the SPANISH YEARBOOK of INTERNATIONAL LAW

# Thoughts on the legal value of the instruments concerning Gibraltar adopted in relation to the EU-UK Withdrawal Agreement

Editorial Notice*

## (A) INTRODUCTION

Because Gibraltar was included in the territorial scope of the EU-UK Withdrawal Agreement (Article 3(1)(b)), the provision concerning the conclusion between the EU and the UK of agreements governing their future relationship (Article 184) could be considered to include that territory as well.[1] As that provision did not specify the need for Spain's agreement for those future agreements to be applied to Gibraltar, the Spanish government understood that Article 184 did not comply with the guidelines adopted by the European Council in April 2017, in particular, the one whereby "[a]fter the United Kingdom leaves the Union, no agreement between the EU and the United Kingdom may apply to the territory of Gibraltar without the agreement between the Kingdom of Spain and the United Kingdom" (para. 24).

When the Spanish government learned of the Draft Withdrawal Agreement negotiated between the EU and the United Kingdom, the Spanish Prime Minister threatened to withhold support for that instrument at the extraordinary meeting of the European Council to be held on 25 November 2018. That threat to break the consensus required for the European Council's endorsement, together with the sensitive nature of the Gibraltar issue in Spanish public opinion, caused Spanish society to pay particular attention to how this "grievance" was resolved. The solution consisted of the adoption by the European Council and the Commission of two joint declarations, whose content had been revealed to Prime Minister Sánchez in advance by means of a letter that the Presidents of the two institutions sent him on the eve of the European Council meeting. At the same time, also on 24 November, the British Ambassador to the EU sent a letter to the Secretary-General of the Council of the EU, acknowledging that Article 184 of the Withdrawal Agreement imposes no obligations regarding the territorial scope of the agreements governing the future relationship

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[1] See a set of Negotiating documents on Article 50 negotiations with the United Kingdom, published as part of the European Commission's approach to transparency on Article 50 negotiations with the United Kingdom.

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between the Union and the United Kingdom. Under these conditions, the European Council endorsed the Withdrawal Agreement and invited the Commission, the European Parliament and the Council to take the necessary steps to ensure its entry into force on 30 March 2019.

The value of these declarations and of the British letter immediately became the subject of debate, based on more or less well-founded arguments. The debate was primarily conducted by political parties, which rejected or affirmed, at their convenience, the legal importance of this set of instruments. At the request of the media, academia has also had the opportunity to weigh in in different ways.

In light of that debate —a purely legal, albeit highly partisan, one— the Editorial Board of the *Spanish Yearbook of International Law* decided that it would be useful to offer a brief analysis with our legal opinion. To this end, we asked our colleague Carmen MARTÍNEZ CAPDEVILA to draft a text discussing the main contested issue, namely, the legal value of the documents adopted and issued in relation to the situation between the Kingdom of Spain and the United Kingdom with regard to the future status of Gibraltar following the British withdrawal from the European Union. The *SYbIL* Editorial Board fully endorses the arguments and conclusions offered in this text.

The remainder of this text thus aims to briefly consider the legal value not only of the aforementioned declarations, but of all the instruments concerning Gibraltar adopted in relation to the Withdrawal Agreement.

## (B) THE PROTOCOL ON GIBRALTAR, THE MEMORANDA OF UNDERSTANDING AND THE TREATY ON TAXATION

The first such instrument is the Protocol on Gibraltar, which is annexed to the Agreement. Like the other two protocols, it forms an integral part of the Agreement (Article 182). Therefore, all the general provisions of the Agreement apply to it, such as the provision on the Agreement's entry into force or those on the settlement of disputes regarding the interpretation and application of the Agreement. Although the Protocol is expressed in legally binding terms, most of the obligations it imposes are extremely vague, which will make it difficult to verify non-compliance. Many of these obligations apply not to the EU and the UK, but to Spain and the UK, which are basically called upon to cooperate. Whether or not Spain effectively has third-party status with regard to this Protocol is debatable; in any case, our country should be understood to have agreed to the obligations that this instrument imposes on it, in the terms required by the rule codified by Article 35 of the Vienna Convention on the Law of Treaties, of 1969, and Article 36 of the Vienna Convention on the Law of Treaties between States and International Organizations or between

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International Organizations, of 1986.

The preamble to the Protocol mentions certain Memoranda of Understanding concluded between Spain and the UK in relation to citizens' rights, tobacco and other products, cooperation on environmental matters and cooperation in police and customs matters, as well as the agreement of both countries to conclude a treaty on taxation and the protection of financial interests.

On 29 November 2018, the Spanish Foreign Minister and the British Minister for the Cabinet signed the four Memoranda of Understanding. All specify that unless the Parties decide otherwise, the memoranda will cease to have effect on 31 December 2020, *i.e.*, upon conclusion of the transition period provided for under the Withdrawal Agreement. However, none expressly mentions the date of its entry into force. The Memoranda on citizens' rights, environmental matters, and police and customs matters do mention the Protocol on Gibraltar, so their implementation could be understood to be dependent on the implementation (and, thus, entry into force) of the Protocol. However, nothing in the text of the Memorandum of Understanding on tobacco and other products suggests the same. Thus, strictly speaking, if necessary, Spain could invoke it before the UK, regardless of the fate of the Withdrawal Agreement and the annexed Protocols. In practice, this seems highly unlikely.

With regard to the legal value of the Memoranda, the fact that they are called Memoranda of Understanding, the contrast with the title of "treaty" used for the instrument on taxation and the protection of financial interests, the procedure followed in Spain for their conclusion, the lack of typical treaty formulas (with the exception of the term "Parties" and the reference —in the Spanish version— to the authentic languages) and the lack of official publication suggest that Spain and the UK have conceived of them as non-legally binding instruments. They would thus be political commitments, whose breach would not entail the international responsibility of the non-compliant country. Nevertheless, some of the Memoranda's provisions describe the undertakings of the signatories with a degree of specificity perfectly comparable to that of a treaty.

In addition to the Memoranda, the Protocol on Gibraltar also refers to the conclusion between Spain and the UK of a "treaty on taxation and the protection of financial interests". According to the information published by the Spanish Ministry of Foreign Affairs, the two countries have already reached an agreement on its content and will shortly authenticate it by signature. Everything clearly indicates that it is a treaty. Furthermore, its conclusion, on the Spanish side, is already expected to require parliamentary approval.

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### (C) THE EUROPEAN COUNCIL AND THE COMMISSION DECLARATIONS

As for the declarations approved and entered in the minutes of the European Council meeting of 25 November 2018, first, the use of such declarations is very frequent in the practice of EU institutions in which, as in the case of the European Council, national interests come into conflict. Suffice it to say that, when the Rules of procedure of the European Council refer to the content of the minutes to be drawn up for each meeting, they cite "the statements made by the European Council and those whose entry has been requested by a member of the European Council" (Article 8). Of the three declarations recorded in the minutes of the European Council meeting of 25 November, two are particularly relevant in terms of their impact on the issue of the application to Gibraltar of the future agreements between the EU and the UK; both are joint declarations of the European Council and the European Commission. The first is an Interpretative Declaration on Article 184 of the Withdrawal Agreement; the second, a Declaration on the territorial scope of the future agreements.

According to the Interpretative Declaration, Article 184 of the Withdrawal Agreement "imposes no obligations regarding the territorial scope" of the agreements governing the future relationship between the EU and the UK and "there is no obligation or presumption, on the basis of this provision, for such agreements to have the same territorial scope as the one provided for in Article 3 of the Withdrawal Agreement". This is the same wording used in the letter that the UK Permanent Representative to the EU sent to the Secretary-General of the EU Council on 24 November 2018. Accordingly, in the declaration, the European Council and the European Commission "take note of the declaration by the United Kingdom, that the United Kingdom shares this interpretation".

When establishing the legal value of an interpretative instrument, the debate should not focus on its mandatory or non-mandatory value. An interpretative instrument is not intended to be a source of obligations for those who endorse it. What matters is whether it has the interpretative effects it is intended to have. In this case, the Interpretative Declaration clearly forms part of the context of the Withdrawal Agreement, in accordance with Article 31(2)(b) of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986. The declaration is clearly an "instrument which was made by one or more parties [the EU] in connection with the conclusion of [a] treaty and accepted by the other parties [the UK] as an instrument related to the treaty". As part of the context, the declaration must be considered in the combined operation by which international treaties are interpreted, an operation that must take into consideration the terms of the treaty in their context and in the light of its object and purpose (Article 31(1) of the Vienna Conventions). As none of the aforementioned elements takes precedence over the others, had the clarifications contained in the declaration

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been included instead in a provision of the Withdrawal Agreement (even in Article 184 itself, thereby making them part of the "terms"), they would have had the same interpretative value that should be recognized here. From this perspective, there is thus no need to regret that the content of the declaration was not enshrined in the Withdrawal Agreement itself.

The second declaration adopted by the European Council and the Commission rounds out the previous declaration and Article 184 of the Withdrawal Agreement, stating that "Gibraltar will not be included in the territorial scope of the agreements to be concluded between the Union and the United Kingdom" once it leaves the EU. "[T]his does not preclude", the declaration continues, "the possibility to have separate agreements between the Union and the United Kingdom in respect of Gibraltar". "[T]hose separate agreements —it concludes— will require a prior agreement of the Kingdom of Spain". The final part of the declaration thus reembraces the terms of the guidelines adopted by the European Council in April 2017, which Spain was unwilling to forget.

This declaration is not intended to reflect an agreement between the EU and the UK. Hence, even if the terms of a second letter sent by the UK Permanent Representative to the EU on 25 November 2018 had been contrary to the terms of the declaration (*quod non*), it could hardly have altered its legal effect.

The Declaration on the territorial scope of the future agreement is a guarantee by the EU to Spain: whether these separate future agreements in respect of Gibraltar are mixed agreements or whether they are configured as EU-only agreements, and regardless of the voting rule used at the EU Council when deciding their conclusion on behalf of the Union, they will require the agreement of Spain. In other words, Spain will have veto power.

The declaration is set out in very precise terms. It was moreover issued by the institution that sets the general guidelines for the EU, guidelines that govern the exercise of their powers by the other institutions. In view of these circumstances, beyond what value the instrument might have as such, under the principle of the protection of legitimate expectation, which is in force in EU law and governs the relations between the Union's institutions and the Member States, safeguarding the expectations that the former might generate in the latter, the Union's institutions (and, in particular, the EU Council) will be obliged to act in accordance with the terms of the declaration. This is especially true given that, in their letter of 24 November 2018, the Presidents of the European Council and of the Commission offered the same guarantees to the Spanish Prime Minister that were later included in the declaration and that conditioned Spain's position at the meeting of the European Council held the next day.

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# From the City of God to Universal Chaos

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*Abstract*: The author raises and reflects on a series of questions to try to understand a phenomenon that began in 1989 and has only grown more pronounced since 11 September 2001. Specifically, "Western civilization", spearheaded by the United States of America, has championed the creation of a universal City of God, which, the author contends, is above the law and justice. However, what this civilisation truly advocates is a paradise for the few, with the aim of consolidating a hegemonic unilateralism that will ultimately exclude the rest of humanity. The author argues that the UN's standing is the last hope for the pacification and democratization of international relations through international humanitarian law and human rights.

> "Time gives the pictures; I merely speak the words which accompany them"
>
> Stefan ZWEIG, *The World of Yesterday* (1943)

## (A) AFTER THE FALL OF THE BERLIN WALL

Every once and a while, we round the corner of time and everything is relativized: from the evolution of ideas to life itself. Sometimes, the pressure becomes overbearing. Then, we scrutinize the past, suffer the present and feel obliged to look ahead to a future that, as always, is increasingly elusive and uncertain. Those of us who were born in the age of reason – or unreason – with World War II (1939-1945), and who grew up in the historical memory of the Spanish Civil War (1936-1939), have lived through half a century rife with upheaval, but also with utopias and hopes. That many of the former turned out to be false and a large part of the latter were dashed does not change the historical correlate, let alone the specific biographies. We have witnessed troubled times and, to the extent of our commitment – a word largely discredited by so-called pragmatists, who are actually nothing more than opportunists – we have also been humble participants, albeit with a humility that neither prevents us from championing the fecundity of individual stories nor tarnishes the work and days.

The end of the 20th century was marked by the spectacular and unexpected collapse of the communist model and, with it, the fearsome leviathan of the Soviet Union. Now, today's

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commentators are seeking to grant similar start-of-the-century status to the attacks of 11 September 2001, with all the aggravating circumstances of that bloody day. They may be right, but, for now, we lack the historical perspective, the distance needed to accurately gauge the exponential magnitude of the disaster. It is one of so many others that tell the miserable tale of humanity, and yet, because of its monstrosity and, especially, because it took place in the very heart of the global leader, it has taken on all the symbolic value of an era.

Those of us with more than fifty years under our belts have witnessed the horrors of the Nazi extermination camps and the Soviet *Gulag*, the atrocities of nuclear weapons, dictatorships of all stripes: the entire catalogue of indignities that human beings can be made to suffer. We saw the rise, peak, decline and collapse of the Soviet empire and the panic of the Korean, Indochina and Vietnam wars. We are aware of the permanent injustice to which the Arab peoples are subjected. We close our eyes to the daily tragedy of sub-Saharan Africa. We bemoan, constantly and vocally, the Latin American purgatory and the hell in which its indigenous communities are languishing. At the same time, we are witnessing the greatest venture to be undertaken by humankind in the 20th century: the end of the colonialism with which the West fuelled its development and enrichment for more than four centuries. We look on impassively as the Earth is exhausted. We have leapt, almost overnight, from a childhood of "crystal" radio receivers to the technological and communicative miracle of computer science and the Internet. We have experienced the loftiest of the sublime and the lowliest of the full range of human perversities and exploitation. For all of us, Primo Levi is much more than the name of an Italian deportee. The chronicle of a small world quickly ballooned into a universe that surpasses the logical coordinates of understanding has marched before the doors of our lives.

We may have fallen prey to credulity when some proclaimed that, with the fall of the Berlin Wall (1989), injustice would disappear from the face of the Earth. It is not that we naively accepted the clumsily interested and even more ham-handedly articulated message put forward by Fukuyama. He may have considered himself a gifted disciple of Hegel, but he was actually a mere reductionist in the service of short-sighted and even shorter-lived policy. In his view, and so he predicated, the demise of communism meant the end of ideologies. Almost immediately, however, it became clear that as long as there was injustice and a lack of freedom, ideological proposals and utopian projects to change and transform the world would persist.

The end of communism did mean the end of a historical era, but it did not lead, as its advocates predicted, to the advent of a different and better time. No new international society arose, nor did there emerge a new international order. But the bipolar system of the Cold War is being replaced by a very different one, which, if the gods and, especially, humankind do nothing to remedy it, will end in an imperial unipolar system led by the United States.

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The shift was accompanied by a terminology that was intended to be original but failed to mask the miseries it concealed. Heralds of the past sought to pass off a set of obsolete and thoroughly damaged goods as novel, falsely encouraging finds. Whilst some declared the death of man, the end of history and the decline of ideologies, others were calling for new Crusades in defence of an imperilled Western civilisation. They have proclaimed the advent of an impregnable City of God, above the law and justice, artfully presented as universal, when what they are truly advocating and defending is a paradise for the few at the cost of excluding the rest of humanity.

In the wake of this collection of archaisms, of old news, glided a word of magical airs: globalization, the banner of the supposed City of God. The world freed, at last, from the yoke of communism, the doors would be thrown wide to a borderless era in which happiness and peace would reign supreme. This new era would be founded on a universal international order governed by the justice of a few. We were all one now. Under the rule of a single monolithic worldview. Any resemblance to the brave new world foretold by Aldous Huxley was no mere coincidence. And yet, as soon as the proposal was formulated, the usual malcontents, killjoys and dissenters appeared. Some refused to accept that globalization was synonymous with homogeneity, let alone that it would open a path to the equality and convergence of cultures.

In the few short years since, rivers of ink have been spilled proposing different, when not outright antipodal alternatives. According to Giddens, one of the most noted theorists of the so-called third way:

> "Globalization can thus be defined as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa."[1]

Faced with this definition, far more restrictive than the verbal excesses of the usual coryphaei, critics soon began to ask whether this highly touted globalization was actually a new and original phenomenon in the history of humankind. The most pessimistic amongst them, their feet firmly on the ground, argue merely that it is a new stage in capitalist development, which merits the label "global" due to its dimensions and aspirations. This is the position taken by, amongst others, Samir Amin.

However, it would be foolish to deny the evidence of processes that point to a certain unifying trend, which is not to say that they are necessarily good or, if you prefer, universally beneficial. Years ago, Manuel Castells, amongst others, pointed to the growing existence of cross-cutting global networks, mainly in the fields of information and communication, with the Internet at the helm, and financial mechanisms, especially, the speculative aspects. This

[1] Giddens, A., *The Consequences of Modernity*, Stanford University Press, 1990.

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gave rise to what the late Susan Strange christened, quite graphically, "casino capitalism" and the creation of what she described as "mad money".

The leap from there to the notion that we already live in a global society woven and governed by networks is a giant one and should not be taken lightly. To understand the present world, let us return to Amin and what, according to him, are the two main features that, for the purposes of this essay, I find especially interesting. The first is the erosion of the nation state: could this weakening lead to its extinction? The second is the deepening abyss separating the industrialized centre from the non-industrialized and, at an ever-faster pace, increasingly impoverished periphery.[2]

Thus, if we stick to the facts and not just opinions, we find ourselves returning to the same old issues, albeit revamped and with renewed impetus. However, new times call for new responses, or, better yet, for finding the most suitable procedures for the analysis. With no desire to offend, it is no coincidence that, as the flag of globalization was being hoisted, we began to hear people sing the praises of the so-called civil society, which further came to be described as "international". It is a way of rounding off the argument to affirm the impossibility of changing something presented as destined and inevitable.

We must thus ask whether the nation state is actually fated to disappear or, on the contrary, whether its stubborn continued existence is a hindrance to the interests of capitalism in the age of globalization. Of course, there will be some who will discredit this dilemma, dismissing it as outdated leftism. However, challenging it on pseudo-ideological or grammatical grounds does not answer the question. That question can be restated: has the nation state achieved the objectives for which it was created and, thus, has the time come to lay it to rest? The bells may well have tolled too soon: the clocks of history cannot be reset on a whim or to further an interest. A very different matter is whether the power of large multinationals and other de facto monopolies, as well as that of a large number of financial institutions, is beyond states' control and there are thus myriad states that merely cater to more powerful interests. However, as weak as they may be, state borders still constitute obstacles that the boosters of globalization dream of toppling.

Notwithstanding the above, and quite contrary to what the detractors of states maintain, based on criteria that might strike some as anachronistic, "international civil society" may well have given rise to two parallel phenomena that make today's reality different from that of the last fifty years. First, numerous new international actors have emerged, most of whom are neither subject to any rules of conduct nor committed to abiding by any law. Second, the number of states has grown considerably since 1945, due, first, to decolonization and, much

[2] Amin, Samir, *Capitalism in the Age of Globalization: The Management of Contemporary Society*, 1999.

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later, to the exacerbation of nationalisms after the fall of the Berlin Wall, which, in Central and Eastern Europe, have caused parochial patriotisms to flourish.

Besides, it would be foolish to pretend that the dogma of the sovereign equality of states, which today number nearly 200, continues unchanged and substantively in force. It is much more likely that international society, civil or otherwise, is undergoing a process of social stratification encompassing states of all possible sizes and countless other similarly heterogeneous international actors. Thus, by the end of the process, we would have an international society rigidly structured in iron-clad class metaphors.

Such a hypothesis would be highly conducive to the designs of globalization. Or, more precisely, to the disappearance of the dreamed of City of God, if it ever truly existed, and its replacement by an utterly uncontainable international anarchy. Simply speaking, the dilemma lies between, on the one hand, those chaotic trends or, more accurately, a perfectly organized chaos from which the powerful would extract their benefits, with nothing at all to temper their profit motive; and, on the other, humankind's undeniable achievements, enabling our survival and development, and its continued pursuit of a horizon of freedom, equality, justice and solidarity. In other words, despite Fukuyama and his acolytes, ideologies once again prevail, opening the door to the return of utopias.

The struggle is unequal, because the weapons are too. Economic might and the power of the media invoke the materiality of the real. In contrast, ideologies are doctrines that, if they advance at all, do so in fits and starts, creating their proposals from the feelings of reason. Richard Falk, an eminent jurist well-versed in such matters since the distant days of the Vietnam War, has quite convincingly described the organizational landscape of the new and threatening times thusly:

> "The main statist/market project of the North is to sustain geopolitical stability, which in turn calls for the continuous expansion of world trade, economic growth and the suppression of nationalist and regionalist challenges emanating from the South – by force if necessary."[3]

Obviously, this perspective retains nothing of the promises made after the fall of the Berlin Wall. There is no new international order, if by that one means the triumph of ethics transplanted to the universe of the norm. On the contrary, we are witnessing the instrumentalization, if not the outright violation, of rules that were hard enough to develop in the first place. Nor has the end of the Cold War and the demise of communism given rise to a harmonious international system. Contrary to the predictions, once the obstacles imposed by the rivalry with communism and the need to contain it were removed, the system fell into the starkest realpolitik. Thus, international society, in terms of its corporate patterns, remains a

[3] Falk, R., *Predatory Globalization: A Critique*, 1999.

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more unattainable goal than ever, even more so than in the times of Tönnies. Globalization has not meant homogeneity and standardization. The world continues to be organized around the existence of specific societies that differ in terms of both their political power and economic and demographic capabilities and with regard to their manifest and fortunate cultural diversity.

All of this is something that people must face. And, as if that were not enough, we must do so living in unbridled times, during an intense process of historical acceleration, a time that leaves virtually no room for reflection, only for action, which must invariably be improvised over the very course of events. Perhaps it is this constantly compounded rush, aggravated by the overload of information and the demand for immediate responses, that has resulted in one of the most striking shortcomings of the present day: the lack of intellectuals, in the sense of guides, of *maîtres à penser*, so essential in times of crisis. Instead, we are left with the hacks, the Monday-morning opinion peddlers, the manufacturers of an ephemeral *pensée unique*, consumed and exhausted twenty-four hours a day.

### (B) THE WORLD AFTER 11 SEPTEMBER

This was the simplistically evoked state of affairs when the 11 September 2001 terrorist attacks took place in New York and Washington, targeting the most significant and spectacular symbols of the power of the United States of America, the only country that, today, can boast and don the mantle of sole global superpower and, should the anti-missile shield prosper, sole stratospheric space superpower, as well. The entire West was paralysed by the terror caused by the enormity and brutality of the crimes for which there is no human justification. As if any more proof were needed, it was once again shown that criminal acts are even more criminal when they are carried out in the developed North than when they take place in the South, where violence and death are de jour. The solidarity with the United States in the first few hours was total, with the criminal exceptions of Afghanistan and Iraq, amongst very few others. Emotions were, legitimately, running high. The unanimity of the condemnation was as absolute as the decision to apprehend the perpetrators of the horrendous crimes and bring them before courts that would bring to bear the full weight of the law. There was no room for reflection, only feelings, if not outright revenge.

Immediately, almost simultaneously, old proposals and assorted doctrines were dragged out and dusted off and, although they had not matured, proffered in an attempt to offer certainty to all those lost in the darkness of uncertainty. At such times, the role of the intellectual, of the thinking person, is precisely the opposite of what was demanded: he or she must reject the temptation to become a prophet, let alone, the Messiah. The intellectual's role is not to give answers, when he or she lacks them, but rather to sow concerns, to raise questions. If the West aspires to remain what it is, it cannot renounce the noblest trait of its historical identity: the

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exercise of reason, the use of secular thought, not the sacralization of irrationality.

If, once we have controlled our emotions, we apply the aforementioned template, then the following are just some, obviously not all, of the questions of varying degrees of depth and complexity that must be answered in the aftermath of the disastrous events of 11 September, especially before we take any steps in the wrong direction.

(1) Are we looking at a new Cold War?

Although most people would be inclined to say no, it is worth making sure before answering emphatically. When the international environment reverts to a jungle and existence is ruled by survival of the fittest, people invariably seek some sort of legitimation to mask or conceal the indiscriminate use of power. At such moments, it is very useful to fabricate an enemy; if it is universal, all the better. Might the West not be seeking to do just that with Islam and the Arab world? In so doing, it would moreover be combining all the necessary ingredients for confrontation in a single rival: from exoticism to geostrategic values, by way of ownership of the world's most fabulous energy resources and the use and enjoyment of geographical positions. Like in the good old days of Rätzel and, later, of Haushofer's *lebensraum*. A single whole steeped in ignorance and unfamiliarity: how better to graduate seamlessly to hatred? And if we should happen to add enough ideological elements to the mix, we can return without delay to the old and disinterred times of the Crusades against absolute evil.

If a single enemy is defined, in this case more dangerous than ever, due to its diffuse and intangible nature, we should prepare for a virtually eternal battle, waged in darkness, in which everything will be done for a sole purpose: to annihilate the rival. Military spending will skyrocket, inevitably to the detriment of the welfare state (but that is what civil society is for, the neoliberals will cry hypocritically); a network of bases will be woven around the world; and, finally, as in the past, thought itself will be militarized and all free reflection will be considered a crime of maximum disloyalty.

(2) Are we living through a bad time for democracy?

Can the entirely understandable alarm at the international panorama justify the suspension, even if just temporary, of the system of freedoms and guarantees? What dangers are implicit in the debate, the false choice, between security and freedom? One hardly needs to recall the measures adopted in the United States authorizing the limited (?) use of torture to obtain supposedly crucial information for preventing potential terrorist attacks. This practice is already systematically carried out in Israel, where, with a subtlety worthy of a better cause, a distinction is drawn between physical and psychological torture or, to put it more bluntly, between torture that leaves a visible trace and torture that does not, one dirty, the other clean. We must not forget that torture humiliates the victim, but it also degrades the torturer, turning

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him or her into a monster. Does nobody recall the effects of this appalling practice in France in the years of Algerian decolonization? Recently, the US government has expressed interest in having the passports of foreign nationals who apply for a visa to enter the United States include their biometric data, a prospect that would fill the most racist Lombrosians with joy. Lastly, can any democrat in his or her right mind remain silent in the face of the military courts, outside of national territory no less, that the White House seeks to create to try those people, American and foreign alike, suspected or guilty of having committed terrorist acts or having abetted in their perpetration? Under such conditions, will any democratic government agree to the extraditions that Washington will surely request? What nauseating aroma is this that wafts from our historical memory, from the images of people caged, like animals or like the great poet Ezra Pound, at Guantánamo?

### (3) Who are the victims of the 11 September attacks?

Without a doubt, first and foremost, the victims were all those who were killed or wounded in the Twin Towers, at the Pentagon and on the other plane that was shot down, whose true story we will never know. Certainly, too, the victims include the citizens of those countries whose governments have taken advantage of the situation to severely restrict their already precarious freedoms. However, quite significantly, the Palestinian people also figure sadly high on the list of victims. Within hours of the events of 11 September, Ariel Sharon proclaimed, "Arafat is our Bin Laden." The sentence was passed. Since then, helicopters and fighter jets have bombed both the territories still under military occupation and those administered by the Palestinian National Authority. Israel has violated the Oslo I and Oslo II accords with utter impunity, not to mention its continued violations of international humanitarian law and the Geneva Conventions. It should thus come as no surprise that the Islamists have taken up the Palestinian cause as their own. It is therefore imperative to create the so oft-promised Palestinian state and not just a smattering of Bantustans comprising Israel's backyard. It is essential to reclaim the flags and symbols from international terrorism, if not strictly for reasons of justice, then for purely selfish reasons, too. As long as there is no justice for the Palestinians, the Middle East will remain a powder keg for international peace and security.

You cannot respond to terrorism with terror. Nobody disputes the usefulness of valid and legal police measures to combat the harrowing crime of terrorism. But not even the blindest can deny the need to address the deeper causes. The best antidote to terrorism is to eliminate its causes. Fanaticism will quite likely always exist, but it will attract far fewer followers once we have rid ourselves of injustice, poverty, discrimination and lack of freedom.

### (4) "Infinite Justice" or "Enduring Freedom"?

These two mottos could easily double as the titles of Westerns, replete with bounty hunters.

But what are the real intentions behind them? The mass bombing of the Afghan population in search of a Bin Laden whose whereabouts are unknown hardly seems to have served justice, unless we are talking about a justice far more blind than infinite. Nor does it seem like the most suitable means of stoking the enthusiasm of the Afghan masses, in particular, and of the wretched of the Earth, in general, for the military prowess of a democratizing West. It might not be such a bad idea to reread the unjustly forgotten Frantz Fanon.

At the same time, can one really pursue so-called "Enduring Freedom" through a grand alliance that includes all manner of dictatorial regimes? Writing off all kinds of outrages committed by Pakistan's military dictatorship, even forgiving debt, and turning a blind eye to Russia's massacres in Chechnya are likewise not the most suitable mechanisms for defending justice and freedom. Bush's statement, that you are either with the United States or with the terrorists, does not augur the most democratic of horizons; however, it may prophetically announce the most militarized and disciplined scenario of the emerging international reality.

These pursuits of endless justice and perpetual freedom, in constant struggle, require us to search for new theatres in which to fight evil. If the Arab countries do not object, we may have to unfurl the flags against Iraq, and that imperilled satrap Saddam Hussein. And, immediately thereafter, move on to Iran and North Korea. That will rid us of the "Axis of Evil", but then we will have to proceed to the Philippines, fight drug trafficking in Colombia, and perhaps do something about Fidel Castro.

Of course, this is not an original or novel theory. The mid-19th century saw the formulation of the doctrine of "Manifest Destiny" in the United States. Its postulate was quite simple: "It will be a happy day when the Stars and Stripes flies over all corners of the world." Perhaps we are looking for a new dawn: a single ruler, a single law, and a single universal policeman.

(5) Is it lawful to casually discuss the possibility of war, as is so shamelessly done?

Since 11 September, the word "war" has been on the lips of politicians and social communicators across the board. Hadn't we prohibited war? Has the Briand-Kellogg Treaty renouncing it been stripped of effect or, even worse, has the UN Charter been repealed? Or perhaps legitimate self-defence is now synonymous with war? Does anything remain, in the wake of the Twin Towers, of the fundamental concepts of aggressor and aggression? Everything seems to suggest that international law is headed for hard times, that we are reverting to a Hobbesian era, when *raison d'État*, the rule of force, and the misnomered national interest, in the most sinister sense, prevailed.

Even the basic idea of cooperation may come to be understood only in the context of the judicial and police mechanisms used to fight terrorism, whilst solidarity may only be practiced with those who think and act like we do or in accordance with our own interests. Today, more than ever, it is necessary to recall the primacy of international law over domestic law and,

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further, that all the general principles of international law remain fully valid. Even if the usual crowd of realists advocate the opposite, it is imperative to continue defending utopias, and, amongst them, the one closest to being achieved, namely, the establishment of the International Criminal Court over other jurisdictions that fail to conceal the desire of some to impose a national jurisdiction, i.e. that of the rich United States, in the disguise of a sweeping global justice. That is why, as was unfortunately to be expected, the United States has not ratified the Court's Statute; Washington does not accept any laws higher than its own, nor does it wish to see its leaders or members of its armed forces brought before international courts on charges of war crimes or crimes against humanity. Tellingly, US rejection of the International Criminal Court is warmly supported by countries such as Russia (with its Chechens), Israel (with its Palestinians) and the People's Republic of China (with its dissidents).

Of course, all of the foregoing means that no country can arrogate to itself the exclusive and unlimited use of force. Until otherwise agreed, Chapter VII of the UN Charter on action with respect to threats to the peace, breaches of the peace and acts of aggression and, in particular, Article 42, which reserves the use of force for the UN Security Council, remain fully in force. The application, for the first time ever, of Article 5 of the North Atlantic Treaty elicits even more reservations. Lingering nostalgia for the Cold War may finally have given the Washington Treaty (1949) a new dimension and even altered its practice, content, scope and geographical framework. Of course, that may simply be an unjustified apprehension. The United States is demonstrating, in the diplomatic terrain and on the battlefield, that it neither needs nor wants legal crutches for its new journey. It claims for itself all the power and glory of its endeavour, which it situates above concepts and ideas that it deems obsolete. The rest of the wide, complex world is left with just two options: to faithfully and loyally follow the United States or, simply by remaining passive, to stand up to the sole global super power. Although there are also those who think that, against all appearances, we are currently witnessing, as predicted years ago, the empire's decline.

Today, the defence of international lawfulness and the institutions of public international law is just as if not more important than the fight against terrorism. If we do not defend lawfulness, we will have retreated to a time that predates the Westphalian system.

### (6) Should the United Nations be defended or destroyed?

Before going any further, it is worth clarifying, once again, what the essence of this universal organization is, i.e. to restate the obvious. Quite simply, the UN is the result of a multilateral treaty, its will is the sum of the wills of its Member States, and it has no powers other than those that they voluntarily assign to it. Obviously, it is the agreement reached by the winners of World War II, but that was no ordinary war: it was a battle for freedom and against nationalism, fascism and the Third Reich. The UN was what the victors wanted, and the

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countries that had not yet achieved independence and remained under the colonial yoke did not participate in its design. However, both the capitalist and communist countries subscribed to its ideology, as did those that later acquired full political sovereignty. Peaceful co-existence and the non-alignment ideology breathed new life into the UN and developed the principles of international law.

Therefore, before we decry the UN's ineffectiveness, we need to denounce the states, which, when they are not paralysing it, are instrumentalizing it to further their own interests. Long gone are the days in which people debated whether the UN had a will of its own and whether the Secretary-General had sufficiently high standing to steer it towards goals that its Member States did not wish to pursue.

Certainly, during the Cold War, the UN General Assembly offered ample proof of its capacity as a discussion forum. The balance between the United States and the Soviet Union, despite its faults, largely prevented the Security Council from being manipulated. However, the end of the Cold War both revealed the UN's inadequacy for the new times and blocked any initiative to automate it, promote its transformation and orient it towards more ambitious goals. One need only look to the ouster of Boutros Boutros-Ghali, whose reappointment the US vetoed, and the docility of his successor Kofi Annan. Today, the danger is that the United States will manipulate the UN, turning it into a useful tool for covering up its highly dubious actions. In this regard, the adoption by the Security Council of Resolution 1373 (2001), on 28 September 2001, is extremely unsettling. After adopting the pertinent measures to suppress the financing of international terrorism, it further implements a series of precepts aimed at controlling persons suspected of international terrorism or intending to perpetrate such abhorrent crimes. Such rules could place tremendous limits on such fundamental institutions for the protection of human beings as political asylum and refugee status. Furthermore, in keeping with the policy that served as the inspiration for that resolution, the Security Council called on all Member States to, within a period not to exceed 90 days, report on the steps their national legislative bodies have taken to implement these resolutions. It is worth considering the possible connection between these measures and the enactment in Spain, for example, of the infelicitous Immigration Law [*Ley de Extranjería*]. Another recent example of the UN's incapability is Israel's refusal to grant entry to a fact-finding mission into its territory, and into that which it occupies militarily, to clarify the circumstances surrounding the siege and destruction of the Palestinian city of Jenin. Is it permissible for a state, a member of the organization, to refuse to comply with a Security Council resolution? The answer bespeaks an unfortunate impotence, if not outright complicity with a government demonstrably in breach of UN resolutions.

Nevertheless, in these dangerous times for the pacification and democratization of

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international relations, the UN is the last hope for a bulwark consisting of all those states, peoples, individuals and social groups who advocate peacemaking through justice, not force, and international co-existence, so greatly weakened today. In a situation like the current one, in view of the threats we face, concepts such as international humanitarian law, the responsibility to intervene, legitimate self-defence, and earlier questions come fully into play. On the one hand, there is the danger of inventing a new Cold War between two ideological ways of understanding our own existence and that of others, of advocating new Crusades to eradicate something that cannot be wiped from the map: cultural diversity. On the other, we could do swift and effective justice to perennially postponed demands and, first and foremost, enable the Palestinian people to exercise their right of self-determination. Then, or, better yet, at the same time, we should demonstrate, on the ground, that respect and tolerance are not just hollow words, emptied of all real content. In other words: we must enable the co-existence of the defence of human rights and dignity with respect for what makes us different. Of course, we must do so rejecting any form of exclusion based on the pretext of multiculturalism or, worse yet, the paternalism of cultural specificity, as well as any likewise manipulative exclusions aimed at allowing those who align themselves with us to curtail freedoms. We would also need to define, exactly and with millimetric precision, when intervention in the internal affairs of states whose governments flagrantly violate fundamental rights is appropriate. More clearly, we must prevent the defence of individual and collective rights from becoming an instrument at the service of expansionist, militaristic or economic goals, or even all three at once.

Finally, it is worth asking whether we might not also be facing —for these objectives are hardly mutually exclusive— a drive to impose a global policing system in the hands of a single policeman, one who would moreover decide at any given time what the proper method is, the applicable law and jurisdiction, and the list of targets. Such a goal would be backed by quite a few allies were it to happen to result in the redistribution of areas of influence and territories in a geographic region of vital importance to world peace and the global economy. This perspective would go some way to explaining the enthusiasm shown in recent months by Russia, Iran, and the People's Republic of China, amongst others, as well as the reawakening of the dormant conflict between India and Pakistan, in light of the conflict in Afghanistan.

So many questions remain to be answered if we are truly to understand this phenomenon that began in 1989 and, since 11 September 2001, has only taken on new and more spectacular dimensions. It is a challenge for all those who, in the face of war, choose peace and solidarity as the means of creating a different world or, at least, of rejecting the one so fervently and militaristically being sold to us. It is a challenge, especially, for the forces of the left, in general, and in Europe, in particular. And it is one that raises another question for another day, a question that, in these times of euro-enthusiasm, concerns us quite directly: what kind of

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Europe are we talking about, when Europe remains silent and impassive, when it is not directly playing the faithful squire to the United States and its British proconsul? A Europe that shamefully yields to US pressure, reducing to ashes the hopes placed in the International Criminal Court? The next rendezvous, perhaps the renunciation of all ethical, legal and political principles, will be in Baghdad. It will be followed by an endless procession of "preventive" wars, which will be the perfect instrument to consolidate the hegemonic unilateralism of the United States of America.

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# Education, Universality and Humanism: The Human Person and the Mission of International Tribunals

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*Abstract*: A wide and sound revisiting on human rights is required from a humanistic and universal point of view. This deserves to be done continuously. This paper reflects, in a comprehensive way, the approach by the author on this core issue of current international law in his role as international judge, both at the Inter-American Court on Human Rights and at the International Court of Justice, and as international scholar.

*Keywords*: Human rights – Universalism – International tribunals

## (A) UNIVERSITAS AND HUMANITAS

In the historical evolution of Universities around the world, a trend of thinking —the humanities— has consistently concentrated on the "transcendental humanity" of human beings. Humanism is also proper to Universitas. And Universitas and humanitas go together: this memorable ceremony bears witness of that. Contrary to the view —of compartmentalized or "specialized" knowledge— that truth could only be reached by empirical investigation. humanists, in their cultivation of general knowledge, continued to insist on the centrality of the values.

In the present age of so-called mass "globalization", or "globalized" massification, attention to cultural identity, in the framework of the universality of the human kind, continues to be regarded as necessary, so that we can live in harmony in the cosmos, respecting the differences which conform that universality, and defend ourselves against the chaos and the irrationality that surround us.

It is necessary today to keep on insisting on the central role of humanities —encompassing literature, philosophy, history, law, language and education— within the Universitas. Cultural legacy, within the framework of universalism, will never be replaced by the simple preparation for professional exercise. University teaching is to remain attentive to education, surrounded

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by human values.

The effectiveness of the right to education is of fundamental importance, in the light of the basic principle of equality and non-discrimination. True education, well beyond professionalization, awakens in the youth of the new generations their vocation to an integral life, from the start not limited by the vicissitudes of the entry in careers of specialized knowledge.

The search for knowledge and understanding cannot be limited by the self-sufficiency of "professionalization courses". The youth hopes to acquire knowledge so as to understand the surrounding world and one's own existence, and to live with lucidity in one's own time. We live nowadays, in any country of the world, amidst the imprevisibility and the chaos, more or less institutionalized, and amidst violence, in distinct degrees.

Never, as throughout the XXth century and beginning of the XXIst century, so much progress was achieved in science and technology tragically accompanied by so much destruction and cruelty, exemplified by successive acts of genocide, atrocities and massive and grave violations of human rights and international humanitarian law. Lessons from the past appear to have been forgotten.

The XXth century rested marked by its tragic contradictions, by its oscillations between advances and steps backwards, by the divorce between wisdom and specialized knowledge, by the antinomy between the domain of sciences and the lack of control of human impulses. The great thinkers of the XXth century were unanimous in pointing out these contradictions, as I have been pointing out, in recent years, in my writings and in several of my Individual Opinions, presented successively in the Inter-American Court of Human Rights (IACtHR)[1], and in the International Court of Justice (ICJ)[2].

## (B) KNOWLEDGE AND HUMANENESS

Professions, multiplied in modern times, have led to specializations, which respond and correspond to the needs of the social milieu. Even if it today there prevails, in the majority of the Universities, an unsatisfactory search of "specialized" or "professionalizing" knowledge (rationalized in function of "social needs" which do not take care of the personal needs of each human being), there are also those —perhaps a minority, today as in the recent past— which

[1] Assembled *in*: A.A. Cançado Trindade, *Esencia y Transcendencia del Derecho Internacional de los Derechos Humanos* (*Votos en la Corte Interamericana de Derechos Humanos, 1991-2008*), vols. I-III, 2nd. rev. ed., Mexico D.F., Ed. Cámara de Diputados, 2015, vol. I, pp. 3-687; vol. II, pp. 3-439; vol. III, pp. 3-421.

[2] Assembled *in*: *Judge A.A. Cançado Trindade - The Construction of a Humanized International Law - A Collection of Individual Opinions* (*1991-2013*), vol. I (IACtHR), Leiden, Brill/Nijhoff, 2014, pp. 9-852; vol. II (ICJ), Leiden, Brill/Nijhoff, 2014, pp. 853-1876; vol. III (ICJ), Leiden, Brill/Nijhoff, 2017, pp. 9-764.

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have not lost sight of the fact that the meaning of existence cannot be acquired by means of a simple search of satisfaction of material needs; the cultivation of culture is part of the search for spiritual development, so as to be able to interpret the past, to understand the present, and to give a meaning to one's own life[3].

Nowhere else can the intergenerational dialogue be cultivated in a more gratifying way as in the Universities, anywhere. This is an attribute which belongs to them by an intrinsic requirement: that of the encounter between generations, living harmoniously each one within its own time, with the due understanding, and the difficult but necessary acceptance, of the ineluctable passing of time. As to the present, Universities, which have also a spiritual dimension, have to influence public affairs, given the need to convey the humanist mentality advanced herein also to scientists and specialists.

Cultural expression, in its highest form, is, after all, spiritual. And Universities can count only on critical reflection and the right reason (recta ratio) to reassert their true vocation as centers of universal learning, and formation of cultured persons, competent professionals who understand the world wherein they live, and well-disposed to contribute to the improvement of the human condition. Some degree of transdisciplinary or multidisciplinary instruction serves the concern as to the need to convey to the new generations a necessarily humanist perspective, that may enable them to understand the world and to preserve basic values to be transmitted to their fellow human beings and their descendants.

Hope is to be kept and nourished. We should never forget that, it is in moments of crisis of values (such as the one we currently witness in the international scenario) that advances have been achieved. Thus, in one of the rare glimpses of lucidity along the XXth century, in the aftermath of the II World War, the General Assembly adopted the U.N. Universal Declaration of Human Rights, on 10 December 1948.

In this respect, may it here be recalled that, seven decades ago, in mid-1947, while the old Commission of Human Rights of the United Nations was preparing the draft of the Universal Declaration of Human Rights, UNESCO consulted the main thinkers of that time all over the world on the main issues to be addressed in its elaboration. May I here single out —as I have done in my Treatise on the International Law of Human Rights (vols. I-III) published in Brazil[4]—, some of the responses to the questionnaire then circulated by UNESCO, which appear to be endowed with topicality nowadays, seven decades later.

While Teilhard de Chardin insisted on the guarantee of the freedom of the individual in

[3] Cf., in this sense, Hermann Hesse, *Uma Biblioteca da Literatura Universal* [*circa* 1945], Lisbon, Edit. Cavalo de Ferro, 2010, pp. 9-10 and 105.

[4] A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. I, 2nd. ed, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 55-57.

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face of the forces of collectivity, Jacques Maritain defended the jusnaturalist foundation of the rights to be proclaimed[5]. Mahatma Gandhi stressed the relations between rights and duties, while Chung-Shu Lo underlined the importance of the rights to life and to the "expression of oneself"; for his part, S.V. Puntambekar stressed the relevance of essential individual freedoms and virtues as fundamental values of human life and conduct[6].

Looking at the forthcoming steps then to be taken, Levi Carneiro stressed the need of the Universal Declaration —after the conclusion of its drafting by the U.N. Commission of Human Rights and its adoption by the U.N. General Assembly— being furthermore accompanied by a binding international convention7. At the end of the UNESCO meetings in Paris (from 26 June to 02 July 1947), its Commission on Philosophical Principles of Human Rights joined its conclusions in a document titled "Bases of an International Declaration of Human Rights"[8]. Universality and humaneness marked presence therein.

In 1948, the same year of the U.N. adoption of the Universal Declaration of Human Rights, in approaching the end of his life, Mahatma Gandhi, father of this nation, had his autobiography written and published. In it, he gave expression, inter alia, to his own views on education. True education in ideal conditions —he wrote— can be imparted "only by the parents", the family itself; it should do "full justice to the young people", giving "the first place to the culture of the heart or the building of character"[9]. It requires "literary training", with attention to distinct cultures, so as to foster understanding. This amounts to the training of the spirit —he added— in early preparation for life, helping the young to "learn to discriminate between good and evil"[10].

The 1948 U.N. Universal Declaration of Human Rights irradiated itself, paving the way for the adoption of successive and numerous human rights conventions and instruments (complementary at global and regional levels), and the historical process of generalization of protection of the rights inherent to the human person, projecting itself at both international and national levels[11]. All these developments, that occurred along the last decades (from 1948 to

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5 *Los Derechos del Hombre - Estudios y Comentarios en torno a la Nueva Declaración Universal Reunidos por la UNESCO*, Mexico/Buenos Aires, Fondo de Cultura Económica, 1949, pp. 97-98 (Teilhard de Chardin), pp. 14-22 and 69-74 (Jacques Maritain).

6 *Ibid.*, p. 23 (M.K. Gandhi), pp. 169-172 (Chung-Shu Lo), and pp. 177-180 (S.V. Puntambekar).

7 *Ibid.*, pp. 160-164 (Levi Carneiro).

8 *Ibid.*, appendix II, pp. 233-246, esp. p. 235.

9 M. Gandhi, *Autobiography - The Story of My Experiments with Truth* [1948], N.Y., Dover Publs., 1983, p. 298.

10 *Ibid.*, pp. 299-302 and 304.

11 Cf. A.A. Cançado Trindade, "The International Law of Human Rights at the Dawn of the XXIst Century", 3 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1999), Castellón/Spain, Ed. Aranzadi, 2000, pp. 145-221; A.A. Cançado Trindade, "Values and Significance of the Universal Declaration of Human Rights at the World and Regional Levels", *in Recueil des Cours - Textes et Sommaires - XXIX Session d'Enseignement (1998)*, Strasbourg, IIDH,

date), are examined in detail in my aforementioned Treatise, including the legacy of the two U.N. World Conferences of Human Rights (Teheran, 1968; and Vienna, 1993)[12], among others, in the framework of the more recent cycle of U.N. World Conferences, which I shall now turn attention to.

### (C) THE LEGACY OF U.N. WORLD CONFERENCES

The evolution of the corpus juris gentium of the protection of the rights of the human person has undergone two global assessments. In historical perspective, the I World Conference on Human Rights (1968) much contributed with the global vision of the indivisibility and interrelatedness of all human rights, thus overcoming the compartmentalized view that used to prevail in the bipolarity characteristic of the cold war period.

The II World Conference on Human Rights (1993), for its part, focused on the application of the instruments of that corpus juris gentium (the indivisibility of human rights in practice), with special attention to discriminated or disadvantaged persons, to vulnerable groups, to the poor and the socially marginalized and excluded, - to all those, in sum, in greater need of protection. Between the I and II World Conferences, 25 years lapsed. Ever since the II World Conference until now (end of 2017), 24 more years have lapsed, but in our days no initiative has been taken to date to convene a III World Conference of the kind, in my perception much needed.

In a wide framework, the remarkable transformations, in the last decades, in the contemporary world scenario have disclosed the considerable density of our times, which are of profound reflection on the very bases of international society, and indeed of the gradual formation of the international agenda of the United Nations. The cycle of World Conferences convened by the United Nations, initiated in 1992[13], has disclosed a concern, also with the precarious living conditions, in distinct circumstances, dramatically affecting greater segments of the population in many parts of the world nowadays.

There has been, ever since, a growing call for the pursuance of social justice among and within nations. These recent years are being marked by an over-all reassessment of many concepts in the light of the consideration of global issues (human rights, social justice, social development, environment, population, human settlements, human security and peace),

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1998, pp. 101-115.

[12] A.A. Cançado Trindade, *Tratado...*, *op. cit. supra* n. (5), pp. 77-338.

[13] Namely, World Conferences on Environment and Development, Rio de Janeiro, 1992; on Human Rights, Vienna, 1993; on Population and Development, Cairo, 1994; on Social Development, Copenhagen, 1995; on Rights of Women, Beijing, 1995; on Human Settlements - Habitat-II, Istanbul, 1996; and World Conference against Racism, Durban/South Africa, 2001.

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affecting the whole of humankind[14]. This process has generated a universal dialogue and concertation, as clearly disclosed by their final documents (declarations and programmes of action).

Those U.N. World Conferences have disclosed, as their common denominator, the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of all human beings. Those World Conferences have indeed been particularly attentive to the conditions of life and special needs of protection in particular of vulnerable groups and the poorer segments of the population. This is reflected in various passages of their lengthy final documents, which place human beings at the centre of their concerns. In focusing on vulnerable groups (such as, among others, those formed by the poorest segments of society), the immediate concern has been with meeting basic human needs, and, from there, fostering people's empowerment[15].

In effect, in recent years I have been drawing attention to the legacy of those World Conferences, in successive Individual Opinions, earlier in the IACtHR, and more recently in the ICJ. Earlier this year, for example, in my Separate Opinion in the case of the Application of the ICSFT Convention and of the CERD Convention (Ukraine versus Russian Federation, ICJ's Order of 19.04.2017), I pondered that the aforementioned cycle of U.N. World Conferences (along the nineties and beginning of the last decade)

> "came significantly to disclose a common denominator, giving cohesion to the final documents they adopted, namely, the recognition of the legitimacy of the concern of the international community as a whole with the conditions of living of the population everywhere.
>
> The U.N. World Conference of Vienna (1993), in particular, added an important element to this common denominator, namely, the special attention devoted to the vulnerable segments of the population everywhere. The protection of the vulnerable constitutes the great legacy of the II World Conference of Human Rights (Vienna, 1993)16: more than any other of the World Conferences of that cycle, it presented, given its wide theme, a systemic vision of all segments of the population affected by vulnerability or extreme adversity.
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> The Declaration and Programme of Action of Vienna, final document adopted by the 1993 Vienna Conference, sought to concentrate special attention on persons suffering from discrimination and vulnerable groups, on the socially excluded, in greater need of protection17.

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[14] A.A. Cançado Trindade, "Sustainable Human Development and Conditions of Living as a Matter of Legitimate International Concern: The Legacy of the U.N. World Conferences", *in Japan and International Law - Past, Present and Future* (ed. Nisuke Ando), The Hague, Kluwer, 1999, pp. 295 and 307-309.

[15] A.A. Cançado Trindade, *Tratado...*, *op. cit. supra* n. (5), pp. 77-338; A.A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Viena, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994) pp. 9-57.

[16] Cf. A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2014, pp. 13-363.

[17] A.A. Cançado Trindade, "Nouvelles réflexions sur l'interdépendence ou l'indivisibilité de tous les droits de l'homme, une décennie après la Conférence Mondiale de Vienne", *in El Derecho Internacional: Normas, Hechos y Valores - Liber Amicorum J.A. Pastor Ridruejo* (eds. L. Caflisch *et alii*), Madrid, Universidad Complutense, 2005, pp.

> The aforementioned document much contributed to the recognition of the centrality of victims in the present domain of protection, with special attention to their living conditions amidst vulnerability. In its legacy, such centrality of the victims is projected until current times, and underlined in cases of systematic violation of their fundamental rights, amidst particularly aggravating circumstances" (paras. 53-55). [18]

Furthermore, the aforementioned recent cycle of U.N. World Conferences has sought to elevate human rights related issues to a central place on the agenda of contemporary international relations, on the basis of the understanding that human rights do in fact permeate all areas of human activity. The recognition of this reality corresponds to a new ethos of our times. It is the privilege of contemporary international lawyers, faithful to the historical origins of our discipline, to contribute to recover and to re-establish the central position of human beings in the universe of the law of nations (droit des gens).

## (D) INTERNATIONAL JUDICIAL RECOGNITION OF THE RIGHT TO EDUCATION

In the international adjudication of human rights cases, it so happens that the right to education marks its presence in legal reasoning even when the rights at stake are other protected rights under human rights Conventions —such as the fundamental rights to life and to personal integrity. This has been so, for example, in respect of the reparations due to those victimized. May I briefly refer, in this respect, among others,[19] to my two Separate Opinions in the cases adjudicated by the Inter-American Court of Human Rights (IACtHR) of Gómez Palomino versus Peru (Judgment of 22.11.2005), and of Blanco Romero and Others versus Venezuela (Judgment of 28.11.2005), where I recalled that educational measures had been ordered by the IACtHR as exemplary forms of reparation, meant to provide satisfaction to the victims.

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59-73.

[18] Cf. A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht, Universiteit Utrecht, 2011, pp. 1-71; A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, ch. X, pp. 179-191; A.A. Cançado Trindade, "Die Entwicklung des interamerikanischen Systems zum Schutz der Menschenrechte", 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010) pp. 629-699.

[19] For example, educational measures had been ordered by the IACtHR as exemplary forms of reparation. For example, in the case of *Aloeboetoe et alii, versus Suriname* (Judgment of 10.09.1993), the IACtHR ordered the reopening of a school and the creation of a foundation to assist the beneficiaries; in the case of the "*Street Children*" (*Villagrán Morales and Others*) *versus Guatemala* (Judgment of 26.05.2001), the IACtHR determined the designation of an educational centre allusive to the victims in the *cas d'espèce*; likewise, in the case of *Trujillo Oroza*, pertaining to Bolivia (Judgment of 27.02.2002), the IACtHR again ordered the designation of an educational centre with the name of the victim. There were cases in which reparations of the kind were meant to provide *satisfaction* to the victims. Thus, in the case of *Cantoral Benavides*, concerning Peru (Judgment of 03.12.2001), for example, the IACtHR ordered the State to provide a scholarship of University studies to the victim; and in the case of *Barrios Altos* (Judgment of 30.11.2001), pertaining to the same respondent State, the IACtHR determined the provision of educational grants, in addition to health services.

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Furthermore, in both Separate Opinions I deemed it fit to point out that educational measures in human rights go beyond means of reparations (such as satisfaction), as they also pertain to the prevention of human rights violations, disclosing the temporal dimension of the safeguard of those rights. In my Separate Opinion in the aforementioned case of Blanco Romero and Others, in particular, I singled out that the IACtHR had ordered, as one of the measures of reparation, as a form of satisfaction and guarantee of non-repetition of the harmful acts, that the respondent State was to implement a programme of formation in human rights (for members of its forces) (paras. 16-17).

And in my Separate Opinion in the aforementioned Gómez Palomino case, I then concluded that

> "Educational measures in human rights thus have a wider dimension than that of reparations, as they are also preventive measures, to combat violence and abuses against the human person. They assume a special relevance nowadays (...): one cannot lose sight of the fact that education is a public good (in search of the common good), and not a simple commodity abandoned to the "logic" (or rather, the lack of logic) of the market (...), and that, in the mid- and long-run, many of the challenges of the protection of human rights can only be effectively faced through education" (para. 13).

Moreover, in my Separate Opinion in the case of the "Street Children" (Villagrán Morales and Others) versus Guatemala (reparations, IACtHR's Judgment of 26.05.2001), I warned that the suffering of the marginalized or excluded ones "is ineluctably projected into the whole social corpus. The supreme injustice of the state of poverty inflicted upon the unfortunate ones contaminates the whole social milieu" (para. 22). An educational centre was designated with a name referring to the young victims in the *cas d'espèce* (para. 31), who, before having been "cruelly and arbitrarily deprived of their lives", had already been "deprived of creating and developing a project of life (and of seeking a meaning for their existence)" (para. 33).

Subsequently, in the case of the Institute of Reeducation of Minors versus Paraguay (Judgment of 02.09.2004), the IACtHR related education to the right to life in its wide dimension, comprising the living conditions with dignity.[20] The fact that the adolescents concerned had not counted on an educational programme (to which the respondent State was bound) was aggravated by the social marginalization wherein they found themselves; the lack of access to education reduced further their possibilities of reinsertion into their social milieu, and of development of their project of life.

In my Separate Opinion, I stressed that the IACtHR's Judgment in the present case of the Institute of Re-education of Minors aptly retook its outlook of the right to life encompassing dignified conditions of living,[21] with the acknowledgment that all human beings, even in the

[20] An outlook inaugurated by the IACtHR in the aforementioned case of the "*Street Children*" (merits, 1999).

[21] As it originally propounded in the paradigmatic case of the "*Street Children*" (*Villagrán Morales and Others*

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utmost defencelessness —like the adolescents in the *cas d'espèce*, who had been socially marginalized and deprived of education for rehabilitation— were subjects (*titulaires*) of rights and not simple objects of protection.[22]

Likewise, within the ICJ, on successive occasions I have drawn attention to the need of a people-centred outlook in contemporary international law, with increasing attention to the centrality of the sufferings of peoples (e.g., my Separate Opinion in the ICJ's Advisory Opinion on the Declaration of Independence of Kosovo, of 22.07.2010), to the fundamental principle of humanity, in the protection of those in utmost vulnerability and even defencelessness (e.g., my Dissenting Opinion in the case of the Convention against Genocide, Croatia versus Serbia, Judgment of 03.02.2015; my Dissenting Opinion in the case of the Jurisdictional Immunities of States, Germany versus Italy, Greece intervening, Judgment of 03.02.2012; my Dissenting Opinion in the case of the Application of the CERD Convention, Georgia versus Russian Federation, Judgment of 01.04.2011)[23].

More recently, in my Separate Opinion in the aforementioned case of the Application of the ICSFT Convention and of the CERD Convention (ICJ`s Order of 19.04.2017), I addressed the matter at length, pondering inter alia that

> "It is significant that, in our times, cases pertaining to situations of extreme adversity or vulnerability of human beings have been brought to the attention of the ICJ as well as other international tribunals. This is, in my perception, a sign of the new paradigm of the humanized international law, the new jus gentium[24] of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. The case-law of international human rights tribunals is particularly illustrative in this respect" (para. 17).

On 23 March 2011, the U.N. Human Rights Council adopted the United Nations Declaration on Human Rights Education and Training, shortly afterwards adopted by the U.N. General Assembly itself, on 19 December 2011. The 2011 Declaration observes that human rights education and training are to embrace "the diversity of civilizations, religions, cultures and traditions of different countries, as it is reflected in the universality of human rights" (Article

*versus Guatemala*, 1999-2001).

[22] For a study, cf. A.A. Cançado Trindade, "*Universitas* and *Humanitas*: A Plea for Greater Awareness of Current Challenges", *in International Journal for Education Law and Policy* - Brussels/Antwerp (2013 - Special Issue: Dignity in Education [Proceedings of the II World Conference on the Right to Education]) pp. 7-16.

[23] Cf. also, in the same sense, my Separate Opinion in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, merits, Judgment of 20.07.2012), and my Separate Opinion in the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, merits, Judgment of 30.11.2010).

[24] Cf. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, 1st. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 3-409; 2nd. rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, pp. 3-782; A.A. Cançado Trindade, *La Humanización del Derecho Internacional Contemporáneo*, México, Edit. Porrúa/IMDPC, 2013, pp. 1-324; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

5(3)).

The 2011 Declaration is in line with the 1948 Universal Declaration of Human Rights; this latter, in asserting (in its holistic vision), in Article 26(1), that "[E]veryone has the right to education", which is to be "free, at least in the elementary and fundamental stages", adds that "[E]ducation shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms" (Article 26(2)).

In my own view, the new jus gentium of our times is centred on the human person.[25] The International Law of Human Rights has much contributed to rescue the centrality of the human person in the present-day corpus juris gentium. The right to education, and the rights in education, are enshrined herein, to the benefit of the ultimate addressees of legal norms, the human beings. States ought to proceed accordingly, reassuming their responsibility as to the human right to education.

## (E) CONTEMPORARY INTERNATIONAL TRIBUNALS IN THEIR COMMON MISSION OF REALIZATION OF JUSTICE

Nowadays, the international community fortunately counts on a wide range of international tribunals, adjudicating cases that take place not only at inter-State level, but also at intra-State level. This invites us to approach their work from the correct perspective of the justiciables themselves and their needs of protection, bringing us closer to their common mission of securing the realization of international justice, either at inter-State or at intra-State level.

From this standpoint, each international tribunal has its own importance, in a wider framework encompassing the most distinct situations to be adjudicated, in each respective domain of operation. They contribute to the historical recovery of the position of the human person as subject of the law of nations (droit des gens), which constitutes, in my understanding, the most important legacy of the international legal thinking of the last six and a half decades.[26]

International human rights tribunals have drawn attention to the position of centrality of the victims, the *justiciables*, giving testimony, together with international criminal tribunals, of the expansion of international jurisdiction, of international responsibility, and of international personality and capacity. This is a notable feature of our times, in the present era of international tribunals. Access to justice has much enlarged, in distinct latitudes and

[25] Cf. A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2010, pp. 1-726; A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-236; A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368.

[26] A.A. Cançado Trindade, *Évolution du Droit international au droit des gens - L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 1-187; A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368.

circumstances.

Due to their work, the international community no longer accepts impunity for international crimes, for grave violations of human rights and of international humanitarian law. Their work has also a preventive dimension. There is nowadays the configuration of a true right to the Law (droit au Droit), of the persons victimized in any circumstances, including amidst the most complete adversity.[27]

International tribunals, in bringing justice to those victimized, even in situations of systematic and generalized violence, and mass atrocities, furthermore contribute decisively to the primacy of the rule of law at national and international levels, demonstrating that no one is above the law, neither the rulers, nor the ruled, nor the States themselves. International law applies directly to States, to international organizations, and to individuals.

Moreover, international tribunals have ascribed great importance to general principles of law, reaffirmed time and time again, and retaining full validity in our days.[28] Legal positivism has always attempted, in vain, to minimize their role, but the truth is that, without those principles, there is no legal system at all, be it national or international. They give expression to the idea of an objective justice, paving the way to the application of the universal international law.

In my own conception, general principles of international law inform and conform the norms and rules of international law, being a manifestation of the universal juridical conscience, the ultimate material source of all Law; in the evolving jus gentium of our times, basic considerations of humanity play a role of the utmost importance.[29] The assertion of an objective law, beyond the will of individual States, is a revival of jusnaturalist thinking. After all, the basic foundations of international law emanate ultimately from the human conscience, from the universal juridical conscience, and not from the "will" of individual States.

Last but not least, the reassuring co-existence of multiple international tribunals has considerably enlarged the number of *justiciables*, in all parts of the world, even in situations of great adversity or vulnerability, if not defencelessness. The operation of international tribunals, in a harmonious and co-ordinated way, is essential to the gradual realization of the old ideal of international justice, as well as to the constant renewal of faith and hope in the construction of a world with prevailing justice.

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[27] A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 196-198, and cf. pp. 132-191.

[28] A.A. Cançado Trindade, "Foundations of International Law: The Role and Importance of Its Basic Principles", *in* XXX *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* - OAS (2003) pp. 359-415.

[29] A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2nd. rev. ed., Leiden/The Hague, Nijhoff, 2013, pp. 1-726.

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# The Review of International Arbitral Awards for Breach of Human Rights and the EU Law, and the Spanish Practice regarding Review of Internal Arbitral Awards

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*Abstract:* The review of international arbitral awards by the internal jurisdictional bodies of the EU Member States can engender State liability. According to the case law of the ECtHR, national jurisdictions are required to exhaustively control the respect of certain rights of the ECHR in the adoption of the controversial arbitral award. The Spanish Practice regarding the control of internal arbitration awards is in line with international standards for the protection of human rights.

*Keywords:* EU Law- International Awards- State Liability-national jurisdiction- Human Rights- judicial review

## (A)INTRODUCTION

This article analyzes the review of the legality of awards by the national jurisdictions of the Member States on grounds of a serious breach of public order of the European Union ('EU'), of which human rights are a part. The review of the legality of the awards can entail various legal consequences for the interested parties, especially in regard to the right of compensation for State liability attributable to the national jurisdiction of the case. Although there is still no case-law in Spain on this subject, it is possible to analyze a relevant case law on the review of the legality of the internal awards which has established criteria to be applied for future cases on the review of international awards.

In addition to this Introduction and the Final Remarks, the article is structured in four parts. The first part describes the state of relations between international commercial arbitration and EU Law, which is mainly grounded in the case law of the Court of Justice of the EU ('CJEU'). The second part analyzes the standards applied by the jurisdictions of the Member States of the EU to carry out the aforementioned review of the legality of the international awards. This analysis shows the existence of various criteria for the implementation of the standards of protection of public order. The third part identifies the

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requirements established by the EU Law for liability of a jurisdictional body of a Member State, deriving from serious breach of EU Law. On the basis of this analysis, it is possible to foresee the existence of cases in which the liability of the national judge could be engendered by not carrying out an adequate review of the legality of an international award. In this context, the exhaustive review of an award for violation of public order derived from serious breach to human rights gets special relevance.

Finally, the fourth part offers an up-to-date perspective of Spanish case law regarding the review of the legality of internal awards for violation of public order. Given that it is a consolidated and well-founded case-law, it is presumable that it will be applicable to future cases regarding the review by Spanish judges of international awards.

## (A) THE CONTROVERSIAL RELATIONS BETWEEN INTERNATIONAL ARBITRATION AND EU LAW

Arbitration was the subject of a specific provision in the Treaty establishing the European Economic Community ('TEEC'), Article 220 of which states, *inter alia*, that "Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...] the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards." Although this was a Community objective, its achievement and implementation were left to the Member States, not to Community Institutions. The resulting set of norms was not to be expressed in a treaty between the Community States, but in a *sui generis* instrument, which is a type of agreement concluded between Member States to achieve Community objectives and which are no longer covered by the existing Treaty regime.[1] As we know, no such international agreement for a framework on arbitration awards has ever been proposed or concluded.

Sixty years after the entry into force of the TEEC, arbitration was explicitly mentioned in another supranational regulatory provision, Recital 12 of European Parliament and Council Regulation 1215/2012, "Brussels Regulation I bis," on jurisdiction and the recognition and

[1] In fact, Member States did not have full autonomy to conclude such agreements, since they were obliged to negotiate them if the Commission deemed it necessary. These were, however, subsidiary objectives that also did not entail a reservation of sovereignty in favor of the Member States, since they could also be achieved by means of Community action on the basis of other Treaty provisions; see Huet, A., 'Commentaire. Article 220' [Commentary on Article 220] in Constantinesco, V., Jacqué J.P., Kovar, R. and Simon, D. (dir.): *Traité instituant la CEE. Commentaire article par article* [Treaty Establishing the EEC: Article-by-Article Commentary], Economica, 1992, 1377. The Treaty of Maastricht reproduced the content of Article 220 of the EEC Treaty in Article 293 of the EC Treaty, and this provision was ultimately repealed with the celebration of the Treaty of Lisbon on 13 December 2007.

enforcement of judgments in civil and commercial matters,[2] to exclude it from the scope thereof, though paradoxically that recital also refers to various aspects of the relationship with EU Law that were the subject of CJEU judgments, such as the recognition and enforcement of the awards, or the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or several aspects of such procedure.[3]

The keys to these complex relationships are established in a controversial jurisprudence of the CJEU, which to date has dealt with aspects as diverse as the nature of the arbitral institutions rendering the disputed awards, their rules of constitution and functioning and jurisdictional autonomy, the incidence of arbitral decisions on the dockets among courts of the Member States, and the framework for the review, recognition, and enforcement of awards.

Concerning to arbitral tribunals and the power of referring questions for preliminary ruling to the CJEU, this jurisdiction has set out a distinction in the light of Article 267 of the Treaty on the Functioning of The European Union ('TFEU'), according to which arbitral tribunals are strictly defined as those constituted by a voluntary act of the parties, as expressed in a clause or agreement that attributes dispute resolution jurisdiction to a private body.[4] Generally speaking, these arbitral bodies settle civil and commercial disputes (commercial arbitration) and, although there is a practice by which arbitrators with the consent of the parties, or the parties themselves, may request the cooperation of the European Commission to clarify matters relating to the EU law applicable to the dispute, as well as to access data or information that may be relevant to the resolution thereof,[5] CJEU case law has repeatedly denied them the possibility of referring questions for preliminary ruling since they are not courts of the Member

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[2] Regulation of the European Parliament and of the Council of 12 December 2012, OJ 2012 L 351/1.

[3] Id. p. 2. The four paragraphs of Recital 12 provide for the full autonomy of the courts of Member States to determine the relevance of an arbitration agreement concluded by the parties on a case-by-case basis. In ruling on such questions, the national court must act in accordance with the rules of the jurisdiction, in any event foregoing the application of Regulation 1215/2012, and, without prejudice to its jurisdiction to rule on the recognition and enforcement of arbitration awards under the 1958 New York Convention, which takes precedence over the regulation.

The existence of this and other multilateral international conventions regulating arbitration was the precise reason for the failure to conclude the Convention foreseen in Article 220 of the TEEC and for the exclusion of arbitration from the scope of the Brussels Convention of September 27, 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention); see the report on the Brussels Convention by P. Jenard, OJ 1979, C59/1, 13.

[4] See the opinion of Advocate General Szpunar in the Ascendi case, C-377/13 [2014], EU:C:2014:246, points 19, 21, and 24. See also M. Szpunar, 'Referrals of Preliminary Questions by Arbitral Tribunals to the CJEU', in F. Ferrari (ed.): *The impact of EU Law on International Commercial Arbitration*, (Juris,New York, 2017), 85, at 123-124.

[5] See, L. Idot, 'Arbitration and Competition' in OECD, DAF/COMP (2010) 40, 13 Dec. 2011, 51, 67-69; also, A. Komminos, 'Assistance by the European Commission and Member States Authorities in Arbitrations', in G. Blanke and P. Landolt (eds.): *EU and US Antitrust Arbitration: A Handbook for Practitioners*, (Kluwer Law International, Alphen aan den Rijn, 2011), 727 at paras. 21-042-048.

States.[6] This case law of the CJEU has been criticized by some scholars on the ground that it could damage the uniform interpretation and application of EU Law.[7] On the contrary, it is settled case law of the Court to recognize this power in respect of arbitral tribunals governed by public law.[8]

However, the CJEU has not recognized this power in respect of arbitral tribunals on international investment on Case C-284/16,[9] although their public nature and other operational features were recognized on the Opinion delivered to this case by Advocate General Wathelet.[10]

Regarding to the rules on the constitution and functioning of arbitral tribunals and their jurisdictional autonomy, the Rich case, which dealt with the appointment of an arbitrator by an English court even when the validity of the arbitration agreement was challenged, established the existing case law, according to which it is for the *lex fori* to rule on these questions.[11]

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[6] See, e.g., the Nordsee case, 102/81 [1982], EU:C:1982:107, [10-13]; the Eco Swiss case, C-126/97 [1999], EU:C:1999:269, [34]; the Denuit et Cordenier case, C-125/04 [2005], EU:C:2005:69, [13]; and the Gazprom case, C-536/13 [2015], UE:C:2015:316, [36]. The CJEU emphasizes that it does not suffice if an arbitral tribunal renders decisions pursuant to the law, if its award has the authority of *res judicata* between the parties, or that it may constitute an enforceable instrument if it is granted an exequatur. For them to be deemed courts of a Member State, it is also necessary that their jurisdiction be mandatory for the parties, that their jurisdictional authority emanate directly from a public act and not from an act of the parties' free will, and that there be a sufficiently proximate link between the legal order of the Member State and the arbitration proceeding.

[7] See N. Landi, 'Arbitral Tribunals and Article 234 of the EC Treaty: A Two Speed Ssystem of Justice Within the European Union?' 11, (2007), Vindobona Journal of International Commercial Law and Arbitration, 173-186 at 185; See also, D. Terkildsen and S.L. Nelsen, 'Arbitral Tribunals and Article 267 of the Treaty on the Functioning of the European Union: The Danish By-Pass Rule', in Ch. Klausenegger, P. Klein, F. Kremslehner, A. Petsche, N. Pitkowitz, J. Power, I. Weiser, G. Zeiler (eds.), *Austrian Yearbook on International Arbitration* 2012, Beck, München, Wien, 201, 202, 195,203-205 etc.

[8] See, e.g., the Vaassen Göbbels case, 61/65 [1966], EU:C:1966:39 [1.A]; the Handels-og KfiD case, 109/88 [1989], EU:C:1989:383, [7-9]; the CJEU's Order in Merck Canada, C-555/13 [2014], EU:C:2014:92, [15-25]; and the Ascendi case, above n. 4 at [24-34]. See also a recent judgment of the CJEU in the case Santogal, C-26/16 [2017], EU:C:2017:453, regarding to a preliminary ruling from the Tax Arbitration Tribunal (Centre for Administrative Arbitration), Portugal.

[9] Preliminary ruling referred by Bundesgerichtshof (Germany) in the case of Achmea BV, C-284/16, [2018], EU:C:2018:158, at [45-49]. Specially at [48] where the Court states <inter alia> that ... 'the arbitral tribunal at issue in the main proceedings is not as such a court common to a number of Member States (...)'. Thus, the arbitral award is not subject to review by a court of a Member State which ensures compatibility with EU Law. Among the contributions that have analyzed this CJEU Judgment see, C. Fouchar and M. Krestin, 'The Judgment of the CJEU in Slovak Republic v. Achmea. A loud clap of Thunder on the Intra-EU BIT Sky', Kluwer Arbitration Blog, 2018, March 7; S. G. Szilágyi, 'It is not just about Investor-State Arbitration.. A look at case C-284/16, Achmea Bv' 3(1), European Papers (2018), 357-373; H. Schepel, 'From conflict-rules to Field Preemption. Achmea and the Relationship between EU Law and International Investment Law and Arbitration', European Law Blog, 2018, March23.

[10] According to the Opinion of Advocate General Wathelet on case C-284/16 delivered on 19 September 2017, EU:C:2017:699 it should be recognized this power to Arbitral Tribunals, see Points 85-131. Advocate General Wathelet issues an explicit finding also in that regard in his Opinion in the Genentech case, C-567/14 [2016], EU:C:2016:177, at. n. 34 and 39.

[11] The Marc Rich case, C-190/89, [1991], EU:C:1991:319, [19]. Among the scholars that have analyzed this

On the more controversial issue of the incidence of arbitral decisions on the dockets among courts of the Member States, the CJEU has until now only addressed the question of the adoption of anti-suit injunctions by an arbitral tribunal in the Gazprom case.[12] Although the CJEU maintains that such measures do not affect the system of mutual recognition established in EU Law to determine the court's jurisdiction in the case[13] – reiterating what it had established for cases in which a court adopts them in its West Tankers case law,[14] Advocate General Wathelet in his Opinion delivered in the above mentioned Gazprom case defended the compatibility of the recognition and enforcement of such arbitration measures with EU Law.[15]

*Gazprom* nevertheless creates a situation of legal uncertainty given that even though it deprives anti-suit injunctions by arbitral tribunals of supranational enforceability[16], a court of a Member State may be bound by that measure under international law in view of the obligations arising for the Parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[17] since the CJEU expressly acknowledges this possibility.[18]

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CJEU Judgment there is a broad consensus as to the correctness of the approach adopted on the relationship between arbitration and EU law; see, e.g., N. Dowers and Z.S. Tang, 'Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal', 3(1) *GIIL*: International Arbitration and Procedure, (2015), 125-146, at 128 and the Bibliography quoted at n. 15.

[12] Above n. 6.

[13] Ibid. at [35-39].

[14] The Allianz and Generalli AG/West Tankers case, C-185/07 [2009], EU:C:2009:69, [29-31].

[15] EU:C:2014:2414, Points 155 and 187-189.

[16] See A. Layton, Arbitration and Anti-suit Injunctions under EU Law', in F. Ferrari (ed.): *The Impact of EU Law on International Commercial Arbitration*, above n. 4, Chapter 3, 63, at 80-84.

[17] Adopted 10 June 1958, entered into force 7 June 1959, 330 UNTS 4739, 3. See also GA Res. 62/65, 6 December 2007. However, the New York Convention does not address the question of enforcement of provisional measures adopted by an arbitral tribunal, nor may one deduce a clear formula for enforcement under the provisions of Article 26 of the UNCITRAL Arbitration Rules (as revised in 2010), GA Res 65/22 (6 December 2010), available at www.uncitral.org. It is a question of determining whether such measures must be enforced as if there were an award or merely an incident of the arbitral proceedings on the merits, and in any event one must consider whether they would be subject to a possible subsequent review or annulment by the responsible arbitral tribunal (Article 26 (5) of the UNCITRAL Arbitration Rules) and that they may be subject to a prior review of compliance with the public order by the court of the Member State in which enforcement is sought; see P. Ewerlöf, 'Interim measures v. the New York Convention – Has the time come to refresh the application of the New York Convention?' 16(4), YAR-Young Arbitration Review, (2015), 9.

[18] The Gazprom case, above n. 6 at [38-39, 41-42]; in this regard, see the analysis of J. Hughes-Jennet and S. Baddeley: "EU: Arbitration anti-suit injunctions do not conflict with Brussels Regulation", Global Arbitration Review, (12.6.2015). Some scholars have underlined the importance of setting forth criteria of legal certainty in situations such as those arising in the West Tankers or Gazprom cases; e.g., G. Kaufmann-Kohler, 'How to Handle Parallel Proceedings: A Practical Approach to Issues Such As Competence-Competence and Anti-Suit Injunctions,' 2(1), Dispute Resolution International, (2008), 110-113. In a *lis pendens* context, however, these measures are shown to be effective for avoiding unjustified procedural damages; see, e.g., O. Vishnewskaya, 'Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?' (2015), *JIA*, (2015), 173-214, at 209.

Last, but not least, the courts of the Member States may legally review an arbitration award and decide, as appropriate, on its validity or invalidity in accordance with EU law. However, the exercise of that authority is based on two different sources that pursue different objectives, one of a supranational nature and another of an international nature. In practice this may lead to contradictory legal situations[19].

On the one hand, CJEU case law has established that, as national judges of EU law, such courts are empowered to facilitate the resolution of proceedings of arbitral tribunals constituted under arbitration agreements based on the free consent of the parties, and to clarify inquiries as to the applicable law, as well as to review the arbitration award if it were subject to appeal or opposition, or another national procedure, including an appeal concerning exequatur. In any of these situations, the national court may also refer questions to the CJEU for preliminary ruling to ensure that EU Law is fully respected.[20]

In sum, the aforementioned power of cooperation with the arbitral tribunals and the review of awards, in addition to safeguarding the principles of primacy and uniformity in the application of EU Law, also contributes to guaranteeing the fundamental right to effective judicial protection,[21] and prevents the creation of situations in which awards contrary to EU Law become binding.[22]

On the other hand, international agreements on arbitration binding on the Member States set forth specific provisions in this respect, empowering the national courts to examine the existence and effects of an arbitration clause. Accordingly, international law allows the national court to act with significant autonomy[23] since the court with jurisdiction may refuse to recognize and enforce the award at issue upon carrying out a review of its validity in accordance

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[19] See N. Basener: *Investment Protection in the European Union*, Nomos-Dike, Baden-Baden/Zürich, 2017, at 465.

[20] See the Nord see case, above n. 6 at [14-15]. This statement is highly relevant given that within their scope of ordinary jurisdictional authority national courts must always ensure that EU Law is respected throughout the territory of the Member States. This duty is essential when dealing with the review of arbitration awards for a number of reasons: first, the arbitrators who are tribunals are not bound by this same duty as they are not part of the public institutions; second, arbitral tribunals are not entitled to refer questions to the CJEU for a preliminary ruling; and third, because domestic legislation usually limits the grounds for annulling an arbitral award to very serious cases of breach of public order, which would not allow the court with jurisdiction to carry out a comprehensive review of the application of EU Law. In this regard, see the Broekmeulen case, 246/80 (1981), EU:C:1981:218, [16-17].

[21] Article 47 of the EU Charter of Fundamental Rights,2007, OJ C 303/1, and 2010 C 83/1.

[22] See the Opinion of Advocate General Reischl in the Nordsee case, EU:C:1982:31, Point 3.b), Point 3.b, iii) and Point 3.bb, ii). The safeguarding of the right of judicial protection ensures that claimants that question the validity of an arbitration agreement have access to national courts. Courts that hear the case will make a ruling, on the basis of the applicable national procedural law and international law, if they must recognize and enforce the award; See the Gazprom case, above n.6 at [38].

[23] See, the Marc Rich case, above at [18]. Also, for example, the CJEU expressly referred to the obligation deriving from article II (3) of the New York Convention in the West Tankers case, above n. 14 at [33].

with its national law, which would not require it to refer the question for a preliminary ruling to the CJEU.[24]

## (B) RULES FOR CONDUCTING A REVIEW OF INTERNATIONAL ARBITRATION AWARDS IN THE JURISDICTIONAL SYSTEM OF THE EU

As above stated, since there is no established regulatory standard, the national courts' review of the compliance of arbitration awards is conducted according to a different standard in view of the public order of the EU precisely as defined by the CJEU.[25]

This entails, on the one hand, the notion of public order in the EU's Legal System,[26] which includes the provisions and principles that constitute its legal foundation.[27] Only in limited cases has the CJEU classified a provision or principle of EU Law as a matter of public policy. For example, human rights,[28] and those Treaty provisions and deriving laws governing the EU's essential objectives, such as the functioning of the internal market,[29] or the area of freedom, security and justice.[30]

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[24] This possibility is based on letter a) of article V (2) of the New York Convention, on which Advocate General Wathelet relied in his opinion on the Gazprom case, EU:C:2014:2414, points 142-143. The simultaneous existence of multiple sources of law on the basis of which the national court may decide a case is likely to create situations of legal uncertainty, even if only in exceptional cases. For example, divergent decisions may be taken between, on the one hand, the arbitral tribunal or the courts of the State of its seat, and on the other, the courts of another Member State with jurisdiction on the basis of the subject matter according to Regulation 1215/2012.See S. Hindeland, 'Repellent Forces: The CJEU and Investor-State Dispute Settlement', 53 Archiv des Völkerrechts (2015) 68-69. See, M. Illmer, 'The Arbitration Interface with the Brussels I Recast: Past, Present and Future', in F. Ferrari (ed.), *The Impact of EU Law on International Commercial Arbitration*, above n. 4, 31, at 60-62. In order to minimize or avoid harm arising from this situation, Advocate General Kokott in her Opinion on the West Tankers case proposed to the CJEU that arbitration be included in the regulatory system of Council Regulation 44/2001, of 22 December 2000, OJ 2001 L 12/1, the scope of application of which currently corresponds to Regulation 1215/2012. But the Court did not accept this proposal in its Judgment, EU:C:2008:466, Point 73. On the other hand, Advocate General Léger in his Opinion on the Van Uden case, points out that *Rich* accepts the possibility that an arbitration award and a Member State court decision may be incompatible and refers to existing formulas for resolving that dilemma, EU:C:1997:288, Point 47.

[25] See C. Liebscher, 'European Public Policy. A Black Box?' Journal of International Arbitration 17 (3), *JIA* (2000), 73-88 at 80-81.

[26] See, G. Karydis, 'L'ordre public dans l'ordre juridique Communautaire: un concept à contenu variable' [Public Order in the Community's Legal Order: A Concept with Variable Content], 38 (1), RTDE, (2002), 1- 26, at 12-14.

[27] See the Kadi case, C-415/05P (2008), EU:C:2008:461 at [304].

[28] See, *inter alia*, the Trade Agency case, C-619/10 (2012), EU:C:2012:531 at [52]; also, the Krombach case, C-7/98 (2000), EU:C:2000:164 at [38-39].

[29] The text of article 101 TFEU as of the Eco Swiss case, C-126/97 (1999), EU:C:1999:269 at [36].

[30] The principle of mutual recognition of the decisions of the courts of another Member State by the court responsible for recognizing or enforcing them; see, among others, the Openbaar Ministerie/A. case, C-463/15 PPU (2015), EU:C:2015:364 at [23-31]; and the P/Q case, C-455/15 PPU (2015), EU:C:2015:763 at [53].

However, the CJEU in the Kadi judgment has established controversial criteria according to which does not allow any derogation from the principles enshrined in Article 6 (1) of the Treaty of the European Union (TEU), even if they could arise from the obligation to implement measures deriving from the resolutions of the Security Council[31]. Thus, although the national judge that controls the legality of an international arbitral award is obliged in any circumstance to avoid the violation of a human right, has a margin of discretion to determine the seriousness of the violation.

Moreover, according to Advocate General Poiares Maduro, only some fundamental rights that holds a prominent place in the firmament of the EU Legal System, would be likely to be protected, and just in case of a serious breach to their very essence[32].

The CJEU has established in this line a case law which hold that human rights do not constitute unfettered prerogatives and may be subject to restrictions, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not constitute, with regard to the objectives pursued, a manifest and disproportionate breach of the rights thus guaranteed[33].

When the courts of the Member States exercise authority to review the validity of an arbitration award in the light of the public order of EU, they are bound to ensure the principle of the effectiveness and the useful effect of the relevant provisions.[34]

It must be underlined that CJEU doctrine sets forth the general obligation of the national court to review disputed international arbitration awards for compliance with the public order of the EU, but subject to the existence of national procedural rules (principle of equivalence),[35] and also, in certain circumstances, to that court's having the necessary facts and law to do so.[36]

According to the Bosphorus Decision by the ECtHR[37] , there is a Presumption on the level

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31 See the Kadi case, abobe n 27, [303-305].

32 See the Opinion of Advocate General Poiares Maduro delivered on 16 January 2008 on case C-402/05P, Kadi, EU:C:2008:11, Point 52.

33 See the Trade Agency case, above n 28, [55]. On the other hand, the notion of public interest refers to those provisions that protect legal assets dependent on the implementation of public policies provided for in the Treaties to achieve the Union's objectives; some of the aforementioned provisions may be found in the field of consumer protection policy. See, *inter alia*, the Mostaza Claro case, C-168/05 (2006), EU:C:2006:675 at [37]; the Martín case, C-227/08 (2009), EU:C:2009:792 at [28]; and cases ac. Unicaja Banco and Caixabank, C-482/13, C-484/13, C-485/13, and C-487/13 (2015), EU:C:2015:21, at [30].

34 See the Van der Weerd case, C-222/05 (2007), EU:C:2007:318 at [35-41].

35 See, e.g., the Eco Swiss case, at [32]. See N. Blackbay, *et al.*: *Redfern and Huntern on International Commercial Arbitration*, (5th edition, Oxford UP, Oxford, 2009), at. 3, 135. According to these scholars, the Eco Swiss case provides an incentive for the arbitration tribunals to raise and apply issues of EU competition Law themselves if they are concerned about the enforceability of their awards in the EU.

36 See, e.g., the Order of the Court of Justice in the Pohotovost s.r.o. case, C-76/10 (2010), EU:C:2010:685, at [50-54].

37 See ECtHR Bosphorous v. Ireland, [2005], paras 155,159.

of protection offered by the EU Law in the field protected by the ECHR which is equivalent both, on substantive guarantees and on procedural guarantees to enforce substantive rights.

Nonetheless, this presumption can be rebutted if the protection is manifestly deficient for the specific case. This practical situation has significant implications for the safeguarding of the individual rights granted by the EU Law every time that the courts of the Member States, when dealing with the review, recognition or enforcement of international arbitration awards don't set aside those that could infringe human rights. Against this background, it could be triggered the individual's right to compensation by application of the principle of State liability owing to an infringement of EU Law.

## (C) STATE LIABILITY FOR INFRINGEMENTS OF EU LAW DERIVING FROM THE CHALLENGE OF INTERNATIONAL ARBITRATION AWARDS FOR VIOLATION OF FUNDAMENTAL RIGHTS BEFORE THE JURISDICTIONS OF THE MEMBER STATES

### (1) The Invocation of State Liability in the EU Law: General Background

As one author has pointed out, it may be somewhat paradoxical that the application of the principle of State liability for infringement of EU Law be governed by stricter criteria than those applied within a true federal structure, such as in the USA, where states of the federation enjoy certain margins of immunity for breaches of federal law.[38] The main reason, however, lies in the need to protect the "useful effect" of the relevant provisions of EU Law in the context of decentralized judicial protection.[39] In the absence of an EU federal judicial system, it is for the courts of its Member States to ensure the "effective judicial protection" (Article 19 TEU) of its legal provisions.

Accordingly, the CJEU's recognition of the principle of State liability for infringement of EU Law functionally complements the principles of primacy and direct effect[40] and is

[38] See, D.J. Meltzer, 'Member State Liability in Europe and the United States,' 4,(1), Int'l J. Const. L. (2006), 39-83, at 54-55.

[39] Ibid., at 66-67.

[40] Francovich and Bonifaci (C-6/90, C-9/90) [1991] EU:C:1991:424 at [31-34]. See also: R. Malcolm, 'Beyond Francovich,' 56 (1), Modern Law Review, (1993), 55-73, at 55-57, 60-62, and 72; J. Steiner, 'From Direct Effect to Francovich: Shifting Means of Enforcement of Community Law,' 18 (1) ELR (1993) 3-22 at 20-21. S. Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?', 17(2) EBLR (2006), 299-315, at 305. A. Ward, 'More than an 'Infant Disease.' Individual Rights, EC Directives and the Case for Uniform Remedies,' in J. Prissen and A. Eschrauwen (eds.): *Direct Effect. Rethinking a Classic of EC Legal Doctrine*, (Europa Law Publishing, Amsterdam, 2002), 45, 64-66, and 73-74; among others. CJEU doctrine on the principle of State liability initially focused on matters concerning the transposition of Directives, Wagner Miret (C-334/92) [1993], EU:C:1993:945, [22], Faccini Dori (C-91/92), [1994], EU:C:1994:292, [27]; and, El Corte Inglés/Blázquez Rivero, (C-192/94), [1996], EU:C:1996:88 [22].

enshrined as a general principle of EU Law[41] requiring specific protection in the Member States, in accordance with the principles of equivalence and effectiveness.[42]

The objective of the principle of State liability for infringement of EU Law is ambivalent. While it seeks to compensate individuals for unjustly caused damages by such breaches, which can hardly be done by means of Articles 258-260 TFEU,[43] it is also an additional instrument to reinforce the coercive nature of the rules of the EU.[44] This is confirmed by extensive CJEU case law, which has progressively extended the principle's scope of application to the point of attributing infringements of EU Law to any public authority of the Member State irrespective of its nature[45] or territorial location.[46]

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41 See Francovich and Bonifaci, above n. 40 at [30-37].

42 See Francovich and Bonifaci, above n. 40 [42-43]; Danske Slagterier (C-445/06) [2009] EU:C:2009:178 [31]; Transportes Urbanos (C-118/08) [2010] EU:C:2010:39 [46-48]; Ferreira da Silva e Brito and others (C-160/14) [2015] EU:C:2015:565 [50]; etc.

43 Although the EC Treaty's amendment by the Maastricht Treaty, which introduced the specific provision of the current second paragraph of Article 260 of the TFEU, was swiftly implemented by the Commission and the CJEU (Commission/Greece) (C38/97) [2000], EU:C:2000:356 [78] and [99], its purpose is to enforce Members States' compliance with EU law. Therefore, it does not provide for an effective means for restoring private individuals for damages caused by said infringements; *see*, J. Marson, 'Holes in the Safety Net? State Liability and the Need for Private Law Enforcement,' 25 (2), Liverpool Law Review, (2004), 113-134, at.124. This is remedied through the enshrining of the principle of State liability for infringement of EU law; see T. Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? An Assessment 20 Years after Francovich,'49(5) CML (2012), 1675-1702 at 1700; J. Tallberg. 'Supranational Influence in EU Enforcement: The ECJ and the Principle of State Liability,' 7(1) Journal of European Public Policy, (2000) 104-121, at. 108; J. Tuuli. 'State Liability: A Tool to Narrow the Gap Between the European Union and its Citizens,' M. Koskenniemi (ed.): *The Finnish Yearbook of International Law*, (Kluwer Law International, Alphen aan den Rijn 1999), 366, 368; among others.

44 See T. Lock, above n. 43 at 1677. See also, R. Rawlings, Engaged Elites Citizen Action and Institutional Attitudes in Commission Enforcement,' 6(1) ELJ (2000), 4-28, at 6; among others.

45 In the first cases cited above, at n. 40, the applicants alleged State liability for failure to transpose directives, even though the failure to act was the fault of the legislature. The CJEU judgments in Brasserie du Pêcheur and Factortame III (C-46/93 and C/48/93) [1996], EC:C:1996:79 [32-36] expressly provide for the possibility of attributing damages to the malfunctioning of a national legislature. Within the doctrine analyzing the impact of this Judgment, see P. Craig, 'Once More Unto the Breach: The Community, the State and Damages Liability,' 113 LQR, (1997), 67-94, at. 92-93; E. Deards, 'Brasserie du Pêcheur: Snatching Defeat from the Jaws of Victory?' 22, ELR, (1997), 620-625; W. Van Gerven, 'Bridging the Unbridgeable: Community and National Tort Law after Francovich and Brasserie'; 45(3), ICLQ, (1996), 507-544 at 540-543.

Based on the judgment in Köbler (C-224/01) [2003] EU:C:2003:513 [33-36], private individuals have been able to obtain redress before national courts for damages caused by the infringement of their rights under EU law due to decisions of a last resort court. Within the scholars analyzing the impact of this Judgment, see N.W. Barber and H. Scott, 'State Liability under Francovich for Decisions of National Courts,' 120, LQR, (2004) 403-406; M. Breuer, 'State Liability for Judicial Wrongs and Community Law: The Case of Gerhard Köbler v. Austria,' 29 (1) ELR (2004), 243-254; C. D. Classen, 'Annotation to Köbler,' 41 CMLR (2004), 813-815; P. Wattel, 'Köbler, CILFIT and Wethgrove: We Can't Go on Meeting Like This,' 41 CMLR (2004), 177-190.

46 Thus, for example, in the Judgment in Klaus Konle (C-302/97) [1999] EU:C:1999:271 [61-62], the Court established the duty of the State to make reparation for damage caused to individuals irrespective of the authority responsible for the breach of EU law, including within a decentralized internal system of competences of a federal

Although the invocation of the principle before us is a widespread occurrence across all the jurisdictions of the Member States,[47] it nonetheless occurs quite sporadically. Moreover, there are few cases in which the applicant obtains reparation in accordance with his or her expectations.[48]

The problem is not so much in the supposed existence of the reluctance or resistance of national jurisdictions to introducing a supranational instrument different from that provided in their own regulatory environments to compensate financially those harmed by the acts of public authorities,[49] as in the difficulty of applying the rules established by the CJEU for invoking the principle in question.[50]

In this regard, of the three necessary requirements for compensation, which are that: the purpose of the EU rule is to attribute rights to individuals, the breach is sufficiently serious,[51] and that there is a direct causal relationship between the breach and the damage suffered,[52] the second condition is difficult to prove.[53] Due to the wide margin of discretion public authorities

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nature. Liability may also be claimed independently of the type of administrative body to which a sufficiently serious breach of EU law is attributed, see, e.g., the judgment in Larsy (C-118/00) [2001], EU:C:2001:368 [35]. Within the scholars analyzing the impact of this case law, see: A. Georgios: "The Allocation of Responsibility in State Liability. Actions for Breach of Community Law: A Modern Gordian Knot?" 26 *ELR* (2001), 139-158, id.: "Not as Unproblematic as You Might Think: The Establishment of Causation in Governmental Liability Actions," 27 *ELR* (2002), 663-667; A. Lengauer, 'Case C-302/97, Klaus Konle v. Republic of Austria,' 37 *CMLR* (2000),181-190; T. Tridimas, 'Liability for Breach of Community Law Growing Up and Mellowing Down?' 38 *CMLR* (2001) 301-332.

47 As shown by the research collectively undertaken at Instituto Universitario Europeo (Florence), *Bottom up or Rock Bottom Harmonization? Francovich State Liability in National Courts*, R. Condon and B. Leeuwen (eds.), EUI WP, Law 2015/03, which analyzes the impact on the jurisdictions of ten EU Member States representing different legal traditions (Common Law, Nordic Scandinavian, Continental and Eastern Bloc countries), between the years 2000-2013, especially p. 53.

48 See R. Condon and B. Van Leeuwen, cit. above n. 46, 54.

49 Thus, for example, the application in the jurisdictions of the UK of the so-called "eurotort" does not pose any issues; see M. Tomulic Vehovec, 'Member State Liability for Breach of EU Law before English Courts,' 8 *CrYbELP*, (2012), 369-410, at 376-377.

50 See T. Lock, above n. 43, 9-10; see also, C. Kremer, 'Liability for Breach of European Community Law: An Analysis of the New Remedy in the Light of English and German Law,' 22(1) *YEL*, (2003), 203-247.

51 The CJEU's case law is consistent in maintaining that in order to determine whether such a breach has occurred and can give rise to non-contractual liability for the EU, there must be a manifest and grave disregard on the part of the institution concerned to comply with the limits imposed on its authority for assessment. The decisive factor for this purpose is the field, circumstances, and context in which the contested act takes place. In that sense, the mere breach of the duty to act diligently, which is inherent in the principle of sound administration, does not constitute a sufficiently serious breach of EU law; see, e.g., the Defensor del Pueblo/Staelen case, C-337/15 P (2017), EU:C:2017:256 at [31][34][37][40][45]. That case law is applicable by analogy to acts committed by the bodies and institutions of the Member States.

52 See cases Brasserie du Pêcheur and Factortame III, above n. 45 at [51]; Danske Slagterier, above n. 5 at [20], etc.

53 See T. Lock, above n. 43, 13, arguing that it is difficult for the applicant to prove the existence of a "serious breach" provided that the State concerned has discretion to adopt the disputed measure.

usually have in these circumstances, the courts opt to confirm the validity of the actions of those public authorities except in flagrant cases of objective and grave breach of EU Law, such as the failure to transpose a directive within its stated deadline.[54]

A line of CJEU case law confirms the discretionary power of national authorities to derogate from fundamental rules and principles of EU Law directly invoked by individuals, provided the protection of human rights is at stake, with liability for breach of EU law being precluded in these circumstances.[55] However, the CJEU itself has interpreted this power restrictively.[56]

## (2) Attribution of liability for Damage Caused by the jurisdictions of the Member States for Breach of EU Law

As discussed above, the national courts' role in reviewing arbitration awards, and the discretionary use of the standard of review to decide on their validity, could create situations that potentially allow an individual invoke the principle of State liability for malfunctions in the Justice System. The first step in that direction was taking in the *Köbler* case,[57] where the recognition of the possibility of compensation for damage caused to individuals by the malfunctioning of the justice system was subject to the fulfillment of certain requirements that were specifically defined to fit the judicial function: that the breach in question is due to a decision of a court or tribunal of last resort, and that such breach is sufficiently serious and manifest.[58] Regarding the notion of a court of last resort, although each national system has its own peculiarities which generally require examination on a case-by-case basis, the CJEU has established the possibility that such courts are not exclusively those which are supreme in each Member State, but rather any one whose decisions on national law are not subject to further judicial remedy.[59]

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However, the CJEU has consistent case law delimiting the main criteria by which a national decision-maker can determine the existence of a "Serious Breach" of EU law; for example, the FuB case (C-429/09) [2010], EU:C:2010:717 at [51-52], establishes elements limiting the discretion of a Member State, which include the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, and the manifest disregard of the case law of the Court of Justice in the field relevant to the case.

[54] See T. Lock, above n. 43, 15-16.

[55] See, e.g., the Judgment in Schmidberger (C-112/00) [2003], EU:C:2003:333, at [65-69], [76] and [93-95]. See the analysis in C. Brown, 'Annotation to Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria,' 40 *CMLR* (2003) 1499-1510.

[56] See, e.g., the Judgment in AGM-COS.MET (C-470/03), [2007], EU:C:2007:213, at [72-73].

[57] Above n. 45.

[58] See, Köbler above n. 45 [59].

[59] See, e.g., the Judgment in Biuro podrózy Partner (C-119/15) [2016], EU:C:2016:987, at [48-54]; see also, Târçia (C-69/14) [2015], EU:C:2015:662, at [40]. The CJEU has pointed out in this regard that a court whose decisions are subject to judicial remedy may not be deemed a court of last resort when the appeal brought against a decision of that court has not been examined on the basis of the withdrawal of the appellant; see Aquino, C-3/16 [2017], EU:C:2017:209, at [38].

On the other hand, the CJEU has set forth narrow criteria for determining the liability of a national court for breach of EU Law, namely that the national court must take account of all the factors which characterize the situation put before it, in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable, the position taken, where applicable, by a Community institution, and noncompliance by the court in question with its obligation to make a reference for a preliminary ruling.[60]

It should be noted here that the CJEU itself has recognized that although a supreme court must bear in mind in its assessment that a case is pending in which a lower court has referred a question for a preliminary ruling, that fact alone does not preclude the supreme court from concluding that the case before it involves an "acte clair." Accordingly, it is not required to make a reference to the Court of Justice on the same question, nor is it required to wait until an answer to that question submitted by the lower court has been given.[61]

But these situations, apart from generating the undesirable circumstance of contradictory decisions issued by national courts, could also create the risk of a serious breach of EU law if the national court interprets one of its rules in a "manifestly erroneous" manner, especially without regard for CJEU case law or if it interprets its national law in violation of EU Law.[62]

### (3) The Attribution of Liability to a National Court for Reviewing the Enforcement of a Disputed Award in the context of the protection of Human Rights

Questions concerning the validity of an international arbitration award may also arise in the context of a dispute concerning the application of EU Law, the central element of which is the manifest breach of a human right enshrined in the Charter of Human Rights of the EU (the Charter) or in the General Principles of EU law, and which forms part of the rights recognized in the European Convention on Human Rights (the Convention).

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[60] The CJEU expressly affirms that such liability may only be claimed in the exceptional case where the court of last resort has manifestly infringed the applicable law, see Köbler above n. 45 [53-55].

[61] See the Judgment in joined cases X and Van Dijk (C-72/14 and C-197/14) [2015], EU:C:2015:564, at [60-63]. Similarly, a court of last resort may abstain from submitting a question for preliminary ruling if it rejects an appeal on grounds of inadmissibility proper to the procedure of that court, provided respect with the principles equivalence and effectiveness. See Aquino above n. 59 at [56].

[62] See Ferreira da Silva e Brito and others above n. 42 [57-60]. Similarly, State liability might be sought where the breach results from an assessment of facts and evidence, especially if this assessment leads to a "manifest infringement of applicable law" as regards the burden of proof, the value of the evidence or the admissibility thereof, or the legal characterization of the facts. This case law entails an extension of possible scenarios in which a national court might commit a "manifest" breach of EU Law. See the Judgment in Traghetti del Mediterráneo (C-173/03) [2006], EU:C:2006:391, at [37-45]. See B. Beutler, 'State Liability for Breaches of Community Law by National Courts: Is the Requirement of a Manifest Infringement of the Applicable Law an Insurmountable Obstacle?' 46 *CMLR* (2009), 773-804, at 789.

In such circumstances, the standard of validity is based on the threshold determined by the doctrine of the European Court of Human Rights (ECtHR). In the light of this doctrine, there are a number of particularly relevant elements concerning the arbitration proceedings which gave rise to the disputed award[63], including whether the parties voluntarily submitted to it or not, the respect for the human rights recognized by the Convention in those proceedings, and the State's indirect intervention in the handling thereof, whether by acts that violate the rights of the interested parties due to the national rules on arbitration not conforming with the Convention or by the actions of the national courts concerned[64].

Although the ECtHR has not to date expressly ruled on the compatibility of arbitration with the Convention, there are numerous Judgments in which it conducts review of the procedures and decisions adopted by arbitral tribunals, especially those relating to civil and commercial arbitration,[65] within the scope of application of Article 6(1).[66] As is well known, this provision corresponds to the second paragraph of Article 47 of the Charter, which establishes the right of every person to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal established by law, and, to be counseled, defended, and represented.

In reality, reviews of compliance with the convention of arbitral tribunals go beyond the scope of Article 6(1) of the Convention and include the whole concept of the right to effective judicial protection,[67] also recognized in the first paragraph of Article 47 of the Charter, and in the case law of the CJEU as a General Principle of EU Law.[68] With these tribunals being excluded from consideration as State bodies,[69] the Court has however identified two possible

[63] See E. De Brabandere, 'Human Rights Considerations in International Investment Arbitration' in M. Fitzmaurice and P. Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, (Martinus, Nijhoff, Leiden, 2012) 183-215.

[64] See M. V. Benedettelli, 'The European Convention on Human Rights and Arbitration: The EU Law Perspective', in F. Ferrari (ed.): *The Impact of EU Law on International Commercial Arbitration*", above n.4, 463.

[65] See, ECtHR Regent Company v. Ukraine, [2008] paras 54-56. See also M. Závodná: *The European Convention of Human Rights and Arbitration*, (Diploma Thesis on file at the Faculty of Law Masaryk University, Brno, 2014), at 6-8.

[66] See *Application No. 28101/95 v. the Neetherlands*, DR 87-B, 112. See also, K. Svobodová: "Application of the Article 6(1) of the ECHR in International Commercial Arbitration", at 108, at 109. According to Svobodová quoting to other Scholars, the key point in solving the relationship between the Convention and arbitration is the above mentioned Article 6(1), which covers the right to access to justice, the right to an independent and impartial judge, the right to file a claim including the right to be heard, the principle of equal treatment, the right to receive a reasoned decision, the right to receive a decision within a reasonable time, and the right to public proceedings, among others.

[67] See S. Besson, 'Arbitration and Human Rights,' 24(3) ASA Bul.(2006), 395-416, at 402.

[68] See, e.g., CJEU Judgment in Johnston (C-122/84), [1986], EU:C:1986:206, at[18-19]; CJEU Judgment in Heylens (C-222/86), [1987], EU:C:1987:442, at [14-15]; CJEU Judgment in DEB (C-279/09) [2010], EU:C:2010:811, at [29-42], [59-60]; among others.

[69] See *Application No. 10881/84 v. Switzerland*, DR51, 83. In this regard, the Court agrees with the generally

grounds for invoking State liability for breach of the Convention as a result of the interested party's submission to arbitral proceedings.

On the one hand, the Court recognizes the horizontal direct effect of the Convention[70]. Accordingly, the rights recognized by the Convention are fully applicable to arbitration proceedings[71], since its provisions form part of the *lex loci arbitri* and the arbitrators have the duty to respect and safeguard them.[72] Consequently, it could be argued before the relevant domestic courts that an award adopted in violation of the Convention is unlawful[73], since the public order obligations arising therefrom prevail over the other obligations deriving from national or international rules in the field of arbitration.[74]

In this situation, the interested party may request the revision of the disputed award, and where appropriate, the adoption of interim measures, or its annulment or non-enforcement, before the relevant court of law.[75] However, it would need to be determined if this were possible in the event the interested party had previously, clearly, and expressly waived this right.[76]

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accepted opinion according to which the arbitrators do not exercise any type of authority nor do they participate in public administration, since they fulfill only the mandate ascribed to them by the parties; thus, e.g., G. Born: *International Commercial Arbitration*, Vol. I, (Wolters Kluwer, Alpen aan den Rijn, 2009) 184.

[70] See, for a wide legal background on Challenging and enforcing awards, C.L. Lim, J. Ho and M. Paparinskis: *International Investment Law and Arbitration. Commentary, Awards and other Materials*, (Cambridge UP,Cambridge 2018, chapter 18.

[71] See S.L. Karamanian, 'The Place of Human Rights in Investor- State Arbitration', 17 (2) Lewis and Clark Law Review (2013) 423-447, at437.

[72] See, ECtHR, Transado Transportes Fluviais do Sado, S.A. v. Portugal, [2003], para 1. See also A. Jaksic: "Procedural Guarantees of Human Rights in Arbitration Proceedings: A Still Unsettled Problem?" 24(2) JIA (2007), 159-172 at 164.

[73] See E. Kleiman, 'The SNF v. International Chamber of Commerce Case and the Obligation to Conduct Arbitration Procedings with "Expected Dispatch"', in D. Bray and H. C. Bray (eds), *International Arbitration and Public Policy*, (Juris, New York, 2015), 49-92.

[74] See, e.g., the decision of the ECtHR (Fifth Section) of 28 October 2012, Suda v. the Czech Republic, [2012], para 55.

[75] See Application 1847/91 v. Germany, DR 83, where the Commission stated, *inter alia*, that "the (national) courts exercised a certain control and guarantee as to fairness and correctness of the arbitration proceedings which they considered to have been carried out in conformity with fundamental rights." According to A. Jaksic, there are several infringements to the Convention caused by arbitral tribunals which could be attributable to the State, such as, for example, the appointment of arbitrators depriving the claimant of his right of access to a court, the establishment of rules that provide for compulsory joinder of third parties or violating the principle of equality of the parties, above n. 72.

[76] This doctrine established by the Court admits the validity of a waiver of judicial review of the award, made under the above conditions, but provided that the arbitrators are presumed to act in accordance with the safeguarding of the human rights under the Convention; see ECtHR Noureddine Tabbane v. Switzerland, [2016] paras 25-31. See also, C.A. Kunz: "Waiver of Right to Challenge an International Arbitral Award Is Not Incompatible with ECHR: Tabbane v. Switzerland," 5(1) EIAR (2016), 125-132. In this regard, the Court itself has established that the waiver of certain rights under the Convention may only occur in relation to some of those provided for under article 6(1), such as judicial review of an arbitral award and the right to be heard; see, e.g., ECtHR, Osmo Suavaniemi and others v. Finland, [1999] Application No. 31737/96. See also G. Petrochilos:

On the other hand, certain acts directly or indirectly attributable to State authorities may also trigger their international liability for violations of the Convention. Directly attributable acts include failures by national courts to admit an application for the revision of an award without the interested party's having made an express and prior waiver to exercise this right,[77] or failures to hear challenges of the recognition or enforcement of arbitral awards rendered in violation of certain human rights under the Convention.[78]

International liability could also be enforced by indirectly attributable acts to a State authority such as for, e.g., the adoption of a law that does not guarantee the parties concerned the application of the human rights under the Convention in arbitration proceedings,[79] the lack of appropriate domestic regulatory instruments, or actions in obstruction of the enforcement of an award.[80]

Finally, the decisions of last instance national courts on the revision and, where applicable, on the annulment of an arbitral award, may trigger the State's international liability if these do not grant effective judicial protection within the broadest possible meaning of Article 6(1) of the Convention, to the applicant who alleged being subject to violations of the rights recognized in the Convention as a result of actions taken in the arbitration proceedings in which the disputed award was rendered.[81]

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*Procedural Law in International Arbitration*, (1st. Ed., Oxford University Press,Oxford, 2004), 114. Moreover, there are other limits on the waiver: e.g., it does not imply waiver of the right to oppose the recognition and enforcement of the arbitral award, see G. Kauffmann-Kohler and A. Rigozzi: Arbitrage International. Droit et practique à la lumière de la LDIP, (2n. ed., Weblaw, Bern, 2010), 747. See also P. Bernardini: "The scope of Review in Annulment Proceedings," in D. Bray, H.L. Bray (eds.): *International Arbitration and Public Policy*, (Juris, New York, 2015) 167.

77 See Application 10881/84 . v. Switzerland, above n. 69.

78 See Application 1847/91 v. Germany, above n. 75. An analysis of the question at A. Samuel: "Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View," 21(5) JIA (2004), 413-437, at 424.

79 See ECtHR Suda v. the Czech Republic, [2012] above n. 74, paras 52-55. It should be noted that national law provides the basis for the constitution and functioning of arbitral tribunals, as well as the binding force of arbitral awards, which is absent in other forms of private dispute settlement such as mediation or conciliation; see G. Born, above n. 69, 187. In this regard, it is reasonable for the parties, by opting for arbitration as a means of dispute settlement, to seek a discreet method compatible with the right to waive public ordinary court proceedings. But this does not mean that the autonomy of the will also allows the parties to fully waive their right to defense, nor does it exempt national judges from granting the effective judicial protection thereof.

80 See ECtHR Regent Company v. Ukraine, [2008] above n. 65, paras 59-62. It should be emphasized in this context that under Article 13 of the Convention, Contracting States are required to provide effective remedies for violations thereof, even if these are caused by private individuals, including the actions and decisions of arbitral tribunals. On the horizontal direct effect of the Convention, see E. Engle: "Third Party Effect of Fundamental Rights (Drittwirkung), 5(2) Hanse LR (2009), 165-173, at 169. The ECtHR has established a settled doctrine on the attribution of international liability to Contracting States for violations caused by the acts of private individuals; thus, e.g., ECtHR A. v. the United Kingdom, [1998], paras 22-24.

81 See ECtHR Osmo Suavaniemi and others v. Finland, [1999] above n. 76. See also J.C. Landrove: "European

## (D) THE SPANISH PRACTICE REGARDING REVIEW OF INTERNAL ARBITRAL AWARDS: THE LIKELY APPLICATION OF ESTABLISHED CRITERIA TO THE REVIEW OF INTERNATIONAL AWARDS

The Spanish Practice regarding review of arbitration awards is circumscribed to date to the decisions of internal scope and of a civil and commercial nature. However, relevant decisions have been adopted by the highest jurisdictional instances that have given rise to a jurisprudence that could be applied to similar situations such as those we have analyzed previously. In this sense, in addition to establishing the full capacity to control the award in question, the jurisdictional body must conduct a thorough assessment of its legality when a human right is at stake. As far as the later dimension is concerned, a Key decision was taken by the Spanish Supreme Court in the case "Agrumexport SA C. Bco. Popular"[82], where this jurisdiction stated on the implications of the Kompetenz-Kompetenz principle under the Spanish Arbitration Act (SAA)[83] Bco. Popular signed a framework netting agreement with Agrumexport which contained a clause whereby all disputes or conflicts resulting from the said agreement shall be finally settled by arbitration in equity. Sometime later, the two parties concluded a swap and a put. Nevertheless, Agrumexport sought the annulment of both derivatives before the judicial courts. Bco. Popular argued that the matter had to be decided in arbitration, but this argument was dismissed by the first instance court and the court of appeals.

The Supreme Court confirmed these decisions and held that the consent to refer disputes to arbitration must be explicit, clear, categorical and unequivocal. According to the Supreme Court, the SAA posits the soft interpretation of the *Kompetenz- Kompetenz* principle which leads to a full review of the arbitration agreement by judicial courts if one of the parties submits the dispute to said courts despite the arbitration agreement. Judicial courts may therefore rule on the validity and effectiveness of the arbitration agreement and on its applicability to the subject matter of the dispute without any limitation.

However, when the arbitrator has already decided that he has jurisdiction, then this decision can only be reviewed by judicial courts through an action seeking the setting aside of the award. This is the case when a violation of public policy may be at stake.

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Convention on Human Rights' Impact on Consensual Arbitration," in S. Besson, M. Hottelier; F. Werro (eds.): *Human Rights at the Center*, (Schulthess, Zürich, 2006), 82. However, some authors maintain that in the event the interested party voluntarily and expressly waives annulment of the award, there is no obligation requiring the relevant court to take *ex officio* action; thus, e.g., see S. Besson, 'Arbitration and Human Rights,' above n. 67, 405; see also, N. Krausz, 'Waiver of Appeal to the Swiss Federal Tribunal: Recent Evolution of the Case Law and Compatibility with ECHR, Article 6', 28(2) *JIA* (2011), 137-162.

[82] STS (Civil Chamber) 2500/2017, ES:TS:2017:2500

[83] Law 60/2003, 23 November 2003 (BOE nº 309, 26 December 2003), as amended by Law 11/2011, 20 May 2011,(BOE nº 21 May 2011).

Two judgments of the Spanish Supreme Court have followed this line. In a decision adopted in 2017, the plaintiff, "PumaSE", demanded two arbitrators who issued an award that was declared void by the Provincial High Court, since they excluded the third arbitrator appointed by "PumaSE". Thus, the Supreme Court confirmed this decision on the main ground that, the said two arbitrators "seriously violating the arbitration rules"[84].

Moreover, in a judgment of 2013, where the plaintiff requested the annulment of an arbitration award that dismissed her claim against a transport company that caused her an accident with bodily harm, because she was unable to obtain a supporting medical document in duly time, the Supreme Court stated that, "it must prevail the constitutional right to effective judicial protection (Article 24.1 of the Spanish Constitution, CE), by obtaining a resolution based on law that takes into consideration all the elements known by the organ that decides"[85].

It must be also underlined some case law of the Madrid Superior Court of Justice on this matter. In most of the cases, the party that had brought the action had invoked a violation of the due process principles seeking the annulment of an award. Thus, in a judgment delivered in February 2017, the Superior Court of Justice stated that was evident that the defendant's oppositions brief in the arbitral procedure has not been considered when adopting the award, with clear breach of its right of defense and with the consequent violation of public order[86]. In a judgment delivered in November 2017, the same Court stated in similar terms that, "the arbitrator adopted the award without the claimants being able to make allegations and propose evidence within a reasonable deadline"[87]. It is the prevailing view of the Madrid Superior Court of Justice that there is a public interest in removing from the legal order those awards that entail a violation of public order. On this ground, the Superior Court of Justice stated that the Courts have the duty to debug the legal order from those awards.

It must be underlined that, according to its judgment delivered on April 24, 2018[88], arbitrators and arbitral institutions may not have any involvement in the action to set aside an arbitral award. Thus, the parties to the annulment action are the claimant and the defendant in the arbitration, an only exceptionally may third parties intervene in the action, provided they prove they ignored the existence of the arbitration and are directly affected by the award, in particular because they should have been a party to the arbitration proceedings. Accordingly, when the parties invoked a violation of a human right that could be attributed to an arbitrator,

[84] STS (Civil Chamber) 362/2017, ES:TS:2017:362.

[85] STS (Civil Chamber) 832/2013, ES:TS:2017:6345.

[86] Judgement of the Madrid Superior Court of Justice (Civil and Criminal Chamber), delivered on February 21, 2017.

[87] Judgement of Madrid Superior Court of Justice (Civil and Criminal Chamber), delivered on November 28, 2017.

[88] Judgment n. 21/2018 of the Madrid Superior Court of Justice (Civil and Criminal Chamber).

they must suit an annulment action before judicial courts. Nonetheless, when the Spanish Courts review an award in the context of annulment proceedings they have some degree of autonomy to determine the existence of a violation of public order for breach of a human right. Thus, in a judgment delivered in October 2017, the Madrid Superior Court of Justice decided not to set aside an award on the main ground that, its foundations, do not incur arbitrary arbitrariness of article 24.1 CE for infringement of mandatory norms and applicable jurisprudence[89].

From the set of decisions that we have analyzed some consequences can be inferred applicable to future situations in which, any Spanish jurisdictional body, including those of last instance, must review an arbitral award:

In their capacity as national judges of EU Law they have to apply the criteria established by the CJEU regarding both, international commercial awards and on international investments awards. According to the soft interpretation of the Kompetenz-Kompetenz principle, as established by the Spanish Supreme Court, they have to make a full review of the award if a violation of public order is at stake;

Where it is about violations of human rights, every jurisdictional body has a certain degree of autonomy to determine if such violation is serious enough to annul the award.

Against this background, and for the purpose of determining the existence of situations in which a decision of a Spanish judicial body on the validity of an award could engender the State's liability for violation of the EU Law, they could only arise very exceptionally.

## (E) FINAL REMARKS

The CJEU's continued refusal to establish any type of cooperation with commercial arbitral tribunals, primarily because these are private bodies created through the free consent of the parties, effectively hands responsibility for reviewing such bodies' application of EU Law over to the courts of the Member States.

Acting in their capacity as national courts of Law of the EU, these jurisdictions must take greater care to ensure that they do not enforce judgments contrary to the principles of primacy and uniformity of application. They must also ensure the protection of all the subjective rights of the interested parties arising under EU Law and, in any event, the fundamental right to effective judicial protection.

However, given the magnitude of these obligations, national courts have a broad degree of

[89] Judgement of the Madrid Superior Court of Justice (Civil and Criminal Chamber), delivered on October 31, 2017.

autonomy in adopting the appropriate decision, since that decision will be taken on the basis of domestic procedural law and applicable international law. In cases on the recognition and/or enforcement of a disputed award, the New York Convention empowers the national court to conduct a review of its validity without requiring it to submit a question for a preliminary ruling to the CJEU. This carries the corresponding risk for purposes of applying EU Law, regardless of the triggering of the "acte clair" doctrine in the event this is a court of last resort.

On the other hand, when dealing with the review of the validity of an award out of the need to protect the public order of the EU, national courts are required to engage in more advanced degree of diligence.

Where the review relates to award enforcement proceedings, two types of situations may arise where the effectiveness of the provisions at issue will depend on the discretion of the national court. First, if the court is required by its national law to conduct the review and has the appropriate legal and factual elements before it, it may order the enforcement of the award, despite its being based on clauses that infringe EU Law, provided the court does not find it to cause any manifest or sufficiently serious damage.

On the other hand, if the court is under no duty to conduct such review, it may limit itself to formally reviewing the award and approving its enforcement without reviewing the validity of clauses in manifest breach of EU Law.

Both scenarios would see the application of a binding decision of an arbitral tribunal with the usual undermining of the principle of legal certainty. The party affected by the breach of rights arising from the provisions in question would have a low probability of successfully invoking the principle of State liability for breach of EU law, despite the act being attributed to a court of last resort.

The standards established by the ECtHR could determine the existence of acts capable of triggering State liability in the context of a dispute concerning the breach of a human right of the Convention in an arbitral award.

In this sense, a wide range of decisions of the ECtHR, adopted primarily in relation to the scope of Article 6(1) of the Convention, have established two methods for interested parties to invoke State liability at the national level. This may be whether the relevant court does not review, annul, or decree the non-enforcement of an award adopted in breach of the Convention upon its being claimed illegal, or indirectly if certain acts attributable to State bodies render it impossible to apply the rights deriving from the Convention to the parties to the arbitration proceedings.

Nonetheless, with regard to the Spanish jurisdictional system, it is difficult to create situations in which, a bad implementation of the review of the legality of an award by a judicial body, engenders the State liability for violation of EU Law. If it is about the review of the

legality of an award for the violation of a human right, which is part of the public order of the EU, the national judge has to apply the soft interpretation of the *Kompetenz-Kompetenz* principle that guarantees that, such award, will be annulled or will not be executed.

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# Four Streams of Democracy and the Recognition of States: the EU Perspective

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*Abstract:* This article argues that there exist four streams of democracy which underpin the recognition policy of the EU and its Member States. Recourse to the democratic idea is manifested when the EU and its Member States acknowledge either a) that the claimant people have a legal right to external self-determination; or b) that the people deserve statehood for moral grounds; or c) that the people concerned have reached a consensus with the Mother State regarding secession; or d) that the government has been committed to certain democratic values and standards (democracy *par excellence*). Recognition in the first three scenarios (streams) legitimizes people's desire to self-rule (*demos kratos*) while in the fourth comes as an act which validates a specific form of rule i.e. democratic governance. The article will in particular seek to determine whether the famous 1991 EC *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,* which made recognition conditional upon the adoption of liberal democracy standards remain valid today

*Keywords:* Recognition of States – Democracy – Self-Determination - European Union

## (A) CONTEMPORARY CRITERIA FOR RECOGNITION OF NEW STATES

The most apparent present-day tendency, both in the academic milieu and in official public announcements regarding the recognition of States revolves around the notion of whether an entity is a State in terms of international law. Put differently, whether it fulfils statehood criteria set by this law. State practice evinces indeed that due regard is paid to Article 1 of the Montevideo Convention, which provides that a State should dispose of the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other State.[1] For example, in 1948, the Netherlands' government was unwilling to go ahead with the recognition of the State of Israel on the grounds that borders of that country had not been adequately established.[2] In contrast, the US, France and the Soviet Union, also alluding to Montevideo criteria, arrived at different conclusions (in their opinion the requirement of defined borders should be interpreted more flexibly) and did

* Doctor of International Law. This paper was presented at the workshop on democratic governance organized by the Manchester International Law Centre on the 3rd of November 2017. The aim of the workshop was to revisit the state of the practice in international law twenty-five years after this narrative attracted attention in international legal scholarship following the publication of Tom Franck's seminal article The Emerging Right to Democratic Governance in 1992 in the American Journal of International Law.

[1] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 (hereinafter cited as the Montevideo Convention) Art. 1.

[2] Memorandum of reply, Bijl A Hand. II 1948/1949-1000 III No. 12 at 20.

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recognize Israel.[3] Singapore's representative in the UN General Assembly during the voting on Resolution 67/19, which concerned upgrading of Palestine's status in the UN to 'non-member observer state', declared that his opposition to the text was premised on the factual (Montevideo) criteria, which Palestine had not satisfied.[4] The majority of commentators and statespersons are in accord that the concept of State evolved from the minimalistic quaternary enumeration enshrined in Article 1 of the Montevideo Convention and the decision on recognition should encapsulate the development of law in that regard considering, in particular, the right to self-determination and the prohibition of the use of force.[5] In other words, an entity should be recognized as a State if it came into existence in harmony with international law, and *a contrario*, recognition should be withheld if it emerged in violation of peremptory norms of international law.[6] State practice seems to corroborate that. With regard to resort to the threat or use of force, the annexation of the Golan Heights in 1981 by Israel, the annexation of Kuwait by Iraq in 1991 or the 'incorporation' of Crimea into Russia in 2014 might be invoked, all of which, of course, were roundly condemned by the international community.[7] In respect to the breach of self-determination right, memories bring back a year 1965 and the Rhodesian white regime, which neglecting the will of domestic Zimbabweans, decided upon the creation of a State known as Southern Rhodesia. A comparable situation occurred with South African Bantustans (Transkei, Bophuthatswana, Venda, and Ciskei) which existed between 1976-1981 to secure the preference of life of the white people through the creation of 'homelands for black tribes'. The UN's vociferous critique and call for non-recognition are reflected in plentiful resolutions.[8]

Apart from espousing *de lege lata* arguments regarding the conception of a State in international law, States while deciding on recognition not infrequently rely on appurtenant facets, which constitute rather *de lega ferenda*. In the former situation, criteria for recognition are conflated with criteria for statehood, while not in the latter, which describe the subjective, idealistic or preferred vision of statehood, propounding what a State should look like. For

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3 H. Panhuys, *International Law in the Netherlands* vol 1 (Sijthoff & Noordhoff, The Hague, 1978), at 374.

4 UN Doc. A/67/PV.44, at 14. See also statements made by the US, at 13 and the UK, at 15 (UK).

5 A. Peters, 'Statehood after 1989: "Effectivités" between Legality and Virtuality' in J. Crawford and S. Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing, Portland, 2012), at 171-184.

6 See Art. 41(2) of the Articles of the International Law Commission (ILC) on the Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83, 12 December 2001.

7 See respectively SC Res. 479, 28 September 1980 and SC Res. 662, 9 August 1990; GA Res. 68/262, 27 March 2014.

8 SC Res. 216, 12 November 1965; SC Res 217, 20 November 1965; SC Res. 402, 22 December 1976; SC Res. 407, 25 May 1977 and SC Res. 283, 29 July 1970; J. Dugard, 'Collective non-recognition: The failure of South Africa's Bantustan states' in B. Ghali (ed), *Amicorum Discipulorumque Liber* vol I (Bruylant, Bruxelles, 1998), at 383-403.

instance, the criterion of the ability and willingness to observe international law and discharge international responsibility may be a condition for recognition, whereas it is not a condition for statehood (perhaps with a more lax approach to Article 4(1) of the UN Charter, stipulating the necessity of carrying out obligations contained in the Charter).[9] Norway in her Royal Decree of 28 March 2008, the purpose of which was to recognize Kosovo as an independent State and explain the basis of Norwegian recognition, underlined that she decided to afford recognition on the strength of assurances contained in the Declaration of Independence promulgated by the Assembly of Kosovo on the 17th of February 2008, which she considers binding under international law. In the Decree, Norway underscored the commitment of Kosovo's authorities to guarantee community rights, provide protection of the Serbian Orthodox Church and show respect for international law norms.

The next in turn criterion for recognition, embedded chiefly in the German conception of statehood, is the evidence of legal order, most notably a constitution. Dellbrück and Wolfrum in their classic work about subjects of international law (*die Völkerrechtssubjekte*) suggest that to a State belongs also - whether written or not - a constitution, whose aim is to regulate a relationship between the government and other organs to which certain functions and competencies are allocated.[10] Again, it is rather evident that the constitution is a sheer criterion for recognition and not statehood. There exist non-state actors, alike dependent States that possess it (e.g. the constitution of the Falkland Islands) yet not being regarded as sovereign States. Similarly, States may adopt it afterwards (Belarus adopted its constitution three years after the declaration of independence in 1991). The possession of constitution *per se* is a hardly articulated argument for recognition, although some States give weight to it. The Czech statement remarks that 'the Assembly of Kosovo passed a constitution [...] a Foreign Ministry, as well as a Ministry for Security Forces, was established [...]. Despite these developments, there are still many States that have not yet recognized Kosovo'.[11] Germany in her statement mentions that on the 15th of June Kosovo's constitution entered into force and that it contains a comprehensive set of laws, establishing new institutions, intelligence agency and diplomatic service, and regulating citizenship and promotion of the rights of communities.[12]

Further implications, which may be deemed as eliciting recognition of States centre on permanence and economic viability. The American Law Institute's Drafts Restatement (2nd) mentions permanence as a precondition for recognition of statehood.[13] Happold in his report

[9] See C. Hillgruber, 'The Admission of New States to the International Community' 9 *EJIL* (1998) 491, at 499.

[10] G. Dahm, J. Delbrück and R. Wolfrum, *Völkerrecht*, vol I (De Gruyter, Berlin, 1989), at 128.

[11] Written statement of the Czech Republic (14 April 2009), at 4.

[12] Written statement of Germany (15 April 2009), at 25.

[13] Restatement [2nd] Foreign Relations Law of the United States (1965), s. 100.

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prepared for the ILA Conference in Sofia in 2012 suggests that the UK shares the American point of view.[14] The criteria which the UK Government purports to apply for the recognition of States were set out in a Written Answer dated 16 November 1989 by the then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs.[15] In pursuance of it, States 'should have, and *seem likely to continue to have*, a clearly defined territory with a population, a government who are themselves able to exercise effective control of that territory, and independence in their external relations.'[16] Permanence seems to be a preventive measure for admittance into the community of States new States, which may temporarily fulfil statehood trappings and soon become failed States.

Having enumerated some of the 'official' criteria for recognition of States, which either permeate legal thought of international legal scholarship or are invoked by States' representatives, it is worth observing that this list is by no means exhaustive. Save for the criterion of democracy, which I decided to single out due to its pivotal importance for the present essay, there may exist further criteria.

## (B) DEMOCRACY AS A CRITERION FOR RECOGNITION OF STATES: PRACTICAL AND THEORETICAL CONSIDERATIONS OF THE FOUR-STREAM APPROACH

There are four streams underlying the rationale behind invoking democracy in recognition of States: legal, moral, consensual and *par excellence*. They not infrequently overlap and it is difficult to categorically affirm the prevalence of one or another as distilled from the State practice.

The first one predicates on the correlation between democracy and the right to self-determination. At its roots lie the American (1776) and French Revolution (1789) which underscored the endogenous endeavours of human beings to emancipate from domination and to decide on their fate. In the course of time, the right to self-determination evolved from the philosophical conception to a legal right.[17] Nowadays, it is treated as a universal, *erga omnes* right, classified among *jus cogens* norms.[18] Its assumptions directly evoke the original Greek

[14] Committee on Recognition/Non-recognition in International Law, 'First report on Recognition/Non-recognition in Contemporary International Law' in International Law Association Report of the Seventy-Fifth Conference (Sofia 2012) (International Law Association, Sofia 2012) 164, at 170-171.

[15] Hansard HofC Session 1988-89, column 494.

[16] *Ibid.*

[17] A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP, Cambridge, 1995), at 37-66.

[18] See UNHCR (Sub-Commission), 'Study by Special Rapporteur Hector Gros Espiell' (1980) UN Doc. E/CN.4/Sub.2/405/Rev.1, at 11-13. For a list of *jus cogens* norms defined by the International Law Commission see ILC, 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June and 2 July-10 August 2001) UN Doc. A/56/10, at 283-284, paras. 4,5.

meaning of self-governance of people (*demos* - people, *kratos* - rule) providing that in virtue of self-determination people can 'determine their political status and freely pursue their economic, social and cultural development'.[19]

The legal right of self-determination has been only accepted in part by States. States are in accord to extend recognition to people who were previously colonized and perpetuate recognition to those whose territories were occupied after 1945 (Kuwait) - in view of the prohibition of the use of force. Legal contours for statehood and recognition were provided in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples,[20] and principle VI of the UNGA Resolution 1541, pursuant to which a Non-Self-Governing Territory can be said to have reached a full measure of self-government by either a) emergence as a sovereign independent State, or b) free association with an independent State or c) integration with an independent State.[21] The ICJ jurisprudence reaffirmed this right in the *Namibia*, *Western Sahara*, *Wall* and *East Timor* cases.[22] The legal right to self-determination of colonized people is unequivocal and meets, in principle, with universal recognition. The fact the UN original membership amounted to 51 States in 1945 and there are 193 Members States now, corroborates this.[23] Nevertheless, the realization of the right itself, and ensuing recognition, may sometimes take a long time (East Timor was admitted to the UN in 2002, the ICJ ruling occurred in 1995), depend on the outcome of a referendum (yet to be conducted in Western Sahara, the ICJ ruling was in 1975) or hinge on a bilateral agreement (the case of Palestine which would demand mutual recognition with Israel).[24] There are still 17 territories which await the realization of self-determination, and possible recognition (if they choose to declare independence). A hope exists that their status may be definitely resolved during the Fourth International Decade for the Eradication of Colonialism (2021-2030).[25]

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[19] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (hereinafter cited as ICCPR) Art. 1.; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (hereinafter cited as ICESCR) Art. 1. See also The UN Charter, Art. 1(2).

[20] GA Res. 1514 (XV), 14 December 1960.

[21] GA Res. 1541 (XV), 15 December 1960.

[22] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) 16, paras. 52-53; *Western Sahara*, ICJ Reports (1975) 12, paras. 54-59; *East Timor (Portugal v. Australia)*, ICJ Reports (1995) 95, paras 29, 33, 37; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004) 136, paras 122, 149, 155.

[23] Available here, accessed 10 October 2018.

[24] See, *inter alia*, Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II) (28 September 1995) 36 ILM (1997), at 551. As for now, Palestine has been recognized by 136 UN Members and Western Sahara by 84 (of which 37 have frozen or withdrawn recognition).

[25] L. Antonowicz, 'Czy zakończenie dekolonizacji zostało odroczone *ad infinitum*?' in B. Krzan (ed), *Ubi ius, ibi remedium: księga dedykowana pamięci profesora Jana Kolasy* (CH Beck, Warsaw, 2016), at 1-9.

In spite of concordance amongst States in the context of decolonization and illegal occupation, the legal right of people to self-determination in other cases is not always tantamount to statehood. Put differently, not all people have the right to create a State. This is so because States were unable to agree which other subjects could benefit from the right (who is 'the people').[26] From the reading of the Badinter Commission Opinion No. 2, it seems that national minorities are not entitled to this right. The Commission stated that Serbs in Croatia (Republika Srpska Krajina) and Bosnia (Republika Srpska) cannot instigate independent States.[27] Besides, as evidenced by the continuous practice of States, it appears very unlikely that such a category will ever be defined and accepted in view of its apparent collision with the principle of territorial integrity, to which States are highly committed. Against this backdrop, the right to self-determination, although remains important, is generally considered to be realized within an existing State.[28] For these reasons neither Chechens, Kurds, Tibetans, Quebecers nor Eelam Tamils have been able to secure international recognition. It is worth adding that the right to self-determination will not lead to a recognized statehood if accomplished with the aid of foreign military assistance (Northern Cyprus, Abkhazia, South Ossetia and Crimea).[29]

Recapitulating the relationship between the recognition of States and democracy within the legal stream, a conclusion must be that they are not entirely complementary. The legitimacy is clearly evident in States' behaviour towards the entities whom they granted the unequivocal right to self-determination, including the right to create a new State. Additionally, the adherence to commitments of permanent recognition of people's right under effective occupation is compatible with the basic principle of democracy. However, the strict reading of law protecting existing borders of States together with non-acceptance of military assistance to the majority of people longing for statehood may be at odds with the fundamental understanding of democracy.

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[26] J. Summers, *Peoples and International Law: How Nationalism and Self-Determination Shape Law of Nations* (Martinus Nijhoff, Leiden, 2007), at 1-2.

[27] A. Pellet, 'The Opinions of the Badinter Arbitration Committee A Second Breath for the Self-Determination of Peoples' 3 *EJIL* (1992) 178, at 183-184. See also opinion of Stefan Talmon regarding Catalonians here, accessed 10 October 2018.

[28] J. Vidmar, 'Territorial Entitlement and Exit Scenarios' in M. Nicolini, F. Palermo and E. Milano (eds), *Law, Territory and Conflict Resolution* (Brill, Leiden, 2016) 105, at 112-113.

[29] Peters, *supra n.* 5. See also, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations (No territorial acquisition resulting from the threat or use of force shall be recognized as legal), GA Res. 2625, 24 October 1970. On the issue of the majority of population favouring secession refer to international reports. For Crimea see here, accessed 10 October 2018. Cf. A Peters, *Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law* (2014) EIJL: Talk!, accessed 10 October 2018.

The second motive for the recognition of States rests on moral foundations, which do not have support in law. According to this version, people who are either substantially and continuously deprived of the capacity to decide on their own fate within the existing State (they cannot realize the internal right to self-determination) or are subject to subjugation and exploitation or their human rights are violated in another way, are entitled to separation.[30] Judge Antônio Augusto Cançado Trindade emphatically argued in his separate opinion in the *Kosovo Advisory Opinion* case that 'No State can use territory to destroy the population. Such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not *vice-versa*'.[31] Scholars and States advocating the right to separate in extreme circumstances, where no other solution can be found, refer to it as '*ultima ratio* secession' or 'remedial secession'.[32] It goes without saying that at the core of the so-called remedial secession lies the concept of legitimacy. Main problems of this approach are the lack of sufficient practice, broad dissonance among States in terms of its acceptance and the possibility of politicization. Therefore, the recourse to remedial secession carries a risk that an entity in question will remain non-universally recognized. In the *Kosovo Advisory Opinion*, the US, the UK, Albania, Germany, Poland, Switzerland, Estonia, Ireland and Latvia invoked the right to remedial secession. On the other hand, the right was opposed by Serbia, Russia, Iran, Spain, Argentina, Bolivia, Azerbaijan, Romania, Libya and Venezuela.[33] The lack of practice is determined by the fact that this approach is not substantiated by any positive law, the possibilities to exert it are limited (the much academically praised humanitarian intervention was rejected by 133 States at the South Summit of the Group of 77)[34] and that it is difficult to define the threshold which would corroborate the secession.

The third stream, which is here termed as consensual, represents the most convenient apprehension of facts by existing States. States are usually content with the compromise reached between parties and extend their recognition. An *a priori* assumption of grassroots democracy is inherent in States' decision on recognition and escapes further analysis of

[30] *Supreme Court of Canada, Re Secession of Québec* [1998] 2 SCR 217, 222, paras 133-134. Also L. C. Buchheit, *Secession – The Legitimacy of Self-determination* (YUP, New Haven, 1978), at 220; C. Tomuschat, 'Secession and Self-Determination' in M. Kohen (ed), *Secession – International Law Perspectives* (CUP, Cambridge, 2006) 23, at 42.

[31] Separate Opinion of Judge Antônio Augusto Cançado Trindade, para 176.

[32] J. Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6 *St Antony's International Review* 37-56.

[33] M. Milanovic, 'Arguing the Kosovo Case' in M. Milanovic and M. Wood (eds), *The Law and Politics of the Kosovo Advisory Opinion* (OUP, Oxford, 2015) 21, at 36.

[34] Non-Aligned Movement, Declaration of South Summit (10–14 April 2000), para 54.

technicalities required for a well-functioning State.[35] It was evident in recognition of Timor Leste in 2002, which four years after raised discussion whether it had any future at all as an independent State,[36] and South Sudan in 2011, which soon after its independence started to be portrayed as a 'failed State'.[37] Thus, the will of people, ideally confirmed by the plebiscite or referendum, normally satisfies the international community. In the *Western Sahara* case, the ICJ pronounced that 'the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned'.[38] Referendum as an option for settling the Western Sahara issue was advanced for a long time by the international community and Spain as an interested party.[39] The International Commission of Legal Experts addressing the question of Catalonian in its Opinion reasserted that a referendum is the best way of confirming the manifestation of popular will. It also noticed that the international legal requirements for a valid referendum are only emerging, yet it is supposed that there must be a free and fair campaign and a transparent and open balloting process as well as a predetermined threshold for the validity of an independence referendum.[40] Looking into the recent past, in the great majority of recognized consensual secessions, indeed, a form of public consultation took place. In the Soviet Union, most of the Republics held referenda.[41] In 1993, the Eritreans cast 99,8% votes in favour of the independence from Ethiopia, in 2006 the Unionists in Montenegro were outvoted by 55,5% of those opting for independence, and in the 2011 referendum in South Sudan 98,8% of the entitled people voted pro-secession. A similar, negotiated process of engendering a new State was seen in the UK, albeit with a different final result. In 2014, a tiny majority of votes - 55,3% determined Scotland's future within the UK.[42] At the end, it worth

[35] Spain, while considering recognition of South Sudan, declared: 'The independence of Sudan is legal as it is envisaged in a peace agreement promoted by the international community, apart from having been agreed by the parties, which is the most important point'. DSS-P, IX Leg., No. 106, at. 5710–5712.

[36] J. Perlez, 'A Nation-Building Project Comes Apart in East Timor', NY Times (14 July 2006), at A3.

[37] A. Loewenstein, 'South Sudan is Becoming a Failed State' Aljazeera (9 Jul 2015) Opinion/Humanitarian crisis.

[38] *Western Sahara*, *supra* n. 22, para 55.

[39] See SC Res. 690, 29 April 1991; SC Res. 1292, 29 February 2000. For the Spanish engagement in the organization of a referendum see: DSC-C, V Leg., No. 96, at. 3079-3081; DSC-C, VII Leg., No. 393, at. 12-13.

[40] Legal Opinion by an International Commission of Legal Experts addressing the question of Catalonia: 'The Will of the People and Statehood' (27 September 2017).

[41] H. Brady and C. Kaplan, 'Eastern Europe and the Former Soviet Union' in D. Butler and A. Ranney (eds), *Referendums around the World: The Growing Use of Direct Democracy* (AEI Press, Washington, 1994) 174, at 190-193.

[42] See J. Vidmar, 'The Scottish Independence Referendum in an International Context' 51 *CYbIL* (2014) 259-288.

emphasizing that non-consensual secessions will most probably remain unrecognized, regardless of the referendum results (Somaliland, Catalonia; Yugoslavia being an exception).[43]

The fourth and last stream illustrates the connection between recognition and democracy *par excellence*. A given community in this case, in order to acquire a form of a recognizable object, needs to conform to a sophisticated set of rules. Here, unlike, in the first three scenarios, the legal, moral, or stemming from a consensus right of people to govern themselves is not sufficient. Democracy in the understanding of the fourth stream either ignores or implicitly incorporates the elements of the three streams, but on top of that, demands a well-developed institutional framework. It is democracy in the fullest sense, composed both of a procedural / election-centric aspect, presupposing that people should vote (as opposed to monarchy or aristocracy) and a substantive aspect, denoting the matureness of the society, that is, its ability to implement all instruments and principles pertinent to the Western idea of democracy.[44] Contemporary, such instruments and principles are: (1) the availability of the political sphere for all, regardless of wealth, race, sex, religion and class; (2) the ability to chose candidates for public offices and freedom of access to these posts; (3) the sovereignty of the nation (people) meaning that the sovereign power - inalienable and indivisible - belongs to the social community living within the borders of the State; (4) the principle of representation - equivalent to the delegation of authority to representatives elected by the people in general elections and acting under its control; (5) recognition of the election as the main source of the legitimacy of power and the need to periodically confirm the legitimacy of power in the general election; (6) the possibility of associating in political parties; (7) the responsibility of the governing class - the creation of specialized institutions for the control of the authorities, intended to prevent it from abuses; (8) the separation of powers - expressing the idea of limiting government through the mutual control of the centers of power and the activities of organized political opposition; (9) freedom of belief and expression; (10) institutional protection of civil rights - expressed in the creation of formal protection of citizens against excessive and unjustified interference of power in their affairs.[45]

This stream is not supported by international law whatsoever and manifests a proclivity towards one political system. The requirement of democracy *par excellence*, if invoked as a

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[43] The Spanish Constitutional Court considered the secession of Catalonia a violation of the 1978 Constitution. See judgments 114/2017, of 17 October 2017; 259/2015, of 2 December 2015; and 42/2014, of 25 March 2014. On the inapplicability of the self-determination right to the Catalans see J. Pérez de Nanclares, 'Legal Considerations Regarding a Hypothetical Unilateral Declaration of Independence by Catalonia: A Legally Unfeasible Political Scenario' 19 *SYbIL* (2015) 35, at 41-45.

[44] See generally D. Beetham, *Democracy and Human Rights* (Polity Press, Cambridge, 1999); T. Franck, 'The Emerging Right to Democratic Governance' 86 *AJIL* (1992) 46-91.

[45] D. García San José, 'El concepto de democracia en derecho internacional' 14 *Revista Jurídica Universidad Autónoma de Madrid* (2006) 65, at 75-87; P. Winczorek, *Nauka o Państwie* (Liber, Warsaw, 2011), at 123-155.

criterion for recognition, can be said to undermine the general principle of inclusiveness of international law. As the ICJ noted in the *Western Sahara case*, 'No rule of international law, in view of the Court, requires the structure of a State to follow any particular pattern, as is evident from the diversity of the forms of States found in the world today'.[46] A 'forceful' implementation of democracy seems to contradict the principles of peaceful co-existence, non-intervention, and equality of States.[47] According to Wheatley, although there is 'a commitment of the international community to democracy as the only legitimate form of government [...] there is [...] no "hard" international law norm that all governments should be democratic'.[48] Moreover, this stream, if applied strictly, is in direct opposition to the principle of effectiveness widely acclaimed by international law. It comes as no surprise that this stream is also the most divisive one, whose application cannot be said to have proliferated globally.

The fourth stream is best exemplified by the democratization trend that emerged in the early 1990s in the West. The dismemberment of three socialist federations (USSR, SFRY and Czechoslovakia) gave a real chance to transpose the Western political ideology into the recognition practice.[49] The European Political Cooperation at an Extraordinary EPC Ministerial Meeting at Brussels on 16 December 1991 adopted 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', which in its preamble explicitly expressed the readiness to (collectively) grant recognition only to those new States 'which had constituted themselves in a democratic fashion'.[50] Two first principles laid down in the document squarely relate to the notion of democratic governance. These are: (1) the respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, *democracy and human rights*; (2) guarantees for the rights of ethnic and national groups and

[46] *Western Sahara*, *supra n.* 22, para 94. On another occasion, the ICJ dismissed the US argument that Nicaragua attempted to establish a 'totalitarian Communist dictatorship' ruling in favour of the freedom of choice of the political, social, economic and cultural system of a State. See *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua vs United States)* ICJ Reports (1986) 14, at 133, para 263.

[47] Very controversial were interventions in Haiti in 1994 and in Iraq in 2003 to 'restore democracy'. See SC Res. 940, 31 July 1994, authorizing the UN peacekeeping mission in Haiti. Consult also G. Tunkin, *Theory of International Law* (Harvard University Press, Moscow, 1974), at 21-48.

[48] S. Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing, Oxford, 2010), at 228. See also S. D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' 48 *ICLQ* (1999) 545ff.

[49] More on the democratization trend and its application today in J. Vidmar, *Democratic Statehood in International Law* (Hart Publishing, Oxford, 2013), at 1-14; J. d'Aspremont, 'The Rise and Fall of Democratic Governance in International Law' in J. Crawford and S. Nouwen (eds), *Select Proceedings of the European Society of International Law* (Hart Publishing, Portland, 2012), at 61.

[50] European Political Cooperation, 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', adopted at an Extraordinary EPC Ministerial Meeting at Brussels (16 December 1991), reprinted in 31 ILM 1486, para 3.

minorities in accordance with the commitments subscribed to in the framework of the CSCE. The Charter of Paris (officially the Charter of Paris for New Europe) as *lex specialis* to the 'Guidelines' constitutes a distinctive bedrock of the democratization policy.[51] It embraces clauses postulating that 'Europe is liberating itself from the legacy of the past [...].' 'Democratic government is based on the will of the people, expressed regularly through free and fair elections [...]'. 'Democracy has its foundation respect for the human person and the rule of law [...]'. 'Democracy is the best safeguard of freedom of expression of all groups of society, and equality of opportunity for each person', etc.[52] The 'Guidelines', at first sight, resembling a political manifesto, and by its very nature reflecting 'soft law', had though considerable ramifications in practice. For instance, procrastination in receiving assurances from Kyrgyzstan, Tajikistan, and Georgia on their readiness to conform with requirements enunciated in the 'Guidelines' postponed their recognition by the EC Member States until 16 January 1992 (Kyrgyzstan and Tajikistan) and 23 March 1992 (Georgia). Of commensurable content and application with the 'Guidelines' was the EC Declaration on Yugoslavia which mirrored the common position of the European Community with regard to the recognition of Yugoslav Republics.[53] The Community agreed to recognize the independence of all the Yugoslav Republics subject to the acceptance of the commitments contained in the 'Guidelines'.[54] The Badinter Commission, which was called to adjudge the 'readiness' of the Republics, reached different conclusions and issued different recommendations regarding the recognition. It noted that Slovenia and Macedonia satisfied the prerequisites embedded in the 'Guidelines' (Opinions No. 6 and 7, issued on 11 January 1992),[55] remarked that Croatia, subject to a reservation (minority protection standards), meets the necessary conditions for its recognition by the Member States of the European Community (Opinion No. 5 of 11 January 1992).[56] The Commission commented on the internal settings of the B&H (Opinion No. 4 of 11 January 1992) and the FRY (Opinion No. 10 of 4 July 1992), however, did not explicitly recommend recognition.[57] It is worthy of note that several other States, not at the time members of the European Community, referred to the fulfilment of similar criteria (the case of Switzerland and Austria).[58] In his speech in 1991,

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[51] Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe (21 November 1990), reprinted in (1991) 30 ILM 193.

[52] Cf. UDHR, Art. 21 and ICCPR, Art. 25 (no reference to multiparty setting is made).

[53] EC Declaration on Yugoslavia (16 December 1991), reprinted in (1992) 31 ILM 1485-1486.

[54] *Ibid*, 1485.

[55] Badinter Arbitration Commission, European Community Conference on Yugoslavia, Opinions No. 6 and 7 (11 January 1992), reprinted in D. Turk, 'Recognition of States: A Comment' 4 *EJIL* (1993) 66, at 77-84.

[56] *Ibid*, at 76-77.

[57] *Ibid*, at 74-76 (BIH) and 90-91 (FRY).

[58] J. Frowein, 'The Contribution of the European Union to Public International Law' in Armin von Bogdandy (ed), *European Integration and International Coordination* (Kluwer, The Hague, 2002) 171, at 174.

the US Secretary of State, James Baker, conditioned recognition on 'five internationally accepted principles': (a) determination of the future in peaceful and democratic processes; (b) respect for all existing borders; (c) support for democracy and the rule of law; (d) safeguarding of human rights, based on full respect for the individual and including equal treatment of minorities; (e) respect for international law and obligations.[59]

The exaggerated adherence to the recommendations on recognition issued by the Badinter Commission in view of the fulfilment of democratic principles by the Yugoslav Republics was subsequently vociferously criticized. Most notably, they were in conflict with the ordinary methods of statehood assessment (Montevideo criteria). Croatia and Bosnia were recommended for recognition and received it, while not being able to exert effective control over the great part of claimed territories. The FRY, on the other hand, met all the Montevideo criteria, yet was not issued such an advice and remained unrecognized until 1996.[60]

Contemporarily, States continue to refer to the notion of democracy *par excellence* as a requirement for statehood. For example, in Slovenia's opinion, Kosovo has undertaken to respect the 'commitments under the Comprehensive Proposal for the Kosovo Status Settlement, particularly regarding respect for ethnic groups, the protection of cultural and religious heritage, and the international supervision of Kosovo'.[61] Slovenia in her statement explicitly cites the 'Guidelines' provisions.[62] Denmark too praises highly the readiness and capability of an entity to govern itself effectively and democratically. Denmark stressed that she has so far contributed more than EUR 200m to stabilize Kosovo and help to develop a multi-ethnic, democratic society. Furthermore, 'in its declaration of independence, Kosovo undertook to protect and promote the rights of all communities in a democratic, saccular and multiethnic republic. In expressing their recognition, Denmark and other States placed significant emphasis on these obligations'.[63] The US acknowledged that to the main factors that undergirded the United States' decision on the recognition of Kosovo's independence on 18 February 2008, belong the question of 'democratic fitness'.[64] The United States placed great weight on Kosovo's commitments, assumed in its declaration of independence and subsequently in its constitution, to protect the rights and interests of all communities in

[59] Reuters, 'Soviet Turmoil'; Baker's Remarks: Policy on Soviets, N.Y. TIMES (5 September 1991), at A12 (reprinting speech given by Secretary of State James Baker on September 4, 1991).

[60] The unrecognition of the FRY was highly political and predicated on its claim to be a continuator of the SFRY. M. Craven, 'The European Community Arbitration Commission on Yugoslavia' *66 BYbIL* (1996) 333, at 370-375. Also B. Roth 'Ne-konsensualna disolucija država u međunarodnom pravu: Inovacija Badinterove komisije u retrospektivi' 52 Politička Misao (2015) 48, at 56-57, 62.

[61] Written statement of Slovenia (17 April 2009), at 2-3.

[62] *Ibid*, at 3.

[63] Written statement of Denmark (17 April 2009), at 1, 11-12.

[64] Written statement of the US (17 April 2009), at 35.

Kosovo. In the letter to President Sejdiu, the US President George W. Bush stated that in recognizing Kosovo as an independent and sovereign state, the United States 'support your embrace of multi-ethnicity as a principle of good governance and your commitment to developing accountable institutions in which all citizens are equal under the law'.[65]

## (C) THE PROBLEMATIC RELATIONSHIP BETWEEN FOUR DEMOCRACY STREAMS

It is universally acknowledged that every organized community should be allowed to govern itself, which *nota bene* does not necessarily denote an independent statehood. The practice of recognition of States confirms the full realization of the will of people in the form of statehood in the first stream (unequivocal legal right of colonized people, which may be protracted) and in the third stream (consensual secession). The recognition of the endogenous will of people to create a State is generally withheld in the second stream (moral recognition, with few exceptions, like Kosovo) and in the great part of the first stream (legal) due to the principle of territorial integrity, prohibition of the use of force, and excessive regard paid to internal self-determination. Nevertheless, it stands to reason that streams may interfere with each other. For example, the second (moral) stream could be invoked within the ambit of the first one (legal) but also of the third one (consensual). The recognition of an entity as a State is in and of itself cloaked by morality. The fourth stream, owing to its intrusive character, may or may not be in harmony with the remaining streams. The imposition of a specific political regime, entailing procedural aspect (voting) and substantive aspect (liberal and economic principles) may cast doubts on the morality of recognition as well as contrast with the idea of self-determination itself. Different opinions are espoused in that regard. For Franck, self-determination is a building block of democratic entitlement.[66] Etzioni, however, is not optimistic about the capacity of self-determination to advance democracy. He argues that 'with rare exceptions', self-determination movements actually 'undermine the potential for democratic development in non-democratic countries and threaten the foundations of democracy in democratic ones'.[67] In the same vein, Miller observed that behind this guise of democracy often hides 'ethnic-nationalism, which has led to the creation of numerous undemocratic states'.[68] Vidmar propounded that the political obligation of multiparty electoral democracy does not lead to an

[65] Letter from United States President George W Bush to President of Kosovo Fatmir Sejdiu (18 February 2008). Weekly Compilation of Presidential Documents, Volume 44, No. 7 (25 February 2008), at 236.

[66] Franck, *supra n.* 44, at 52.

[67] A. Etzioni, 'The Evils of Self-Determination' 89 *Foreign Policy* (1992-1993), at 21.

[68] R. Miller, 'Self-Determination in International Law and the Demise of Democracy?' 41 *Columbia Journal of Transnational Law* (2003) 601, at 610.

automatic realization of the right of self-determination.[69] Finally, some authors claim that there is no conclusive nexus between democracy and general well-being and higher living standard.[70] For Peterson, statements redolent of the UN Secretary-General, contained in his Agenda for Peace (1992), that 'there is an obvious connection between democratic practices - such as the rule of law and transparency in decision making - and the achievement of true peace and security in any new and stable political leadership'[71] are examples of the teleological dogmatism leading to the proliferation of one system, often connected with the installation of a 'legitimate' governor.[72] Thus, the recognition of a claim to statehood exercised through the external self-determination (first three streams) is not always synonymous with democracy *par excellence* (fourth stream) and *vice-versa*.

## (D) FOUR DEMOCRACY STREAMS IN THE CONTEMPORARY RECOGNITION PRACTICE OF THE EUROPEAN UNION AND ITS MEMBER STATES

This part seeks to determine to which stream(s) of democracy adheres the European Union while arriving at the decision to recognize a new State. Of particular interest will be whether the demand of democracy *par excellence* (fourth stream), for which it was renowned in the 1990s, retains validity today. To do so, the stance of the EU as a whole, as well as its Member States, and its institutions will be analysed in the context of (non)recognition of four most recent statehood claims: Palestine, Montenegro, Kosovo and South Sudan.

Palestine proclaimed independence on 15 November 1988, which until now is recognized by 136 out of 193 Member States of the United Nations (70%) and 9 out of 28 Members of the European Union (32%). For that reason, it is not possible to talk of coordinated, group recognition and the problem has to be dealt with from the perspective of particular Member States' decisions and activities of the EU institutions. In fact, only Sweden recognized Palestinian statehood as a Member of the EU; all other States did it prior to accession (Poland, Hungary, Romania). It seems that Sweden, as well as the majority of Eastern European States,

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[69] J. Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' 10 *Human Rights Law Review* (2010) 239-268.

[70] A. Leftwich, *States of Development: On the Primacy of Politics in Development* (Polity, Cambridge, 2000), at 129.

[71] UNGS, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping, 17 July 1992, UN Doc. A/47/277 S/24111, para 59. See also Vienna Declaration and Programme of Action, 29 June 1993, UN Doc. A/CONF.157/23, para 8; 'Progress Review and Recommendations' adopted by the Third International Conference of the New or Restored Democracies on Democracy and Development held at Bucharest from 2 to 4 September 1997, UN Doc. A/52/334, Appendix.

[72] N. Petersen, *Demokratie als Teleologisches Prinzip: Zur Legitimität von Staatsgewalt im Völkerrecht* (Springer, Berlin, 2009), at 59-139.

recognized Palestine within the first (legal) and second (moral) stream. As indicated before, Palestine, as a relic of colonization, enjoys the unequivocal right to self-determination, which includes the right to statehood.[73] The realization of the said right may, however, prolong and depend on an agreement in contentious cases. Margot Wallström, Swedish foreign minister, while explaining Swedish recognition stated that 'It is an important step that confirms the Palestinians' right to self-determination. [...] We hope that this will show the way for others'.[74] Sweden might have relied also on a moral stream, which in the cases of a protracted inability to overcome an impasse and human rights violations could justify recognition. According to the official statement, Sweden 'has seen the escalation of Israeli Settlements, violence in Jerusalem and on the West Bank, and on top of that, three wars in Gaza'.[75] In all likelihood, it will the first and the second stream that will constitute the benchmark for future recognition of Palestinian statehood. Josep Borrell, Spanish Minister of Foreign Affairs, European Union and Cooperation announced on 20 September 2018 that recognition of Palestine is on the government's' table, since the stalemate, which is conducive to human rights violations of the Palestinians, cannot be tolerated indefinitely.[76] For obvious reasons, the third stream (consensual) which could underpin the decision on recognition has to be excluded. The fourth stream demanding democracy *par excellence* seems also not to have been of much relevance in the case of Palestine. The state-building process lasts, and the EU involvement in the democratization and human right protection continues.[77] The review of policies implemented by the European Instrument for Democracy and Human Rights (EIDHR) in Palestine during 2011 and 2015 suggests that democracy is far from stable, notwithstanding the possible differences between the notions of this term around the world. It observed that the most significant violations of human rights and democratic principles included infringements of International Humanitarian Law (IHL) and the United Nations (UN) Conventions on human rights, especially on the prohibition of torture, arbitrary detention, legal defence, freedom of movement and residence, freedom of expression, assembly and association and fundamental economic rights, such as the right to water and the right to work (mostly referring to territories under Israeli control).[78] The Annual Report on Human Rights and Democracy in the World

[73] GA Res. 1541, *supra n.* 22. See also United Nations Partition Plan for Palestine: GA Res. 181(II), 29 November 1947.

[74] Available here, accessed 10 October 2018.

[75] Video available here, accessed 10 October 2018.

[76] Available here, accessed 10 October 2018.

[77] See G. Denoeux and R. Springborg, *Promoting Democracy and State Building in Palestine* (Saffron Books, London, 2005); D. Bouris, 'The European Union's Role in the Palestinian Territory after the Oslo Accords: Stillborn State-building' *6 Journal of Contemporary European Research* (2010) 376-394.

[78] ODIHR, 'Review of the Effectiveness of the EIDHR Programme in Palestine 2011 – 2015', accessed 10 October 2018.

2016 clearly distinguished between responsibilities of the Palestinian Authority and Israeli authorities in the occupied territories. It concluded in reference to the former that '[...] Respect for freedom of expression, freedom of assembly and freedom of the media did not improve; they came under increased pressure due to harassment, threats and sometimes arbitrary arrests of journalists. 21 death sentences were handed down in Gaza, but none in the West Bank thanks to a moratorium. [...] In general, fundamental freedoms and human rights are anchored in the Palestinian Basic Law, but effective implementation is often not guaranteed. [...] There are various problems especially in the fields of gender, (domestic) violence against women and discrimination against LGBTI persons. Persons with disabilities continue to suffer from social exclusion. Arbitrary detention has remained a matter of concern. There were regular reports of torture and ill-treatment in detention centres. Freedom of expression in Gaza is still under severe pressure with attacks on journalists [...].' [79]

That being said, Sweden did not follow the fourth stream. The situation of other EU States, which do not recognize Palestine, is less clear but it appears that the major obstacle in that regard is not the compliance with the set of democratic principles but the fact that Palestine does not meet standard statehood criteria, as underlined by the UK during the voting on Palestine's status in the UN in 2012,[80] which diverges by and large from the position previously taken in Yugoslavia.

The EU institutional outlook appears to back Palestinian statehood. Javier Solana, the EU 'foreign policy' chief, at the end of his tenure in 2009 called for the United Nations to recognise the Palestinian State by a set deadline, even though a settlement had not been reached. Similar approach was taken by his successor Catharine Ashton who called for a 'two-State solution'.[81] The Council of the European Union (Foreign Affairs) at its meeting on 13 December 2010 confirmed readiness, when appropriate, to recognize a Palestinian State. It reiterated the 'two-State solution' by stating 'We want to see the State of Israel and a sovereign, independent, democratic, contiguous and viable State of Palestine living side by side in peace and security.'[82] In the statement, we also read 'the right of Palestinians to achieve statehood must never be called into question'.[83] Furthermore, the EU commended building of the institutions of the future State of Palestine, praised Fayyad plan (reform and development plan, based on neoliberal agenda), and welcomed the World Bank's assessment that 'if the Palestinian

[79] Annual Report on Human Rights and Democracy in the World 2016, at 67-69, accessed 10 October 2018.

[80] UN Doc. A/67/PV.44, at 15.

[81] M. Alagha, *Palestine in EU and Russian Foreign Policy: Statehood and the Peace Process* (Routledge, Oxford, 2017), at 4.

[82] Council of the European Union, Press release No. 17835/10 of the 3058th Council meeting on Foreign Affairs, at 2.

[83] *Ibid*, at 13.

Authority maintains its current performance in institution building and delivery of public services, it is well positioned for the establishment of a State at any point in the near future'.[84] At the same time, it underscored governance deficiencies in Gaza. Finally, the EU Council affirmed its 'readiness to contribute to a negotiated solution on all final status'. Various pronouncements of the EU Council do not admit of an easy answer as to which stream is preponderant. Although it mentions legal, as well as democracy *par excellence* streams, due to the provisions 'when appropriate' and 'readiness to negotiated solution', it is plausible to contend that the third stream (consensual) will prevail in the case of the recognition of Palestine by the Council. In contrast, the EU Parliament in its resolution on recognition of Palestine statehood of 17 December 2014 gave preference to the first (legal) and second (moral) stream, emphasizing the due regard to international law and the fact that direct peace talks between the parties are stalled. With that in mind, it opted for the recognition of Palestinian statehood as the most viable solution. The peace talks and state-building should continue notwithstanding.[85] Nevertheless, it should be borne in mind that so long as the individual (Western) States do not make their minds to definitely recognize Palestine as a State, everything else will remain an institutional rhetoric, which may continue for a long time.

The second example of invoking democracy in the EU recognition policy framework is evident in its recognition of Montenegro. Montenegro proclaimed independence on 3 June 2006, after a slim majority of people chose in an agreed referendum to separate from the State Union of Serbia and Montenegro. The EU respected the referendum results and welcomed the new State, with which it wishes to cooperate and which has the prospect of joining the European Union.[86] The focal point of affording recognition in the case of Montenegro was the third stream i.e. consensus, which, as mentioned before, requires that the will of people is substantiated, ideally in a referendum carried out by appropriate standards. To this end, the only conditions imposed were the 55% supermajority of votes in favour and a minimum turnout of 50% as proposed by the EU special envoy Miroslav Lajčák and endorsed by the EU Council.[87] Given that both requirements were met, the Presidency on behalf of the European Union declared that it welcomes the 'successful organisation of the referendum on the independence' which was in line with OSCE and Council of Europe standards for democratic electoral processes. Moreover, 'the conduct of the referendum was a sign of maturity of the political forces and people of Montenegro'. In light of that, it called on all sides concerned to

[84] *Ibid*, at 14.

[85] European Parliament, Resolution (2014/2964(RSP)) (17 December 2014) on recognition of Palestine statehood.

[86] 'Statement by the EU Commissioner for Enlargement Olli Rhen', accessed 10 October 2018.

[87] See in Parliamentary Assembly of the Council of Europe, 'Documents: working papers' 2006 ordinary session (third part) (26-30 June 2006) Documents 10951-10996, at 216-218.

accept the result.[88] The first (legal) and second (moral) streams were absent, as Montenegro was neither colonized or occupied after 1945 nor had it a track of harrow struggle for independence. The fourth stream was either assumed as the State Union of Serbia and Montenegro was a recognized State before, or was subordinated to the third consensual stream. The latter assumption might be validated by taking into consideration the 2016 EU Commission report on Montenegro's accession negotiation achievements. The Commission noted that Montenegro is 'moderately prepared' in areas of public administration, the judicial system and fight against corruption. More progress is needed in the province of the fight against organized crime. The implementation of legislative reforms to align with the EU standards on human rights remains weak. There exist room for improvement in the area of freedom of expression.[89] Taking a closer look at the situation of Montenegro, it might be also that what was then a requirement for statehood (Guidelines) is now a requirement for admission.

Kosovo declared independence on 17 February 2008, which as of now has been recognized by 111 UN Member States (57%) and by 23 out of 28 EU Member States (82%).[90] Owing to the division on the status of Kosovo between the EU Members States, a collective recognition reminiscent of that of Montenegro two years earlier, could not be achieved. Kosovo has been recognized by the EU Member States mainly within the ambit of the second stream (moral). Needless to say that the first and third are not applicable - Kosovo is not a vestige of colonialism and a consensus between it and Serbia has not been reached.[91] The fourth stream providing for a well-functioning democratic society has played an important role, albeit rather as a consequence of recognition or something which is on a right path to be achieved. In other words, the recognition of Kosovo is said to enhance stability and democracy and there is a viable prospect that the existing institutional framework will lead to a well-functioning democratic State. This is evident in written submissions of the EU States that have recognized Kosovo. Finland expounded the moral element of recognition (second stream) by stating that 'The decision by Serbia to curtail the internal self-determination of Kosovo in the late 1980s was closely connected with the policy that led to the violent break-up of the federation'. She

[88] Declaration of 23 May 2006 by the Presidency on behalf of the European Union regarding the referendum in Montenegro (P/06/73).

[89] European Commission, Commission Staff Working Document 'Montenegro 2016 Report' (9 September 2016) SWD(2016) 360 final, at 6-21, 53-73.

[90] Kosovo is said to have lost recognition of six countries since November 2017. Suriname, Burundi, Guinea Bissau, Liberia, São Tomé and Príncipe and Papua New Guinea have purportedly revoked their recognitions, accessed 10 October 2018.

[91] See 'First Agreement of Principles Governing the Normalization of Relations' (Brussels Agreement) (16 April 2013), accessed 10 October 2018. Spain, justifying its non-recognition of Kosovo, explained that there are only two means to accept the secession of a State – through the approval of the UN Security Council or through the approval of the parties. 16 *SYbIL* (2012) 95, at 105.

went on to claim that 'The Milosevic regime continued to pursue a deliberate policy of repression and persecution with regard to Kosovo, seeking to ensure that the ethnic Albanian majority in Kosovo become politically powerless.'[92] Finally, Finland referred to *Milutinovic et al.* case, which points to excessive and indiscriminate force used by the forces of the FRY and Serbia in 1998 against the Kosovo Albanian civilian population.[93] As per the fourth stream, Finland conceded that States created out of a violent struggle rarely fulfil ideally criteria of democratic representation. However, she added that the declaration of independence was based on the Constitutional Framework and that only international recognition of Kosovo could secure lasting solution for peace and respect for fundamental rights and freedoms.[94] A similar dichotomy of invoking both streams is present in the majority of other statements. Poland justified recognition in virtue of the second stream, contending that Kosovo is a *sui generis* case. In Poland's opinion, Serbia did not provide sufficient guarantees to the protection of fundamental human rights and violated these rights by depriving Kosovo of autonomy. As a consequence, Serbian territorial integrity eroded.[95] Besides, Poland alluded to the United Nations Mission in Kosovo (UNMIK) which assumed all legislative, executive and judicial authority throughout Kosovo and the 'Comprehensive Proposal for the Kosovo Status Settlement' which in the first paragraph provides that 'Kosovo shall be a multi-ethnic society, which shall govern itself democratically, and with full respect for the rule of law, through its legislative, executive, and judicial institutions.'[96] It follows that a blind eye is turned to current deficiencies of democracy, which could be rectified with time and the overall situation of democracy improved within the international institutional framework in Kosovo.[97] The international institutional framework was installed in Kosovo pursuant to UN Resolution 1244, which decided on the deployment of a civil mission in Kosovo (UNMIK).[98] UNMIK's mandate envisages, *inter alia*, the performance of civilian administrative functions, promotion of self-governance in Kosovo and protection and promotion of human rights.[99] On 15 May 2001, UNMIK enacted the 'Constitutional Framework for Provisional Self-Government', a set of rules resembling a constitution, which established organs of self-government (chapter 1),

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92 Written statement of Finland (16 April 2009), at 5.

93 ICTY, *Prosecutor v. Milutinovic et al* (Judgement of 26 February 2009) Case No. IT-05-87-T, at 324-325, 350.

94 Written statement of Finland (16 April 2009), at 9-10.

95 Written statement of Poland (18 April 2009), at 21-23, 27-29.

96 *Ibid*, at 16-17.

97 Serious concerns about democratic governance were expressed in the EU Parliament Resolution 2008/2663(RSP). For current concerns refer to European Commission, Commission Staff Working Document 'Kosovo 2016 Report' (9 September 2016) SWD(2016) 363 final, at 6-30, 65-72.

98 SC Res. 1244, 10 June 1999.

99 Available here, accessed 10 October 2018.

affirmed commitments to most international human rights instruments (chapter 3), stipulated law and order (chapter 6) and set out powers and responsibilities reserved to the SRSG (chapter 8).[100] On 4 February 2008, the Council of the European Union established the European Union Rule of Law Mission in Kosovo, which assists Kosovo's judicial authorities and law enforcement agencies in their progress towards sustainability and accountability.[101]

Given the great majority of the EU States recognize Kosovo, some analogies are expected in the works of the EU institutions as well. In opposition to the deadlock in the EU Council, which determined that each State should decide alone on its relations with Kosovo,[102] the EU Parliament strongly urges States to recognize Kosovo. In its recent resolution on the 2015 Report on Kosovo, it underlined that five EU States that currently do not recognize Kosovo should follow suit, as this would help to strengthen stability in the region.[103] At the same time, the position of the EU Parliament can hardly be squared with any of the four streams. It does not refer to any legal or moral foundations for statehood, what is more, it does not make statehood conditional upon the bilateral agreement. Lastly, in its first resolution after the unilateral proclamation of independence by Kosovo of 5 February 2009, the Parliament called for the recognition of Kosovo, yet in the same text emphasized serious concerns about democratic governance, which in turn means that it has not held on to the fourth stream either.[104]

South Sudan is the newest country and the last example referred to in the present analysis, where the EU and its Member States alluded to the idea of democracy while justifying recognition. South Sudan declared independence on 9 July 2011, which on the same day was positively received by the European Union. Two days later, South Sudan got admitted to the United Nations. In the case of South Sudan, the third stream (consensual) was of the utmost importance.[105] The first should be excluded, as it was a part of Sudan before, not any other colonizer. Likewise, the fourth stream should be renounced - South Sudan is virtually a failed State. The second stream, though, could have left some impact in view of the half-century-long conflict between the north and south part. Notwithstanding, at the core of the EU and its Member States' recognition decision lies the long-negotiated 2005 Comprehensive Peace

[100] UNMIK Regulation No. 2001/9 (15 May 2001) UNMIK/REG/2001/9.

[101] Council of the European Union, Council Joint Action 2008/124/CFSP.

[102] Council of the European Union, 2851th Meeting General Affairs and External Relations (18 February 2008), Conclusions on Kosovo, Doc. 6262/08.

[103] European Parliament, Resolution on the 2015 Report on Kosovo (4 February 2016), Doc 2015/2893(RSP).

[104] European Parliament, Resolution on Kosovo and the role of the EU (5 February 2009), Doc 2008/2663(RSP).

[105] S. Sheeran, 'International Law, Peace Agreements and Self-Determination: The Case of Sudan' 60 ICLQ (2011) 423, at 443-445.

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Agreement culminating in a referendum.[106] According to the official EU declaration, the 'referendum was conducted peacefully and credibly and its outcome was a true reflection of the democratically expressed wishes of the people of South Sudan'.[107] In the same text, the EU expressed hope that South Sudan's leaders will embrace diversity and pluralism and lay the foundation for a democratic, inclusive and fair society, based on the rule of law and respect for human rights and fundamental freedoms.[108] This means that democracy is yet to be established appropriately and did not play a critical role in the EU recognition of South Sudan.[109] In that respect, South Sudan, mindful of a political, social and economic distinctiveness, resembles Kosovo, where democracy *par excellence* is to be attained at some point in the future, a basis for which is the internationally arranged framework. In South Sudan's case, democratization should be realized with the assistance the United Nations Mission in South Sudan (UNMISS), the European Instrument for Democracy and Human Rights and pursuant to the 2015 Agreement on the Resolution of the Conflict in South Sudan.[110]

## (E) CONCLUSION

The analysis of the recent EU policy on recognition shows that the infamous '*Guidelines*' have lost validity. The requirement of democracy *par excellence* is undoubtedly superseded by a democratic consensus between the Mother State and the seceding entity as evidenced by the examples of Montenegro and South Sudan. Both entities, upon the successful outcomes of referendums, were uniformly accepted by the EU Member States and the EU institutions as sovereign States, despite (serious in the case of South Sudan) room for improvement of democratic governance standards. In the case of a divided opinion on a statehood claim among the EU Members, again, it is rather not democracy in its fullest sense that substantiates the decision on recognition but an aspect of a legal or moral right to self-determination. Palestine was recognized by Sweden on account of its legally affirmed right to statehood and humanitarian law considerations. Kosovo was primarily recognized on a moral basis. Regard to democracy is paid, albeit in the future context. The EU Member States, as well as the

[106] Declaration by the EU and its Member States on the Republic of South Sudan's independence (9 July 2011), Doc 2679/1/11 REV 1.

[107] *Ibid*, at 1.

[108] *Ibid*, at 2.

[109] The UN, while establishing mission in South Sudan (UNMISS), specified that one of its main goals should be strengthening of the capacity of the Government of the Republic of South Sudan to govern effectively and democratically. SC Res. 1996 (2011), 8 July 2011. For evidence that South Sudan is far from achieving good governance see Report of the Commission on Human Rights in South Sudan (6 March 2017) A/HRC/34/63, at 7-16.

[110] SC Res. 2290, 31 May 2016.

European Parliament, believe that a solid democracy can be established subsequently within the international institutional framework and recognition can only assist peace and democracy. There are three possibilities to address the issue of why the then stringent adherence by the EC to 'good governance' and human rights has given the floor to the rudimental understanding of democracy based on the legal, moral or consensual right to self-determination. Firstly, the EU prefers to introduce the requirement indirectly, which is a less controversial method in terms of international law in the eyes of the public. Democratization can be achieved *in futuro* by a less coercive means, for example, within the international legal framework. Secondly, there is no real prospect of the emergence of new States in the vicinity and interests of the European Union. The EU does not want to stand out in the international arena. Lastly, it is possible that the criterion of headful attendance to good governance, democracy and human rights has only changed levels and terminology. The EU will recognize a candidate as a 'Member State' only upon the fulfilment of substantially the same, if not stricter, criteria for admission.[111]

[111] 'Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union'. Article 2 spells out that 'The Union is founded on the values of respect for human dignity, freedom, democracy [...]'. Consolidated Version of the Treaty on European Union [2008] OJ C115/13, Art. 2.

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# Interim Measures Requested before International Courts and International Quasi-Judicial Bodies in the Protection of Human Rights: Do they also Protect the Right to Participate in Public Affairs?

Beatriz VÁZQUEZ RODRÍGUEZ*

*Abstract*: The adoption of precautionary measures by international courts and the indications regarding their adoption by quasi-judicial bodies in the protection of human rights have been a fundamental element in guaranteeing effective judicial protection of individual rights recognized in International Human Rights Treaties. However, the exceptional and urgent character of these measures, the indeterminacy of the requirements for their adoption, and the discussions on their legal nature have raised several problems in practice. These issues are being resolved based on the case law that originates from these courts and bodies, which will inevitably lead to the existence of certain particularities with respect to the solutions offered according to the given system of human rights protection. In fact, one of these particularities concerns the material scope of protection. The present contribution focuses on the adoption of precautionary measures in the protection of political rights, particularly regarding the right to take part in the conduct of public affairs, on which the various international human rights protection systems have unique positions.

*Keywords*: European Court of Human Rights, Human Rights Committee, Inter-American Court of Human Rights, interim measures, International Human Rights Protection, participation in public affairs, political rights.

## (A) INTRODUCTION

The adoption of precautionary measures at the international level is of particular interest regarding the individual protection of human rights. These procedural measures are a useful instrument for the protection of individuals who are subject to an imminent risk of suffering an irreparable damage of certain rights enshrined in the human rights treaties applicable to them. Although firmly recognized in contemporary International Law, precautionary measures do not enjoy a homogeneous basis in the international legal system, neither in terms of their jurisdiction nor with regard to their material scope of application. Instead, their bases differ depending on which regional human rights protection mechanism we turn to at the international level, or on whether we are referring to the precautionary measures recommended by the monitoring body established by International Human Rights Treaties.

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While respect for particularism in the international legal system is significant, greater uniformity in the adoption and implementation of precautionary measures in the field of international human rights protection would be desirable. This because of the given importance of the rights protected, whose standards of protection should not be guaranteed depending on the protection system to which the individual is attached. However, as we shall see, this does not mean that the systems are compartmentalized or that they represent opposing realities regarding the protection of human rights, but rather that in some cases, their mutual influence and interconnectedness will be highlighted.

Based on this premise, interim measures will be analyzed from a strictly International Human Rights Law perspective[1] through what has been established in conventional or regulatory standards as well as through important contributions in the matter made by the case law of the respective courts, where applicable. Such case law has been instrumental in determining the subject matter, the material scope of application of precautionary measures, and, in some cases, their obligatory character. In this regard, this study will cover the adoption of interim measures by the European Court of Human Rights (ECtHR) and their adoption in the Inter-American System for the protection of human rights, with special reference to political rights and, more specifically, to the right to participate in public affairs.[2] In addition, given that the possibility of indicating precautionary measures is not exhausted with respect to their application by international courts in the protection of human rights but rather it is possible that certain monitoring bodies established in Human Rights Treaties may indicate interim measures to States Parties, this paper will also analyze through a comprehensive approach, the practice regarding interim measures adopted by the Human Rights Committee (CCPR), bearing in mind that Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right of every citizen to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections, and to have access, on general terms of equality, to public service in a State Party[3]. The reason for paying special attention to

[1] Other international judicial bodies that can adopt this type of measures, such as the International Court of Justice (ICJ), the Court of Justice of the European Union (CJEU), or the International Tribunal for the Law of the Sea (ITLOS) are excluded from this study.

[2] However, this question will not be analyzed from the perspective of the African System, since both the entry into force of its Additional Protocol and the constitution of the African Court of Human Rights are very recent, so that its jurisprudence does not have a significant path regarding our object of study. In that sense, the first time that the African Court of Human and Peoples' Rights adopted provisional measures, it was in March 2011 through an interim measure requesting the government of Libya to abstain from any action that it will involve the loss of human lives or the violation of their physical integrity that may violate the norms of The African Charter on Human and Peoples' Rights or other human rights instruments to which they are a party.

[3] Regarding the quasi-judicial bodies, there are several that have attributed this power, some based on the provisions of its constituent instruments as is the case of CEDAW (Art. 5, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6 October 1999, U.N. Doc. A/54/49 and art.

this right of participation in public affairs is the existence of a recent practice that allows us to ask if, in general terms, it is a right that is being protected through the adoption of this type of specific measures.

### (B) PRECAUTIONARY MEASURES AS PROCEDURAL MECHANISM TO AVOID IRREPARABLE DAMAGE

Interim measures have a long history in the internal legal systems of the States, and concepts of similar nature can even be found in Roman Law.[4] From an exclusively internal point of view, the nature of these measures, issued by a court's decision, presupposes the existence of a general procedural principle which seeks to guarantee, in advance, the foreseeable consequences which may arise in the course of a litigation between the parties. If this legal concept is extrapolated to the international sphere and, in particular to the sphere of international human rights law, the legal nature of these measures remains unchanged. To this extent, even though the measure will be adopted in this case by an international court or quasi-judicial body with jurisdiction over the protection of human rights, States Parties of the Convention are required to implement, as soon as possible, all necessary measures recognized in their internal legal systems to prevent the violation of a right protected in a Human Rights Treaty.

Accordingly, it has been argued that, "la transposición normativa de las medidas cautelares, del ordenamiento nacional hacia el internacional, no genera modificaciones sustanciales en cuanto al contenido de tales presupuestos, y en cuanto al objeto perseguido."[5] It is true, however,

63.1, Rules of procedure of the Committee on the Elimination of Discrimination against Women, Annex I of the Report of the Committee on the Elimination of Discrimination against Women (A/56/38), identically they provide that: "After receipt of a communication and prior to its final decision, the Committee has the option of contacting the State Party with an urgent request that the State Party take steps to protect the alleged victim or victims from irreparable harm") and the case of CRPD (Art. 4, Optional Protocol to the Convention on the Rights of Persons with Disabilities, 13 December 2006, A/RES/61/106, "At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation"); another on the basis of its rules of procedure as is the case of CAT, (Art. 114.1, Rules of procedure of the Committee against Torture, adopted by the Committee at its first and second sessions and amended at its thirteenth, fifteenth, twenty-eighth, forty-fifth and fiftieth sessions). However, we will focus on the CCPR, because it is the only one that can adopt provisional measures for the protection of political rights, in particular the right to take part in the conduct of public affairs, vote and be elected at genuine periodic elections, and have equal access to public service positions.

4 See, A. Aguiar-Aranguren, 'Apuntes sobre las medidas cautelares en la Convención Americana sobre los Derechos Humanos', in R. Niento (ed.), *La Corte y el Sistema Interamericano de Derechos Humanos* (Corte Interamericana de Derechos Humanos, San José, 1994) at 95-96.

5 We translate: 'The normative transposition of precautionary measures, from the national to the international order, does not generate substantial changes in the content of such budgets, and in terms of the

that "[l]a transposition des mesures provisoires ou conservatoires de l'ordre juridique interne à l'international toujours face à la probabilité ou à l'imminence d'un "dommage irréparable", et la préoccupation ou la nécessité d'assurer la "réalisation future d'une situation juridique" ont eu pour effet d'étendre le domaine de la juridiction internationale, avec la réduction conséquente du célèbre domaine réservé de l'Etat."[6] As a result, this extension of international jurisdiction becomes essential with respect to the adoption of precautionary measures in the protection of human rights, in which the protected legal right goes beyond a mere right of individual request and becomes an instrument that guarantees the effective protection of human rights, i.e. a protection that goes beyond the individual interests of the parties involved in the dispute to find a justification for protecting the interests of the entire international community as a whole. In recent times, however, the proliferation of international courts with the power to adopt these measures has caused them not to have a homogeneous character or a single objective, as R. J. Macdonald emphasizes,

> "despite the proliferation of tribunals and interim measures –or perhaps because of it- there is no general rule which can be drawn from them regarding the nature and obligatory character of such measures [...] Interim measures in international law differ as to the nature of the body which issues them, the conditions under which request can be made, the conditions under which requests will be granted, whether the tribunal can indicate the measures proprio motu, whether the security deposits are required, and so on."[7]

Nevertheless, despite the variety of procedures for adopting precautionary measures in the different international human rights protection systems, it must be noted that all of them are certainly based on a common model, i.e. the one developed in the Statute of the Permanent Court of International Justice (PCIJ),[8] which was later reflected in Article 41 of the Statute of the International Court of Justice (ICJ).[9] It follows from the wording of that provision that the

object pursued', E. Rey Cantor; A. M., Rey Anaya, 'Medidas cautelares y medidas provisionales ante la Comisión y la Corte Interamericanas de Derechos Humanos', 14 *Revista Jurídica UCES* (2010) 127-193, at 130.

6 P. Guggenheim, *Les Mesures Provisoires de Procédure Internationale et leur Influence sur le Développement du Droit des Gens*, (Rec. Sirey, Paris 1931), at 174.

7 R. J. Macdonald, 'Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights', 52 *Heidelberg Journal of International Law* (1992), at 720.

8 According to the Encyclopedia of Public International Law, "The PCIJ Statute was inspired by the work of the Institute of International Law in 1875 and by the rules of the Central American Court of Justice (1907-18) established in 1907", R. Wolfrum, Interim (Provisional) Measures of Protection', in R. Wolfrum (dir.), *The Max Planck Encyclopedia of Public International Law*, Vol. V, (Oxford University Press, Oxford 2012), at 299. See also, R. J. Macdonald, *supra* n. 7, at 717-720.

9 Art. 41, Statute of the International Court of Justice: '1. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the

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power of the ICJ to adopt such measures is discretionary and exceptional, in the sense that they are adopted only under special circumstances. The laconism of this provision has been completed by the ICJ's own case law on the nature and subject matter of precautionary measures. More specifically, regarding the *Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*, the Court ruled that: "Whereas the right of the Court to indicate provisional measures as provided for in Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings and that the Court's judgment should not be anticipated by reason of any initiative regarding the measures which are in issue."[10]

On the basis of this ruling, the ICJ seemed to identify three characteristics to determine the main subject matter of interim measures, namely: the preservation of the respective rights of the parties, which implies maintaining the status quo of the pending situation; the existence of a risk that may cause irreparable damage through acts or omissions of the respondent State; and that the Court's decision to adopt interim measures does not prejudge or anticipate the final judgement on the merits of the case[11]. Although this scenario presented by the ICJ serves as a starting point for determining the object of these measures, it must be borne in mind that the specific objectives of each system are linked to their material scopes of application established in the international treaties on the matter, in our case, the European Convention on Human Rights (ECHR), the American Convention on Human Rights, and the International Covenant on Civil and Political Rights (ICCPR); as well as in the provisions concerning interim measures recognized in some regulatory provisions.

## (C) JURISDICTIONAL AND PROCEDURAL ISSUES IN THE ADOPTION OF PRECAUTIONARY MEASURES

respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council'.

[10] *Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*, ICJ Reports (1972) at 18.

[11] The Institute of International Law (IIL) has studied the issue of provisional measures having passed a resolution at its session of Hyderabad 2017 ('Provisional measures', final resolution Third Commission, 8 September, 2017). Throughout the preparatory work, the practice of the ICJ deserved special attention, (see: 'Provisional measures-preparatory work', Third Commission, final report 23, December, 2016). It should be noted that within the Third Commission there was some debate about the scope of their work; in this regard, the Report indicates: 'There was no clear consensus on these issues and, in view of the fact that the subject is potentially enormous, this report is mainly limited to judicial tribunals and deals with public international law, private international law, international commercial arbitration and some universal principles of private law', *Ibídem*, at. 268.

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In general, there are differences in the jurisdictional capacity to adopt precautionary measures in international Human Rights protection systems. While in the cases of the ECtHR, the CCPR, and the Inter-American Commission, the power to adopt interim measures has no conventional but regulatory basis; the Inter-American Court of Human Rights, in contrast, has such power under its founding treaty, as will be seen below.

Beginning our analysis with the European system of human rights protection, one finds that, during the process of drafting of the 1949 Convention, the 'Travaux Préparatoires' included a provision on interim measures which was almost identically worded to Article 41 of the Statute of the ICJ, but which was not finally reflected in the text of the Convention.[12] After several attempts, and in response to the demands of some Member States, the now defunct Commission on Human Rights included interim measures in Rule 36 of its Rules of Procedure, recognizing that "The Commission, or when it is not in session, the President may indicate to the parties any interim measure the adoption of which seems desirable in the interest of the parties or the proper conduct of the proceedings before it."[13] Subsequently, the Court also included this power, which was consolidated in Article 36 of its Rules of Court in the same terms as the Commission had included it in its own rules. With the entry into force of Protocol No. 11 and the abolition of the European Commission on Human Rights, the power to adopt interim measures with respect to claims brought by individuals was concentrated in the hands of the Court. This was definitively consolidated in Rule 39 of its Rules of Court, according to which:

> 1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.
> 2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.
> 3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.
> 4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.[14]

Regarding procedural issues, Article 34 ECHR provides, as is well known, that any individual,

[12] See, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights*, (Martinus Nijhoff, The Hague, 1975-85), at 302-320.

[13] See, 'Amendments to the Rules of Procedure of the European Commission of Human Rights', 17 *Yearbook of the European Convention on Human Rights* (1974) at 52.

[14] Rule 39, ECHR, Rules of Court, entered into force on 16 April 2018.

non-governmental organization, or group of individuals may present an individual application claiming to be the victim of a violation by one of the States parties of the rights set forth in the Convention. Under this provision, those having legal standing as applicants may, under Rule 39, submit a request to the Court for the adoption of precautionary measures at any stage of the proceedings, provided that the individual or group of persons is under the jurisdiction of one of the States parties under Article 1 ECHR. Each request is examined by the Court on an individual basis, and all of them shall be given priority unless the request involves a dilatory tactic. If the application is incomplete or insufficiently substantiated, the Court may decline to hear it or, on an exceptional basis, may request the submission of additional information. However, under Rule 39, ECtHR is also allowed to adopt interim measures on its own initiative.

After the entry into force of Protocol No. 11, a relevant change to the procedure was introduced, as requests for interim measures in the current system are automatically recorded once submitted, irrespective of whether they are subsequently adopted by the Court. In practice, the President will consult with a judge with expertise in the respondent State's laws and will review the documentation submitted by the applicant. For instance, with respect to the most frequent cases, i.e. applications for the suspension of expulsion or deportation orders, the Court will consider

grounds of fear; evidence submitted, Convention Issue or Article invoked; reasons for leaving home country, whether applicant applied for political asylum and decision made as to it; date arrival in Member State; decisions by the Member State administrative or judicial bodies on expulsion/extradition of the applicant; availability of any other domestic authority to stop the impending expulsion/extradition; suspensive effect of domestic remedies; government assurances given by the state to be expelled or deported to; and involvement of UNHCR and decisions made by that body.[15]

Once a decision has been taken based on the necessary requirements for the granting of measures, the ECtHR informs the applicant or, where appropriate, his or her legal representatives in writing. However, the reasons for granting or refusing them are not reflected in the decision provided by the Court. Thus, the Steering Committee for Human Rights (CDDH), in its report on precautionary measures, made the following recommendation: "The Court could consider also communicating additional, generic information on interim measure requests, including on the reasons for refusals, in such a way as not to put the safety of the

[15] H. R. Garry, 'When Procedure Involves Matters of Life and Death: Interim Measures and the European Convention on Human Rights', 7(3) *European Public Law* (2001) 399-432, at 414.

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applicant at risk."[16] A more detailed statement of reasons on the ECtHR's position in each specific case is relevant, since it could enable states to determine with greater precision what constitutes irreparable damage. Thus, this statement of reasons would enable them to assess it in their internal procedures while avoiding the need for the applicant to resort to the ECtHR. In addition, this would also provide greater legal certainty, which would allow the individual to know the reasons for their adoption or refusal, while allowing states to more adequately challenge an eventual imposition of interim measures.

The ECtHR, however, did not deem it appropriate, considering that any additional wording to its decisions would amount to additional work for the Court and would delay the adoption of these urgent measures.[17] In the event that the Court decides to order interim measures, the respondent State is informed of its decision by fax or mail.[18] Otherwise, the decision is final and there is no appeal against the Court's decision. This does not mean that the applicants cannot submit a new request as long as new evidence is provided to meet the requirements for the granting of the measures.[19]

Under Rule 39, the European Court may decide to apply interim measures until the end of the proceedings, unless new circumstances arise that require the lifting of interim measures, or the adoption of interim measures until a date that the Court itself determines. After this date, the ECtHR will have to decide whether their temporary extension is necessary, by setting a new date, or whether to decree a new extension until further notice. The Court may decide to lift them, either because deems it appropriate, as it considers that the applicant is not in a position to suffer irreparable damage, or at the request of the applicant himself or herself, or because the respondent Government so requests.[20] The Court typically adopts such measures until a specific date, after which it will consider whether or not they should be extended depending on whether or not it considers that there is an imminent risk. In addition, it should be stressed that, due to the urgent nature of these measures, the time frame for the Court to reach a decision is really short and therefore it makes a general assessment. It is only *a posteriori*, once the case has been brought to the attention of the Court, that it may even consider that the facts which *prima facie* gave rise to the adoption of these measures do not then constitute

[16] Draft CDDH report on interim measures under Rule 39 of the Rules of Court, GT-GDR-C (2013) R2, 2 February 2013, at 13.

[17] *Ibídem*, at 10.

[18] Toolkit on How to Request Interim Measures under rule 39 of the rules of the European Court of Human Rights for Persons in Need International Protection, UNHCR, (Strasburg, 2012) 1-20, at 13.

[19] See: S. D. Jóhannsdóttir, *Interim Measures under Rule 39 of the Rules of the European Court of Human Rights Protecting Human Rights in Cases of Urgency*, M thesis on file at the University of Iceland, Iceland, at. 24 – 26.

[20] Toolkit on How to Request Interim Measures under rule 39 of the rules of the European Court of Human Rights for Persons in Need International Protection, *supra* 65, at. 14.

breaches of the Convention.[21]

Turning to the inter-American human rights system, one of the most notable differences with respect to the European system is that the possibility of adopting interim measures has a conventional basis. This is because they are regulated in the founding Treaty, which, as we shall see below, has resolved from the outset the problems regarding the obligatory character of these measures at this specific regional level and, as a result, the liability arising from their possible non-compliance. However, there are also some similarities with the European system of human rights protection, since, as is well known, the creation of the Inter-American Court of Human Rights has had the ICJ and the ECtHR as its references.[22] As was the case in the beginning of the European system, there is a duality with regard to the application of interim measures for the protection of human rights, which in this case remains unchanged to this day. According to the very terminology used by this system —and despite the fact that in both of them "the nature of provisional measures is not only preventive in the sense that they preserve a juridical situation, but fundamentally protective, because they protect human rights"—[23] it distinguishes between *precautionary measures*, which are adopted by the Inter-American Commission on Human Rights (IACHR), and *provisional measures*, which are issued by the Inter-American Court.

With respect to precautionary measures, they have their origins in the IACHR Rules of Procedure,[24] Article 25 of which states that "the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures. Such measures, whether related to a petition or not, shall concern serious and urgent situations presenting a risk of irreparable harm to persons or to the subject matter of a pending petition or case before the organs of the inter-American system."[25] It follows from the wording of this provision that the IACHR can, on its own initiative or at the request of a party, indicate to a State Party the

[21] 'The full facts of the case will often remain undetermined until the Court's judgment on the merits of the complaint to which the measure is related. It is precisely for the purpose of preserving the Court's ability to render such a judgment after an effective examination of the complaint that such measures are indicated. Until that time, it may be unavoidable for the Court to indicate interim measures on the basis of facts which, despite making a prima facie case in favour of such measures, are subsequently added to or challenged to the point of calling into question the measures' justification', *Paladi v. Moldova*, para. 89.

[22] See E. Rey Cantor; A. M., Rey Anaya, *supra* n. 5, at 128-132. See also, M. Díez Crego, 'El impacto de la jurisprudencia de la Corte Interamericana sobre el Tribunal Europeo de Derechos Humanos', 75 *Revista de la Facultad de Derecho* PUPC (2015) at 31-56.

[23] *Case of Herrera-Ulloa v. Costa Rica*. Provisional Measures. Order of the Inter-American Court of Human Rights, 6 December, 2001, para. 4.

[24] Rules of Procedure of the Inter-American Commission on Human Rights (IACHR), (Approved by the Commission at its 137th regular period of sessions, held from 28 October to 13 November, 2009, and modified on 2 September, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on 1 August, 2013).

[25] Art. 25.1, Rules of Procedure of IACHR.

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adoption of different actions to protect the human rights protected by the American Convention on Human Rights and to avoid imminent harm, considering in any case the seriousness and the urgency, with the aim of avoiding irreparable damage. For their part, the provisional measures adopted by the Inter-American Court have a conventional basis, since Article 63(2) of the American Convention on Human Rights empowers the Court to adopt protection measures in exceptional situations in order to avoid irreparable damage to individuals.

From the above, several conclusions can be drawn, because this system, as far as the adoption of precautionary measures is concerned, has two fundamental differences with respect to the European one. First of all, it must be noted that the provisional measures adopted by the Inter-American Court have a conventional basis, so, by virtue of the principle of *pacta sunt servanda*, enshrined in The Vienna Convention on the Law of Treaties, there is an obligation on the parties to comply with them in good faith. This issue will be addressed in the section on the obligatory character of these measures. Second of all, there is a difference concerning the material content of the provisions relating to provisional measures, since this system specifies in its conventional and regulatory standards, in a much more precise manner, the criteria necessary for the application of these measures, as will be seen in subsequent sections.

In the case of the Inter-American Court and the Inter-American Commission, there are certain particularities with respect to procedural issues. The Inter-American Court of Human Rights may consider a request for interim measures when the State issuing it is a party of the American Convention and when it has recognized the jurisdiction of the Court as compulsory. In this regard, a distinction must be made between the jurisdiction in contentious cases submitted to the Court and the jurisdiction of the Court in cases where proceedings are pending before the Commission.[26] In the first case, Article 63(2) of the Convention states that, in matters under consideration of the Court, the Court shall adopt interim measures in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons. This means that there must be an ongoing proceeding in place beforehand. In addition, according to Article 27 of the Rules of Procedure of the Court, the measures may be issued by the Court on its own initiative at any stage of the proceedings, or the "victims or alleged victims, or their representatives, may submit to it a request for provisional measures, which must be related to the subject matter of the case."[27] In the second case, also enshrined in Article 63(2) of the Convention and in Article 27(2) of the Rules of Procedure of the Court, in the case of matters not submitted to the Court, the Court may act at the request of the Commission. This request for precautionary measures by the Commission to the Court is also recognized in

[26] See, E. Rey Cantor; A. M., Rey Anaya, *supra* n. 5, at 172-188.

[27] Art. 27.3, Rules of Procedure of IA Court HR.

Article 19(c) of the Statute of the Commission, but its Rules of Procedure further develop this premise by considering that such a request will be made "when the State concerned has not implemented the precautionary measures granted by the Commission; when the precautionary measures have not been effective; when there is a precautionary measure connected to a case submitted to the jurisdiction of the Court; or when the Commission considers it pertinent for the efficacy of the requested measures, to which end it shall provide its reasons."[28] The applications submitted by anyone having legal standing as applicants according to the aforementioned circumstances shall be submitted "to the Presidency, to any Judge of the Court, or to the Secretariat."[29]

With regard to the granting of the measures, it will be the President, in consultation with the Permanent Commission, who shall draft a decision in which he or she will call upon the State to adopt a series of precautionary measures in defense of the rights enshrined in the Pact of San José. At a later session, the Court shall ratify the decision previously taken by the President and may maintain or extend the precautionary measures proposed.

As for the Inter-American Commission, Article 25 of its Rules of Procedure states that in order to request the adoption of precautionary measures to the States parties, it may act on its own initiative or at the request of a party. If it is at the request of a party, this implies that the request may be submitted by an individually affected person, a person linked to a particular group, organization, or community of people, or by a third party acting on their behalf, in order to prevent a risk of irreparable damage to persons or to the subject matter of a petition or case pending before the bodies of the inter-American system. This means that the request for interim measures may be made in connection with a previous request; in connection with a pending case; or a simple request for precautionary measures may be made. In the last case, the request must include a brief with reference to the facts and modes of proof, and it is important to note that, in this proceeding, "el principio de subsidiariedad no opera en relación con la solicitud de las medidas cautelares, es decir, que no se exige el agotamiento de los recursos de jurisdicción internos para acceder a la protección internacional a través de esta institución procesal",[30] while it is required for the submission of complaints or petitions to this body, although it is true that the Commission —among other reasons— will take into account "whether the situation has been brought to the attention of the pertinent authorities or the

[28] Art. 76.2, Rules of Procedure of IACHR.

[29] Art. 27.4, Rules of Procedure of IA Court HR.

[30] We translate: 'The principle of subsidiarity does not operate in relation to the request for precautionary measures, that is, it does not require the exhaustion of domestic remedies to access international protection through this procedural institution', E. Rey Cantor, *supra* 5, at 184. In the same sense, see: H. Faúndez Ledesma, *supra* n. 43, at 275.

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reasons why it would not have been possible to do so."[31]

In any event, if the requirements and formalities set out above are complied with, the Commission may request the state to adopt precautionary measures; it may reject the request for measures on the grounds that, on the merits of the case, it is a petition for human rights violations and, as such, it should have exhausted the remedies of the domestic jurisdiction; or it may demand further information from both the applicant and the state concerned.

For its part, the Human Rights Committee has considered in its practice that the possibility of indicating interim measures derives from the mandate established in the Covenant on Civil and Political Rights, which has subsequently been codified in its regulatory standard. Based on the current Article 92 of its Rules of Procedure, "The Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. In doing so, the Committee shall inform the State party concerned that such expression of its Views on interim measures does not imply a determination on the merits of the communication."[32]

With regard to procedural issues relating to such measures in the Human Rights Committee, it only needs to be recalled that individual complaints may be lodged against a State, provided that it is a State party to the International Covenant on Civil and Political Rights and that, in addition, such State has recognized the power of the Committee monitoring the Treaty to receive and consider complaints from individuals, ratifying the Optional Protocol to the International Covenant on Civil and Political Rights. Under Article 92 of its Rules of Procedure, this body, after receiving a communication and before issuing its advisory opinion, has the power to request the State party against which the complaint is addressed, to adopt interim measures in order to avoid irreparable damage to the victim of the alleged violations. Although not specified in the Rules of Procedure, the Committee entrusts the Special

[31] Art. 25.6.a) Rules of Procedure of IACHR.

[32] Art. 92, Rules of procedure of the Human Rights Committee, 11 January 2012, (The current version of the rules was adopted at the Committee's 2852nd meeting during its 103rd session). In addition to these measures, in accordance with the practice of recent years, the Special Rapporteur has requested States Parties to adopt what he calls "protection measures" in relation to the author or authors of a communication, which he also extends to their relatives when there is circumstantial evidence that the submission of the communication to the Committee has led to acts of intimidation to its authors. The Committee itself considers that the differences between protection measures and interim measures are found "in that their purpose is not to prevent irreparable damage affecting the person who is the subject of the communication, but simply to protect those who might suffer adverse consequences for having submitted the communication, or to call the State party's attention to the worsening of their situation, which is linked to the alleged violations of their rights", The mandate of the Special Rapporteur on New Communications and Interim Measures, CCPR/C/110/3, 6 May, 2014, at 3.

Rapporteur on New Communications and Interim Measures[33] with the processing of requests for communications for which interim measures are issued.[34] In practice, in most cases, the request for interim measures is linked to the submission of a new communication, with the Special Rapporteur having the power to decide whether to accept or refuse it when taking a position on the registration of the communication. The Special Rapporteur will only act if considers that the petition must be attended to take into account the particular circumstances of the specific case and without it being necessary to invite the State to present its point of view. This could cast doubt on the guarantees offered by this procedure as far as the State is concerned, although it has been justified by noting that "The protection of international human rights processes and of the individual in question takes priority over any short term inconvenience caused to the State".[35]

Regarding the transparency of the indication of these measures, it should be stressed that, there is no requirement to state or make public the grounds for his or her decision to adopt precautionary measures. Thus, this decision is communicated only to the parties without disclosing the grounds on which the interim measure in question was ordered or refused.[36] In this regard, it has been argued that, in the case of the CCPR, efficiency and urgency are given priority in the adoption of these measures over the need to provide extensive justification for its decision.[37] Finally, it is important to note that, if the CCPR decides to indicate interim measures in a particular case, this does not imply that it has made a decision on the admissibility or the merits of the case. However, the Committee should adopt such measures when there is a reasonable likelihood that the individual complaint may be successful at the merits stage.[38]

### (D) THE MATERIAL SCOPE OF APPLICATION OF PRECAUTIONARY MEASURES

[33] The mandate of the Special Rapporteur encompasses five main functions among which is "(b) dealing with requests from authors on interim and protection measures", *Ibídem*, at 2.

[34] This practice was adopted by the Committee at its 35th session in 1989. At its 55th session in 1995 the Committee decided that the Special Rapporteur would retain this competence until the Working Group on Communications took up the question of admissibility, UNGAORA/vol. I, para. 467

[35] S. Joseph, K. Mitchell, L. Gyorki and C. Benninger-Budel, *A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*, (OMCT Handbook Series, Vol. 4, 2006), at 99.

[36] According to H. Keller and C. Marti, with regard to the commitment made by the CCPR regarding the ECHR's publication of the reasons why it guarantees or denies provisional measures: "The Special Rapporteur on New Communications and Interim Measures recently suggested such an approach also for the HRC", H. Keller, C. Marti, 'Interim relief compared: use of interim measures by the UN Human Rights Committee and the European Court of Human Rights', 73(3) *Heidelberg Journal of International Law* (2013) 325-372, at 339.

[37] E. Rieter, *Preventing Irreparable Harm. Provisional Measures in International Human Rights Adjudication*, (Intersentia, Maastricht University, 2010), at 141-144.

[38] See: Individual Complaint Procedures under the United Nations Human Rights Treaties, Fact Sheet nº 7/Rev.2, 2013, at 13-14.

As has been mentioned, it is necessary to turn to conventional and procedural standards in order to understand, according to their context, when precautionary measures can be adopted. However, given the minimal guidance provided by the statutes of the international courts — even less so in the case of the ECtHR—, and of the quasi-judicial bodies, it will be the case law originating from them the one completing and redefining the objectives of the interim measures and the scope of the rights protected in their respective jurisdictions, as we shall see below.

(1) Criteria for the Adoption of Precautionary Measures

Rule 39 of the ECtHR Rules of Court does not determine the material scope in respect of which interim measures could be adopted. As we have seen, only the last sentence of its first paragraph states that these measures would be indicated to protect "the interests of the parties or of the proper conduct of the proceedings." However, the ECtHR case law has answered this question, and in *Mamatkulov and Askarov v. Turkey*, in addition to stressing the exceptional nature of these measures, it confirmed that the Court's practice allowed the adoption of these measures only in cases where there is "an imminent risk of irreparable damage."[39] Furthermore, bearing in mind the different nature of the provisions on interim measures included in Treaties other than those applied by the ECtHR, the ECtHR referred to the provisions on this issue included in the Statutes of the ICJ and the Inter-American Court of Human Rights and in the Rules of Procedure of the CCPR and The Committee against Torture in the United Nations system. All of them confirmed that "the preservation of the asserted rights of the parties in the face of the risk of irreparable damage represents an essential objective of interim measures in international law. Indeed, it can be said that, whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending."[40]

As a result, without a specific provision in the ECHR on the specific material scopes in which Rule 39 applies, the Court's practice has shown that such measures are adopted in very limited situations in which, in any event, the existence of "an imminent risk of irreparable damage" is demonstrated. However, its own case law does not provide the data to consider when such an imminent risk of irreparable damage exists. In the *Paladi* case, the Court only considered that "where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention",[41] the object of an interim measure shall be to preserve and protect the rights and interests of the parties in a dispute before the Court while pending the final decision.

But under what conditions can the Court *plausibly* assert that there is such an imminent

39 *Mamatkulov and Askarov v. Turkey*, (App. n. 46827/99, 46951/99), 4 February, 2005, para. 104.
40 *Mamatkulov and Askarov v. Turkey*, para. 124.
41 *Paladi v. Moldova*, (App. n. 39806/05), 10 March, 2009, para. 89.

risk of irreparable damage? In this regard, the ECtHR —in relation to expulsion and extradition cases— has considered that this imminent risk exists only and exclusively when there is no possibility of invoking domestic remedies to suspend these orders, or when invoked but not successfully, which means that "the situation must be imminent and exceptional and there must no longer be any suspensive domestic remedy available against the disputed act; there must be a high degree of probability that the disputed act will contravene the ECHR and there must be a risk of irreparable damage."[42] Nevertheless, some authors believe that, in order for this criterion to be met and for the application of precautionary measures to be considered, there must be cumulative criteria: "First, there must be a threat of irreparable harm of a very serious nature. Second, the harm must be imminent and irremediable, and third, prima facie, there must be an arguable case that removal will violate the Convention."[43]

As far as the inter-American system is concerned, there is a fundamental difference with the ECtHR, which is that, while the ECtHR only refers in its regulatory standard to the need for the existence of "an imminent risk of irreparable damage", the inter-American system has explicitly laid down the criteria necessary for the adoption of these measures, both in its conventional standard as well as in its regulatory standard. This has brought about important interpretive work by the Inter-American Court to clarify the scope of its terms. In this sense, under Article 25(2) of the Rules of Procedure of the Inter-American Commission, the Commission may, on its own initiative or at the request of a party, indicate to a State party the adoption of precautionary measures to protect human rights protected by the American Convention on Human Rights and to avoid an imminent harm, considering that:

> a. "serious situation" refers to a grave impact that an action or omission can have on a protected right or on the eventual effect of a pending decision in a case or petition before the organs of the inter-American system;
> b. "urgent situation" refers to risk or threat that is imminent and can materialize, thus requiring immediate preventive or protective action; and
> c. "irreparable harm" refers to injury to rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation.[44]

With regard to the Inter-American Court, Article 63(2) of the Pact of San José recognizes that:

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[42] Y. Haeck, C. Burbano Herrera, L Zwaak, 'Non-compliance with a Provisional Measure Automatically Leads To a Violation of the Right of Individual Application ... or Doesn't It?: Strasbourg Court Takes Away Any Remaining Doubts and Broadens Its Pan-European Protection', 4 *European Constitutional Law Review*, (2008) 41-63, at 43. See also, P. McCormick, 'A Risk of Irreparable Damage: Interim Measures in Proceedings before the European Court of Human Rights', 12 *The Cambridge Yearbook European Legal Studies*, (2009-2010) 313-336, at 318; E. Rieter, 'Provisional Measures: Binding and Persuasive? Enabling Human Rights Adjudicators to Follow Up on State Disrespect', 59(2) *Netherlands International Law Review* (2012), 165-198, at 171-174.

[43] N. Mole, C. Meredith, 'Asylum and the European Convention Human Rights' (2010) 9 *Human Right Files*, 1-291, at. 218.

[44] Art. 25.2, Rules of Procedure of IACHR.

"In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission."[45] According to the contents of this provision, the requirements are apparently the same as for the adoption of precautionary measures by the Commission. However, the requirement of gravity, in this case, implies that it must be of a higher degree, i.e. extreme in nature. In the same way, Article 27 of the Rules of Procedure of the IACHR reiterates the need for the cumulative existence of the requirements of: extreme gravity, urgency, and avoiding irreparable damage to persons.[46] In this system, it has also been repeatedly pointed out that the adoption of these measures, as in the case of the ECtHR, is carried out on a case-by-case basis, so that their adoption cannot be subject to "strict criteria that must apply to each and every case; instead, it has to look at the nature of the risk and the harm that the precautionary measure seeks to avert."[47]

Beginning with the requirement of gravity, it has been argued that, in this notion, "no basta con la gravedad del peligro que se anticipa, sino que también se requiere que este sea verosímil. La gravedad de la amenaza es la consecuencia de un peligro real y no meramente hipotético"[48] and, as a result, "se debe de relacionar con hechos o situaciones que pongan en peligro derechos humanos fundamentales, es decir, aquellos que bajo ningún respecto pueden verse menoscabados o limitados en su ejercicio."[49] In order for the gravity to be "extreme", the Court has considered that the situation must be of "an intense or high level of gravity",[50] and therefore it "obviously refers not only to the gravity of the threat but also to its extreme nature. Therefore, the threat should not refer to just any risk; this risk must be extreme and of gravity, and the

45 Art. 63.2, American Convention on Human Rights, Pact of San José, Costa Rica, 1969.

46 Art. 27.1, Rules of Procedure of IA Court HR, approved by the Court during its LXXXV Regular Period of Sessions, held from, 16 to 28 November, 2009.

47 Annual Report, Inter-American Commission of Human Rights, 2011, at 73.

48 We translate: 'the seriousness of the danger that is anticipated is not enough, but it is also required that it be credible. The seriousness of the threat is the consequence of a real danger and not merely hypothetical', H. Faúndez Ledesma, 'Medidas cautelares y medidas provisionales: acciones urgentes en el Sistema Interamericano de Protección de los Derechos Humanos', 107 *Revista de la Facultad de Ciencias Jurídicas y Políticas*, (1998) at 537. On the notion of urgency, see: A. Aguiar-Aranguren, *supra* n. 4, at. 20.

49 We translate: 'it must relate to facts or situations that endanger fundamental human rights, that is, those that under no circumstances may be impaired or limited in their exercise', A. Aguiar-Aranguren, *supra* 4, at 102.

50 *Matter of Monagas Judicial Confinement Center ("La Pica") regarding Venezuela.* Provisional Measures. Order of the Inter-American Court of Human Rights, November 24th, 2009, para. 3; *Case of Salvador Chiriboga v. Ecuador*. Provisional Measures. Order of the Inter-American Court of Human Rights, 15 May, 2011, para. 7; *Case of Gonzales Lluy et al. vs. Ecuador*. Provisional Measures. Order of the Inter-American Court of Human Rights, 2 September, 2015, para. 7.

ordinary tools of apparatus of the State should not suffice to cope with such threat".[51] With regard to the requirement of urgency, the Court has found that this requires "the remediation response to be immediate. The analysis of this aspect corresponds to assessing the timing and duration of the precautionary or protective intervention requested",[52] which should involve "above all, an immediate and, in principle, of short duration measure in order to face with such situation, since a lack of response would mean a danger per se."[53] In the practice developed by the IACHR, the Court jointly assesses the requirements of gravity and urgency, since, as argued by some authors, "Lo primero [que haya extrema gravedad y urgencia] implica que exista un riesgo de daño sumamente grave y que resulte apremiante, en virtud de las circunstancias existentes -que deben ser apreciables de forma casuística-, adoptar sin demora la medida que parezca necesaria -de la naturaleza y con las características pertinentes- conforme a la hipótesis de riesgo que se contemple."[54]

Finally, with respect to the requirement to avoid irreparable damage, the Court has ruled that "there must exist a reasonable probability that the damage is caused and it must not involve legally protected interest capable of being repaired."[55] There is no specific jurisprudential line on this issue, although some authors have considered that "en realidad, un daño irreparable para las personas solo puede ser el resultado de una violación de su derecho a la vida o a la integridad física, y probablemente de la violación de garantías judiciales que tengan una incidencia directa sobre el disfrute de esos derechos."[56] However, the IACHR has not

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[51] *Matter of the Mendoza Prisons regarding Argentina. Provisional Measures.* Order of the Inter-American Court of Human Rights, 30 March, 2006, Concurrent Opinion of Judge D. García-Sayán, para. 11.

[52] *Matter of Four Ngöbe Indigenous Communities and its members regarding Panama.* Provisional Measures. Order of the Inter-American Court of Human Rights, 28 May, 2010, para. 9.

[53] *Matter of Capital El Rodeo I & El Rodeo II Judicial Confinement Center regarding Venezuela.* Provisional Measures. Order of the Inter-American Court of Human Rights, 8 February, 2008, para.18; *Matter of Alvarado Reyes et al. regarding Mexico.* Provisional Measures. Order of the Inter-American Court of Human Rights, 15 May, 2011, para.16.

[54] We translate: '[that there is extreme gravity and urgency] implies that there is a risk of extremely serious damage and that it is urgent, by virtue of the existing circumstances -which must be discernible in a casuistic way-, adopt without delay the measure that seems necessary according to the hypothesis of risk that is contemplated', S. García Ramírez, *Los Derechos Humanos y la Jurisdicción Interamericana* (Universidad Nacional Autónoma de México, México, 2002), at 130.

[55] *Matter of Monagas Judicial Confinement Center ("La Pica") regarding Venezuela.* Provisional Measures. Order of the Inter-American Court of Human Rights, 24 November, 2009, para. 3; *Matter of Yare I and Yare II Capital Region Penitenciary Center regarding Venezuela.* Provisional Measures. Order of the Inter-American Court of Human Rights, 24 November, 2009, para. 3; *Matter of Pérez Torres et al. ("Campo Algodonero") regarding Mexico.* Provisional Measures. Order of the Inter-American Court of Human Rights, 30 June, 2011, para 11; *Matter of the Penitentiary Center of the Central Occidental Region (Uribana Prison) regarding Venezuela.* Order of the Inter-American Court of Human Rights, 6 September, 2012, para. 11.

[56] We translate: 'in fact, irreparable damage can only be the result of a violation of their right to life or physical integrity, and probably of the violation of judicial guarantees that have a direct impact on the enjoyment of those rights', H. Faúndez Ledesma, *supra* n. 40, at 160. In relation to the requirement of "irreparable harm", see: A. M.

interpreted the material scope of application of these measures in such a restrictive way as to limit their application to Articles 4 (right to life) and 5 (right to humane treatment) of the American Convention on Human Rights, as we shall see in the following section.

As regards the CCPR, in order to be able to indicate interim measures, its regulatory provision determines the need "to avoid an irreparable damage", which means that its material scope of application is similar to those studied in relation to the ECtHR and the Inter-American System for the Protection of Human Rights. Therefore, for requesting the adoption of precautionary measures before the CCPR, the applicant must also, a priori, demonstrate that there is an imminent risk of irreparable damage and that the remedies in his or her domestic legal system do not provide such a guarantee to prevent such damage. For the determination of the *prima facie* existence of irreparable damage, the CCPR, in *Charles E. Stewart v. Canada*, stated that these requirements "cannot be determined generally"[57] but the assessment must be carried out on a case-by-case basis. In addition, according to the CCPR, "the essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy."[58] With regard to the imminence of the risk, the CCPR also found that it was a fundamental requirement, and so in *Lansman*, it refused to indicate interim measures, considering that "the application of rule 86 of the rules of procedure would be premature but that the authors retained the right to address another request under rule 86 to the Committee if there were reasonably justified concerns that quarrying might resume."[59] With regard to the irreparability of the damage, the CCPR's ruling in *Weiss* is crucial, when it found

> "that in a case where it has requested interim measures of protection, it does so because of the possibility of irreparable harm to the victim. In such cases, a remedy which is said to subsist after the event which the interim measures sought to prevent occurred is by definition ineffective, as the irreparable harm cannot be reversed by a subsequent finding in the author's favour by the domestic remedies considering the case. In such cases, there remain no effective remedies to be exhausted after the event sought to be prevented by the request for interim measures takes place; specifically, no appropriate remedy is available to the author now detained in the United States

Salvador Ferrer, 'Medidas provisionales en casos de desaparición forzada en la jurisprudencia de la Corte Interamericana de Derechos Humanos: Análisis, crítica y reto', 32 *Revista Electrónica de Estudios Internacionales* (2016) 1-31, at 4-5.

57 CCPR, *Charles E. Stewart v. Canada*, Com. n. 538/1993, 1 November, 1996, para. 7.7.

58 *Ibídem*.

59 CCPR, *Ilmari Lansman and forty-seven other members of the Muotkatunturi Herdsmen Committee and members of the Angeli local community*, Com. n. 511/1992, 24 October, 1994, at 5.

should the State party's domestic courts decide in his favour in the proceedings still pending after his extradition."[60]

This case substantially broadened the scope of interim measures, insofar as it no longer implies that the determination of an "irreparable damage" should be considered to be a precondition for the granting of an interim measure, since it alludes to the possibility that such a risk exists.[61]

(2) The Scope of Protected Rights: The Exceptional Nature of the Precautionary Protection of the Right of Political Participation

As stated above, the ECtHR has considered that, taking into account the necessity of the aforementioned requirements, the assessment to propose interim measures must be made on a case-by-case basis and, precisely because of their nature, the most characteristic cases in the practice of the ECtHR are those in which the claimants feared that, if an expulsion or extradition order was enforced, they could face threats to their lives, which would therefore be contrary to Article 2 ECHR (right to life) or to ill-treatment, prohibited by Article 3 ECHR (prohibition of torture and inhuman and degrading treatment). In this respect, the ECtHR has adopted precautionary measures with regard to asylum seekers who fear that, if their expulsion order is enforced, they may be subjected to persecution, ill-treatment, or other serious attacks of many different natures: some cases involve the risk of persecution on political, ethnic, or religious grounds,[62] or on grounds of sexual orientation;[63] other cases comprise the risk of stoning for adultery or genital mutilation;[64] others the risk of being socially excluded[65] or sexually exploited;[66] and other cases consider that there is a risk that expulsion could prevent access to HIV treatment[67] or psychological care.[68] Specifically, with regard to Article 2 of the Convention, the ECtHR has adopted interim measures to prevent the extradition of individuals to a State where there is a death sentence against them, thus avoiding their execution.[69] More exceptionally, the ECtHR has also adopted such measures in relation to Article 5 ECHR (right to liberty and security) and Article 6 ECHR (right to a fair trial) where

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[60] CCPR, *Weiss v. Austria*, Com. n. 1086/2002, 15 May, 2003, para. 8.2.

[61] *Ibídem*, para. 8.2.

[62] *Abdollahi v. Turkey*, (App. N. 23980/08), 3 November, 2009; *F.H. v. Sweden* (App. n. 32621/06), 20 January, 2009; *Y.P. y L.P. v. France* (App. n. 32476/06), 1 September, 2010; *W.H. v. Suède* (App. n. 49341/10), 8 April, 2015; *F.G. v. Sweden* (App. n. 43611/11), 23 March, 2016.

[63] *M. E. v. Sweden*, (App. n. 71398/12), 8 April, 2015.

[64] *Jabari v. Turkey*, (App. n. 40035/98), 11 July, 2000; *Abraham Lunguli v. Sweden*, (App. n. 33692/02), 1 July, 2003.

[65] *Hossein Kheel v. the Netherlands*, (App. n. 34583/08), 16 December, 2008.

[66] *M. v. The United Kingdom*, (App. n. 16081/08), 1 December, 2009.

[67] *D. v. The United Kingdom*, (App. n. 30240/96), 2 May, 1997; *N. v. The United Kingdom* (App. n. 26565/05), 27 May, 2008.

[68] *Paposhvili v. Belgium*, (App. n. 41738/10), 17 April, 2014.

[69] *Öcalan v. Turkey*, (App. no. 46221/99), 12 May, 2005; *Nivette v. France*, (App. n. 44190/98), 3 July, 2001.

there is a risk of flagrant denial of justice in the event of expulsion or extradition.[70] According to statistics, during 2017, out of a total of 1,669 precautionary measures requested to the ECtHR, 1,019 were outside the scope of application of the Court, 533 were refused, and 117 were adopted. The latter were linked to cases of expulsion.[71]

Nevertheless, the ECtHR has also adopted precautionary measures apart from these situations of expulsion or extradition, for example, under Article 3, the ECtHR adopted precautionary measures in order to safeguard the health of the applicant in detention.[72] In addition, under Article 6, the Court ordered interim measures to protect the right to a fair trial and, more specifically, the right to legal assistance in order to guarantee adequate representation of the defendant in the proceedings before the ECtHR.[73] Even more exceptionally, it has applied Rule 39 of its Rules of Court to protect rights under ECHR Article 8 (right to respect for private and family life) in cases where it considered that there was a potentially irreparable risk for private or family life,[74] including here the adoption of precautionary measures to prevent the destruction of evidence essential to the examination of a claim, by preventing a clinic from destroying the claimant's embryos before the ECtHR had the chance to complete its examination of the case;[75] or by adopting interim measures to suspend the implementation by the French Council of State of a judgement authorizing the withdrawal of the artificial nutrition and hydration which kept a fully dependent person alive.[76] Likewise, based on the protection of rights contained in Article 8, the ECtHR adopted a precautionary measure to suspend an eviction order.[77] Recently, the Court has also adopted provisional measures to protect rights related to freedom of expression recognized in Article 10 of the Convention.[78]

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[70] *Soering v. The United Kingdom*, (App. n. 14038/88), 7 July, 1989; *Othman (Abou Qatada) v. The United Kingdom*, (App. n. 8139/09), 17 January, 2012; *Ismoilov and Others v. Russia*, (App. n. 2947/06), 24 April, 2008. For an examination of the adoption of provisional measures regarding the violation of rights related to cases of deportation, see: C. Burbano Herrera, Y. Haeck, 'Staying the Return of Aliens from Europe through Interim Measures: The Case-law of the European Commission and the European Court of Human Rights' 13 *European Journal of Migration and Law* (2011), 31-51.

[71] ECtHR, Thematical statistics - Interim measures, available here and here.

[72] *Kotsaftis v. Greece*, (App. n. 39780/06), 12 June, 2008; *Paladi v. Moldova*, (App. n. 39806/05), 10 March, 2009; *Aleksanyan v. Russia*, (App. n. 46468/06), 22 December, 2008; *Salakhov e Islyamova v. Ukraine*, (App. n. 28005/08), 14 March, 2013.

[73] *Öcalan v. Turkey*, (App. no. 46221/99), 12 May, 2005; X. *v. Croatia*, (App. n. 11223/04), 17 July, 2008.

[74] *Amrollahi v. Denmark*, (App. n. 56811/00), 11 July, 2002; *Eskinazi and Chelouche v. Turkey*, (App. n. 14600/05), 6th December, 2005; *Neulinger and. Shuruk v. Switzerland*, (App. n. 41615/07), 6 July, 2010; *B. v. Belgium* (App. n. 4320/11), 10 July, 2012.

[75] *Evans v. The United Kingdom*, (App. n. 6339/05), 10 April, 2007.

[76] *Lambert and Others v. France*, (App. n. 46043/14), 5 June, 2015.

[77] *Yordanova and Others, v. Bulgaria*, (App. n. 25446/06), 24 April, 2012, *A.M.B. and Others v. Spain*, (App. n. 77842/12), 28 January, 2014; *Raji and Others v. Spain*, (App. n. 3537/13), 16 December, 2014.

[78] *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, (App. n. 16812/17), 28 November, 2017; *Sedletska v. Ukraine*, (App. n. 42634/18), 18 September, 2018.

In contrast, with regard to the right of political participation, it is true that, although Article 3 of the Additional Protocol to the European Convention on Human Rights only establishes an international obligation for States Parties to hold periodic and free elections, the case law has combated the restrictive regulation of this precept, and has considerably expanded the scopes of protection with regard to the right of political participation[79]. However, neither the defunct Commission nor the ECtHR have adopted interim measures for the protection of this right, with their case law being very restrictive regarding a possible extension of their material scope of protection. For example, the Court has excluded the application of Rule 39 of its Rules of Court for the adoption of interim measures in relation to the French State's decision not to hold a referendum on the Treaty of Lisbon, where it considered that "Elle n'a toutefois jamais accueilli une demande de mesures provisoires dans des circonstances telles que le refus d'un Etat d'organiser un référendum, fort éloignées du cadre habituel de pareilles mesures";[80] or for preventing the Turkish Constitutional Court from ruling on the dissolution of a political party.[81] In short, according to the present practice of the ECtHR, and as it stated in the *Mamatkulov and Askarov v. Turkey case,*[82] these urgent and exceptional measures are applied primarily by virtue of Articles 2 and 3 of the ECHR —and are usually linked to situations of expulsion or extradition— since, by their very nature, in the event of violation, damage of an irreversible nature can occur, which makes them more sensitive to being protected by the test applied by the ECtHR case law.

In the inter-American system, the application of provisional and precautionary measures has been adopted with respect to a much more extensive material scope, although it should be borne in mind that, based on the joint application of the aforementioned articles of the Inter-American Convention on Human Rights, more than one hundred precautionary measures have been requested.[83] Apart from these cases, to a lesser extent, interim measures have also been

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[79] See: *Mathieu-Mohin and Clerfayt*, (App. n. 9267/81), 2 March, 1987; *United Communist Party of Turkey and Others v. Turkey*, (App. n. 133/1996/752/951), 30 January, 1998; *Bowman v. United Kingdom* (141/1996/760/961), 19 February, 1998; *Hirst v. the United Kingdom (no. 2)*, (App. n. 74025/01), 6 October, 2005.

[80] ECtHR, Communiqué du greffier, Usage indu des demandes de mesures provisoires, 21 December, 2007.

[81] *Sezer c. Turkey*, (App. n. 35119/08), Press release 28 July, 2008.

[82] "Interim measures have been indicated only in limited spheres. Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage. While there is no specific provision in the Convention concerning the domains in which Rule 39 will apply, requests for its application usually concern the right to life (Article 2), the right not to be subjected to torture or inhuman treatment (Article 3) and, exceptionally, the right to respect for private and family life (Article 8) or other rights guaranteed by the Convention. The vast majority of cases in which interim measures have been indicated concern deportation and extradition proceedings", *Mamatkulov and Askarov v. Turkey*, (App. n. 46827/99 and 46951/99), 4 February, 2005, para. 104.

[83] *Matter of Millacura Llaipén et al. regarding Argentina*, provisional measures, orders: 6 July, 2006; 6 February, 2008; 25 November, 2011; 21 November, 2012; 13 February, 2013 and 26 November, 2013; 28 April, 2006; 4 July, 2006; 12 May, 2007; 8 July, 2009; 26 August, 2010 and 26 June, 2012; *Case of the Mapiripán Massacre v. Colombia*,

adopted with respect to other articles of the Pact of San José, such as Article 13 (freedom of thought and expression),[84] Article 16 (freedom of association),[85] Article 19 (rights of the child),[86] Article 21 (right to property),[87] Article 22 (freedom of movement and residence),[88] or Article 25 (right to judicial protection),[89] among others.[90]

In this system, however, precautionary measures have also been adopted for the protection of Article 23 (right to participate in government),[91] and more specifically with regard to guaranteeing the right of political participation. The American Convention on Human Rights —and, as we shall also see, in the case of the Covenant on Civil and Political Rights—, unlike the European Convention, explicitly recognizes the right of political participation. Thus, Article 23 of the Pact of San José states that all citizens are entitled "a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be

provisional measures, orders: 27 June, 2005; 3 May, 2008; 2 September, 2010 and 1 March, 2011; *Case of Gutiérrez Soler v. Colombia*, provisional measures, orders: 9 July, 2009; 30 June, 2011 and 23 October, 2012; *Case of Bámaca-Velásquez v. Guatemala, provisional measures, orders:* 29 August, 1998; 5 September, 2001; 21 February, 2003; 20 November, 2003; 11 March, 2005 and 27 January, 2009; *Case of Mack Chang et al. v. Guatemala*, provisional measures, orders: 21 February, 2003; 6 June, 2003; 26 January, 2009; 16 November, 2009 and 26 January, 2015; *Matter of Lysias Fleury regarding Haiti*, provisional measures, orders: 7 June, 2003; 2 December, 2003 and 25 November, 2008; *Matter of the Mendoza Prisons regarding Argentina*, provisional measures, orders: 22 November, 2004; 18 June, 2005; 30 March, 2006; 27 November, 2007 and 26 November, 2010; *Case of DaCosta Cadogan and Boyce et al. v. Barbados*, provisional measures, order: 2 December, 2008; *Matter of Dottin et al. regarding Trinidad and Tobago*, provisional measures, order: 14 May, 2013; *Matter of the Communities of the Jiguamiandó and the Curvaradó regarding Colombia*, provisional measures, orders: 6 March, 2003; 17 November, 2004; 15 March, 2005; 7 February, 2006; 5 February, 2008; 17 November, 2009; 30 August, 2010; 25 November, 2011; 27 February, 2012 and 22 May, 2013; *Case of Fernández Ortega et al. vs. Mexico*, provisional measures, orders: 30 April, 2009, 23 November, 2010; 20 February, 2012; 23 February, 2016; 7 February, 2017; *Matter of children deprived of liberty in the "Complexo do Tatuapé" of Fundação CASA regarding Brazil*, provisional measures, orders: 17 November, 2005; 30 November, 2005; 4 July, 2006; 3 July, 2007 and 25 November, 2008.

[84] *Case of Herrera Ulloa v. Costa Rica*, provisional measures, orders: 21 May, 2001; 23 May, 2001; 7 September, 2001; 6 December, 2001 and 26 August, 2002.

[85] *Matter of Carlos Nieto et al. regarding Venezuela*, provisional measures, orders: 9 July, 2004; 22 September, 2006; 3 July, 2007; 5 August, 2008 and 26 January 26, 2009.

[86] *Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic regarding Dominican Republic*, provisional measures, orders: 26 May, 2001 and 8 July, 2009; *Matter of L.M. regarding Paraguay*, provisional measures, orders: 1 July, 2011 and 27 April, 2012.

[87] *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, provisional measures, orders: 6 September, 2002 and 26 November, 2007; *Matter of Garífuna Comunity of Barra Vieja regarding Honduras*, provisional measures, order: 14 October, 2014.

[88] *Matter of Peace Community of San José de Apartadó regarding Colombia*, provisional measures, orders: 24 November, 2000; 18 June 18, 2002; 17 November, 2004; 15 March, 2005; 2 February, 2006; 6 February, 2008 and 30 August, 2010.

[89] *Case of Durand and Ugarte v. Peru*, provisional measures, order: 30 May, 2018.

[90] For a complete list of the resolutions on provisional measures issued by the Inter-American Court of Human Rights, see: Sistematización de las resoluciones sobre medidas provisionales emitidas por la Corte Interamericana de Derechos Humanos, 2018.

[91] *Case of Castañeda Gutman v. Mexico*, provisional measures, order: 25 November, 2005.

elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country."[92] In addition, in the following paragraph, it contemplates a series of limits restricting the exercise of political participation, only on grounds "of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."[93] In this system, there has also been an important jurisprudential work by the Court that has extended the material scope of protection to guarantee this right to participate in political life. However, unlike the ECtHR, precautionary measures were taken here to protect this right. Specifically, in the *Case of Castañeda Gutman*, on 17th October 2005, the Commission adopted precautionary measures to protect the political rights of this individual, specifically to allow his candidacy for the presidency of Mexico to be registered, while the Commission decided on the admissibility and merits of the case. Subsequently, the Commission requested interim measures before the Inter-American Court, considering that these measures did not afford the necessary protection to the individual and could cause him irreparable damage. Although the Inter-American Court finally did not deem the adoption of interim measures to be appropriate, this was not based on the consideration that this political right did not meet the test of "extreme gravity and urgency, and when necessary to avoid irreparable damage to persons" for the indication of these measures, but because it considered that, if this Court were to rule on them, "the petitioner's claims would be consummated with the order for the adoption of provisional measures. Indeed, to adopt the requested measures would be tantamount to deciding, *in limine litis* and by way of an incidental proceeding, issues central to the case and their consequences."[94]

In this sense, it can be argued that there is no doubt that most of the interim measures indicated in this system have been so with the aim of providing protection against possible irreparable damage linked to Articles 4 (right to life) and 5 (right to humane treatment) of the American Convention on Human Rights, which were adopted in the same way as the majority of precautionary measures in the European system, that is, on the basis of the equivalent articles in the ECHR, i.e. Article 2 (right to life) and Article 3 (prohibition of torture). In this system, however, the Commission has adopted precautionary measures for the protection of political rights recognized in Article 23 of the Pact of San José, and the Court has considered that they are eligible for protection through interim measures. It is true that these cases are very rare in practice, but this is not due to a restrictive application of the case law of the Commission or

[92] Art. 23.1, American Convention on Human Rights.

[93] Art. 23.2, *Ibídem*.

[94] *Matter of Castañeda-Gutman regarding Mexico*. Provisional Measures. Order of the Inter-American Court of Human Rights, 25 November, 2005, para. 6.

the Court, but because, as has been said, "el proceso de plena garantía de la participación política se encuentra en una fase intermedia, [...] se trata de un derecho inacabado [...]" and thus "es delicado, dilatado y aún insuficiente."[95] Furthermore, as Justice García-Sayán stressed in his concurring opinion in the *Case of Yatama*, the right to take part in the conduct of public affairs, "as all juridical categories, has evolved and has been reformulated with historical and social progress [...] In recent years, this evolution has developed substantially the concept of the right to take part in the conduct of public affairs, which, nowadays, is a reference point that includes a very wide variety of components [...] Indeed, the broad and general concept of the right "to take part in the conduct of public affairs," as it appears in the Convention, has been refined and expanded."[96] Therefore, this implies not only an extension of the material scope of this right, but also of its procedural scope, accepting the possibility of adopting this type of measures to protect rights of this nature.

Quantitatively, during 2017, the Court issued 22 decisions on interim measures, including cases of adoption, extension, lifting, or refusal of requests for interim measures.[97] Currently, the Court has 26 interim measures under supervision, with Colombia (5), Mexico (4), Brazil (4), and Venezuela (4) being the states with the highest number of indicated interim measures. In the case of the Inter-American Commission, in 2017, 1,037 measures were requested before the Commission, and 45 were granted. The largest number of requests for these measures were made in Colombia (246), Mexico (187), Argentina (88), and Brazil (76). However, the largest number of precautionary measures were granted with respect to the states of Venezuela (10) and Guatemala (6).[98]

In the case of the CCPR, between 2015 and 2017, the Special Rapporteur requested the adoption of interim measures in accordance with Rule 92 of the Rules of Procedure of the Committee in more than a hundred cases.[99] In addition, like the ECtHR and the Inter-American System, in most cases this body has recommended that States Parties adopt interim

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[95] We translate: 'The process of full guarantee of political participation is at an intermediate stage, [...] it is an unfinished right, [...], it's delicate, dilated and still insufficient', E. Bernales Ballesteros, 'El derecho humano a la participación política', 59 *Derecho PUCP: Revista de la Facultad de Derecho* (2006), 9-32, at 10.

[96] *Case of Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs, 23 June, 2005. Series C, nº 127. Concurring Opinion of Judge D. García-Sayán, para. 12-13.

[97] Annual Report of the Inter American Court of Human Rights, 2017, at 101.

[98] Statistics of the IACHR, available here.

[99] See: analysis of Committee's case law: Consideration by the Human Rights Committee at its 111th, 112th and 113th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights Jurisprudence - CCPR/C/113/4; Consideration by the Human Rights Committee at its 114th, 115th and 116th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights - CCPR/C/116/3; Consideration by the Human Rights Committee at its 117th, 118th and 119th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights - CCPR/C/119/3.

measures[100] to avoid potential violations of the right to life (Article 6)[101] and the right not to be subjected to torture and inhuman treatment (Article 7).[102] However, more exceptionally, it has also adopted interim measures with the aim of preventing possible violations of the freedom of thought, conscience, or religion (Article 18),[103] freedom of expression (Article 19),[104] or the rights of indigenous people (Article 27).[105] With regard to the political rights recognized in Article 25 of the International Covenant on Civil and Political Rights, as noted by the Committee in its General Comment No. 25, "Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol",[106] which would also imply the application of interim measures.

This is confirmed by the United Nations when it emphasizes the importance that the system attaches to this right. It has been highlighted in the report "Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them",[107] by the United Nations High Commissioner for Human Rights, which states that Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognizes the right and opportunity of every citizen to have access, on general terms of equality, to public service in his country, and that, in addition, "Restrictions to the right to participate in political and public affairs, while permissible, must be objective, reasonable, non-discriminatory and provided for by law [...] The "essence" of the right should never be affected. Several international human rights mechanisms have emphasized that limitations should remain the exception rather than the rule."[108] Thus, the report goes on to point out that the human rights mechanisms have concluded that the limitation of political participation on the grounds of

[100] For a study on situations in which interim measures requests have been issued, see: S. Ghandhi, 'The Human Rights Committee and Interim Measures of Relief', 13(2) *Canterbury Law Review* (2007), 203-226, at 206-210.

[101] CCPR, *Glenn Ashby*, Com. n. 580/1994, 21 March, 2002; *Lyubov Kovaleva and Tatyana Kozyar*, Com. n. 2120/2011, 29 October, 2012.

[102] CCPR, *Sendic Antonaccio*, Com. n. 063/1979, 28 October, 1981; *Alice Altesor and Victor Hugo Altesor*, Com. n. 010/1977, 29 March, 1982; *Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov*, Com. n. 1461/2006,1462/2006,1476/2006,1477/2006, 16 July, 2008.

[103] CCPR, *Malcolm Ross*, Com. n. 736/1997, 18 October, 2000.

[104] CCPR, *Hak-Chul Shin*, Com. n. 926/2000, 16 March, 2004.

[105] CCPR, *Bernard Ominayak, Chief of the Lubicon Lake Band*, Com. n. 167/1984, 26 March, 1984.

[106] CCPR, General Comment No. 25 - The right to participate in public affairs, voting rights and the right of equal access to public service (art. 25), CCPR/C/21/Rev.1/Add.7, 27 August, 1996, para. 2.

[107] Report of the Office of the United Nations High Commissioner for Human Rights, "Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them", A/HRC/30/26, 23 July, 2015.

[108] *Ibídem*, para. 14.

"intellectual or psychosocial impairment and the imposition of linguistic requirements for candidates for public office or the automatic disenfranchisement of detainees, convicted felons or people under guardianship have been found by human rights mechanisms to constitute unreasonable and discriminatory restrictions on the exercise of political and public participation rights."[109] It further indicates that General Comment No. 25 on Article 25 of the Covenant, as well as the case law of the CCPR, "provide guidance on the measures that States should take to implement the right to participate in political and public affairs."[110] In this regard, it is true that the Committee has taken a position on a number of issues concerning the rights recognized in Article 25 of the Covenant on Civil and Political Rights, as highlighted by two examples from recent practice. In *Sudalenko v. Belarus*,[111] the Committee had to examine whether the rights protected under Article 25 of the Covenant had been violated, in particular the right to be elected to public office, due to Belarus' refusal to allow the author of the communication to hold a rally before his future voters. The Committee considered that "the possibility of meeting with potential voters as integral to the rights guaranteed under article 25 of the Covenant, which includes the right to be elected to public office. Although the State party may establish rules and regulations governing political campaigns, those rules and regulations must not disproportionally restrict the rights guaranteed under the Covenant."[112] As a result, the Committee held that his rights, under Article 25, Paragraph b), read in conjunction with Article 21 of the Covenant, had been violated. More recently, in *Sacrano v. Venezuela*,[113] the Committee considered that the termination of his duties as mayor and his de facto disqualification from exercising his right to vote and be elected also constituted a violation of Article 25(b) of the Covenant.

However, despite the existing case law on the protection of this right, with regard to the adoption of precautionary measures for its protection, there is no practice as such in the procedure of this body. In *Diergaardt*,[114] interim measures were requested to the Committee, as the authors of the communication considered that the termination of self-government in their community and the new territorial division had divided the Baster community, which would have a negative impact on the rights of a minority, by virtue of Article 25(a) and (c) of the Covenant. However, the Committee did not find a violation of Article 25, nor did it determine the necessity of adopting such measures in advance. In addition, it is necessary to

[109] *Ibídem*, para. 15.
[110] *Ibídem*, para 6.
[111] CCPR, *Sudalenko v. Belarus*, Com. n. 1992/2010, 27 March, 2015.
[112] *Ibídem*, para. 8.6.
[113] CCPR, *Scarano v. Venezuela*, Com. n. 2481/2014, 17 March, 2017. See also, CCPR, *Delgado Burgoa v. Bolivia*, Com. n. 2628/2015, 28 March 2018; CCPR Maldonado Iporre v. Bolivia, Com. n. 2629/2015, 28 March 2018.
[114] CCPR, *Diergaardt et al. v. Namibia*, Com. n. 760/1997, 25 July, 2008.

emphasize that the measures requested were not strictly to protect this right but were aimed at preventing expropriation or the purchase and sale of community land. In a subsequent case, *Dissanayake*, the individual concerned considered that his expulsion from Parliament, his disqualification for nine years from participating in the conduct of public affairs and, in particular, from carrying out relevant duties in the main opposition party in a presidential election year, as well as the suspension for a period of nine years of his right to vote and to be elected, amounted to a clear violation of his rights under Article 25 of the Covenant. The State Party in question considered that the disqualification of a convicted person from voting or standing as a candidate could not be interpreted as an undue restriction for the purposes of Article 25 of the Covenant. However, the Committee held that "the right to vote and to be elected may not be suspended or excluded except on grounds, established by law, which are objective and reasonable."

Furthermore, referring to Comment No. 25, it considered that "if a conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence." In this specific case, although it found that such restrictions were indeed provided for in the Sri Lankan legislation, it did not deem the restrictions to be reasonable. As a result, "the Committee concludes that the prohibition on the author's right to be elected or to vote for a period of seven years after conviction and completion of sentence, are unreasonable and thus amount to a violation of article 25(b) of the Covenant."[115] Again, in this case, precautionary measures were requested, but these were requested because the author of the communication, during the proceedings in his domestic courts, had been sentenced to two years of hard labor for contempt, and he considered that he could suffer irreparable damage if he served his sentence. However, the Special Rapporteur finally considered that working in a print shop did not appear to cause such damage.

It is in this context that, in March 2018, the action of this Committee took place, urging Spain to adopt all the necessary measures to guarantee that Jordi Sánchez —former president of the Catalan National Assembly and JxCat deputy, who was nominated as a candidate for President of the Generalitat— could exercise his political rights in an attempt to protect the right granted under Article 25 of the Covenant.[116] In particular, the CCPR noted that "Under rule 92 of the Committee's rules of procedure, the State party has also been requested to take all necessary measures to ensure that Mr. Jordi Sánchez I Picanyol can exercise his political rights in compliance with article 25 of the Covenant."[117] At first glance, this position of the

[115] CCPR, *Dissanayake*, Com. n. 1373/2005, 4 August, 2008, para. 8.5.

[116] CCPR, Procedure of individual communication under the Optional Protocol, G/SO 215/51 ESP (140), 23 March, 2018.

[117] *Ibídem*.

Committee appears to be novel. However, it should be borne in mind that, as highlighted by the Committee, "this request does not imply that any decision has been reached on the substance of the matter under consideration."[118] This communication was therefore included in the register of individual claims, which constitutes a step prior to the possible admissibility of the complaint, where Spain has six months to put forward the arguments on the admissibility and merits of the case, which will be assessed by the CCPR at a later stage.[119]

More recently, on the 22th of May, the CCPR rejected the request of the representatives of former President Lula da Silva to adopt provisional measures to prevent his entry in prison because "based on the information that Lula presented to the committee, it has not been established that there is a risk of irreparable damage"[120]. However, the representatives of the former president, considering that there were new elements that demonstrated the possibility of suffering irreparable damage, submitted another request to the Committee. This time, the CCPR in its communication of August 17th concluded that, "the facts indicate the existence of a possible irreparable harm to the author's rights under article 25 of the Covenant"[121]. Thus, by virtue of Article 92 of its Rules of Procedure, it requested the State Party, "to take all necessary measures to ensure that the author enjoy and exercise his political rights while in prison, as candidate to the 2018 presidential elections, including appropriate access to the media and members of his political party; as well as not to prevent the author from standing for election at the 2018 presidential elections, until the pending applications for review of his conviction have been completed in fair judicial proceedings and the conviction has become final".[122]

### (E) THE OBLIGATORY CHARACTER OF COMPLYING WITH THE INTERIM MEASURES ADOPTED

With regard to the legally obligatory character of precautionary measures with regard to the

[118] *Ibídem.*

[119] Three days after the aforementioned Communication, the CCPR had also accepted the complaint filed by former President Carles Puigdemont against an alleged violation of Article 25 of the International Covenant on Civil and Political Rights in Spain. However, in this case, precautionary measures are not indicated; the former President is just requested to point out "the kind of remedies you would like to obtain from the State party in case the Committee concludes that a violation of the Covenant has taken place in the case you have submitted, unless you have already indicated these remedies in your initial submission", (CCPR, Procedure of individual communications under the Optional Protocol, G/SO 215/51 ESP (141), 26 March, 2018). In any event, it should not be forgotten that —as in the case of Jordi Sánchez— the report of the Committee only states that the complaint was given permission to proceed and grants the Spanish authorities a period of six months to provide all the information on the matter. As a result, this permission does not prejudge the actions of the executive or the judiciary, nor does it determine the adoption of any specific measure.

[120] Statement of Sarah Cleveland, CCPR member, press conference in Geneva, 22 May, 2018.

[121] CCPR, ref: G/SO215/51 BRA (1), 17 August, 2018.

[122] *Ibídem.*

international protection of human rights, the issue differs significantly from one system of protection to another. The basis for this dissimilarity is determined by the different character of the provisions relating to these measures. As has already been pointed out, in the European system, provisions are of a regulatory character. In principle, this has meant that, during the first few years, the case law of the ECtHR refused to recognize the obligatory character of these measures, so that non-compliance with them did not imply any legal obligation towards the state to which they were addressed. However, from the *Mamatkulov and Abdurasulovic v. Turkey case*, in a move confirmed by the Grand Chamber in *Mamatkulov and Askarov v. Turkey*, the ECtHR radically changed its position and recognized the obligatory character of the States concerned to comply with the interim measures adopted by the ECtHR. With regard to the inter-American system, the interim measures of the IACHR have a conventional basis, so that from the outset, any failure by States to comply with them is a violation of the principle of *pacta sunt servanda*. Specifically, regarding the character of these measures indicated by the Inter-American Commission, we will see how the debate has also been settled by the case law of the IACHR. Finally, with respect to the CCPR, this aspect is determined by a regulatory standard, although there has been an important jurisprudential work that has been done on this issue and that will be analysed under this heading.

In the European system, it was in the *Cruz Varas case* that this issue was examined, first by the Commission and then by the ECtHR. The Commission, in its report on the merits of the case, considered that Sweden had failed to fulfill its obligations under Article 25(1), now Article 34 ECHR, by failing to comply with the precautionary measures adopted by the Commission to prevent the deportation of Mr Cruz Varas, on the understanding that the Commission did not need to assess whether the indication of precautionary measures was obligatory in general terms for the States addressed. The Commission's examination was limited "on the specific question of whether, in the circumstances of the case at hand, the failure of Sweden to comply with the indication constituted to breach of Art. 25 (l) of the Convention."[123] For the Commission, "Although the Convention itself is silent as to provisional measures and their nature, it does contain a general obligation of Contracting States, in Art. 25(l), not to interfere with the effective exercise of the right of petition under the Convention."[124] However, for the Court, the Commission's reasoning was not correct, considering that there was no provision in the ECHR empowering the Commission to order precautionary measures. For the Court, allowing an interpretation that imposes obligations on States meant misconstruing the

[123] See the report of the Commission in *Publications of the European Court of Human Rights*, series A, vol. 201, at 42 and ss.

[124] P. Vernet, 'Los Alcances de la Nueva Jurisprudencia de la Corte Europea de Derechos Humanos Respecto de las Medidas Provisionales', 21 *Anuario Español de Derecho Internacional* (2005) 535-560, at 545.

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regulatory provision,[125] thus creating new rights and obligations for the States Parties, which, besides, at the time of the drafting of the ECHR, they ultimately refused to include. The Court added that other sources of international law could not be used to consider this obligation either, inasmuch as it could not be inferred that a custom had formed on its obligatory character, since there was no *opinio iuris* on the matter, nor could it be determined, on the basis of the existence of general principles of international law, that the interim measures indicated by international courts entailed legal obligations for states.[126] However, it is important to remember that the ECtHR ruled by 10 votes against the dissenting vote of 9 judges, who pointed out that, while unlike other international instruments, there is no explicit clause on interim measures:

> "this does not exclude an autonomous interpretation of the European Convention with special emphasis placed on its object and purpose and the effectiveness of its control machinery. In this context too, present-day conditions are of importance. Today the right of individual petition and the compulsory jurisdiction of the Court have been accepted by nearly all the member States of the Council of Europe. It is of the essence that the Convention organs should be able to secure the effectiveness of the protection they are called on to ensure."[127]

Ten years later, in the *Conka case*,[128] the ECtHR reaffirmed its position. However, a few years later, the jurisprudential shift of the Court was reflected in *Mamatkulov and Abdurasulovic v. Turkey*, where the ECtHR, deviating from its previous jurisprudence, considered that, if a State did not comply with the interim measures ordered, it was failing to comply with its obligations under the Convention, thereby undermining the effectiveness of the right of individual application, recognized in Article 34 of the Convention, because it thus prevented the Court from ensuring effective protection and from carrying out an effective examination of the application laid down in the same provision. In addition, the scope of this provision included the obligation to "refrain from any act or omission that will undermine the authority and effectiveness of the final judgment."[129]

Its new line of argument has led some authors to state that "The change of direction is a masterstroke as the silence of the Convention regarding the binding force of interim measures no longer constitutes in 2005 an insurmountable barrier."[130] The Court based its argument on

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[125] *Case of Cruz Varas and Others v. Sweden*, (App. n.15576/89), 20 March, 1991, para. 99.

[126] *Case of Cruz Varas and Others v. Sweden*, para. 101 and 102.

[127] *Case of Cruz Varas and Others v. Sweden*, Joint Dissenting Opinion of Judges, parr. 5. See, E. García de Enterría, 'Sobre la legitimidad de las medidas cautelares utilizadas por la Comisión y el Tribunal Europeo de Derechos Humanos', 25 *Poder Judicial* (1992) 9-31.

[128] *Case of Conka v. Belgium*, (App. n. 51564/99), 8 February, 2002.

[129] *Mamatkulov and Abdurasulovic v. Turkey*, (App n. 46827/99, 46951/99), 6 February, 2006, para. 110.

[130] L. Burgorgue-Larsen, 'Interims measures in the European system of Human Rights', 2 (1-2) *Inter-American and European Human Rights Journal* (2009) 99-118, at 103.

the general principles of law, on the case law of several courts concerning the obligatory character of precautionary measures, and on the character of these measures in relation to the committees established pursuant to the Covenants on Human Rights. With regard to the general principles, the Court justified the obligatory character of these measures on the basis of the application of the principle of "inherent powers", considered by many authors to be "a general principle of international law and inherent part of the judicial function" [131] and particularly necessary when these interim measures are not included in their constituent instruments. In addition, the Court also considered that failing to comply with these measures was a breach of the obligations pursuant to the European Convention, on the grounds that, when a state "ratifies a treaty and accepts the competence or jurisdiction of the tribunal charged with the enforcement of the rights protected in the treaty, the State must comply in good faith not only with the substantive provisions of the treaty but also with its procedural and regulatory provisions."[132] From this perspective, the ECtHR's legal argument for justifying these measures is based on what is already recognized in *Loizidou v. Turkey*: "the special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms."[133] Thus, given the specificity and importance of the rights recognized in this Treaty, the adoption of precautionary measures goes beyond granting effectiveness to individual claims, since this is about protecting the very essence of the Convention. In addition, the ECtHR understood, as the judges had argued in the dissenting opinion in the *Cruz Varas case*, that the Convention should be interpreted and applied in a way that would make the protection of recognized rights effective, which implies a dynamic and evolving position with respect to its interpretation. In other words,

> "on the one hand it takes into account the international judicial environment and the resulting general principles of international law (in favour of what some call the unity of the judicial function); hence, it states that «whatever the legal system in question, the proper administration of justice requires that no irreparable action be taken while proceedings are pending». On the other hand, it relies on the extraordinary specificity of the Convention right to individual application (emphasising here the single nature of the European judicial system) which must not be obstructed in any way." [134]

[131] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Grotius Publications, Oxford, 1953) at 269.

[132] *Mamatkulov and Abdurasulovic v. Turkey*, para. 109.

[133] *Mamatkulov and Abdurasulovic v. Turkey*, para. 100. See: *Loizidou v. Turkey*, (preliminary objections), 23 March, 1995, Series A nº 310, para. 70).

[134] L. Burgorgue-Larsen, *supra* n. 127, at 105. See also, O. De Schutter, 'The Binding Character of the Provisional Measures adopted by the European Court of Human Rights', 7 *International Law FORUM du Droit International* (2005), 16-23, at 21.

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In this regard, the ECtHR case law has also clarified the scope of these measures by considering, in *Olaechea Cahuas v. Spain*, that non-compliance with Article 34, when the respondent state does not adopt the interim measures indicated, does not depend on whether or not the risk that led to their adoption actually materializes.[135] The Court also did not admit in *Ben Khemais v. Italy*[136] the non-implementation of the measures adopted in cases of expulsion by the respondent States Parties, because these states argued that diplomatic guarantees and assurances had been obtained from the state to which the individual was to be expelled.[137] In general terms, the ECtHR has never accepted the "objective impediments"[138] alleged by states, such as the absence of a legal mechanism in their legal systems[139] to justify non-compliance by States Parties.

In the case of the inter-American system, from the very beginning, "the drafters of the American Convention of Human Rights, from a consideration of twenty years of practice of the European human rights institutions, considered that a binding interim measures power was an important part of any scheme for the effective protection of human rights."[140] Thus, the obligation of states to comply with precautionary measures and provisions derives in general terms from Article 1(1) of the American Convention on Human Rights itself, in which states commit themselves to respect the rights and freedoms recognized therein, and to guarantee their free and full exercise to all persons subject to their jurisdiction.[141] Furthermore, with respect to the interim measures adopted by the IACHR, given their conventional origin, their obligatory character is not disputed. This provision is further reinforced by what is laid down in Article 68(1), where the States Parties to the Convention undertake to comply with the decisions of the Court. This implies that the submission to the contentious jurisdiction of the Court extends to complying with the interim measures adopted, as the IACHR pointed out in the *Case of Velásquez Rodríguez v. Honduras*, when it stated that the Court's jurisdiction

[135] *Olaechea Cahuas v. Spain*, (App. n. 24668/03), 10th August 2006, para. 81. See: C. Harby, 'The Changing Nature of Interim Measures before the European Court of Human Rights', 1 *European Human Rights Law Review* (2010), 73-84, at 74-75; Y. Haeck, C. Burbano Herrera and L. Zwaak, 'Non-Compliance With a Provisional Measure Automatically Leads to a Violation of the Right of Individual Application ... or Doesn't It? Strasbourg Court Takes Away Any Remaining Doubts and Broadens Its Pan-European Protection', 4 *European Constitutional Law Review* (2008), 41-63.

[136] *Ben Khemais v. Italy*, (App. n. 246/07), 24 February, 2009, para. 80-83.

[137] On cases of non-compliance, see: Y. Haeck, C. Burbano Herrera and L. Zwaak, 'Strasbourg's Interim Measures under Fire: Does the Rising Number of State Incompliances with Interim Measures Pose a Threat to the European Court of Human Rights?', 11 *European* Yearbook on *Human Rights* (2011), 375-403.

[138] See: *Grori v. Albania*, (App. n. 2536/04), 7 July, 2009, para. 191, 194 and 195.

[139] *Shtukaturov v. Russia*, (App. n. 44009/05), 27 March, 2008, para. 148.

[140] R. J. Macdonald, *supra* n. 7, at. 722.

[141] See, M. Del Rosario, 'Las Medidas Cautelares y Provisionales de la Comisión y la Corte Interamericana de Derechos Humanos, Funciones y Alcances', 22 *Praxis de la Justicia Fiscal y Administrativa* (2017), 37-62.

regarding interim measures had been established in the Pact of San José, but also by "*el carácter de órgano judicial que tiene la Corte y los poderes que de ese carácter derivan.*"[142] Finally, with respect to the obligatory character of the precautionary measures contemplated in the Rules of Procedure of the Commission, the IACHR, in its decision on interim measures in the *Matter of the Mendoza Prisons*, considered it appropriate to point out, "The ultimate aim of the American Convention is the effective protection of human rights, and, pursuant to the obligations contracted under it, the States should ensure the effectiveness of their mechanisms (endow them with effet utile), which implies implementing and carrying out the resolutions issued by its supervisory organs, whether the Commission or the Court."[143] Nevertheless, some authors have expressed the view that the Inter-American System should develop legal arguments regarding the possible non-compliance with the interim measures by the States Parties, since, despite being established in legally binding provisions, "The absence of true legal effect given to provisional measures by the Inter-American Court and the lack of decisions that endorse its position on the legal consequences of non-compliance by States with provisional measures go against the very credibility of the institution because its decisions may begin to be perceived by individuals and other social actors as decisions that are simply theoretical."[144]

As to the Human Rights Committee, and as to whether these measures create obligations for States Parties to the Covenant, the answer is that, in principle, since the prerogative to indicate these measures is contained in a regulatory provision, they do not have such an obligatory character. However, this Committee also seems to consider that despite coming from a regulatory provision, the binding nature of these measures is based on the principle *pacta sunt servanda* and on the implicit obligation of the States Parties to comply with the legal obligations assumed when affirms that, "Failure to implement such interim or provisional measures is incompatible with the obligation to respect in good faith the procedure of individual communication established under the Optional Protocol."[145] In this respect, there has been a change in the position of the CCPR, with a new —much more explicit— approach to the obligatory adoption of the precautionary measures adopted by this Committee until the famous *Piandiong* advisory decision, perhaps because, as has been said, the Committee "had

[142] *Case of Velásquez Rodríguez v. Honduras*, Order of the Inter-American Court of Human Rights, 19 January, 1988, para. 1.

[143] *Matter of the Mendoza Prisons regarding Argentina. Provisional Measures*. Order of the Inter-American Court of Human Rights, 22 November, 2004, para.16.

[144] C. Burbano Herrera, Y. Haeck, 'Letting States off the Hook? The Paradox of the Legal Consequences following State Non-compliance with Provisional Measures in the Inter-American and European Human Rights Systems', 28 (3) *Netherlands Quarterly of Human Rights* 2010, 332-360, at 360.

[145] General comment no. 33, Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights, 25 June, 2009, CCPR/C/GC/33.

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clearly lost patience with State's indifference towards interim measures",[146] because, in previous cases, such as *Mansaraj et al.*[147] and *Glenn Ashby*,[148] although the Committee had requested States Parties to suspend the executions of the individuals, states had ignored the interim measures indicated. However, in *Dante Piandiong et al. v. Philippines*, the CCPR provides a more explicit and categorical basis for the consequences of non-compliance with interim measures by States Parties, due to the very nature of the body, as it considers that

> "By adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and Article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (Article 5 (1), (4)). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its views."[149]

In its argumentation, the Human Rights Committee went on to state that "a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile"[150] and it found that: "Interim measures (...) are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from the country, undermines the protection of Covenant rights through the Optional Protocol."[151] In short, it follows from the foregoing that the Committee's competence to hear complaints and, where appropriate, to adopt interim measures derives from the principle of *pacta sunt servanda*, which entails a legal obligation for the states which have become bound by the Optional Protocol. For some authors, this has meant that, "even though the HRC has never used the term "binding" [...] it has implicitly endowed its interim measures with obligatory character in so far as it considers incompliance as a separate or autonomous breach of the Optional Protocol and the Covenant."[152] Another author, in a similar vein, considers that "The argument that interim measures are essential to the competence granted to quasi-judicial enforcement bodies by the States and that

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[146] G. J. Naldi, 'Interim Measures in the UN Human Rights Committee', 53(2) *The International and Comparative Law Quarterly*, (2004), 445-454, at. 449.

[147] CCPR, *Mansaraj et al.*, Com. n. 839/1998,840/1998,841/1998, 16 July, 2001.

[148] CCPR, *Glenn Ashby*, Com. n. 580/1994, 21 March, 2002.

[149] CCPR, *Dante Piandiong, et. al. v. Philippines*, Com. n. 869/1999, 19 October, 2000, para. 5.1.

[150] *Ibídem*, para. 5.2.

[151] *Ibídem*, para. 5.4.

[152] H. Keller, C. Marti, *supra* n. 117, at 345.

such measures are, therefore, implied in the underlying treaty is compelling and necessary to the fabric of international law."[153]

Recently, the CCPR has pronounced again on this issue in the framework of the procedure of individual communications under the Optional Protocol in the case of Lula Da Silva, since his representatives presented a request to the Committee to clarify the legal nature of the provisional measures adopted on August 17th. In this regard, the Committee referred to the aforementioned General Comments No. 33 and No. 31, which consider that this type of measure is essential to avoid irreparable damage and involves obligations that all branches of government and other public or governmental authorities of the States Parties. In his view, this interpretation flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[154]

In any event, despite the Committee's attempts to afford binding force to the adoption of interim measures indicated by it, these measures cannot actually be considered to have such force, which does not prevent any State Party, as guarantor of the democratic state and the rule of law, from considering in good faith the Committee's recommendations to ensure the protection of the human rights recognized in an international treaty to which it is bound. In the case of Spain, it is established jurisprudence in different national jurisdictions that this type of measure does not have executive force. Regarding the Constitutional Court, it has considered that "las «observaciones» que en forma de Dictamen emite el Comité no son resoluciones judiciales, puesto que el Comité no tiene facultades jurisdiccionales (como claramente se deduce de la lectura de los arts. 41 y 42 del Pacto), y sus Dictámenes no pueden constituir la interpretación auténtica del Pacto, dado que, en ningún momento, ni el Pacto ni el Protocolo facultativo le otorgan tal competencia".[155] The Supreme Court, in the same line, has affirmed that "los dictámenes del Comité de Derechos Humanos de las Naciones Unidas no tienen carácter vinculante, pues el Pacto Internacional de Derechos Civiles y Políticos (...), cuando regula, en los artículos 28 y siguientes, al citado Comité, especialmente en los artículos 41 y 42, no diseña un órgano jurisdiccional, con facultades de carácter jurisdiccional, es decir, para determinar el Derecho de forma definitiva en caso de conflicto e imponerse frente a todos.

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[153] J. Pasqualucci, 'Interim Measures in International Human Rights: Evolution and Harmonization', 38(1) *Vanderbilt Journal of Transnational Law* (2005) 1-49, at 16.

[154] CCPR, procedure of individual communication under the Optional Protocol, ref: G/SO215/51 BRA (1), 10 September, 2018.

[155] We translate: "the 'observations' issued by the Committee in the form of a View, are not judicial decisions, since the Committee does not have jurisdictional powers (as is clear from the reading of articles 41 and 42 of the Covenant), and its Views cannot constitute the authentic interpretation of the Covenant, since, neither the Covenant nor the Optional Protocol give it such competence", STC 70/2002, 3 April, 2002. In the same sense see: STC 80/2003, 28 April, 2003; STC 296/2005, 21 November, 2005; STC 116/2006, 24 April, 2006.

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Ni tampoco se le atribuye al mismo el monopolio para la interpretación y aplicación de sus normas".[156] However, the absence of legal and enforcement authority "no significa que no deban ser tenidos en cuenta por los Estados para encauzar su acción legislativa de forma que se cumplan las exigencias derivadas de la interpretación que, de las normas del Pacto, hace el Comité, pues lo cierto es que el Pacto forma parte de nuestro Derecho interno según el artículo 96.1 de la CE".[157] From its side, the National Hight Court has also pronounced in the same sense.[158]

However, with regard to the obligatory character of the measures in the case of Jordi Sánchez,

[156] We translate: "The views adopted by the Human Rights Committee are not binding force, since the International Covenant on Civil and Political Rights (...), when it regulates, in articles 28 et seq., does not design a jurisdictional body, determine the law definitively in case of conflict and impose on everyone. Nor is the monopoly for the interpretation and application of its norms attributed to it", STS 507/2015, 6 February, 2015. In the same sense see: STS 3862/2009, 9 March, 2011; STS 4310/2017, 6 November, 2017; STS 3094/2018, 11 July, 2018.

[157] We translate: "it does not mean that they should not be taken into account by the States in order to direct their legislative action so that the requirements derived from the Committee's interpretation of the rules of the Pact are met, because the Covenant is part of our domestic law according to Article 96.1 of the EC", *Ibídem*. In the opposite direction, the Supreme Court has recently ruled on the obligatory character of the recommendations originating from the Committee of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), stating that "aunque ni la Convención ni el Protocolo Facultativo regulan el carácter ejecutivo de los Dictámenes del Comité de la CEDAW, no puede dudarse que tendrán carácter vinculante/obligatorio para el Estado parte (...) una alegación o denuncia de vulneración de derechos fundamentales que se apoya en una declaración de un organismo internacional reconocido por España y que ha afirmado que el Estado español ha infringido concretos derechos de la recurrente que tenían amparo en la Convención, acordando medidas de reparación o resarcimiento en favor de la denunciante y medidas de actuación por parte de España... en el seno de un procedimiento expresamente regulado, con garantías y con plena participación de España (...). Las obligaciones internacionales relativas a la ejecución de las decisiones de los órganos internacionales de control cuya competencia ha aceptado España forman parte de nuestro ordenamiento interno, una vez recibidas en los términos del artículo 96 de la Norma Fundamental, y gozan de la jerarquía que tanto este artículo –rango supralegal- como el artículo 95 –rango infraconstitucional– les confieren", We translate: "neither the Convention nor the Optional Protocol regulates the executive nature of the Views of the CEDAW Committee, it cannot be doubted that they will be binding / obligatory character for the State party (...) an allegation of infringement of fundamental rights based on a declaration by an international body recognized by Spain and which has affirmed that the Spanish State has infringed concrete rights of the appellant under the Convention, agreeing reparation measures in favor of the whistleblower and measures of action by Spain ... within a procedure expressly regulated, with guarantees and with full participation of Spain (...). The international obligations related to the execution of the decisions of the international control bodies whose competence has been accepted by Spain are part of our domestic legal system, once received in the terms of Article 96 of the Spanish Constitution, and enjoy the hierarchy that the article 96 and 95 confer them", STS 1263/2018, 17 July, 2018. According to K. Casla, "This is a revolutionary decision not only for Spain, but for comparative constitutional law and for international human rights law", Supreme Court of Spain: UN Treaty Body individual decisions are legally binding, *EJIL Analysis*, 1 August, 2018. However, it may be advisable to take into account the exceptional circumstances of the case, consisting of the fact that, in a separation case, following the judicial decision to lift the regime of supervised visits, the ex-partner of the plaintiff murdered the common daughter. These dramatic circumstances could generate a special sensitivity that would explain the proclamation of the patrimonial responsibility of the Spanish State in the specific case.

[158] SAN 989/2016, 2 February, 2018.

which are very different from those of the aforementioned cases, it should be borne in mind that the CCPR, when accepting the complaint, is only aware of the allegations made by the interested party, without yet having been checked against Spain's allegations in the specific case. In addition, the restriction of the right of political participation, as a limited right, could also be considered to be justified, given that both his situation of pretrial detention and the refusal of permission to attend the plenary session for his investiture are decisions that have been adopted by national courts in due process of law and in compliance with the applicable Spanish regulations. Finally, in view of the non-binding nature of these measures, it should be added that they cannot interfere with decisions taken by the judiciary either. In any case, one might ask, to what extent could the Spanish Government adopt any measure without interfering with the work of the courts, taking into account also the generic nature with which they have been formulated by the CCPR for this specific case. Without going into this question, it is worth mentioning that, in order to have these measures complied with, Jordi Sánchez lodged an amparo appeal before the Constitutional Court, requesting that, pursuant to the decision of the CCPR, the possibility of defending his candidacy for the Presidency of the Generalitat be authorized through alternative means, such as videoconferencing from prison or before the court. In its Writ, the Constitutional Court rules first on the terms of the communication, stating that "it is enough to look at the generic content of the resolution to reject the existence of the relation claimed by the appellant between that communication and the eventual issuance of the requested precautionary measure."[159] Subsequently, the Constitutional Court rules on the nature of Article 25 of the Covenant and its limitations, considering that it is true that this article cannot be unduly restricted, but adds that the situation of provisional detention of Jordi Sánchez "inherently" imposes limitations on the political rights deriving from the precautionary situation of loss of liberty. Therefore, it finally concludes that "the object of this *amparo* appeal is to assess the conformity to the law of the judicially approved measure at issue, as well as its legitimate purpose and its proportionality. Therefore, the resolution of such issues may not be addressed through precautionary measures and must wait to the final substantive judgement of the Court."[160] In this regard, perhaps contrary to what the Constitutional Court argues, instead of entering to assess the generic nature of the content of the communication to reject the granting of the requested precautionary measure, it would have been sufficient to have referred to its jurisprudence based on the non-executive or binding legal nature of the decisions of this Committee. In any case, it will be necessary to wait for the Committee to decide on the admissibility and —if appropriate— on the merits of the case, bearing in mind, moreover, that Jordi Sánchez is no longer a candidate for the Presidency of the Generalitat.

[159] STC 2228/2018, 22 May, 2018, para. 5.

[160] *Ibídem*.

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Moreover, if we analyse the practice regarding non-compliance, the Committee, in its documents analysing its practice, has confirmed that there are a significant number of cases of non-compliance with interim measures by some States Parties.[161] A recent example of non-compliance is *Aarrass v. Spain*,[162] where the Committee requested the State Party not to extradite the applicant to Morocco while the case was pending. Spain ignored this request and the extradition took place a few days later. Russia also failed to comply with the measures indicated in the case of *N.S. v. Russian Federation*[163], which were aimed at preventing the extradition of the applicant to Kyrgyzstan. In the cases *Yuzepchuk v. Belarus* and *Grishkovtsov v. Belarus*,[164] the Committee indicated interim measures to Belarus to prevent it from enforcing the death sentence of the applicants while the Committee was considering the matter. In both cases, however, Belarus ignored the Committee's indications and a few days later both individuals were executed.

## (F) CONCLUSIONS

As the present paper has attempted to highlight, subsidiary mechanisms for the protection of human rights at the international level are a key element in strengthening the protection guaranteed by the internal legal systems of states. This extends to the adoption of precautionary measures at the international level, as they are a further guarantee of the full protection of the human rights recognized in international Treaties on the subject. In this sense, the evolution and practice of the different systems have given rise to different solutions regarding the material scope in the protection of these rights, such as the possibility of adopting precautionary measures for the protection of rights of a political nature.

From the practice of these courts and quasi-judicial bodies in the protection of human rights, it appears that the adoption of interim measures has mainly revolved around the protection of fundamental rights, such as the right to life or personal integrity, against which no restriction or limitation may be placed. Perhaps by their very nature, it has been easier for international authorities to guarantee the respect of these rights by States Parties, at a time when not all internal legal systems were protecting this type of rights with the guarantees now recognized

[161] See: Consideration by the Human Rights Committee at its 111th, 112th and 113th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights Jurisprudence - CCPR/C/113/4, at 17-19; Consideration by the Human Rights Committee at its 114th, 115th and 116th sessions of communications received under the Optional Protocol to the International Covenant on Civil and Political Rights - CCPR/C/116/3, at 4-5.

[162] CCPR, *Aarrass v. Spain*, Com. n. 2008/2010, 21 July, 2014.

[163] CCPR, *N.S. v. Russian Federation*, Com. n. 2192/2012, 27 March, 2015.

[164] CCPR, *Yuzepchuk v. Belarus*, Com. n. 1906/2009, 24 October, 2014; *Grishkovtsov v. Belarus*, Com. n. 2013/2010, 1 April, 2015.

in their basic rules. However, it is worth considering whether, in line with the evolution of the practice of these international courts and quasi-judicial bodies, in addition to adopting these measures to protect the aforementioned rights, there has been a material extension regarding the protection of other rights not included in this category and therefore not protected in absolute terms. The question is therefore whether practice shows that the possibility of adopting precautionary measures for the protection of certain political rights has been accepted, or whether, on the contrary, this is merely an exception in the practice of certain systems.

The present paper argues that, in the case of the ECtHR, this court has not yet recognized a material extension for the protection of rights of a political nature, focusing on the adoption of precautionary measures for the protection of the rights to life or physical integrity, thus preventing violations of these rights in some states which do not yet adequately guarantee them. However, it should be added that, exceptionally, the ECtHR has adopted such measures to protect other types of rights, such as those relating to the right to a fair trial (Article 6); the right to respect for private and family life (Article 8) and the right to freedom of expression (Article 10 of the ECHR) which could indicate an incipient evolutionary element in its practice. In the case of the Inter-American System, there are few cases in which these measures have been indicated, but they are not of an exceptional nature and their bodies accept this possibility of protection. Finally, in the CCPR, the cases considered highlight an incipient practice regarding the indication of precautionary measures regarding political rights, in which a change can also be observed regarding their content. Thus, the CCPR apparently, has gone from formulating this type of measures with generic character to enunciate specific measures with respect to the particular case. Nevertheless, this possibility of provisional protection is still at an early stage with regard to this type of rights.

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# State Succession and International Watercourses: the role that the 1978 Vienna Convention and the Case of Gabčíkovo-Nagymaros Project could play

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*Abstract*: The existence of international watercourses in the territory where a secession phenomenon occurs brings with it important and specific legal problems related to the succession of States, which this paper deals with: in relation to the membership of international organizations; with respect to the succession of States in respect of State property; and, last but not least, with reference to the succession of States in respect of treaties, particularly in respect of international agreements on international watercourses. With regard to the latter, this paper analyses the argument given by the International Court of Justice in the Case of Gabčíkovo-Nagymaros Project, and reviews the work of the International Law Commission for the purpose of the progressive development of International Law and its codification on the topic of the succession of States; in the hopes that by searching for rules and general principles, solutions could be found for other cases.

*Keywords*: State Secession – State Succession – International Watercourses.

## (A) INTRODUCTION

The creation of South Sudan, as a result of the choice of the people of southern Sudan for secession during the January 2011 referendum,[1] has modified the riparian States in the Nile Basin and has brought about certain questions about the situation of the new State in this respect.

The topic of the succession of States in the case of the secession is, without doubt, an issue of special relevance and one which has once again become pertinent in International Law. The said relevance and complexity increase when international watercourses exist in the territory

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[1] South Sudan gained independence from Sudan on 9 July 2011, after a referendum. On 14 July 2011, the General Assembly decided to admit the Republic of South Sudan to membership of the United Nations (GA Res. 65/308, 14 July 2011).

It is important to note that the representative of South Africa, sponsor of a draft resolution, said "African heads of State and Government acknowledge that the Sudan represents an exceptional case that does not negate the sacrosanct principle of respect for colonial borders. I stand here before the General Assembly with the distinct honour to introduce, on behalf of the Group of African States, the draft resolution on the admission of the Republic of South Sudan to membership in the United Nations, comfortable in the knowledge that this act in no way creates a precedent for secessionist tendencies" (A/65/PV.108, at 2).

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in which secession occurs. In summary: What rights and duties does a new State retain with respect to legal obligations undertaken by its predecessor State?

In an attempt to shed light on this topic, the paper first begins with secession and succession; later, it covers the relationship with international watercourses, and highlights the different areas in which problems arise. Subsequently, the problem of the succession of States in respect of international water treaties will be analysed.

As far as the way in which one proceeds, the methodology is twofold: firstly, this paper analyses the argument given by the International Court of Justice (ICJ) in the Case of Gabčíkovo-Nagymaros Project;[2] therefore, the main object of this part of the research is the study of the succession of Slovakia in the 1977 Treaty;[3] secondly, this paper reviews the work of the International Law Commission (ILC) for the purpose of the progressive development of International Law and its codification on the topic of the succession of States in respect of treaties.

The work concludes by answering the question in the title about the role of the 1978 Vienna Convention[4] and the Case of the Gabčíkovo-Nagymaros Project.

## (B) STATE SECESSION AND STATE SUCCESSION

The State secession phenomenon —when part or parts of State territory withdraw from a State with the will to create a new State or states— always entails territorial modifications. The succession of States rules can be applied, sometimes, to these territorial modifications. Thus, succession of States is a very relevant topic in International Law nowadays.

As a general statement, the problem of the succession of States arises in relation to territorial transformations.[5] This is true, no matter what the origins of the said modifications: in the sixties, these and the new States were the results of the decolonization process;[6] currently, they are the product of the disintegration of States and of cases of secession.[7]

Notwithstanding the above, the origin of the territorial modification will definitely influence the solution to the problem of succession. In effect, when it talks of the succession of States in International Law, it usually refers as much to the process of creation and disappearance of

[2] *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997*, ICJ Reports (1997) 7-84. Hereinafter Gabčíkovo Case.

[3] See note 21.

[4] Vienna Convention on Succession of States in respect of Treaties (done at Vienna on 23 August 1978, entered into force on 6 November 1996) 1946 *UNTS* 3. Hereinafter 1978 Vienna Convention.

[5] J.D. González Campos, 'Algunas consideraciones sobre los problemas de la sucesión de Estados', XVI *Revista Española de Derecho Internacional* (1963) 551-578, at 567.

[6] The GA Res. 1514 (XV), 14 December 1960 was a milestone.

[7] They gave rise to the emergence of many new European States in the last few decades.

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States as to the legal consequences of these transformations.[8] Therefore, it is affirmed that the cause of State succession is always a territorial modification occurring in conformity with International Law. Thus, both the 1978 Vienna Convention and the 1983 Vienna Convention[9] apply only to the effects of a succession of States occurring in conformity with International Law and, in particular, with the principles of International Law embodied in the Charter of the United Nations. Precisely for this reason, the succession of States rules can only be applied at times to the State secession phenomena. Thus, it is affirmed that an illegal territorial modification, such as one brought about by the unlawful use of force,[10] would not be recognized nor ruled by International Law.

### (C) SECESSION, STATE SUCCESSION AND INTERNATIONAL WATERCOURSES

Where there are watercourses in the territory that produces the secession, the political composition of the international basins usually changes. It is possible for watercourse States[11] to change or for the number of riparian States to increase. This is not hypothetical as it has happened at the Danube and the Nile.

After the dismemberment of the USSR, Yugoslavia and Czechoslovakia (this is the case that interests us most) changes were produced in the States of the Danube River Basin; in addition, their number increased. In the case of the River Nile, its flow extended over the territory of ten States and, after the creation of South Sudan, to eleven States.

We have already said that the main object of the research is the study of the 1977 Treaty between Hungary and Czechoslovakia (which resulted in the Gabčíkovo Case) with the hope that by searching for rules and general principles, solutions could be found for other cases, as the Nile. There are a lot of unsolved problems related to the situation that secession and the birth of South Sudan brought about in the Nile. Among these, the most urgent is to know the situation of this new State in the basin, particularly its legal position in relation to the 1959 Agreement signed by Egypt and Sudan.

The following sections will refer to the succession of States in respect of international watercourses treaties. First, it should be noted that the existence of international watercourses in territory where a secession phenomenon occurs brings with it other legal problems, both in

[8] C. Jiménez Piernas, *Introducción al Derecho Internacional Público. Práctica de España y de la Unión Europea* (Tecnos, Madrid, 2011), at 181.

[9] Art. 6 of the 1978 Vienna Convention and art. 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (done at Vienna on 8 April 1983, not yet in force).

[10] *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion of 22 July 2010*, ICJ Reports (2010), at paragraphs 81, 84 and 122.

[11] State in whose territory part of an international watercourse is situated.

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relation to the membership of international organizations and with respect to the succession of States in respect of State property.

In relation to the membership of international organizations various questions arise. On the one hand, specific problems emerge when succession affects States that form part of international basins, which is the theme of the succession in the Commission of International Rivers. Therefore, for example, Slovakia replaced Czechoslovakia in the Danube Commission,[12] simply by sending a letter dated the 12 December 1992, written by the Minister of Foreign Affairs of the Slovak Republic to the Director General of the Danube Commission,[13] based on the Tripartite Agreement on Membership in International Organizations.[14]

On the other hand, general problems must also be considered, especially owing to their consequences, when the international basin is linked to an International Organization *sui generis* for regional integration. When it is linked with a special subsystem of International Law such as European Union Law[15] to which, *prima facie*, only members of the European Union are bound.

In the event of secession of territories in a member State of the European Union, only the said State will retain its membership to the organization, and the new State will form a third State outside the European Union.[16] Consequently, it will no longer be bound by the environmental policy of the European Union. This would be a serious problem for the rest of the member States, because the European Union has some of the world's highest environmental standards.[17]

Secondly, specific problems of succession of States could arise in the case of real property situated outside the territory of the pre-existing State; these problems should be solved by the principle of equity, not by the principle of territory.[18] In addition, more problems arise with

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[12] The Commission set up by the Convention regarding the Regime of Navigation on the Danube (adopted 18 August 1948 in Belgrade, entered into force on 11 May 1949). A non-official version in English: Danube Commission Web.

[13] J. Klabbers, M. Koskenniemi, O. Ribbelink, A. Zimmermann (editors), *State Practice Regarding State Succession and Issues of Recognition* (Brill Nijholl, Leiden, 1999), at 494.

[14] K.G. Bühler, *State Succession and Membership in International Organizations* (Kluwer Law International, The Hague, 2001), at 275.

[15] A. Mangas Martín, 'European Union Law: a Special Subsystem of International Law', in *Liber Amicorum of Judge José María Ruda* (Kluwer Law international, La Haya, 2000), 585-593, *passim*.

[16] A. Mangas Martín, 'La secesión de territorios en un Estado miembro: efectos en el Derecho de la Unión Europea', 25 *Revista de Derecho de la Unión Europea* (julio-diciembre 2013) 47-68, at 58-60.

[17] The EP and Council Directive 2000/60/EC of 23 October 2000, establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1, considered this to be a problem and attempted to solve it with art. 3.5. However, while member States are obliged to apply the rules of the directive, the non-member States are not (C. Tirado Robles, *La Política del Agua en el Marco Comunitario y su Integración en España* (Thomson Aranzadi, Navarra, 2004), at 81.

[18] T. Ushakova, *La sucesión de Estados en materia de bienes, archivos y deudas: el caso de la URSS* (Editorial

the existence of real property of a third State (such as the public works concession contract for the construction, management, operation and maintenance of such property).

## (D) SUCCESSION OF STATES IN RESPECT OF TREATIES: INTERNATIONAL WATER TREATIES

In relation to the succession of States in respect of agreements on international watercourses, there are relevant questions: What happens with multilateral treaties signed by the predecessor State? And what about bilateral treaties? Are these treaties no longer in force or are they still in force in the territory of the drainage basin despite any State secession? What will be the territorial scope of the treaties that remain in force? Would the territory which is subject to secession be included in this scope or would it be outside of it? What happens about the rights and duties of third States, especially with lower riparian States? In summary, what rights and duties does a new State retain with respect to legal obligations undertaken by its predecessor State?

As the following pages explain, it is not possible to give general answers to such questions; the answers will be different depending on the nature of each water treaty. In addition, the answers could vary within treaties of an analogous nature according to whichever agreement it relates to. This is because the geographic particularism of international watercourses has consequences for the law of international watercourses, which is infused by two opposing tensions: Particularism *Vs* Universalism and the Fragmentation of International Law *Vs* General Law.[19]

These tensions explain the existence of conventions which only regulate some of the uses of international watercourses, for example, only the demarcation of boundaries, navigational use or the production of hydroelectric energy and only in one river. More recent treaties carry a broader scope: to cover all uses of international water resources as well as management and environmental protection.[20]

To sum up, hundreds of treaties on international watercourses differ greatly and are very diverse in nature. This summary explains the main conclusion of this paper: the problem of the succession of States in respect of water treaties has to be considered case by case. The most pertinent consideration has to be the nature of the treaty in question (the number of parties,

Universitaria Ramón Areces-Universidad de Alcalá, Madrid, 2006), at 78-79.

[19] See 'La labor de la CDI: problemas, tensiones y opciones', in A. Aura y Larios de Medrano, *La regulación internacional del agua dulce. Práctica española* (Thomson-Aranzadi, Navarra, 2008), at 52-73.

[20] Such as art. 3 Convenio sobre cooperación para la protección y el aprovechamiento sostenible de las aguas de las cuencas hidrográfica hispanoportuguesas, hecho "ad referendum" en Albufeira el 30 de noviembre de 1998, at *BOE* 37, 12 de February 2000. A non-official version in English is available at A. Mendes, F. Octavio de Toledo (Coordinators), *Luso-spanish treaties. A centennial history of cooperation* (Instituto da Água-Dirección General del Agua, 2009), at 28-72. See A. Aura, *op. cit.*, at 231-233.

whether the treaty is bilateral or multilateral, is less relevant).

## (E) THE 1978 VIENNA CONVENTION AND THE CASE OF GABČÍKOVO-NAGYMAROS PROJECT

### (1) Overview

In the Gabčíkovo Case, the ICJ considered that the 1977 Treaty[21] "cannot be affected by a succession of States". The ICJ found that the 1977 Treaty, signed by Hungary and Czechoslovakia, was still in force, notwithstanding the dismemberment of Czechoslovakia. The Court therefore concluded that "the 1977 Treaty became binding upon Slovakia on 1 January 1993".[22] Thus, the relationship between Hungary and Slovakia was governed by the 1977 Convention. That relationship was also determined by the rules of other relevant conventions to which the two States are party, by the rules of general International Law and, in this particular case, by the rules of State responsibility; "but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*".[23]

The ICJ argued its assertion in article 12 of the 1978 Vienna Convention, considering the nature and character of the 1977 Treaty. Hungary never signed or ratified the 1978 Vienna Convention. Thus, the ICJ discussed whether article 12 of the 1978 Convention reflects the state of customary International Law; and it found that article 12 does reflect a rule of customary International Law. Therefore, the ICJ did not find it necessary to analyse article 34 of the 1978 Vienna Convention, the law governing the "Succession of States in cases of separation of parts of a State" (that is, in the case of secession).

This section will refer to the articles 34 and 12 of the 1978 Vienna Convention, in relation to the Draft Articles adopted by the ILC,[24] and to the documents of the UN Conference;[25] also, it will refer to Gabčíkovo Case, with regard to these articles. Secondly, the role that both could

[21] The Treaty on the Construction and Operation of the Gabtikovo-Nagymaros Barrage System and related instruments (signed in Budapest by Czechoslovak Socialist Republic and Hungarian People's Republic, on 16 September 1977), 1724 *UNTS* 120.

[22] Gabčíkovo Case, par. 123. Note that on 19 January 1993 the General Assembly decided to admit the Czech Republic (GA Res. 47/221, 19 January 1993) and the Slovak Republic (GA Res. 47/222, 19 January 1993) to membership of the United Nations. See A. Aura, *op. cit.*, at 154-166.

[23] Gabčíkovo Case, par. 132.

[24] "Report of the ILC on the work of its twenty-sixth session, 6 May -26 July 1974, Official Records of the General Assembly, Twenty-ninth session" (A/9610/Rev.1).

[25] The Official Records of the United Nations Conference on Succession of States in Respect of Treaties consist of three volumes: A/CONF.80/16, A/CONF.80/16/Add.1, A/CONF.80/16/Add.2.

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play in other cases will be studied.

## (2)1978 Vienna Convention and the Gabčíkovo Case

Considering that the situations in which new States are created vary enormously,[26] the 1978 Vienna Convention basically foresees two different scenarios for State succession in respect of treaties: the "clean slate" principle or *tabula rasa* applies for newly independent States;[27] and "universal continuity" applies for most other cases of the emergence of new States, including those in which one State separates from another State, regulated only by article 34.[28] Therefore, all situations are divided into two groups completely differentiated by the 1978 Vienna Convention, according to the colonial past of the new State. Nonetheless, the situation was very different in the ILC Draft Articles, because the project of article 34 also provided, for certain situations, the *tabula rasa* rule for new States without colonial heritage.[29]

Slovakia argued that the 1977 Treaty remained in force between itself, as successor State, and Hungary, with support from the general rule of automatic succession imposed by article 34, in the Gabčíkovo Case, as first argument. But the ICJ did not find it necessary to enter into a discussion about whether or not article 34 reflected a customary rule, and focussed on analysing article 12 of 1978 Vienna Convention,[30] because Slovakia's second argument rested on "the principle of *ipso jure* continuity of treaties of a territorial or localized character", the rule that Slovakia said is embodied in this article.

Article 12, under the title of "Other Territorial Regimes", provides that rights and obligations of a territorial character established by a treaty are unaffected by a succession of

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[26] See section B.

[27] Art. 2, Use of terms, states that "1.For the purposes of the present Convention: (f) 'newly independent State' means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible". A detailed regulation of this scenario is given at arts. 16-30, in the Part III "Newly independent States".

[28] In Part IV "Uniting and separation of States".

[29] When the Commission was developing its draft articles, art. 33 (later changed to art. 34), the paragraph 3 stated: "Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State" (n. 24, at 260).

This paragraph was deleted at the UN Conference, at its 49th meeting: the Committee of the Whole voted by roll-call on the second part of the amendment submitted at the 1977 session by France and Switzerland (A/CONF.80/C.1/L41/Rev.1) seeking to delete paragraph 3 of article 33. The amendment was adopted by 52 votes to 9, with 22 abstentions; It was adopted without discussion, as a consequential amendment to article 2.

[30] Art. 12.2: "A succession of States does not as such affect: (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory; (b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restriction".

States. This article together article 11[31] should be understood as a limit or exception to the *tabula rasa* principle (which was the rule not only for cases of newly independent States but also for cases that may be assimilated to them at ILC Draft Articles), as explained the ILC.[32] In other words, the ILC believed that for the principle of the absence of any general obligation upon the successor State to consider itself bound by treaties concluded by its predecessor to be acceptable, it was essential that certain types of treaties should be regarded as having binding force on the successor State, as treaties relating to boundary regimes and other forms of territorial regimes. The reports of Special Rapporteurs and oral and written comments of Governments[33] have made it clear that articles 11 and 12 reflect customary international law; nevertheless, neither the precedents nor the opinions of writers give clear guidance as to the criteria for determining when article 12 operates.[34] The UN Conference adopted articles 11 and 12 (only amended by the addition of the third paragraph).[35]

The ICJ confirmed that article 12 reflects a rule of customary international law in the Gabčíkovo Case; and it notes that neither of the Parties disputed this. But Hungary denied that the 1977 Treaty was a "localized" treaty within the meaning of article 12 of the 1978 Convention because Hungary considered that the 1977 Treaty was simply a joint investment. Nonetheless, the Court found that the content of the 1977 Treaty[36] indicates that it must be regarded as establishing a territorial regime within the meaning of article 12 of the 1978 Vienna Convention: It created rights and obligations "attached to" the parts of the Danube to which

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31 That stipulates that State succession does not affect boundaries established by a treaty or rights and obligations established by a treaty that relate to a boundary regime

32 The ILC was of the opinion that the main implication of the principle of self-determination in the law concerning succession in respect of treaties was precisely to confirm the traditional clean slate principle as the underlying norm for cases of newly independent States or for cases that may be assimilated to them (...) In addition, the clean slate principle does not, in any event, relieve a newly independent State of the obligation to respect a boundary settlement and certain other situations of a territorial character established by treaty (A/9610/Rev.1 at 169).

33 See "First report on succession of States in respect of treaties", by Sir Francis Vallat, Special Rapporteur (A/CN.4/278 and Add.1-6, at pars. 417-462).

34 "Some further precedents of one kind or another might be examined, but it is doubtful whether they would throw any clearer light on the difficult question of territorial treaties" (*Ibid* at 207).

See C. Leb, M. Tignino, `State succession to water treaties: uncertain streams', in L. Boisson de Chazournes, C. Leb, M. Tignino (Eds.), *International Law and freshwater. The multiple challenges* (Edward Elgar, Cheltenham, 2013), 421-444, at 443. They suggest that "a general categorization of water treaties as territorial treaties and thus the application of the principle of automatic succession are inadequate".

35 A/CONF.80/16/Add.2, at 153-155 and 189.

36 "An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational regime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Danube were affected" (at par. 123).

it relates; thus the Treaty itself cannot be affected by a succession of States.

In the Gabčíkovo Case the ICJ gave specific meaning to the vague concept of "territorial treaties"; so, the ICJ did in this Judgment what the ILC could not do in its commentaries, nor the UN Conference in its records. Nevertheless, the decision of the Court in the Gabčíkovo Case does not completely resolve the question of the scope of article 12, and leaves room for alternative interpretations.[37]

### (3) The role that the 1978 Vienna Convention and the Gabčíkovo Case could play

This analysis of the Gabčíkovo Case, in relation to the 1978 Vienna Convention and the ILC Draft Articles, has been made by searching for rules and general principles to help clarify other cases, such as the unsolved problem of the legal position of South Sudan in the Nile Basin,[38] particularly in relation to the 1959 Nile Waters Agreement,[39] which focuses mainly in water allocation.[40]

The first thing to be pointed out is that the 1978 Vienna Convention *per se* is not applicable between the above-mentioned States.[41] However, article 12 of the 1978 Convention can be applied, because the ICJ has affirmed it reflects a rule of customary International Law. So, the issue is to determine if the 1959 Agreement is a territorial treaty, or at least if it creates a

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[37] See Separate Opinion of Judge Bedjaoui, at pars. 20-26. He considers that the majority of the Court has not sufficiently clarified the question of the nature of the 1977 Treaty and of the applicable law. He said that the 1977 Treaty is a territorial treaty, is a treaty to which Slovakia validly succeeded, and is treaty which is still in force today; and he explains the reasons in which this assertions are based.

[38] As a former part of Sudan governed under that treaty, is the new State of South Sudan obligated to continue to abide by its terms?

In 2011, South Sudan seceded from Sudan. Prior to secession, Sudan and Egypt had allocated water rights to the Nile according to the terms they negotiated under the 1959 Nile Waters Agreement. This agreement of 8 November 1959 is, in essence, a renegotiation of the agreement that Egypt signed with Great Britain on 7 May 1929. The agreement of 1959 benefits Sudan and Egypt enormously; in fact, it attributes almost 90% of the waters to them, because derivations of water upstream are forbidden without their consent, which prejudices upper river states (see art. 5.2 of the 1959 Agreement). For this reason, The Nile Basin Initiative (NBI), an intergovernmental partnership, was created in 1999.

See Salman M.A. Salman, 'The new state of South Sudan and the hydro-politics of the Nile Basin', 36-2 *Water International* (March 2011) 154–166, at 158-159.

[39] Agreement between the Republic of the Sudan and the United Arab Republic for the full utilization of the Nile waters (signed at Cairo, 8 November 1959, entered into force 12 December 1959) 453 UNTS 51 (available electronically at FAO web).

[40] The agreement begins by fixing as the parties "established rights" the amounts of water actually being used by them as of de date of its conclusion (art. 1), and it increases water allocations to both Egypt and Sudan (art. 2). The treaty authorizes the construction of some projects (art. 3) and it also established a Permanent Joint Technical Commission for cooperation between the States (art. 4)

[41] Egypt became a Party to the Convention, but Sudan only signed but never ratified it and South Sudan neither signed nor ratified it (Status of Treaties Deposited with the Secretary-General (UNTREATY, accessed 25 July 2018).

territorial regime. So, the main question that arises is whether, or not, a territorial regime is created by water allocation provisions (in the same way that 1977 Treaty provisions did it[42]). As we have stated previously, the decision of the Court in the Gabčíkovo Case leaves room for diverse interpretations.[43]

## (F) CONCLUSIONS

The geographic particularism of international watercourses has a consequence: agreements on international watercourses differ greatly and are very diverse in nature. Consequently, it is not possible to give general answers to the problem of the succession of States in respect of water treaties. The issue has to be considered case by case, and the most pertinent consideration has to be the nature of the treaty in question; the number of parties, whether the treaty is bilateral or multilateral, is less relevant.

In the Case of the Gabčíkovo-Nagymaros Project, the ICJ based its reasoning on article 12 of the 1978 Vienna Convention, considering the nature of the 1977 Convention (the particular provisions in this agreement). Therefore, the decision of the Court in the Gabčíkovo Case would play a limited role in attempting to resolve disputes between States at other cases.

[42] See *supra* n. 36

[43] Mohamed S. Helal, who used to work as Egyptian Diplomatic before being Assistant Professor of Law, considers that water allocation provisions created territorial rights that have survived South Sudan's secession from Sudan. So, "Sudan and South Sudan have to enter inter negotiations on the allocation of their common share of 18.5 bcm vis-à-vis Egypt, as established by the 1959 Nile Agreement". See M. S. Helal, 'Inheriting International Rivers: State Succession to Territorial Obligations, South Sudan, and the 1959 Nile Waters Agreement', 27 *Emory International Law Review* (2013) 907-985, at 979-980 and 983.

However, the author of this paper notes that the regime created by water allocation provisions at 1959 Agreement only for Parties, is very different from the navigational regime created by the 1977 Treaty, which recognized rights both for Parties and other users of the Danube River.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

*Secession of States and Self-determination in contemporary International Law*

# An Introduction

Carlos JIMÉNEZ PIERNAS, Xavier PONS RAFOLS,
Enrique MARTÍNEZ PÉREZ and Francisco PASCUAL VIVES*

The Seminar 'Secession of States and self-determination in contemporary International Law', addressing current issues in Public International Law and organized by the *Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales* (AEPDIRI) [Spanish Association of Professors of International Law and International Relations], was held at the University of Alcalá on 12 and 13 April 2018. It was directed by professors Carlos Jiménez Piernas and Xavier Pons Rafols, with collaboration by professors Enrique Martínez Pérez and Francisco Pascual Vives on the Organising Committee.

The idea was proposed by the AEPDIRI's Board of Directors themselves, and the Seminar was announced at the Association's conference in Bilbao in September 2017, in a political context complicated by the secessionist tensions in Catalonia and the resulting political and territorial crisis of that turbulent autumn. From this perspective, the Seminar largely concentrated on the legal and scientific framework of the 'Statement on the Lack of Foundation in International Law of the Independence Referendum in Catalonia', issued by members of AEPDIRI in September 2017 and signed by over three hundred members of the Association.[1]

However, rather than embarking on political disquisitions, the Seminar promotors and organizers simply wished to offer a rigorous academic meeting with in-depth debate, meaningful consideration, and analysis of State secession and the principle of self-determination of peoples from the current perspective of Public International Law and Spanish juridical international doctrine. Although the case of Catalonia may have been in the back of our minds, we aimed (and, we think, managed) to distance ourselves from it, to direct the

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[1] See *Revista Española de Derecho Internacional*, Vol. 70, no. 1 (2018), pp. 295-298 [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.3.03]; and *Revista Electrónica de Estudios Internacionales*, no. 34 (2017).

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presentations, papers and debates towards a strictly legal dialogue that could be of interest outside Spain. This is why the final texts of the proceedings and papers have been presented in English in this special *Ágora* of the *Spanish Yearbook of International Law* [SYbIL].

The Seminar and its various round table discussion groups were designed to articulate these factors and consider in depth many of the problems and international legal aspects involved in State secession and the principle of self-determination of peoples in contemporary International Law. As indicated in the call for papers, we started with the idea that the phenomenon of State secession, in which parts of the territory of an existing State become new independent States, is not new. It has had its moments in history, and secessionist tensions are even building in democratic Member States of the European Union, beyond the processes that came about with the end of the Cold War in the 1990s. Scotland and Catalonia are two obvious examples, but they are not the only ones, and other European Union Members could find themselves engulfed by these tensions according to how these two processes develop. In 2010, the International Court of Justice also issued an advisory opinion on the accordance with International Law of a unilateral declaration of independence, and more recently, in Eastern Europe, secessionist tensions have been revived in Georgia, Crimea and eastern Ukraine in the last few years.

On a related topic, we also considered that the principle of self-determination of peoples in its external dimension has given rise to new statehoods that are not exactly cases of secession, as a territory under colonial domination is considered by International Law to have a legal status that is different from the colonizing State. In any event, as the case of New Caledonia highlights, this principle is still exercised in colonial situations, including in colonies of European Union Member States, but the internal dimension of self-determination is certainly increasingly relevant with respect to its links to human rights and democracy. Many international organizations, such as the United Nations, the Council of Europe and the Organization for Security and Cooperation in Europe, have adopted political approaches, legal instruments and operational activities in all of these dimensions.

The desire to tackle these questions from the Public International Law perspective, in a purely academic, university-level intellectual exercise, led us to design a Seminar with five round table discussion groups that should have a certain internal logic, as we understood it. Therefore, the first-round table was called 'Content and exercise of self-determination of peoples in the twenty-first century', and it attempted to update this principle. This first group was moderated by Santiago Torres Bernárdez, former *Greffier* at the International Court of Justice, with speakers Juan Soroeta Liceras (University of the Basque Country), who set out the scope of the principle of self-determination in its external dimension, and Paz Andrés Sáenz de Santamaría (University of Oviedo), who considered the internal dimension of self-

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determination. The second-round table, called 'Secession processes in the framework of democratic States', was moderated by Araceli Mangas Martín (*Universidad Complutense de Madrid*). Javier Roldán Barbero (University of Granada) discussed democracy and International Law, and Xavier Pons Rafols (University of Barcelona) examined the scope of the right to political participation in International Law and good international practice on referendums. The third round table discussed the 'Scope of secession as a remedy in International Law' and was moderated by Antonio Remiro Brotóns (Autonomous University of Madrid), with participation by Carlos Jiménez Piernas (University of Alcalá) and Esperanza Orihuela Calatayud (University of Murcia), who offered their perspectives on this alleged right to secession-remedy in light of the Kosovo case and the advisory opinion of the International Court of Justice. The fourth round table tackled 'Problems in International Law arising from situations of State secession' and was moderated by Oriol Casanovas y la Rosa (*Universidad Pompeu Fabra*). In this group, Antoni Blanc Altemir (University of Lérida) referred to the circumstances of secession and State secession in the post-Soviet space, and Concepción Escobar Hernández (*Universidad Nacional de Educación a Distancia*) tackled some selected problems related to State secession, such as nationality, membership of international organizations and international responsibility. Finally, the fifth and last round table focused on 'The European Union: secession processes and self-determination of peoples'. This group was moderated by Gregorio Garzón Clariana (Autonomous University of Barcelona), with presentations by José Manuel Sobrino Heredia (University of La Coruña), who examined the legal regime applicable to territories with special status in the European Union and cases pending decolonization, and Luis Pérez-Prat Durbán (*Universidad Pablo de Olavide*), who analyzed the role of the European Union international missions in territories that have experienced secessionist tensions.

This extensive and, in our opinion, comprehensive and coherent programme, was complemented by the various papers accepted by the Scientific Committee for oral presentation in the Seminar. The Scientific Committee comprised Oriol Casanovas y La Rosa (retired professor of Public International Law at the *Universidad Pompeu Fabra*), Gregorio Garzón Clariana (emeritus professor of Public International Law at the Autonomous University of Barcelona), Araceli Mangas Martín (professor of Public International Law at the *Universidad Complutense de Madrid*), Antonio Remiro Brotóns (emeritus professor of Public International Law at the Autonomous University of Madrid) and Santiago Torres Bernárdez (former *Greffier* at the International Court of Justice). The Scientific Committee also reviewed the papers in their definitive versions before submitting them for publication.

Diverse circumstances have dictated that not all the discussions and papers presented at the Seminar have finally been published in this special SYbIL *Ágora*, but we would like to thank

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all the speakers and contributors once again for their interest, availability, generosity and scrupulous respect for the deadlines established. We would also like to sincerely thank the members of the Scientific Committee, who also kindly agreed to moderate the various Seminar round tables, for their invaluable contribution. We would also like to note our gratitude to the *SYbIL*'s Editorial Board and his Editor-in-Chief, Professor Mariano Aznar, for opening the doors of this yearbook to the written submissions, and to Ms. Hanan Laghrich, assistant to the Editor-in-Chief. The Seminar has also been partially funded by the R+D Project "La Unión Europea ante los Estados fracasados de su vecindario: retos y respuestas desde el Derecho Internacional (II)" (DER2015-63498-C2-2-P). Finally, we would like to express our gratitude for the trust placed in us by AEPDIRI's Board of Directors when they commissioned us to lead and organize the Seminar.

However, we could not end this presentation of the written texts of the discussions and submissions to the Seminar without referring to the intense scientific debate that took place during those two days, which enriched all of the participants. This debate was based on the fact that there are no absolute truths in law, and it is the responsibility of jurists to justify their positions with legal arguments. We understand that the Seminar was not only an intense intellectual exercise, but also an exercise demonstrating the commitment and responsibility of our universities and their academic staff. The AEPDIRI umbrella covers both of these concepts, and the Association has never strayed far from them. It seems exceedingly obvious to us that the university and academia in general should provide knowledge and orientate the society served by the academic institution and its teaching staff, especially when that society finds itself, as it does now, in a situation of crisis, or a confluence of multiple crises, of confusion and great uncertainty. In recent years, other social and political sectors in Spain may not have risen to the significant challenges that we face as a society, but we in universities and wider academia have at least tried to fulfil our responsibilities.

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*Secession of States and Self-determination in contemporary International Law*

# Current validity of the external dimension of the self-determination of peoples. Pending cases of decolonization

Juan SOROETA LICERAS*

*Abstract*: More than half a century after the adoption of the UN General Assembly's Resolution 1514 (XV), the right of self-determination of peoples remains fully in force. In spite of the ongoing debate within internationalist doctrine over a possible evolution of its content and its extension to other subjects of international law, the author of this study, which does not analyse this question, underlines that there is no doubt whatsoever that it continues to be fully applicable to territories subjected to colonial rule and that these are not restricted to those included in the list de UN's Non-Self-Governing Territories.

*Keywords*: Self-determination – Decolonization – Non-Self-Governing Territories - *uti possidetis iuris* - Natural resources exploitation

## (A) INTRODUCTION

On the occasion of the fiftieth anniversary of the adoption of its Resolution 1514 (XV), on December 10, 2010 the UN GA declared the period 2011-2020 "Third International Decade for the Eradication of Colonialism". Despite the grandiloquence of this declaration and this body's permanent commitment to put an end to this scourge, which in most cases dates back to the 19th century, the fact is that the progress made in the last two decades in the sphere of decolonization has been practically null.

Indeed, as Professor Antonio Remiro has pointed out[1], everything seems to suggest that the 21st century has marked the end of the process initiated with the creation of the United Nations and that, for different reasons, the pending cases have become so frozen that, as we shall see in the following pages, either they are residual cases affecting tiny and very sparsely populated territories, in which the claims for self-determination on the part of the indigenous population

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[1] A. Remiro Brotóns *et al*, *Derecho Internacional. Curso General* (Tirant Lo Blanch, Valencia 2010), at 120-121.

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are very limited or even non-existent, or the interests of the major Powers involved prevent the application of international law.

It is often said that both the Covenant of the League of Nations and the United Nations Charter established the path to follow in order to carry out the decolonization of half the world. However, what the states participating in both organizations envisaged was not the end of decolonization throughout the world, but only in the colonial territories under the control of the states which lost the wars that preceded the creation of both organizations. In fact, both the League of Nations Mandate System and the Trusteeship System (henceforth TS) and Non-Self-Governing Territories (NSGT) regime of the United Nations anticipated the end of the colonial phenomenon, but only in some of the territories that had previously been administrated by the states that lost both wars. So much so that Article 77 of the UN Charter still refers to the winners and losers of the Second World War in terms that are unacceptable in the 21st century, but which clearly reflects the intention of the states that created the Organization: the basic objectives of the TS shall be: "to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence (...)" of "the territories which may be detached from *enemy states* as a result of the Second World War".[2]

If the forecast in both texts was the future independence of these territories, for the remaining colonial territories, those administered by states that had not lost the war, what was established was the need for the states which administered them to ensure the development of territories and populations, with no reference to the exercise of the right to self-determination. Thus, if in the case of the TS the target was reached in 1994 with the independence of the Palau Islands[3], in that of the NSGT, following the independence of East Timor in 2002, there are still 16 territories on the list that were included in 1946 (Anguilla, Bermuda, Cayman Islands, Malvinas/Falkland Islands, Turks and Caicos Islands, British Virgin Islands, United States Virgin Islands, Montserrat, Saint Helena, Gibraltar, Guam, New Caledonia, Pitcairn, French Polynesia, American Samoa and Tokelau) and one that was added in 1963 (Western Sahara).

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[2] Emphasis added.

[3] These are the cases of British Togoland, united with the Gold Coast form Ghana (1957); Italian Somaliland, united with British Somaliland to form Somalia (1960); French Togoland, independent as Togo (1960); French Cameroons, independent as Cameroon (1960); British Cameroons: Northern territory joined Nigeria and Southern territory joined Cameroon (1961); la British Tanganyika (1961): in 1964, Tanganyika and Zanzibar, which had become independent in 1963, united as Tanzania); Belgian Ruanda-Urundi, divided in 1962 in two States: Rwanda and Burundi; New Zealand Western Samoa, independent as Samoa (1962); Australian Nauru, independent in 1968; Australian New Guinea, united with Australian Papua to become the independent State of Papua New Guinea (1975); Federated States of Micronesia and Marshall Islands, which became fully self-governing in free Association with the United States in 1990; Northern Mariana Islands, which became fully self-governing as Commonwealth of the United States in 1990, and finally, Palau Islands which became fully self-governing in free Association with the United States in 1994.

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Albeit in summary fashion, in this study I shall analyse the current situation of the territories yet to be decolonized, classifying them for explanatory purposes into four groups[4]. Firstly, I shall refer to the territories in the NSGT list in which, because of their small size or population, there is no strong demand for self-determination on the part of the indigenous population. Secondly, I shall refer to other NSGT in which these demands pose serious problems for the administering Powers. Thirdly, I shall analyse two cases in which decolonization is not linked to the exercise of self-determination by the people of the territory, as it is not really possible to speak of the existence of a people as such, but of the territorial integrity of the states. Finally, I shall analyse a series of territories that, although they do not appear on the list of NSGT, are still pending decolonization.[5]

## (B) NSGT IN WHICH THERE IS NO CLEAR CLAIM FOR THE RIGHT TO SELF-DETERMINATION ON THE PART OF THE INDIGENOUS POPULATION OR, IF THIS EXISTS, IT IS VERY LIMITED

### (1) Tax Havens

Over time, some of these territories have become a new kind of problem in the international arena that has a significant impact upon the world economy, owing to the establishment therein of genuine tax havens. For this reason, neither the indigenous population, which on occasions enjoys a privileged economic situation compared with other territories with similar dimensions and populations, nor the states that administer them are particularly interested in changing their status. In fact, if definitive decolonization were to occur, this would put an end to the prevailing legal limbo which, among other things, facilitates tax evasion. These are the territories of Anguilla, Bermuda, Cayman Islands, Turks and Caicos Islands, British Virgin Islands, Saint Helena and Montserrat[6], administered by the United Kingdom, and the United States Virgin Islands. In all these territories the GA "strongly urged the administering Power to refrain from undertaking any kind of illicit, harmful and unproductive activities, including

[4] Given the limitations of this work, I am not going to analyse the case of Palestine, in which added to its colonial origins is subsequent Israeli occupation and colonization, as it has been the subject of numerous studies. By way of summary, cf. my paper "Una visión del conflicto palestino: bloqueo histórico, colapso jurídico y fracaso político", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, Servicio de Publicaciones de la UPV/EHU, Bilbao, 2006, pp. 261-332.

[5] Indeed, as was highlighted by Professor Andrés, this list does not include all the territories still pending decolonization (P. Andrés Sáenz de Santa María, 'La libre determinación de los pueblos en la nueva sociedad internacional', 1 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1997), at 146-150).

[6] The case of Montserrat was severely affected by the eruption in 1995 of the volcano Mount Soufrière, almost completely destroying Plymouth, the territory's capital, a city that since then has been deserted. A consequence of this event was a drastic reduction in the island's population, which fell from 11,000 to 4,000, jeopardizing the very existence of one of constituent elements of a state: its population.

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the use of the Territory as a tax haven, that were not aligned with the interest of the people of the Territory".[7]

Aware that the aspirations to independence in these territories are minimal[8], and in order to reach a solution that might bring an end to colonization, the GA declares in its resolutions that "the specific characteristics and the aspirations of the people" of those territories "require flexible, practical and innovative approaches to the options for self-determination, without any prejudice to territorial size, geographical location, size of population or natural resources".[9] Thus, the GA notes that in these territories independence is probably not the most realistic solution and expresses its willingness to accept other forms of decolonization. In fact, in some cases, like that of Saint Helena, the GA recalls that the territory's own representatives have specifically stated that they do not seek independence.[10] In these types of territories, the trend is for, after adoption of new constitutional texts, decolonization to be produced via the establishment of increasingly strong links with the administering Power, similar to those in Free Associated States.[11]

Nevertheless, the basic principle of decolonization is unchanged: the GA continues to insist that "there is no alternative to the principle of self-determination, which is also a fundamental human right, as recognized under the relevant human rights conventions".[12] On many occasions the GA has even openly criticised the manoeuvres of some administering Powers so as to avoid its exercise by the indigenous population.[13]

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7 Cf. for example, the reports of the Committee of 24 (Special Committee on Decolonization) of May 25, 2017, in relation to Saint Helena (A/AC.109/2017/13), or of January 26, 2017, in relation to Anguila (A/AC.109/2017/2).

8 Thus, for example, the GA has recalled that, in the case of Bermuda, most of the population wishes to maintain ties with the UK (GA Res. 72/98, 15 December 2017).

9 Cf. For example, GA Res. 72/97, 7 December 2017, in relation to Anguila, although it is used as a matter of form in those related to other NSGT. This is the case, for example, of GA Res. 72/98, in relation to Bermuda, 72/108, in relation to the Turks and Caicos Islands, 72/100, in relation to the Cayman Islands, and others adopted on the same date.

10 Cf. GA Res. 72/106, in relation to Saint Helena. This is the case of the United States Virgin Island, in a referendum held on October 11, 1993, in which only 31.4% of the electoral roll participated, the successful option favoured a status of continued or improved territory (80.3%), compared with the other two options: "total integration within the USA" (14,2%) and "elimination of USA sovereignty" (4.8%). Cf. A/AC.109/1183, at 15-16.

11 This is the case of, among others, the constitutions of the British Virgin Islands of 2007, Turks and Caicos Islands of 2006 (partially suspended by the UK, which has direct control of the territory), or of Montserrat of 2011.

12 Ibidem.

13 Cf. i.e. GA Res. 72/108 or 72/109.

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### (2) Pitcairn, the *Reductio ad Absurdum* of the Right to the Self-determination of Peoples

The archipelago of Pitcairn, situated right in the middle of the South Pacific, administered by the UK, is an extreme case that borders on the absurd and would allow any territory whatsoever to defend its viability as state regardless of its particular circumstances. At the time of writing, the census population of the archipelago is 39 people! And just five years earlier was even lower, because half of the males were imprisoned after being sentenced for decades of sexual abuse in the exercise of what they regarded as a sort of ancestral *droit de seigneur*.[14] Despite this, also in this case the GA resolutions insist on declaring that "there is no alternative to the principle of self-determination, which is also a fundamental human right, as recognized under the relevant human rights conventions".[15] Pitcairn's economy, in the total absence of a tourist sector, depends fundamentally on the sale of postage stamps, since its attempts to attain fishing rights in its Exclusive Economic Zone (EEZ), established in 1992, have proved to be in vain on account of its location over a thousand nautical miles from the nearest populated area. For this reason, the efforts and studies devoted by the United Nations to the constitutional evolution of the territory, its future status and its development at an economic, social and cultural level appear to be a luxury, if compared with processes of decolonization of territories submitted to intense foreign exploitation.

### (3) Tokelau, the Blue Print

Finally, I have included the case of Tokelau in this section because, in my opinion, it constitutes a blue print for the decolonization of small insular territories such as those being analysed. The GA itself regards it as an example of efficient cooperation for the decolonization process and praised the way in which the administering Power contributes to the political, economic, social and cultural development of the territory. It is no coincidence that this administrator is neither

[14] The Special Committee's 2017's working paper "clarifies" that "this figure does not include the twelve individuals currently abroad" (A/AC.109/2017/12, of January 25, 2017). The current population of this NSGT are descendants of the sailors who mutinied on the *Bounty*, a British naval ship, in 1790 and of the Tahitian women taken by these during their flight from justice. Various cult films have been made on the subject of this incident, prominent examples including: "Mutiny on the Bounty" (1935 and 1962) and "The Bounty" (1984). In 2004, following various accusations, British justice retried six of the twelve men on the island, an action described by the "island authorities", UN interlocutors, as British neo-colonial conduct. Cf. M.O., Eshleman, 'A Preliminary Legal Bibliography of the Pitcairn Islands, South Pacific Ocean', 106(2) *Law Library Journal* (2014), at 221-236, accessed 27 August 2018. Since then these authorities have refused to intervene, as they had done previously, before the Special Committee. Between 2014 and 2019 the island authorities implemented a repopulation plan. In this respect, in June 2015 they passed the "Same Sex Marriage and Civil Partnership Ordinance" Law, in a desperate attempt to attract people to the island.

[15] GA Resolution 72/105, 7 December 2017.

the USA[16] nor the UK, but New Zealand, a state whose cultural and geographical proximity makes cooperation between the two parties considerably easier. In fact, on the occasion of the arrival in the territory of a UN visiting mission, the local authorities stated that attitude of New Zealand towards the territory was not colonialist and that, therefore, Tokelau was not a colonized country.[17]

In 2003 the island authorities and those of the administering Power signed a "Joint Statement on the Principles of Partnership", which laid the foundations for holding a referendum on self-determination in 2006 on the basis of a draft constitution for Tokelau and a free trade agreement with New Zealand. The condition under which, in this fashion, definitive decolonization of the territory would take place was that the modification of the island's status should be approved by a two thirds majority of votes, something that occurred in neither of the two referendums held in 2006 and 2007[18], as a result of which both parties agreed to a "pause" in the initiatives of self-determination while Tokelau focused on attending its basic needs. The situation remains the same today, although, given the good relationship with the administering Power, it is likely that on the next occasion that majority will be attained, with voting in favour of decolonization in 2007 falling only 2% short of the required figure.

### (c) NSGT where there is a strong demand for self-determination on the part of the indigenous population

#### (1) Guam

The case of Guam is an eloquent example of the intransigence of the USA when it comes to proceeding to the decolonization of the territories it administrates, even ignoring the GA's request to be allowed to send a mission to visit the territory.

There are several significant problems hindering and in fact preventing the decolonization of the territory. On the one hand, the Chamorro people was stripped of their lands in violent fashion and only extremely slowly are the legitimate owners recovering what is rightfully theirs.

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[16] The authorities of the territory have questioned in relation to the future referendum of self-determination the need to clarify the degree to which the 1983 *Treaty between New Zealand and the United States of America on the Delimitation of the Maritime Boundary between Tokelau and the United States of America* (ONU, *Treaty Series*, vol. 1643, Part I, at 28231; United States Treaty and other International Agreements 10775) violated the territorial integrity of Tokelau, by leaving under USA sovereignty the island of Swains which, until then, had formed part of the archipelago. New Zealand explained to the visiting mission that this was a type of deal with the USA to obtain the latter's renunciation of sovereignty over the whole of Tokelau (A/AC.109/2009, of September 7, 1994, at 53).

[17] Ibid., at 65.

[18] In the referendum of 2006, 60% of the votes were in favour of self-government in a regime of free association; in October 2007, 64.4% (A/AC.109/2017/14).

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On the other, the territory is subject to intense and incessant militarization, via the creation of military installations and an increase in related activities that have even been denounced by the GA.

But perhaps most significant and relevant from the point of view of the future exercise of the right to self-determination of peoples is the composition of the census for the referendum. The GA has voiced its concern following a recent ruling by a federal court in the USA, in March 2017, declaring "that a plebiscite on self-determination could not be limited to native inhabitants".[19] This is a key question throughout the whole decolonization process, as the holder of the right to self-determination is the people of the territory, its indigenous population, and not the colonists who have settled there. As I shall go on to indicate, this is one of the factors employed by both Morocco and the European Union in order to undermine this right and its beneficiary in the conflict over the Western Sahara: the territory's indigenous population. Because in Guam and in the Western Sahara massive immigration has resulted in the people of the territory constituting a minority in their own land.

### (2) American Samoa

This NSGT is another tax haven, so could well have been included in one of the previous sections but, unlike the aforementioned examples, its population has a marked identity which accentuates the differences with the administering Power and there is significant opposition to the latter's presence in the territory. In any case, and unlike what happens in Guam, the land is the exclusive property of the inhabitants of the territory, given that the area purchased by the US military to set up a naval base was returned to the Samoan Government following the USA's departure from the territory in 1950.

The islands' representatives have declared before the Decolonization Committee that without a "flexible and innovative approach", the prospects of decolonization are bleak, which does not appear to concern the administering Power, which has refused even to accept the request by the local authorities, endorsed by the GA itself, that a mission be sent to the territory.[20] For this reason, the local authorities have specifically requested the GA to maintain the territory on the list of NSGT.

### (3) New Caledonia

The colonization of New Caledonia, begun in 1853 by France, had serious consequences for the indigenous population of the territory, the Kanak people, who in the space of a few decades were stripped of their lands, livelihood and sacred sites; their artistic heritage was destroyed

[19] GA Res. 72/102, 7 December 2017.
[20] GA Res. 72/96, 15 December 2017.

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and the population confined to reservations, leading to a loss of references of identity as a people and the destruction of their organizational structures.

This territory, home to over 25% of the world's nickel reserves, is considered as a "French overseas sui generis community" and governed by chapter XIII of the Constitution of France, and has the status of associated territory to the European Union. It was included in the list of NSGT between 1946 and 1947, but when France failed to fulfil the obligations established in Article 73 (e) of the UN Charter, was again included in 1986. In spite of this and the GA's demands and the mission that visited the territory in 2014[21], France continues to withhold the information referred to in the aforementioned article.

The first significant agreements regarding the territory's future were the Matignon-Oudinot Agreements [22] of 1988, reached after a period of use of armed force against the colonial presence (1984-1988). By virtue of the subsequent Nouméa Accord (May 5, 1998), adopted in referendum on November 8 of that year by the inhabitants of the territory (72% of votes in favour), certain competences were transferred to the local authorities, with the exception of those relating to defence, security, justice and currency. The agreement provided for the staging of a referendum on self-determination between 2014 and 2018.

According to 1996 data, in this territory too, as result of immigration, the Kanak people is a minority in its own land (44,1%) and owner of only 50% of the latter[23]. Nevertheless, as provided for in the Nouméa Accord, more or less coinciding with the publication of this study, the referendum on self-determination will be held on November 4, 2018. The census for the referendum is comprised of permanent residents of the territory since 1994[24], and the question to be put to the population, made public on March 27, 2018 by the French Prime Minister following negotiations with all the signatories of the Nouméa Accord, will be: "Do you want New Caledonia to accede to full sovereignty and become independent?". In the event of a triumph of the "no" vote, in accordance with the Noumeá Accord, one third of the members of the Congress of New Caledonia may request that two new referendums be held in 2020 and in 2022[25].

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[21] "The mission encourages the administering Power to report under Article 73 e of the Charter of the United Nations the positive activities being undertaken in New Caledonia, as that would provide the international community with a deeper understanding of all elements of the self-determination process of New Caledonia, in accordance with the Nouméa Accord" (A/AC.109/2014/20/Rev.1, 18 June 2014, para. 116).

[22] A/AC.109/1000, at 9-14.

[23] Ibid., at 5 and 66.

[24] More details of the composition of the census for the referendum (Accessed 22 August 2018)

[25] At the time of writing these lines, the results of this referendum have just been announced: 56.4% of voters (80.83% of the electorate) have rejected the option of independence. Given that, contrary to the forecasts issued prior to the referendum, the difference in votes between the two options is so small, there is likely to be a new referendum in 2020, in which the likelihood of the pro-independence option prevailing or at least continuing to gain ground cannot be ruled out.

### (4) French Polynesia

As in the Kanak case, although the territory was included in the list of NSGT in 1946, the GA decided in 2013 to once again add it to the said list ("GA recognizes that French Polynesia remains a Non Self-Governing Territory within the meaning of the Charter, and declares that an obligation exists under Article 73 (e) of the Charter on the part of the Government of France, as the administering Power of the Territory, to transmit information on French Polynesia").[26] In spite of this and the GA's demands, France has yet to fulfil its obligations as set out by the UN Charter, providing the information referred to in Article 73 (e), and allowing a UN mission to visit the territory.

But in this case, there is a circumstance which differentiated it from all the others and which aggravates the colonial Power's responsibility. For, as is well known, because the matter was taken before the International Court of Justice by Australia and New Zealand, the nuclear tests performed by France in this part of the Pacific Ocean over more than three decades had and continue to have serious consequences for the health of the population and the environment in this part of the world.[27] It was not until February 2017 that a French law amended a previous law of 2010, increasing the possibilities of victims of radiation produced by the nuclear tests obtaining compensation from the French Government. In spite of this minor progress, we have no further news of the Polynesian people's right to self-determination.

### (5) Western Sahara

Spain began to colonize Western Sahara in 1884.[28] Unlike the British and French, Spanish colonization was not particularly traumatic: the inhabitants of the area enjoyed a cordial relationship with the Spanish colonizers. This continued until 1970 when the first nationalist aspirations appeared. Another factor that set the colonization of Western Sahara apart was that the Spanish had no intention of exploiting the natural resources; their sole interest was in small-scale fishing. However, the situation began to change when important deposits of

[26] GA Res. 67/265, 23 August 2013.

[27] Cf. "The environmental, ecological, health and other impacts of the 30-year period of nuclear testing in French Polynesia", Report of the Secretary-General of 25 July 2014 (A/69/189).

[28] For a general perspective of the conflict Cf. M. Barbier, *Le conflit du Sahara occidental* (Harmattan, Paris, 1982); T.M. Franck, 'The Stealing of the Sahara', 70 *American Yearbook of International Law* (1976): 694–721 (DOI: 10.2307/2200382); R. Riquelme Cortado, 'Marruecos frente a la (des)colonización del Sahara Occidental', *Anuario Mexicano de Derecho Internacional* 13 (2013): 205-265 (DOI: 10.1016/S1870-4654(13)71042-0); J. Soroeta Liceras, *International Law and the Western Sahara Conflict,* (Ed. Wolf, Oisterwijk, The Netherlands, 2014); and 'The Conflict in Western Sahara After Forty Years of Occupation: International Law *versus* Realpolitik', *German Yearbook of International Law* (2016), 59-2016, at 188-224; Y.H. Zoubir and D. Volman (eds.), *International Dimensions of the Western Sahara Conflict* (Westport, CT: Praeger, 1993).

phosphate were discovered in 1960s; this aroused the interest of both Spain and Western Sahara's northern neighbour, Morocco.

From the moment Spain joined in 1955, the United Nations began to pressure it to organize a referendum on self-determination in the territory so that the Sahrawi people could freely decide their own future. After the *Carnation Revolution* in Portugal and the subsequent independence of all Portuguese colonies, Spain finally had no option but to organize the referendum in 1974.[29] Everything at the time seemed to indicate that a new North African State was about to be born. However, Morocco had other ideas: it aspired to annex Western Sahara. This was the height of the Cold War; Morocco's plans received the support of the USA and France who feared the shadow of the socialist block might fall on yet another State. These two countries succeeded in having the GA pass a resolution which obliged Spain to suspend the referendum until the ICJ had ruled on whether Morocco and Mauritania had some sort of sovereign rights over the area.[30]

On the 16th of October in 1975 the Court of The Hague ruled that neither Morocco nor Mauritania had ever had any sovereign rights over the Sahrawi territory and that the conflict should be resolved through a referendum on self-determination.[31] On the 6th of November, the "Green March", a multitude of 350,000 Moroccan civilians assembled by King Hassan II, "peacefully" penetrated Sahrawi territory. However, one week before on the 31st of October, Moroccan forces had invaded the territory from the north and the Mauritanians from the south.[32] Despite the promises of the Spanish prince who would later become King Juan Carlos

[29] On August 20, 1974, the Spanish representative before the United Nations notified the Secretary General of the following: "The Spanish Government will hold a referendum, under the auspices and guarantee of the United Nations, within the first six months of 1975 on the date which will be established duly in advance; it will adopt the measures required for the indigenous inhabitants of the territory to exercise their right to self-determination in conformity with Resolution 3162 (XXVIII), of December 14, 1973; and will establish the procedure for holding the referendum, through the pertinent consultations, within the period stated" (A/9714).

[30] GA Res. 3292 (XXIX), 13 December 1974, requests the ICJ, "without prejudice to the application of the principles embodied in General Assembly Resolution 1514 (XV), to give an advisory opinion at an early date on the following questions: I) Was Western Sahara (Río de Oro and Sakiet El Hamra) at the time of colonisation by Spain a territory belonging to no one (*terra nullius*)?; If the answer to the first question is in the negative, II) What were the legal ties between this territory and the kingdom of Morocco and the Mauritanian entity?".

[31] "The Court's conclusion is that the materials and information presented to it do not establish *any tie of territorial sovereignty* between the territory of Western Sahara and the kingdom of Morocco or the Mauritanian entity. Thus, the Court has not found legal ties of such a nature as might affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara and, in particular, of the *principle of self-determination through the free and genuine expression of the will of the peoples of the Territory*" (*Western Sahara, Advisory Opinion, I.C.J., Reports 1975*, at 162 (emphasis added).

[32] GA Resolution 34/37, 21 November 1979, "reaffirms the inalienable right of the people of Western Sahara to self-determination and Independence" and "deeply *deplores* the aggravation of the situation resulting from the continued occupation of Western Sahara by Morocco and the extension of that *occupation* to the territory recently evacuated by Mauritania" (emphasis added).

I, Spain not only failed to comply with its obligations as the administering Power by defending the territory against the invaders but also handed it over to them through the "Madrid Tripartite Agreements", signed on the 4th of November 1975. To this day, Spain is still the administering Power in the territory and therefore responsible for it[33].

The POLISARIO Front is a national liberation movement recognized by the United Nations as the "sole and legitimate representative of the Sahrawi people".[34] From its formation in 1973, it carried out military operations against Spain; it subsequently waged a war of national liberation against the two States (Morocco and Mauritania) that were illegally occupying its territory. The civilian population fled to the south of the Algerian desert in search of refuge. As they fled, the Moroccan Air Force dropped napalm and white phosphorous bombs on them, actions constituting war crimes and genocide; they are currently the subject of legal proceedings in Spain. Mauritania abandoned the conflict in 1979 and recognized the Sahrawi Arab Democratic Republic (SADR), a State that had already proclaimed its independence on 27th of February 1976. It is currently recognized by more than eighty other States and is a full member of the African Union.

During the war, Morocco built a 2,800 km wall that has divided Western Saharan territory in two ever since. It received military and strategic support from the USA, France, Israel and other States. Two thirds of the territory remain under Moroccan occupation to this day; the other third is controlled by the POLISARIO Front. Since then the Sahrawi population comprises three groups: the ones who remain in their homeland and suffer foreign repression and military occupation; the ones who live in the refugee camps in Tinduf in the south of Algeria; and last of all the ones who live south of the wall in the Sahrawi-controlled sector of the territory.

The cease-fire came into force on the 6th of September 1991 after an agreement between Morocco and the POLISARIO Front under the auspices of the United Nations and the Organization for African Unity (currently the African Union).[35] This agreement made provision for a referendum on self-determination supposed to be held within six months. From 1991 to 2000 the MINURSO (*The United Nations Mission for the Referendum in Western Sahara*) went about compiling the census for the referendum in a process that took ten long

[33] Spain *remains, de jure*, if not *de facto, the administering Power of the territory*, and, as such, until the period of decolonization is completed, retains the obligations contained in Articles 73 and 74 of the UN Charter; including, *providing protection, even jurisdictional protection, to its citizens from all abuse, for which it must widen the scope of its territorial jurisdiction* to cover the acts referred to in the complaint. Cf. *National High Court (Audiencia Nacional)*, 40/2014, Ordinary Procedure 80/2013, Writ (*Auto*) of 4 July 2014.

[34] Ibidem.

[35] SC Res. 621 (1988), 20 September 1988.

years due to the systematic blocking tactics by the Moroccan part.[36] However, once MINURSO had published a provisional electoral list for the holding of the referendum (February 2000)[37], Morocco accused the members of the mission of bias and abandoned the peace plan. King Mohammed VI declared that he would never accept a referendum on self-determination, but an autonomy formula for Western Sahara, which would remain an integral part of its national territory and under its sovereignty. Since then, France's veto in the Security Council has prevented the United Nations from organizing the referendum and obliging the parties involved to abide by its results. In addition, it has prevented the MINURSO from monitoring the respect of human rights in occupied Sahara.

The situation of the Sahrawi refugees is desperate. More than forty years have gone by since they settled in the *hammada*, the most inhospitable part of the desert. Climatic conditions are extreme and they only survive thanks to ever dwindling humanitarian aid. The situation of the group that remains in its homeland and offers peaceful resistance to Moroccan military occupation is also desperate. Morocco commits massive violations of their human rights: forced disappearances, torture, rape, marginalisation, exclusion from employment and education etc.; all these form part of the population's daily lot.[38]

In the meantime, Morocco is illegally exploiting Western Sahara's natural resources – phosphate, fishing, agriculture etc. – violating international law and negotiating with the European Union, which is party to the crime. They may try and deny it but both the European Union and Spain openly support the illegal annexation of the territory. At the same time, Moroccan settlers continue to arrive in the area in contravention of the Geneva Convention of 1949, which prohibits the transfer of population from the occupying State's territory to the occupied territory.

But after years of inaction before the courts, the appeal for annulment lodged by the POLISARIO Front before the ECJ against the free trade agreement signed between Morocco and the European Union, which had been applied in Western Sahara since its entry into force, and the preliminary ruling referred to Court by the British High Court as the result of

[36] Cf. J. Soroeta Liceras, 'El plan de Paz del Sahara Occidental, ¿viaje a ninguna parte?', 10 *Revista Electrónica de Estudios Internacionales* (December 2005), at 1-33; 'Vigencia del Plan de Paz del Sahara Occidental (1991-2013)', in *El derecho a la libre determinación del pueblo del Sahara Occidental. Del ius cogens al ius abutendi* (Thompson Reuters Aranzadi, Pamplona, 2013), at 199-226.

[37] "Moroccan officials questioned again the impartiality and objectivity of Identification Commission members" (GS Report, 17 February 2000, S/2000/131).

[38] An historic event took place in November of 2010; it reflected the extreme frustration of those suffering these injustices. More than 20,000 people set up an enormous camp 10 kilometres from El Aaiun, the capital of Western Sahara. The aim of this massive gathering was to protest against the situation of marginalisation and impoverishment; it was called the Gdeim Izik Camp. The Moroccan army violently dismantled the camp after a month despite the peaceful nature of the protest. The Sahrawi people called it the "Camp for Dignity". Noam Chomsky regarded it as the first incident in the Arab Spring.

proceedings brought by the Western *Sahara Campaign* UK in relation to the fishing agreements, being implemented in the Western Sahara's territorial waters since the 1980s, have lent unexpected momentum to the Saharan claims. These proceedings have been the subject of numerous studies, so I shall only refer to them in summary fashion.[39]

Two ECJ judgements of 2016 and 2018[40] have ended both proceedings. On the one hand, the high court stated something elementary: given that it is a NSGT, *Western Sahara does not form part of Morocco*; on the other, given that pursuant to article 29 of the Vienna Convention on the law of treaties, "[U]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory", the two agreements mentioned are neither applicable "nor applied"[41] (*sic*) in Western Sahara, so they

[39] Among others, cfr. my papers 'La jurisprudencia del TJUE en relación con la legalidad de la explotación de los recursos naturales del Sahara Occidental o *el dogma de la inmaculada legalidad de la acción exterior de la Unión Europea* y sus consecuencias', *Revista General de Derecho Europeo*, 46 (2018), at 61-114; 'La Sentencia de 10 de diciembre de 2015 del Tribunal General de la UE (t-512/12), primer reconocimiento en vía judicial europea del estatuto del Sahara Occidental y de la subjetividad internacional del Frente POLISARIO', *RGDE* (2016) vol. 38, at 202-238, and 'La cuestión de la legalidad de la explotación de los recursos naturales del Sahara Occidental ante el Tribunal de Justicia de la Unión Europea', in *Retos para la Acción Exterior de la Unión Europea* (C.Martínez Capdevila and E.J. Martínez Pérez (Dir.), (AEPDIRI, Tirant Lo Blanch, Valencia, 2017), at 73-96; and 'La jurisprudencia del TJUE en relación con la legalidad de la explotación de los recursos naturales del Sahara Occidental o el dogma de *la inmaculada legalidad* de la acción exterior de la Unión Europea', *Revista General de Derecho Europeo* (2018), in press. See also A. Annoni, 'C'è un giudice per il Sahara occidentale?', 99(3) *Rivista di Diritto Internazionale* (2016), at 866-876; F. Dubuisson and G. Poissonnier, 'La question du Sahara occidental devant le Tribunal de l'Union européen, une application approximative du droit international relatif aux territoires non autonomes', 2 *Journal du Droit International* (2016), at 503-522; J. Ferrer Lloret, 'El conflicto del Sahara Occidental ante los tribunales de la Unión Europea', 42 *Revista General de Derecho Europeo* (2017), at 15-64; J. González Vega, 'La Guerra de los Mundos: realidad versus formalismo jurídico o el poder de la interpretación (a propósito de la sentencia TJUE de 27 de febrero de 2018, Western Sahara Campaign UK, C-266/16)', 60 *Revista de Derecho Comunitario* (2019), mayo-agosto, at 515-561; and 'El Sáhara occidental, de nuevo, en Luxemburgo: las implicaciones de una unión de Derecho', 56 *LA LEY Unión Europea* (2018); P. Hipold, 'Self-determination at the European Courts: The Front Polisario Case or The Unintended Awakening of a Giant', 2(3) *European Papers* (2017), at 907-921; S. Hummelbrunner and A. Carlijn Prickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union', *Utrecht Journal of International and European Law* (2016) 32(83), at 19-40; E. Kassoti, 'The Council v. Front Polisario Case: The Court of Justice's Selective Reliance on International Rules on Treaty Interpretation (Second Part)', 2(1) *European Papers* (2017), at 23-42; E. Milano, 'Front Polisario and the Exploitation of Natural Resources by the Administrative Power', 2(3) *European Papers* (2017), at. 953-966; J. Odermatt, 'Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front Polisario)', 111(3) *American Journal of International Law* (2017), at 731-738; O. Peiffert, 'Le recours d' un mouvement de libération nationale à l'encontre d'un acte d'approbation d'un accord international de l'Union: aspects contentieux', 52(2) *Revue Trimestrielle de Droit Européen* (2016), at 319-336; A. Rasi, 'Front Polisario: A Step Forward in Judicial Review of International Agreements by the Court of Justice?', 2(3) *European Papers* (2017), at. 967-975.

[40] Judgment of the Court (Grand Chamber) of 21 December 2016, *Council v. Front Polisario*, C-104/16 P, EU:C:2016:973, and Judgment of the Court (Grand Chamber) of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118.

[41] *Ibid.*, at 131-132.

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are valid. Nevertheless, as the General Court indicated in 2015, it is clear that, on the one hand, the agreement is applied in Western Sahara, "or, more precisely, to the largest part of that territory which is controlled by the Kingdom of Morocco"[42], and on the other, that throughout all the negotiations that was the undisguised intention of both parties (European Union and Morocco). To exempt the European institutions from international responsibility, and despite the fact that the latter explicitly recognized that the agreements have been applied in Saharawi territory since their entry in force, the ECJ has stated that the agreements have been applied in the territory only "*de facto*", a declaration devoid of legal content aimed at preventing appeals by the POLISARIO Front against illegal exploitation of Saharawi natural resources during the last thirty years.

Both ECJ judgements make it clear that the EU and Morocco may not conclude agreements regarding the exploitation of the territory's natural resources without the consent of the "people of Western Sahara" which "must be regarded as a *third party*"[43]. But the European institutions have not given up. To resolve this question, they aim to replace "the consultation of the people of Western Sahara" with the fact that "the people concerned by the agreement be adequately involved"[44]. To justify this legal aberration, the Commission commits another that is even more serious, since, following the discourse of the Moroccan government, it even questions the very existence of the Saharawi people.

Thus, there were "consultations with a wide range of socio-economic and political actors in Western Sahara, especially through interviews with civil society organisations, Western Saharan MPs, economic operators and representatives of the Polisario Front"[45]. These are bodies and institutions created by the Moroccan government, elected via a census in which most of the voters are colonists, in elections in which the Sahrawis do not participate, and, therefore, institutions that defend the official position of the Moroccan government. There are only two exceptions: the POLISARIO Front, which rejected any type of agreement between the EU and Morocco vis-à-vis exploitation of Saharawi natural resources, and the only two "legalized" Saharawi human rights associations according to the Moroccan administration[46], which refused to meet the members of the Commission and denounced the EU's attempt to "validate" the agreements, eluding the obligation established by the ECJ to consult the Sahrawi

[42] Judgement of the General Court (Eight Chamber) of 10 December 2015, *Front Polisario v. Council*, C T-512/12, EU:T:2015:953, at 103.

[43] Judgment of the Court (Grand Chamber) of 21 December 2016, *Council v. Front Polisario*, C-104/16 P, EU:C:2016:973, at 106.

[44] European Commission Staff Working Document (SWD (2018) 346 final, at 10, accessed 13 September 2018).

[45] Ibid., at 7.

[46] *ASDVH* (*Asociación Saharaui de Víctimas de Graves Violaciones de los Derechos Humanos Cometidas por el Estado marroquí*) and *Association El Ghad pour les droits de l'Homme*.

people through the POLISARIO Front, considered by both associations to be their sole and legitimate representative.

These "consultations" served as an excuse for the Council to adopt two Rulings in July 2018 which modify the aforementioned agreements on free trade and fishing and render them applicable. At the time of writing, both Decisions are still pending approval by the Parliament, which for decades has defended the Saharawi people's right to self-determination, as the only holder of this right, which therefore does not correspond to the Moroccan colonists. One hopes that the Parliament will act in coherence with its previous policy and reject the Council's proposal. Otherwise the POLISARIO Front will be forced to go to the ECJ to demand enforcement of its judgments.

In any case, the ECJ judgements have enabled the Saharawi national liberation movement to initiate legal proceedings all over the world against companies that negotiate with Morocco the illegal exploitation of the territory's natural resources. A May 2017 judgement by the South African *High Court* declaring that phosphates transported from El Aaiun to New Zealand are not the property of the company that extracts and sells them, but of the SADR[47], marks a before and an after in international trade in these resources. Fearing further legal proceedings against them, the Moroccan companies that illegally extract these resources from Western Sahara have been forced to abandon the traditional routes of the south of the African continent and the Panama Canal, where a similar appeal was also lodged[48], and transport this merchandise to America, Asia and Australasia by sailing round Cape Horn, making this trade more difficult and far more expensive. Meanwhile, legal action taken before domestic courts of other States, and even the mere threat of such action, has led since December 2015 to a multitude of companies abandoning the Saharawi territory for fear of having to pay hefty reparations. The POLISARIO Front has begun a long legal journey in order to defend the rights of the people it represents and will no doubt continue to do so, given that for the first time after over 40 years of occupation it has succeeded in breaching the bunker built by Morocco and the EU.

### (D) TERRITORIES WHOSE DECOLONIZATION MUST BE DEVELOPED VIA APPLICATION OF THE PRINCIPLE OF THE TERRITORIAL INTEGRITY OF STATES

[47] *High Court of South Africa, Eastern Cape local Division*, Port Elizabeth, Case 1487/17, judgement of 5 May 2017 (Accessed 29 June 2018).

[48] The appeal was lodged on May 17, 2017 by the Saharan Arab Democratic Republic (SADR) against a company transporting a cargo of phosphates to Canada. Writs (Autos) of the Primer Tribunal Marítimo de Panamá no. 122 and 126, of 16 and 19 May 2017 (the author of this study has a copy).

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In this section I shall refer to two NSGT, Gibraltar and the Malvinas/Falkland Islands, which are under the administration of the UK, which has made it quite clear that it is not prepared to proceed to the decolonization of either.

These are two territories in which one cannot speak of the existence of a people that seeks to exercise the right to self-determination. For this reason, although the United Nations resolutions state that the interests of the territory's population must be taken into account[49], "in cases such as this, the said population does not legally decide its own destiny, does not hold the right to free determination, and is not the dominantly protected legal asset. The consequence of decolonization is, purely and simply, the retrocession of the territory".[50] As Professor Remiro has pointed out, these are the only two cases in which the United Nations has regarded as decolonizing the claims of other States upon a NSGT it being understood that the right to self-determination is attributed to the population of the claimant State and is materialized in the reintegration of the territory. The aim is to avoid the consolidation of the colonial status of a territory via the population imported by the colonial Power.[51]

Both cases (in particular that of Gibraltar[52]) have been the object of extensive studies by internationalist doctrine, so I shall not dwell on their analysis.

### (1) Gibraltar

The British government, which in 1830 had included the territory among the *Crown colonies*[53], began in 1946 to provide the information that, pursuant to article 73 (e) of the Charter, must be provided by States that administer NSGT, thus acknowledging the colonial status of the

[49] GA Res. 2231 (XXI), 20 December 1966.

[50] J.D. González Campos, L.I., Sánchez Rodríguez and P. Andrés Sáenz de Santamaría, *Curso de Derecho Internacional Público* (2nd ed., Civitas, Madrid, 1998), at 774 (we translate).

[51] A. Remiro Brotóns, 'Desvertebración del Derecho Internacional en la Sociedad Globalizada', 5 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (2001), at 105.

[52] Among the extensive Spanish literature on the question, cf. for example, P. Andrés Sáenz de Santamaría and C. Izquierdo Sans, *'Eppur si muove*. Un nuevo enfoque en las negociaciones sobre Gibraltar (A propósito de los Comunicados Conjuntos de 27 de octubre y 16 de diciembre de 2004)', 56(2) *Revista Española de Derecho Internacional* (2004), at 741-764; C. Antón Guardiola, *Gibraltar: Un desafío en la Unión Europea* (Tirant lo Blanch, Valencia, 2011); A. Del Valle Gálvez and I. González García (Eds.), *Gibraltar, 300 años* (Servicio de Publicaciones Universidad de Cádiz, 2004); A. Del Valle, 'Gibraltar, su estatuto internacional y europeo, la incidencia de la crisis de 2013-2014', 48 *Revista Catalana de Dret Públic* (2014), at 24-52; J. Díez-Hochleitner, 'Les relations hispano-britanniques au sujet de Gibraltar: etat actuel', 35 *Annuaire Français de Droit International* (1989), at 167-187; C. Izquierdo Sans, '¿Quid de Gibraltar hoy?', *6 Cursos de derechos humanos de Donostia-San Sebastián* (2006), at 243-264; M Ortega Carcelén, 'Gibraltar y el Tratado de Utrecht', *Real Instituto Elcano* (2013); J. Verdú Baeza, 'La controversia sobre las aguas de Gibraltar: el mito de la Costa Seca', 66(1) *Revista Española de Derecho Internacional* (2014); and *Gibraltar: Controversia y Medio Ambiente* (Dykinson, Madrid, 2008).

[53] A/AC.109/PV/208.

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territory.[54] Despite this, when in 1963 the question was addressed by the Decolonization Committee, it refuted the latter's competence to analyse the question of the Gibraltar's sovereignty.[55] Arguing that the applicable principle is that of self-determination, on September 10, 1967 the British government called a referendum in which almost the entire population (99.64%) voted in favour of maintaining ties with the United Kingdom.

The GA denied any effect to the referendum, since it contravened various previous resolutions issued by the GA itself. They stated that the maintenance of Gibraltar as a colony of the United Kingdom was in violation of Spanish territorial unity and integrity[56], and called upon both parties to reach a negotiated agreement, taking into account "the interests" of the Gibraltarian population.[57] By means of Resolution 2429 (XXIII), the GA requested "the administering Power to terminate the colonial situation in Gibraltar no later than 1 October 1969 ", urging the British Government to initiate negotiations with a view to the return of the territory to Spain.[58] However, in 1969 the British Government decided to convert Gibraltar into a *British Overseas Territory*. Meanwhile, logically, the Spanish Government shares the GA's considerations and understands that the applicable principle is that of territorial integrity, and therefore considers that the will of the population of the territory lacks any legal relevance.

The negotiations for Spain's adhesion to the EEC gave rise to the so-called *Brussels Declaration* (1984), which appeared to steer the conflict towards solution, but the fact is that the European Union has been able to do little to change the main aspects of the dispute.[59] Thus, for instance, a proposal of co-sovereignty, which could be a possible solution to the conflict, was rejected by Gibraltar's population in a new referendum held in 2002. This was followed shortly afterwards by the creation of the *Tripartite Forum for Dialogue on Gibraltar*, with the participation of the two States and the Gibraltarian authorities, but the results of its work were limited.[60] Britain's decision to abandon the European Union has opened a new chapter, given the serious consequences this may have for the economy and population of the colony. The fact that 95.91% of the population voted in favour of "*remain*" is an eloquent demonstration of their concern over a future outside the EU. Although Spain has formally invited the UK to

[54] In 1962 the Committee of 24 included Gibraltar among the NSGT (ST/TRT/B.1962/1/ Add.1).

[55] A/AC.109/PV/208, 11 September 1963.

[56] GA Res. 2353 (XXII), 8 January 1968.

[57] GA Res. 2070 (XX) and 2231 (XXI), 16 December 1965 and 20 December 1966.

[58] GA Res. 2429 (XXIII), 18 December 1968.

[59] C. Izquierdo Sans, *Gibraltar en la Unión Europea. Consecuencias sobre el contencioso hispano-británico y el proceso de construcción europea* (Universidad Autónoma de Madrid, Madrid, 1996).

[60] On this Forum, cf. A. Del Valle Gálvez and I. González García, *Gibraltar y el Foro Tripartito de Diálogo* (Dykinson, Madrid, 2009).

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reconsider the proposal of joint sovereignty[61], it is still too soon to know whether *Brexit* can provide or not a definitive solution for the Rock.[62]

### (2) The Malvinas/Falkland Islands

Although this is a very old colonial controversy, the war in 1982 between Argentina and the UK over the territory's sovereignty stained it with blood, wrecking the half-hearted attempts at rapprochement previously made by the governments of both states, and brought to the attention of international public opinion the existence of this NSGT.[63] But in this study I shall leave aside analysis of this question to focus on the colonial issue and the applicability of the right to self-determination.

The GA Resolutions on the question have reiterated since 1965 the UK's obligation to decolonize the territory, and "invite the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland to proceed without delay with the negotiations recommended by the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples with a view to finding a peaceful solution to the problem, bearing in mind the provisions and objectives of the Charter of the United Nations and of *General Assembly resolution 1514* (XV) and the interests of the population of the Falkland Islands (Malvinas)".[64]

Perfectly applicable to this case is the reference to Gibraltar with regard to the "interests of the territory's population"; in the Malvinas/Falklands Islands there is no "people" or "indigenous population" seeking self-determination, since, as in Gibraltar, the arrival of the British in the territory resulted in the expulsion of its inhabitants. For this reason, the GA insists on taking into account the "interests", but not the "opinion" of the territory's inhabitants.

[61] A/AC.109/2017/8, 7 March 2017, at 52.

[62] On the possible consequences of *Brexit* in relation to the Gibraltarian conflict, cf. the collective work of M. Martín Martínez and J. Martín Pérez de Nanclares (coordinators), *El Brexit y Gibraltar: un reto con oportunidades conjuntas* (Ministerio de Asuntos Exteriores y de Cooperación, Madrid, 2017).

[63] On the main issues of this conflict, cf. L. Coconi, '¿Islas Malvinas o Falkland Islands?: la cuestión de la soberanía sobre las islas del Atlántico Sur', *Asociación para las Naciones Unidas de España, Conflictos olvidados* (2007) 5; N.E. Consani, 'La cuestión Malvinas', 38 *Relaciones internacionales* (2010), at 11-16; B.A. Bologna, 'Los derechos de Inglaterra sobre las Islas Malvinas: Prescripción', 4(4) *Revista de Estudios Internacionales* (1983), at 782 y s.; H. Gros Espiell, 'El caso de las Malvinas y el derecho a la libre determinación de los pueblos', 7 *Anuario Hispano-Luso-Americano de Derecho Internacional* (1984), at 27-42; A.M. Viejonuevo Sonia, 'Self-determination v. territorial integrity: The Falkland/Malvinas dispute with reference to recent cases in the United Nations',16 *South African Yearbook of International Law* (1990-1991), at 11-14.

[64] GA Res. 2065 (XX), 16 December 1965. This was followed by many others, the most noteworthy being GA Res. 3160 (XXVIII), 31/49, 37/9, 38/12, 39/6, 40/21, 41/40, 42/19, or 43/25.

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Despite the fact that it is still on the list of NSGRT, and therefore pending decolonization, the United Kingdom denies the territory's colonial status;[65] understands that the applicable right is that of self-determination that the population has clearly expressed its wish to continue being British and that there will be no negotiations over sovereignty until the inhabitants so desire.[66] As Gros Espiell would observe, the decolonization of the territory must be effected via application of the principle of the sovereign territorial integrity of the State, "lo que no sólo es compatible con el principio de la libre determinación de los pueblos, sino la única forma correcta y justa de aplicación de este principio".[67]

The fact is that the conflict is far from being resolved and new tensions arise with relative frequency. Thus, for example, the UK's decision to extend its jurisdiction over maritime space adjacent to the islands provoked a note of protest from the Argentine government which, in turn, was rejected by the administering Power: "The United Kingdom does not recognize Argentine jurisdiction over the area, which lies within 200 miles of the Falkland Islands and more than 200 miles from Argentine baselines".[68] This conflict also extends to the islands' continental shelf.[69] Meanwhile, in April 2015 the Argentine Government filed criminal charges in its courts against five oil companies for illicit activities of exploration and eventual extraction of hydrocarbons on the islands' continental shelf.[70] The inclusion in the Constitution of Argentina of a specific reference to Argentine sovereignty was in turn the object of an official protest by the United Kingdom...[71]

Both in the case of Gibraltar and that of the Malvinas/Falkland Islands, apart from violating the obligation to decolonize both territories, the UK violates the duty of every state to *comply*

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[65] The Argentine claims also extend to the islands of South Georgia and South Sandwich, situated to the east of the Falklands, over which the UK in fact exercises its sovereignty. The Argentine Constitution of 1994 reiterates that these islands form part of the territorial integrity of Argentina.

[66] A/AC.109/2010/15, 16 March 2010.

[67] H. Gros Espiell, *supra* n. 62, at 236 ("what is not only compatible with the principle of the self- determination of the peoples, but the only correct and just way to apply this principle", we translate). In spite of this, the Legislative Council of the Falklands stated in 1995 that "the Falkland Islands (Malvinas) had achieved most of the goals set by the Special Committee. The Islanders had the right to self-determination enshrined in their Constitution, and the Territory had enjoyed 155 years of peaceful democracy, interrupted briefly in 1982, when the Republic of Argentina chose to invade the Islands. The Islanders had a free association with an independent State, namely, the United Kingdom of Great Britain and Northern Ireland which, apart from defense and foreign policy, amounted to self-government. The United Kingdom recognized the Islanders' right to self-determination; Argentina did not" (A/AC.109/2121, 18 June 1995, at 25).

[68] A/AC.109/2027, 22 June 1995, at. 6 and 8.

[69] Thus, for example, on April 30, 1998 Argentina denounced the illegality of a public tender for the exploration and exploitation of natural resources on the continental platform of the Falkland Islands, via a note addressed to the UK embassy in Buenos Aires (cf. A/53/121, 12 May 1998).

[70] These are the British companies *Rockhopper Exploration plc, Premier Oil plc, Falkland Oil And Gas Limited* and the US companies *Noble Energy Inc. and Edison International SpA.*

[71] Cf. A/AC.109/2027, 22 June 1995, at 10.

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*in good faith* with its obligations under the Charter, since when the GA requests that it negotiates with Spain and Argentina, it does not merely intend formal negotiations to be held *sine die*, but that the negotiations have a purpose and genuinely seek to resolve the conflict.[72] As some authors have noted, the systematic repetition of this conduct is contrary to the duty to negotiate in good faith the solution to an international controversy and contrary to UN Law on decolonization.[73]

## (E) OTHER TERRITORIES UNDER COLONIAL RULE

### (1) Puerto Rico

Although it does not usually occupy a prominent position in studies on decolonization, given, on the one hand, the island's status within the USA as "Associated Free State", and, on the other, the fact that it is not on the list of NSGT, this is a territory with regard to which, as recently noted by Philip Alston, UN Special Rapporteur on extreme poverty, "in light of recent Supreme Court jurisprudence and Congress's adoption of PROMESA there would seem to be good reason for the UN Decolonization Committee to conclude that the island is no longer a self-governing territory".[74] In fact, since the 1980s the Decolonization Committee has been requesting that the analysis of the question should revert to the GA.

In 1946 Puerto Rico was included in the list of NSGT, but in 1952, following the promulgation of the Constitution of the Associated Free State, it was removed. GA Resolution 748 (VIII) stated that "when choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination", and that "in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico

[72] As the ICJ indicated, "the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement" (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, at 47).

[73] J.D. González Campos, L.I. Sánchez Rodríguez and P. Andrés Sáenz de Santamaría, *supra* n. 49, at 693.

[74] As is indicated by this report presented before the UN Human Rights Council in 2018, "69. Political rights and poverty are inextricably linked in Puerto Rico. If it were a state, Puerto Rico would be the poorest state in the Union. But Puerto Rico is not a state, it is a mere 'territory.' Puerto Ricans have no representative with full voting rights in Congress and, unless living stateside, cannot vote for the President of the United States. In a country that likes to see itself as the oldest democracy in the world and a staunch defender of political rights on the international stage, more than 3 million people who live on the island have no power in their own capital (...) 71. It is not for me to suggest any resolution to the hotly contested issue of Puerto Rico's constitutional status. But what is clear is that many, probably most, Puerto Ricans believe deeply that they are presently colonized and that the US Congress is happy to leave them in the no-man's land of no meaningful Congressional representation and no ability to really move to govern themselves" (Accessed 27 August 2018).

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have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity". Accordingly, it concluded that "the Declaration regarding Non-Self-Governing Territories and the provisions established under it in Chapter XI of the Charter can no longer be applied to the Commonwealth of Puerto Rico".[75]

Nevertheless, since 1972 the Decolonization Committee have been analysing the situation in Puerto Rico. Thus, the Decision of the Committee of 20 June 2016 recalls that "25 July 2017 marks the 119th anniversary of the *intervention in Puerto Rico by the United States of America*", and insists that "the process of decolonization of Puerto Rico, in compliance with General Assembly resolution 1514 (XV) and the resolutions and decisions of the Special Committee on Puerto Rico, has not yet been set in motion".[76] Meanwhile, the Decolonization Committee's June 18, 2018 Resolution, adopted by consensus, after explicitly declaring the inalienable right of the Puerto Rican people to self-determination and independence in accordance with GA Resolution 1514 (XV), again urges the USA to assume responsibility for initiating a process that would enable Puerto Rico to take sovereign decisions vis-à-vis its urgent economic and social needs.[77]

Since 1967 the population has been consulted on successive occasions (1993, 1998, 2012 y 2017), consultations that on the one hand are not binding for the USA, and on the other, do not satisfy the minimum requirements in order to be considered tantamount to what is required by Resolution 1514 (XV), in spite of the denomination of the latter as: "Law for the immediate decolonization of Puerto Rico". As the Special Committee has recalled, in the 2012 consultation "a majority of the people of Puerto Rico rejected its current status of *political subordination*, and that in the context of the significant upsurge of the economic and fiscal crisis in Puerto Rico, such status *prevents it from taking sovereign decisions* to address their serious economic and social problems, including unemployment, marginalization, insolvency, poverty, and issues related to education and health; a situation made worse by the imposition of a *Puerto Rico Oversight, Management, and Economic Stability Act* by the United States Congress". It also noted that "the Supreme Court of the United States, in conformity with the request made by the Department of Justice, decided in June 2016 in the case of *Puerto Rico v. Sánchez Valle*, that *the original and ultimate source of governmental power in Puerto Rico lies in the United States Congress*, and that any limited concession of self-government to Puerto Rico may be unilaterally revoked by the United States Congress".

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[75] GA Res. 748 (VIII), 27 November 1953, was adopted by a slim majority after intense debates and pressure from the USA: 26 votes in favour, 16 votes against and 18 abstentions; in other words, only 43%.

[76] A/AC.109/2017/L.12 (Emphasis added).

[77] Available electronically here (accessed 27 August 2018).

The Special Committee also reveals its concern because as a result of the *Puerto Rico Oversight, Management, and Economic Stability Act*, which mandated the establishment of the Financial Oversight and Management Board, "the already weakened area in which the prevailing regime of political and economic subordination in Puerto Rico operates is reduced even further".[78]

As well as stating that all these questions leave Puerto Rico in a situation of dependence and subordination in relation to the USA similar to that of the territory prior to the proclamation of the Associated Free State, the Special Committee draws attention to another circumstance, which also occurs in the USA's colonization of some of the territories that it administers: military exploitation. This is the case of island of Vieques, which was used for over 60 years by the US army to perform military manoeuvres, bombings included, with the corresponding negative consequences for the population's health, the environment and economic and social development. For this reason, the Special Committee urges the Government of the United States "to complete the return of occupied land and installations on Vieques Island and in Ceiba to the people of Puerto Rico, respect fundamental human rights, such as the right to health and economic development, and expedite and cover the costs of the process of cleaning up and decontaminating the areas previously used in military exercises through means that do not continue to worsen the serious consequences of its military activity in order to protect the health of the inhabitants of Vieques Island and the environment".

Meanwhile, the USA confines itself to "respectfully" asking the Committee "to focus its time and energy on the 17 NSGT that are waiting to be removed from the list"...

It is plain to see that this is a blatantly colonial situation. In fact it could be said that "Puerto Rico is even further from true self-governance today than it was in 1953".[79] Despite this, given that approximately half the citizens of Puerto Rico (around 3,500,000) currently reside in the USA[80], the option of the island becoming independent does not appear to have much future. But the possibility of reopening the debate over the decolonization of the territory in an international scenario would force the US authorities to initiate new negotiations that would make it possible to increase the territory's level of self-government and improve the living conditions of its inhabitants.[81] In any case it should be the people of Puerto Rico that decides the future of the territory, and not the US courts.

78 A/AC.109/2017/L.12 (emphasis added).
79 *Developments in the Law - The U.S. Territories*, 130 *Harv. L. Rev.* (2017), at 1656-1679, at 1679.
80 A/AC.109/2002/L.4, at 3.
81 Ibidem.

### (2) West Papua

The process that led this territory, also known as West Irian, to become a part of Indonesia, an integration still strongly challenged by the population[82], was not undertaken via consultation of the territory's population respecting universal suffrage, but by means of a consultation (*musjawarah*) of the tribal councils.

The fact is that when the United Nations arrived in the territory to attend the preparation of the referendum (UNSF)[83], Indonesia had already decided that the latter would not be held and that the consultation was to take the form of the aforementioned *musjawarah*, basing this decision upon the fact that the people of West Papua was one of the most primitive and underdeveloped populations in the world.[84] It also justified the non-holding of a referendum or a plebiscite on account of the fact that in the New York agreement, under which Holland and Indonesia negotiated the way in which the territory's self-determination should be implemented, there was no mention of the terms "referendum" or "plebiscite".

Despite "supervision" by a special envoy of the United Nations, this process constitutes a serious violation of the right to self-determination, particularly because in addition to the absence of a referendum respecting universal suffrage, the "consultation" of the tribal councils was strictly controlled by the Indonesian army, which isolated and coerced the council members, so that, as was indicated by T.D. Musgrave, "the Act of Free Choice was clearly nothing of the kind, and certainly did not represent the view of the vast majority of Papuans, who had shown their resistance to becoming a part of Indonesia through repeated demonstrations and armed rebellions throughout the entire period of Indonesian administration".[85]

But what is also particularly serious is the fact that the administration of the territory was transferred to the UN during a transitional period of nine months, after which administration of the territory was handed over to Indonesia, which six years later would perform the "consultation" of the tribal councils (approximately 1,000 of the territory's 800,000 inhabitants were consulted[86]).

This was the crude manner in which the integration was consolidated. It was subsequently endorsed by the GA through Resolution 2504 (XXIV), of November 19, 1969. This resolution

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[82] On the current situation of West Irian, cf. P. King, *West Papua & Indonesia since Suharto. Independence, Autonomy or chaos?* (University of New South Wales Press Ltd, Sydney, 2004).

[83] Unites Nations Security Force in West New Guinea (October 1962-April 1963).

[84] T.D. Musgrave, 'An analysis of the 1969 Act of Free choice in West Papua', in C. Chinkin & F. Baetens (ed.) *Sovereignty, Statehood and State Responsibility. Essays in Honour of James Crawford*, (Cambridge University Press, 2015), at 220.

[85] Ibidem.

[86] Cf. J. Morand-Deviller, "Autodétermination en Irian occidental et à Bahrein", 17 *Annuaire Français de Droit International* (1971), at 513-540.

recalled that "the arrangements for the act of free choice *were the responsibility of Indonesia* with the advice, assistance and participation of a special representative of the Secretary-General", something that, as T. Franck graphically observed in relation to the Saharawi conflict, was "like inviting a cat to consult the canaries".[87] As Morand-Deviller pointed out, the basic assumption was the legality of the consultations carried out in the processes of decolonization that were supervised by a UN envoy whose presence was accepted by the administering Power, so when he latter opposed this supervision, the process fell under suspicion.[88]

As F. Villar says, the example of Western Irian is "uno de los episodios más lamentables en que se hayan visto envueltas las Naciones Unidas en el proceso de descolonización".[89] Obviously, this case cannot be regarded as a precedent, but as "une dérogation à une règle générale dont la valeur juridique demeure entière: l'exigence d'une consultation du peuple pour toute intégration d'un territoire non autonome à un Etat indépendant, conformément au Principe IX de la résolution 1541 (XV)".[90] Although, in the UN's eye there is nothing surprising about the integration of a colonial people into a non-colonial Power since it is no more than a form of independence, of freedom[91], this integration must be the product of a decision freely taken by the people in question, which, obviously, did not occur in the case of West Papua.

### (3) The Malagasy islands of Glorieuses, Juan de Nova, Europa and Bassas da India

Since 1979 the GA has maintained in its programme the analysis of the question of Malagasy islands of Glorieuses, Juan de Nova, Europa and Bassas da India.[92] At the request of Madagascar, which claims sovereignty over these since its independence in 1960, in 1979 the GA adopted Resolution 34/91, in which besides declareing the "the necessity of scrupulously respecting the national unity and territorial integrity of a colonial territory at the time of its accession to independence", invited "the Government of France to initiate negotiations without further delay with the Government of Madagascar for the reintegration of the above mentioned islands, which were *arbitrarily separated from Madagascar*" and urged the Government of France "to repeal the measures which infringe the *sovereignty and territorial integrity of Madagascar* and

[87] T.M. Franck, *supra* n. 29, at 717.

[88] J. Morand-Deviller, *supra*, n. 85 at 514.

[89] F. Villar, *El proceso de autodeterminación del Sahara* (F. Torres ed., Valencia, 1982), at 258-260 ("one of the most regrettable episodes in which the United Nations has been involved in the process of decolonization", we translate).

[90] C. Rucz, 'Un referendum au Sahara occidental?', 40 *Annuaire Français de Droit International* (1994), at 248.

[91] J.F. Guilhaudis, *Le Droit des peuples à disposer d'eux-mêmes* (Presses Universitaires de Grenoble, 1976), at 86.

[92] Its status of "island" according to international law is very questionable, as, while Bassas da India only emerges at low tide, the other three are uninhabited, with only a small French military detachment of around ten soldiers who ensure control over the islands.

to refrain from taking other measures that would have the same effect and could hinder the search for a just solution to the present dispute".[93]

During the next session, GA Resolution 35/123 "invites the Government of France to initiate with the Government of Madagascar, as a matter of urgency, the negotiations provided for in resolution 34/91, with a view to settling the question in accordance with the purposes and principles of the Charter of the United Nations".[94]

In this case, as in the one addressed in the next section, France violated the principle *uti possidetis iuris*, by separating at the moment of independence these islands from the main island[95], "la Grande Île", since as the ICJ established in its judgement of December 22, 1986, in the *case of the Frontier dispute* (*Burkina Fasso/Republic of Mali*), "as a principle which upgraded former administrative delimitations, established during the colonial period, to international frontiers, is therefore a principle of a general kind which is logically connected with this form of decolonization wherever it occurs".[96]

In spite of the GA's insistence that France respect Malagasy territorial integrity, given the establishment of the EEZ around what it called the "Îles Eparses"[97], which along with the island of Mayotte ensure this state both control of the fishing resources in practically half of the Mozambique Channel[98] and future exploitation of the vast hydrocarbon reserves present on its continental shelf, nothing suggests that this permanent member of the SC, accustomed to ignoring GA Resolutions in questions of decolonization, is going to change its position.[99]

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93 Emphasis added.

94 In the same sense, cf. GA Res. 36/452, 37/424, 38/422, 39/421, 40/429, 41/416, 42/415, 43/419, 44/419, 45/402, 46/402, 47/402, 48/402, 49/402, 50/402, 51/402, 52/402...

95 Décret n°60-555 du 1 avril 1960 relatif à la situation administrative de certaines îles relevant de la souveraineté de la France (Accessed 28 August 2018).

96 *Frontier Dispute, Judgment, I.C.J. Reports 1986*, at 566, paragraph 23.

97 Under this common denomination, France includes Tromelin, an islet of 0.8 km2 whose sovereignty is claimed by Mauritius. Through a joint communiqué, in December 2002 the governments of Mauritius and Madagascar agreed to support their respective demands: "sur la question de Tromelin et les îles Éparses, le gouvernement mauricien continuera à accorder son appui à la revendication du gouvernement malgache sur les îles Éparses (Juan de Nova, Europa, Bassas da India et les îles Glorieuses). Le gouvernement mauricien a, de son côté, réitéré sa souveraineté sur Tromelin et a souhaité pouvoir continuer de bénéficier du soutien du gouvernement malgache à cet effet. Le gouvernement malgache a pris note de la position mauricienne" (Accessed 28 August 2018).

98 Via the establishment of an EEZ around these islands, the EEZ that France controls measures 636,000 km2. On these questions and for the French point of view, cf. B. Dujardin, 'Les espaces maritimes français', 477 *La Revue Maritime* (2006), faccessed 28 August 2018).

99 The French position is reflected perfectly in the words of Jean-Marc Châtaigner, former French ambassador to Madagascar, when he criticizes the contents of Resolution 34/91 in the following terms: "Cette résolution, se référant étonnamment aux principes de décolonisation (alors que les îles Éparses n'ont aucune population autochtone), est souvent citée à tort, par les partisans de la souveraineté malgache sur les îles Éparses, comme un fondement juridique de leur position. Il convient en effet de rappeler que les résolutions de l'AGNU n'ont pas de valeur juridique contraignante en droit international public, contrairement aux résolutions du Conseil de sécurité"

### (4) Mayotte and the Decolonization of the Comoros Islands

Following the UN's steps in order to bring an end to the decolonizing process, the authorities of the Comoros Islands and France concluded the agreements of June 15, 1973, which anticipated the holding of a referendum on self-determination in the territory. On December 22, 1974 the referendum was held on the four islands that make up the archipelago (Grande Comore, Anjouan, Moheli and Mayotte). The first three voted in favour of independence, while Mayotte voted against.[100]

Although it is not necessary to recall the absolute validity of the principle of *uti possidetis iuris*, and consequently, the illegality of the attempt to separate Mayotte from the rest of the islands that form the archipelago, on the basis of these results (I am not going to analyse the irregularities that characterized the election campaign in Mayotte), the French Government organized two referendums (February 8 and April 11, 1976) on the island. In both the population voted in favour of remaining under French administration, as a result of which France accepted the independence of the new State of the Republic of Comoros, but excluded its main island.

GA Resolution 31/4 declared that "the referendums imposed on the inhabitants of the Comorian island of Mayotte constitute a violation of the sovereignty of the Comorian State and of its territorial integrity", and described the French presence on the island as "occupation". Consequently, it "condemns and considers null and void the referendums", and "*calls upon* the Government of France to withdraw immediately from the Comorian island of Mayotte". The resolution could not be more robust. This resolution was adopted on the basis of the primacy of the principle of territorial integrity over that of the free choice of the people of Mayotte, especially bearing in mind that "in accordance with the agreements between the Comoros and France, signed on 15 June 1973 (...) the results of the referendum of 22 December 1974 were to be considered *on a global basis and not island by island*"[101]. This is one of the first GA resolutions on the question, followed by others of a similar nature, adopted on an annual basis.

In the domestic French sphere, it appeared that F. Mitterrand's entry into Government in May 1981 might change this island's destiny, since in his election manifesto he argued in favour of its reintegration into the Comoros, but this proposal was never more than a paper tiger. In recent years there have been proposals of economic, scientific and environmental co-

(J.M. Châtaigner, 'Les îles Éparses : enjeux de souveraineté et de cogestion dans l'océan Indien', *La Revue maritime* (2015), at 84, accessed 28 August 2018. The ambassador forgets that, as we have seen in the cases of Gibraltar and the Malvinas/Falklands, decolonization does not mean that the population should exercise the right to self-determination and that on occasions, like this one, the applicable principle for decolonization to occur is that of territorial integrity.

[100] In the case of the first three islands the vote in favour of Independence was 99.8% (150,000), compared with 65% against in Mayotte (around 5,000 votes)

[101] AG Res. 38/13, 21 November 1983.

management of these island territories, but the pressure exerted by the more nationalist right has prevented these proposals from being voted on in the French National Assembly, as they were considered to be an abandonment of sovereignty. Meanwhile, the instability in the rest of the islands has steadily increased since 1995, with French mercenaries inciting the pro-independence movements.[102]

After a new referendum called by Sarkozy in 2011, Mayotte became French Department 101 and in January 2014 became a RUP (*Région Ultra Périphérique*) under European administration. But it seems that neither the French authorities nor the indigenous population, who regarded this privileged status as a major advance in their development, anticipated the possible consequences of converting this little island into a piece of the European Union more than 8,000 kilometres from the French capital and in the middle of a particularly poor part of the world. This circumstance has led to the biggest crisis in the island since its separation from the rest of the country, and it has resulted in massive immigration from the rest of the islands to Mayotte in search of the "European" dream, to the extent that, despite the expulsion of over 20,000 of these immigrants, in April 2018 the "illegal" population of the island constituted 50% of the total (approximately 260,000 inhabitants).

Nonetheless, French economic interests in the exploitation of economic resources in both the EEZ and the island's continental shelf prevent significant progress in the solution of the conflict, in other words, in decolonization.

### (5) The Chagos Archipelago: Law enters the stage

In 1965, three years before the declaration of the independence of Mauritius, which already appeared to be inevitable, the United Kingdom separated from its territory the Chagos archipelago,[103] with the intention of creating on the largest island, Diego García, a military base. This action was endorsed in the same year by the *Lancaster House Undertakings*, concluded between the UK and the Mauritian representatives during the negotiations prior to the territory's independence, in which the archipelago's separation was a *sine qua non* of

[102] As P. Caminade has noted, since 1995 French mercenaries have contributed to the destabilization of the country, fomenting the nationalism that has emerged in the rest of the country's islands. This author considers that the instability in the Comoros is a direct consequence of illegal French occupation and France's neo-colonial policy. Since then citizens arriving in Mayotte from the other islands have been returned immediately by the French authorities. In the eyes of the UN this is a single state, so these expulsions are in breach of international law (P. Caminade, *Comores-Mayotte: une histoire coloniale* (Agone, Marsella, 2003).

[103] On November 8, 1965 the archipelago became the *British Indian Ocean Territory* (B.I.O.T.), via the *The British Indian Ocean Territory Order 1965*, *Statutory Instruments 1965*, No. 1920. As has been said, the island of Tromelin was also segregated from Mauritius by France.

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decolonization.[104] According to this agreement, the UK committed to, amongst other questions, the following: "if the need for the facilities on the islands disappeared the islands should be returned to Mauritius". In spite of this, on December 20, 1966 the UK ceded its "new colony" to the USA for fifty years with the option of prolongation for further twenty years.

Between 1968 and 1973, the year in which the military base became operational, the approximately 2,000 inhabitants of the island of Diego García were expelled, and had to resettle in Mauritius and the Seychelles in conditions of extreme poverty, in order that the USA could build the base.

GA Resolution 2066 (XX), after reiterating "the inalienable right of the people of the Territory of Mauritius to freedom and independence in accordance with General Assembly resolution 1514 (XV)", invites the Government of the United Kingdom of Great Britain and Northern Ireland to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV) and to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".[105] This resolution was followed by other similar ones which have always been ignored by the British authorities.

In this same sphere of the United Nations, the Human Rights Committee has been addressing the question and has criticised the fact that despite its previous recommendation, the UK has not included the Chagos archipelago in its periodic report because "it claims that, owing to an absence of population, the Covenant does not apply to this territory". It has also stated that the UK "should ensure that the Chagos islanders can exercise their right to return to their territory (...) and consider compensation for the denial of this right over an extended period".[106]

But beyond the limited scope of the resolutions adopted by the United Nations GA or the Human Rights Committee, both the victims of the expulsion and the Republic of Mauritius itself have recurred to every possible judicial institution in defence of their rights.

On the one hand, though with little success, the citizens that were expelled from Diego García have launched different proceedings in the domestic courts of the USA and the UK,

[104] Among others, and in addition to the aforementioned, the following commitments: (...) compensation totalling up to £3m should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands; (...) the British Government would use their good offices with the U.S. Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable: (a) Navigational and Meteorological facilities; (b) Fishing Rights; (c) Use of Air Strip for emergency landing and for refuelling civil planes without disembarkation of passengers; (...) that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government". Cf. *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, 18 March 2015, at 77, accessed 9 September 2018.

[105] GA Res. 2066 (XX), 16 December 1965.

[106] "Consideration of reports submitted by States parties under article 40 of the Covenant", 30 July 2008 (CCPR/C/GBR/CO/6, para. 22).

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and in the ECHR itself. An excellent work by Pigrau Solé analyses all of these in detail, so I shall not address the question in depth in this short study.[107] These proceedings have been largely unproductive, and as this author notes, they highlight both "los instrumentos jurídicos que permiten a los gobiernos eludir el escrutinio judicial de sus decisiones políticas y utilizar a los tribunales nacionales, en los Estados Unidos y el Reino Unido, justamente para blindar dichas decisiones", and the considerable reluctance of these courts to recognize the relevancy of the International Law in their respective legal systems.[108] Similarly, the ECHR has preferred to ignore the origin of the expulsion of the claimants, in other words, the UK's violation of the principle of *uti possidetis iuris* and of its obligations established in article 73 (e) of the UN Charter, dismissing the legal action on procedural grounds.[109]

Meanwhile, the Mauritian Government, since the very moment of its independence, and particularly since 1984, has been very belligerent in its demands. In that year it claimed the 200 miles of EEZ surrounding the archipelago which, despite the UK's protests[110], and as P.H. Sand recalls, "was recognized in the Agreement between the European Economic Community and the Government of Mauritius on Fishing in Mauritian Waters (June 10, 1989)".[111] For its part, the UK proceeded that same year to declare its own EEZ[112], though this did not prevent the Mauritian boats from continuing to fish there.

Going a step further, in 2010 the United Kingdom declared a "Marine Protected Area" (MPA) around the archipelago, although it excluded from the latter the island of Diego García. The result of this action was that Mauritius, on December 20, 2010, submitted the case to arbitration under UNCLOS Annex VII, disputing the compatibility of the MPA with UNCLOS and the competence of the UK to establish it. For, if in spite of the declaration of the EEZ by the UK, until then the Mauritian boats had fished in these waters without great

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[107] Cf. A. Pigrau Solé, "El caso de la Isla de Diego García: territorio sin Derecho Internacional, personas sin derechos", 31 *Revista Electrónica de Estudios Internacionales* (2016), at 1-36. As Professor Pigrau recalls, this is jurisprudence from US courts, which in 2004 and 2006 blocked legal proceedings in application of the well-known doctrine of the "political question", and from British courts in five key decisions: *Michel Ventacassen Case*, 1975; *Bancoult 1 Case*, 2000; *The Chagos Islanders Case*, 2003 and 2004; *Bancoult 2 Case* (2006, 2007 and 2008) (ibid. at 9-17) y *Bancoult 3 Case* (2016 and 2018). See also P.H. Sand, "The Chagos Archipelago Cases: Nature Conservation Between Human Rights and Power Politics", *The Global Community Yearbook of International Law & Jurisprudence* (2013), I, at 125-149.

[108] Pigrau Solé *supra* n. 108, at 35 ("the legal instruments that allow governments to avoid judicial scrutiny of their political decisions and use national courts in the United States and the United Kingdom to justify such decisions", we translate).

[109] European Court of Human Rights, Fourth Section, Decision, Application no. 35622/04, *Chagos Islanders against the United Kingdom*, 11 December 2012.

[110] United Kingdom's Note Verbale of 18 February 1985. See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, at 105.

[111] P.H. Sands, *supra*, n. 108 at 138, n. 84.

[112] Fisheries Zone. Proclamation No. 8 of 1984.

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problems, the declaration of the MPA expressly prohibited commercial fishing. As Pigrau Solé has pointed out, and as Mauritius maintained, behind the environmental justification lies the real reason for the declaration of the MPA: consolidate the military activity of the Diego García base and protect the decision to prevent the return of the original inhabitants.[113]

The Tribunal decided that it lacked jurisdiction to consider Mauritius' claim that the UK was not the "coastal State" in respect of the Chagos Archipelago for the purposes of the Convention;[114] that it also lacked jurisdiction to consider Mauritius' alternative claim that the *Lancaster House Undertakings* endowed Mauritius with attributes of a "coastal State".[115] The Tribunal stated that the dispute concerned the question of sovereignty over the Chagos Archipelago and not a matter concerning the interpretation of the UNCLOS and that it did not therefore have jurisdiction to decide the matter.

However, although partially, the court found in favour of the claimant state. In its opinion, the "Lancaster House Undertakings" were a *sine qua non* imposed by the United Kingdom upon the negotiators in order that Mauritius could become an independent state,[116] and consequently Mauritius holds legally binding rights to fish in the waters surrounding the Chagos Archipelago, to the eventual return of the Chagos Archipelago to Mauritius when no longer needed for defence purposes, and to the preservation of the benefit of any minerals or oil discovered in or near the Chagos Archipelago. But perhaps most importantly from the perspective of international law is the application to the UK of the institution of the *estoppel*,[117] identifying the existence of two necessary circumstances for the latter: "(a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in

[113] Pigrau Solé *supra* n. 108, at 25.

[114] *In the Matter of an Arbitration Before An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea between the Republic of Mauritius and The United Kingdom of Great Britain and Northern Ireland.* Award of 18 March 2015, at 221.

[115] Ibid. at 228.

[116] "The Tribunal considers the *Lancaster House Undertakings* to have been an essential condition to securing such Mauritian consent to the detachment of the Archipelago as was given. Without yet passing on the legal nature of these commitments or the validity of Mauritian consent, the Tribunal is confident that, without the UK's undertakings, neither Sir Seewoosagur Ramgoolam nor the Mauritius Council of Ministers would have agreed to detachment" (Ibid. at 422).

[117] The British position has been stated on numerous occasions in the following terms: "The British Government maintains that Chagos archipelago is British since 1814. It does not recognize the sovereignty claim of the Mauritian Government. However, the British Government has recognized Mauritius as the only State which has a right to assert a claim of sovereignty when the United Kingdom relinquishes its own sovereignty. Successive British Governments have given undertakings to the Government of Mauritius that the Territory will be ceded when no longer required for defence purposes and does not recognize the sovereignty claim of the Mauritian Government. But recognizes Mauritius as "the only State that has a right to assert a claim of sovereignty when the United Kingdom relinquishes its own sovereignty" (A/55/PV.28, 22 September 2000).

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question".[118] So, "these representations took the form both of confirmation that the United Kingdom had given an undertaking in the past[119] and of independent promises, and were made in statements by the Prime Minister and Foreign Secretary of the United Kingdom, who were unequivocally authorized to speak for it on this matter. The Tribunal also considers that the United Kingdom's consistent, unvaried practice of permitting Mauritian fishing in the waters of the Archipelago constituted a representation by conduct that such fishing rights would be continued, not necessarily".[120] Therefore, the Court concludes that "in establishing the MPA surrounding the Chagos Archipelago the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of the Convention".[121]

It is clear from the text of the judgement that it seeks to satisfy both parties, something unfortunately very common in international jurisprudence. Thus, regrettably it avoids reference to the causes of the conflict. In this respect, I am in total agreement with the dissenting and concurring opinion of Judges Kateka and Wolfrum: the Mauritian Ministers were coerced in 1965 into agreeing to detachment and UK's detachment of the Archipelago violated the international law of self-determination.[122] In any case, and as some authors have observed,[123] this arbitration decision appears to oblige the parties to negotiate over the future of the archipelago although the USA's presence renders its resolution far more difficult.

But there is yet another fact that may prompt the definitive decolonization of the territory which, as in the case of the Malvinas/Falklands or Gibraltar, should be undertaken via application of the principle of territorial integrity. On 22 June 2017, the GA adopted resolution 71/292 in which it requested the Court to render an advisory opinion on the following questions:

> "a) *Was the process of decolonization of Mauritius lawfully completed* when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly

[118] *In the Matter of an Arbitration Before An Arbitral Tribunal Constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea Between the Republic of Mauritius and The United Kingdom of Great Britain and Northern Ireland.* Award of 18 March 2015, at 438.

[119] "[t]he British Government has therefore given an undertaking to the Government of the Republic of Mauritius that, when the islands are no longer needed for the defence purposes of the United Kingdom and the United States, they will be ceded to Mauritius" (Letter dated 1 July 1992 from the British High Commissioner, Port Louis, to the Prime Minister of Mauritius (Annex MM-103) Ibid., at 439. See also Letter dated 10 November 1997 from the UK Secretary of State for Foreign and Commonwealth Affairs to the Prime Minister of Mauritius (Annex MM-105) (Ibidem).

[120] Ibídem.

[121] Ibid. at 547.

[122] Dissenting and Concurrent Opinion Judge James Kateka and Judge Rüdiger Wolfrum, at 70-80.

[123] Pigrau Solé *supra* n. 108, at 35; M. Walbel, 'Mauritius v. UK: Chagos Marine Protected Area Unlawful', at 5, published 17 April 2015, accessed 9 September 2018).

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resolutions 1514 (XV), of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?"

"b) What are the *consequences under international law*, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

At the time of writing, the public hearings phase has concluded and the Court is ready to begin its deliberation,[124] so it is too soon for any kind of evaluation. In spite of the fact that these are not contentious proceedings, so their consequences will necessarily be limited, it is to be hoped that the Court takes into account both the arbitration decision of 2015 and its advisory opinion of 1975 on the Western Sahara and the decolonization policy practised by the United Nations during the more than fifty years since the UK decided to segregate the archipelago of Mauricio, violating, like other colonial Powers (the aforementioned case of Mayotte is an eloquent example), the principle of *uti possidetis iuris*. The Court has a unique opportunity to once again insist on the need to conclude the decolonization process. Everyone is aware that the advisory opinion could have an impact upon other incomplete processes.

The decolonization of the Chagos Archipelago represents a classic problem of decolonization, but its geo-strategic situation on one of the main Pacific routes for hydrocarbons and strategic raw materials, and the return to the Cold War since Trump's arrival in the White House appear today to constitute an insurmountable obstacle. Nevertheless, in this case, as in that of the Western Sahara, the use of jurisdictional channels seems to have slightly opened a door that appeared to be closed. Although as André Oraison predicted almost three decades ago, "Diego Garcia risque de rester, longtemps encore, un 'super porte-avions' britannique ancré au coeur de l'océan Indien et armé par les Américains pour le compte de l'Occident",[125] those of us who still believe the virtues of international law when in the hands of judges hope that this does not prove to be the case.

## (F) SOME CONCLUSIONS

In recent decades the debate has reopened with regard to the current scope of the right of peoples to self-determination, a question that is analysed in depth in this edition of the *Spanish Yearbook of International Law*. But apart from this debate, its applicability to peoples subjected to colonial rule is beyond any doubt. The repeated reference to its validity in resolutions adopted every year by the GA and the SC in relation to NSGT leaves no room for doubt.

[124] *ICJ Press Release* No. 2018/44, 6 September 2018.

[125] A. Oraison, 'À propos du litige Anglo-Mauricien sur l'archipel des Chagos (La succession d'États sur les îles Diego Garcia, Peros Banhos et Salomon)', *Revue belge de droit international* (1990), 1, at 53.

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Big Powers and their allies insist on prioritizing their interests over respect for international law, maintaining the prevailing *statu quo* in the territories they administer or occupy. Their main argument is the passage of time: the right of peoples to self-determination is an "obsolete right", an "anachronism"[126]. But behind this affirmation with no legal basis lie all kinds of hidden interests: from the strictly economic (exploitation of the land territory's natural resources, of the EEZ[127] and of the continental shelf) or political, military or geo-strategic, to rancid and antiquated nationalistic claims. Although the passage of time obviously complicates the decolonization of these territories, under no circumstance can it serve as an excuse to consolidate and "legalize" a situation born of a serious violation of international law; even less so in cases of military occupation.

Despite this, in some cases the problems involved in decolonization appear to be almost insurmountable. This is the case of some NSGT that have become authentic tax havens, in which, if it occurred, decolonization would consist in incorporation into the administering powers, albeit they were then dressed up as "associated free states". To the decolonization of other NSGT, in which the colonizers dispossessed the population of its lands to use them for military purposes (such as Guam, American Samoa or New Caledonia) or even to carry out nuclear tests (French Polynesia), and in spite of strong protests by their inhabitants, is added the problem of registration for the census, given the demographic changes resulting from colonial power's organized policy of colonization, which has turned the indigenous population into a minority in its own land. This is also the situation of the population of Western Sahara, the largest African territory pending decolonization, in which purely economic interests (fishing, agriculture, phosphate...) combine with other political and geo-strategic aspects of greater importance to the European Union (immigration control, combatting jihadist terrorism, stability of the regime). The UN's intervention in the Peace Plan has already borne fruit: the MINURSO did its job thoroughly and since 2000 a census for the referendum has existed, but the intransigence of the occupying power and the French veto on the SC prevent the referendum from being held. Something similar occurs with the decolonization of the two NSGT that should be undertaken via the application of the principle of territorial integrity (Gibraltar and Malvinas/Falkland), although in this case it is the UK that is preventing the application of international law.

Although their resolution is equally complex, the case of other territories that are not on the list of NSGT and whose decolonization was deemed to have terminated by the middle of the

[126] "The era when self-determination was synonymous with an absolute right to political independence has passed, and more flexible and creative bases for compromise between disputing parties are presently in order" (S.J. Spector, 'Western Sahara and the Self-Determination Debate', *Middle East Quarterly*, summer 2009, at 33-43).

[127] Although a simple glance at the coast of its mainland territory suggests the opposite, France currently possesses the largest EEZ in the world, 8% of the total.

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last century, like Puerto Rico or West Papua, is once again on the Decolonization Committee's agenda along with that of others that were segregated from their respective states when they gained independence, in violation of the principle of *uti possidetis iuris* (The Malagasy islands of Glorieuses, Juan de Nova, Europa and Bassas da India, Mayotte and the Chagos Archipelago). This is further evidence that the GA does not consider the phenomenon of decolonization to be over and that it takes the matter seriously.

The United Nations was created by the states that won the war, which granted themselves the right to veto which makes it impossible for the SC to impose the application of international law and conclude the decolonization process. Three of them, USA, France and the UK, are responsible for this situation, since with the exception of West Papua, all the territories mentioned are under the administration or military occupation of these three states or their allies. In these circumstances there is little cause for optimism. So far the right to veto has been the final phase of these processes.

However, the recourse to legal proceedings taken by the authorities of some of these territories has begun to bear fruit. When the frustrated attempts by Portugal with regard to East Timor or Nauru in relation to Australia before the ICJ seemed lost in the mists of time, domestic courts within the states and international courts like the ECHR, the ECJ or the ICJ itself have had to dust off the international law manuals and study the key points of the rights of peoples to self-determination. I am not so naive as to think that these proceedings will be sufficient for that Third International Decade for the Eradication of Colonialism, due to end in 2020, to be a reality. But they may represent the push that the international community needs in order, once and for all, to achieve this. I hope this is the case.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

*Secession of States and Self-determination in contemporary International Law*

# A right of all peoples: the internal dimension of self-determination and its relationship with democracy

Paz ANDRÉS SÁENZ DE SANTA MARÍA*

*Abstract*: Regulated for the first time in article 1 of the 1966 International Covenants on Human Rights, internal self-determination is configured as a collective human right which is linked to the democracy, whose subject is the people constituted in a state and whose content is related to the rights of political participation and the procedural aspects of the democratic principle. So have reminded the Spanish constitutional bodies that have ruled on the Catalan question. The international order does not go far regarding the internal dimension of self-determination and its generic proclamation.

*Keywords*: Internal self-determination – Democracy - Article 1 of the 1966 International Covenants on Human Rights - Democratic clause - Catalonia

## (A) INTRODUCTION

A review of the most relevant literature on the right of peoples to self-determination points to two common features worth emphasizing at the outset: its long-standing link to decolonization and its complexity.

The former casted doubt about the future of the principle after most territories under colonial domination gained their independence. In 1989, a renowned expert on the subject warned that:

> "The question that remains is whether the concept of self-determination will continue to play a legal as well as political role in the future."[1]

Needless to say, time has proved that there was no cause for concern about the vitality of this right. Regarding its complexity, it is unanimously acknowledged, as shown by the following remarks drawn from the literature on the right to self-determination:

> "it is difficult, extraordinarily intertwined with other norms of international law, controversial, topical, and well illustrates the complexities of the law-creating process."[2]

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1 K. Hannum, 'The limits of Sovereignty and Majority Rule: Minorities, Indigenous People and the Right to Autonomy', in E.L. Lutz, H. Hannum and K.J. Burke (eds.), *New Directions in Human Rights* (University of Pennsylvania Press, Philadelphia, 1989), at 9.

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> "No other area of international law is more indeterminate, incoherent, and unprincipled than the law of self-determination."[3]
>
> "The international law of self-determination is in fact full of gaps, contradictions, and incongruences."[4]
>
> "The right of peoples to self-determination is frustratingly ambiguous. Its subject, 'the people', is not defined and unlikely ever to be so. The right can be used in contradictory ways: to support or split states, to protect sovereignty or to encourage intervention. This vagueness is the perennial attraction of self-determination..."[5]

This paper focuses on the internal dimension of the right to self-determination. Although it has always existed, for decades it has been overshadowed by its external dimension linked to decolonization.[6] In the post-colonial era, self-determination is associated precisely to its internal aspect,[7] but that does not mean neglecting the peoples that have not been able to exercise external self-determination.

### (B) THE EMERGENCE OF INTERNAL SELF-DETERMINATION IN THE ACADEMIC LITERATURE

As is well known, in the 1990s a nourished set of doctrinal contributions on the internal dimension of self-determination came to light, with works that are an inexcusable reference[8]; in them is where the expression is consecrated, which today is generally accepted. The Supreme Court of Canada's opinion in *Re Secession of Quebec*[9] in 1998 contributed decisively

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[2] R. Higgins, *Problems and Process. International Law and How We Use It* (Clarendon Press, Oxford, 1994), at. 111.

[3] F. R. Tesón, 'Introduction. *The Conundrum of Self-Determination*', in F.R. Tesón (ed.), *The Theory of Self-Determination* (CUP, 2016), at 1.

[4] E. Rodríguez-Santiago, 'The Evolution of Self-Determination of Peoples in International Law', in F.R. Tesón (ed.), *The Theory of Self-Determination*, *supra* n. 3, at 202.

[5] J. Summers, 'The internal and external aspects of self-determination reconsidered', in D. French (ed.), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law* (CUP, 2013), at 229.

[6] L.-A. Sicilianos, *L'ONU et la démocratisation de l'État. Systèmes régionaux et ordre juridique universel* (Pedone, Paris, 2000), at 33; See, in a similar vein, Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (La Documentation Française, Paris, 1999), at 327-328; also, J. Summers, *supra* n. 5, at 230.

[7] As highlighted by Ch. Tomuschat, 'Self-Determination in a Post-Colonial World', in Ch. Tomuschat (ed.), *Modern Law of Self-Determination* (Nijhoff, Dordrecht, 1993), at 1-20.

[8] Th. Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992), at 46-91; J. Crawford, 'Democracy and International Law', 64 *BYIL* (1993), at 113-133; Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* n. 7; A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (CUP, 1995); Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, *supra* n. 6; M. Koskenniemi, "National self-determination today: problems of legal theory and practice", 43 ICLQ (1994), at 241-269; G. Palmisano, *Nazione Unite e autodeterminazione interna* (Giuffré, Milan, 1997); J. Salmon, "Internal Aspects of the Right to Self-Determination: towards a Democratic Legitimacy Principle", in Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* n. 7.

[9] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

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to consolidating the concept, which was also integrated into the Spanish literature,[10] although with some reluctance in certain cases.[11]

That set of literature from the 1990s continues to be an essential reference, even after the new wave of publications stemming from the Kosovo affaire and other conflicts.[12] In any case, the content of the right to self-determination remained unchanged.

### (C) THE REGULATION OF INTERNAL SELF-DETERMINATION: THE RELEVANT TEXTS

It is notorious that the internal dimension of self-determination was first reflected in Article 1 of the 1966 International Covenants on Human Rights. Its content is the outcome of the negotiations between two groups of states: on the one hand, the socialist and developing countries supported the USSR's initial proposal to include a provision on the right to self-determination, understood as linked to the struggle against colonial domination; on the other, Western states —particularly those with colonies— opposed such inclusion.

The preparatory work took place in the framework of the UN Commission on Human Rights, and the draft covenants were submitted to the Third Committee in 1955, thus setting the wording of Article 1.[13] Paradoxically, as noted by A. Cassese, the strategy of those opposed

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[10] F. Mariño Menéndez, 'Naciones Unidas y el derecho de autodeterminación', in F. Mariño Menéndez (ed.), *Balance y perspectivas de Naciones Unidas en el cincuentenario de su creación* (Univ. Carlos III de Madrid, BOE, 1996), at 98-99; P. Andrés Sáenz de Santa María, "La libre determinación de los pueblos en la nueva sociedad internacional", I *Cursos Euromediterráneos Bancaja de Derecho Internacional*, (1997), at 113-203.

[11] J. Soroeta Liceras, in his 2011 course in Vitoria, warns that "although the distinction between both dimensions is now uncontested, it barely contributed to the debate on its scope, and it has caused more problems than it has solved."Therefore, "we don't see the need to broaden its scope to 'all peoples'."However, he finally accepts it with resignation: "Nevertheless, the debate is now closed... so we will not insist on this issue."("El derecho a la libre determinación de los pueblos en el siglo XXI: entre la realidad y el deseo", *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz* (2011), at 468-469). He was not the only one to show some reluctance: V. Abellán pointed out that the concept of internal self-determination deprives the principle of its conceptual autonomy, which is thus limited to the common features with international human rights law. That is why he expressed doubts regarding this new concept and advocated the original formulation linked to colonization ('Consideraciones jurídicas internacionales sobre la libre determinación de los pueblos', in *Soberanía del Estado y Derecho Internacional. Homenaje al profesor Juan Antonio Carrillo Salcedo*, T. I (Sevilla, Universidad de Córdoba, Universidad de Sevilla, Universidad de Málaga, 2005), at 70-72).

[12] To mention but a few works: D. Raič, *Statehood and the Law of Self-Determination* (Kluwer, La Haya, 2002); D. French (ed.), *Statehood and Self-Determination. Reconciling Tradition and Modernity in International Law*, *supra* n. 5; A.K. Coleman, *Resolving Claims to Self-Determination. Is there a role for the International Court of Justice?* (Routledge, London, New York, 2013); J. Vidmar, *Democratic Statehood in International Law. The Emergence of News States in Post-Cold War practice* (Hart Publishing, Oxford/Portland, 2013); J. Fisch, *The Right of Self-Determination of Peoples. The Domestication of an Illusion* (CUP, 2015); P. Hilpold (ed.), *Autonomy and Self-Determination* (Edward Elgar, Cheltenham, 2017).

[13] On the preparatory work, see, *inter alia*, H. Hannum, "Rethinking Self-Determination", 34 *Virginia Journal of International Law* (1993), at 1-69; A. Cassese, *supra* n. 8, at 47-52, Th. CHRISTAKIS, *supra* n. 6, at 335-337. A. Jarillo Aldeanueva has pointed out that Article 1 "was directly proposed by the General Assembly, thus limiting the scope for redrafting within the Human Rights Commission"(*Pueblos y Democracia en Derecho*

to enshrining the principle of self-determination led to a wider regulation than the one initially proposed by its supporters.[14] The date, 1955, is relevant because it shows that section 2 of General Assembly resolution 1514 (XV) merely reproduced what had been agreed 5 years before.[15]

The second relevant text is U.N. General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV). From the outset, Western states were resolved to extend the right to self-determination to all peoples, especially since they considered that it could be a political weapon against authoritarian socialist governments.[16] From the perspective that concerns us here, it is worth noting that the Declaration does not only contain a general enunciation but also what some have called a safeguard clause and others a democratic or representative government clause, depending on whether the focus is on territorial integrity or the substantive content of internal self-determination. It is worth recalling that the original wording "without distinction as to race, creed or colour", which led to different interpretations, was later replaced by the generic expression "without distinction of any kind", already to be found in the 1993 Vienna Declaration and other subsequent instruments.[17]

Considering the dates when the *leading texts* were adopted, 1966 (actually 1955, as explained above) and 1970, the intervening states –and particularly those of the Socialist bloc– could not have foreseen all the subsequent effects, but the potential was already there.[18]

What is the meaning and scope of these texts? As discussed below, the general aspects do not raise doubts, but their scope and boundaries are much less clear.

## (D) THE CLEAR ASPECTS OF INTERNAL SELF-DETERMINATION: A COLLECTIVE RIGHT OF ALL PEOPLES LINKED TO THE PRINCIPLE OF DEMOCRACY

There is consensus that Article 1 of the Covenants links self-determination to human rights, the former being construed as a collective right underpinned by the principle of democracy.

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*Internacional* (Tirant lo Blanch, Valencia, 2012), at 67). This author notes that the internal aspects of self-determination were also addressed during the discussions in the Third Committee (*Ibid.*, p. 79).

[14] A. Cassese, *supra* n. 8, at 52.

[15] As pointed out by J. Fisch, *The Right of Self-Determination of Peoples. The Domestication of an Illusion*, *supra* n. 12, at 198.

[16] A. Cassese, *supra* n. 8, at 109.

[17] U.N. General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, U.N. Millennium Declaration, GA Res 55/2, U.N. 2005 World Summit Outcome, GA Res. 60/1.

[18] On the potential of these UN texts, see L.-A. Sicilianos, *L'ONU et la démocratisation de l'État. Systèmes régionaux et ordre juridique universel*, *supra* n. 6, at 122-126.

Among the Spanish writers, X. Pons Rafols has argued that the Covenants give rise to "a conceptual and systematic relationship between self-determination and human rights",[19] "which remains constant and upholds its preeminence indefinitely."[20] Also, "this connection between self-determination and human rights bears testimony to the value of such important issues as the principle of democracy."[21] A. Mangas Martín relies on the GA Res. 2625 (XXV) to point out that "the internal dimension of self-determination corresponds to the very content of the idea of democracy."[22]

Similar opinions can be found in other countries' literature. Regarding the Covenants, A. Cassese highlights in his reference work that it "is the first time that an international legal rule proclaimed self-determination *qua* the right of a whole people to democratic rule."[23] As highlighted by J. Crawford, Article 1 "asserts the principle of democracy at a collective level",[24] without forgetting the link established by T. M. Franck between internal self-determination and what he calls the "emerging right to the democratic governance."[25] According to L. A. Sicilianos, internal self-determination "constitutes the very essence of democratic legitimacy."[26]

As for the subject of the right, most scholars understand the expression "all peoples"as the people constituted in a state. Therefore, in the words of A. Remiro, "the peoples concerned

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19 "Legalidad internacional y derecho a decidir", 27 *REEI* (2014), at 29; also in *Cataluña: Derecho a decidir y Derecho internacional* (Ed. Reus, Madrid, 2015), at 134.

20 "Legalidad internacional y derecho a decidir", *supra* n. 19, at 29, and *Cataluña: Derecho a decidir y Derecho internacional*, *supra* n. 19, at 136. The idea had already been put forward by A. Cassese, *supra* n. 8, at 101.

21 "Legalidad internacional y derecho a decidir", *supra* n. 19, at 30, and *Cataluña: Derecho a decidir y Derecho internacional*, *supra* n. 19, at 142.

22 "Democracia y Estado de Derecho: respuestas legales desde las Naciones Unidas", 50 *Revista catalana de dret públic*, (June 2015), at 5. In the same vein, F. Mariño Menéndez considers that the ultimate aim is the "realization of democracy" ("Naciones Unidas y el derecho de autodeterminación", in F. Mariño Menéndez (ed.), *Balance y perspectivas de Naciones Unidas en el cincuentenario de su creación*, *supra* n. 10, at 99). J. Roldán Barbero remarks that, in its internal dimension, self-determination "evokes, also in its origins, political democracy" (*Democracia y Derecho internacional* (Civitas, Madrid, 1994, at 162).

23 *Supra* n. 8, at 65-66.

24 "Democracy and International Law", *supra* n. 8, at 16.

25 "The Emerging Right to Democratic Governance", *supra* n. 8, at 65-66. According to P. Thornberry, it is the "democratic aspect" of self-determination ("The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism", in Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* n. 7, at 120). For H. Thierry, this dimension of self-determination "is confused with a right to democracy" ("L'évolution du droit international", 222 *RCADI* (1990-III), at 169).

26 *Supra* n. 6, at 126.

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are assimilated to the population of the states",[27] while A. Mangas refers to "the people or peoples within a constituted state."[28] Many authors endorse this stance.[29]

Hence, the general ideas are shared, but –as always– the devil is in the details. How far does the principle of democracy underpinning internal self-determination extend? Is it acceptable to claim, as Prof. Mangas does, that "internal self-determination and democracy are ultimately interchangeable concepts"?[30]

The first challenge arises from the fact that the United Nations has acknowledged that there is no single pattern of democracy. The 2005 United Nations World Summit Outcome document states that "while democracies share common features, there is no single model of democracy, that it does not belong to any country or region",[31] and the same has been affirmed by other Resolutions.

## (E) THE BLURRED BOUNDARIES OF INTERNAL SELF-DETERMINATION: WHAT IS THE SCOPE OF THE PRINCIPLE OF DEMOCRACY?

Thus, one can attempt to outline the scope of the democratic principle from the concrete perspective of the collective human right to self-determination using two main perspectives: scholarly literature and the comments of the supervisory bodies established by human rights treaties.

### (1) The content of internal self-determination in the literature

A review of the scholarly works shows a wide consensus regarding the content of internal self-determination.

For instance, A. Rosas has pointed out three aspects: the people's right to define its own political system; to have its own voice in the amendment of the constitution; and to take part in the conduct of public affairs, including participation in elections and referendums.[32] A. Cassese refers to the people's right to choose freely its own rulers through democratic processes and, in particular, through free elections,[33] considering that internal self-determination presupposes that all members of a population are able to exercise those rights

[27] 'Soberanía del Estado, libre determinación de los pueblos y principio democrático', in F. Mariño Menéndez (ed.), *El Derecho internacional en los albores del siglo XXI. Homenaje al profesor Juan Manuel Castro-Rial* (Trotta, Madrid, 2003), at 553.

[28] *Supra* n. 22, at 5.

[29] See, *inter alia*, D. Raič, *Statehood and the Law of Self-Determination*, *supra* n. 12, at 237 and 284.

[30] *Supra* n. 22, at 6.

[31] GA Res. 60/1, para. 135.

[32] 'Internal Self-Determination', in *Modern Law of Self-Determination*, *supra* n. 7, at 249.

[33] *Supra* n. 8, at 346-348.

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and freedoms allowing the expression of the popular will.[34] D. Raič mentions a right to participation[35] and links internal self-determination to Article 25 of the International Covenant on Civil and Political Rights (ICCPR).[36] H. Hannum invokes that provision as well as Articles 19 (freedom of opinion and expression) and 21 (freedom of association).[37] L.A. Sicilianos points to the people's right to adopt its own constitution and to amend it, as well as the right to choose its rulers and to take part in the conduct of public affairs, including in particular participation in elections.[38] According to this author, the ICCPR contains other provisions conceptually related to the right to self-determination: Article 19 (freedom of expression), 21 (right of peaceful assembly), 22 (freedom of association), 25 (right to take part in the conduct of public affairs), since:

> "only if individuals effectively enjoy the abovementioned rights does the people as a whole have a real right to self-determination, and vice versa."[39]

Among Spanish scholars, X. Pons refers to "the existence of representative governments, the participation of all in public affairs or the respect for the rights of groups and minorities";[40] A. Mangas elaborates on the "right of the whole population to take part in political, economic and cultural life ... [which] is only possible through free elections", pointing out that "the people or peoples in a constituted state are entitled to demand, based on the right to self-determination, respect for the law, (political, cultural, racial, religious...) pluralism, and personal rights and freedoms."[41] F. Mariño has stressed the importance of "respect for all civil and political human rights regarding, in particular, the exercise of the freedoms of thought, expression, assembly, and association, and the right to take part in free, secret and regular elections."[42] In the words of C. Gutiérrez Espada, Article 25 of the ICCPR is "the very core of the peoples' right to internal self-determination."[43]

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[34] It expressly refers to Articles 19, 21, 22 and 25 of the ICCPR (*op. cit.*, p. 53).

[35] *Supra* n. 12, at 237.

[36] *Ibid.*, pp. 274-275.

[37] *Supra* n. 13, at 58-59.

[38] *Supra* n. 6, at 33; also at 125. In his view: "The right to internal self-determination, collective in nature, is conceptually different from the individual political rights. Although on a different level, they are both closely linked in the sense that the collective right is fully realized through the exercise of individual rights" (at 155).

[39] *Ibid.* at 126. In a similar sense, P. Hilpold cites Articles 21, 22 and 25 of the ICCPR ("Self-determination and Autonomy: Between Secession and International Self-determination", 24 *International Journal on Minority and Group Rights*, (2017), at 327).

[40] "Legalidad internacional y derecho a decidir", *supra* n. 19, at 30.

[41] *Supra* n. 22, at 5-6.

[42] *Supra* n. 10, at 98-99.

[43] 'El derecho de libre determinación de los pueblos', in F.J. Ansuátegui Roig, J.M. Rodríguez Uribes, G. Peces-Barba, E. Fernández García (eds), *Historia de los Derechos Fundamentales*, Vol. 4, T. 3 (Dykinson, Madrid, 1998), at 680. A. Jarillo Aldeanueva also highlights the complementarity between Articles 1 and 25 of the ICCPR (*supra* n. 13, at 94).

Ultimately, the common approach is to relate internal self-determination to the political rights enshrined in the ICCPR; hence the oft-used expression "political self-determination."

The most recent works introduce some nuances. For instance, J. Vidmar holds that the connection between the clause on representative government and human rights does not necessarily imply a right to democracy in the sense of an obligation to establish a multi-party political system or a specific electoral model. In his opinion, the former only evokes certain democratic elements –i.e., some general democratic principles.[44] D. Raič also considers that representative government does not mean liberal democracy *per se*.[45] Even A. Cassese acknowledges that the democratic model outlined in the Covenant —which is the common reference point— is so generic that states can easily contend that they live up to it.[46]

However, there is no actual disagreement since all of them ultimately advocate a procedural democracy, implemented through regular elections and political participation rights. That is the same approach adopted by the Canadian Supreme Court when it highlighted that the people of Quebec has always had access to government:

> "Residents of the province freely make political choices and pursue economic, social and cultural development... The population of Quebec is equitably represented in legislative, executive and judicial institutions... Canada is a 'sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction.'"[47]

It is nevertheless worth mentioning that some authors are not fully convinced by these arguments, which brings us back to a vague scenario. Along these lines, C. Gutiérrez Espada claims that the true revolution stemming from the principle of self-determination lies on its application to the state's population:

> "I do not believe that any general international law enshrines, as part of a people's right of self-determination, the subjective right of every State's population to have a true representative

[44] *Democratic Statehood in International Law. The Emergence of News States in Post-Cold War practice*, *supra* n. 12, in particular at 199-201. This author even argues that "via the right of self-determination, international law requires a *representative* government, but representative is not necessarily a synonym for democratic" (*ibid*. at 8).

[45] *Supra* n. 12, at 275-279. According to this author, "the notion of 'representativeness' assumes that government and the system of government is not imposed on the population of a State, but that it is based on the consent or assent of the population and in that sense is representative of the will of the people, regardless of the forms or methods by which the consent or assent is freely expressed" (*ibid*., at 279).

[46] *Supra* n. 8, at 54.

[47] Para. 136 of the Opinion.

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> government, establishing supervisory and enforcement mechanisms for that purpose. At least, that is not yet the case..."[48]

On the other hand, it is important to bear in mind that the collective right to self-determination is associated with individual rights to political participation and, to a great extent, it is materialized through them, but its identity transcends such rights. At the same time, the former is a precondition for the exercise of the latter.

### (2) The content of internal self-determination according to the supervisory bodies established by human rights treaties

The Observations and Comments of the human rights treaty bodies provide some guidelines on the content of this right, even if they are scarce and do not add much to academic contributions.[49]

The reference text is the well-known General Comment No. 12 of the Human Rights Committee (CCPR), of 1984, on the right to self-determination enshrined in Article 1 of the Covenant.[50] Three main ideas stand out.

First, its link with human rights: according to the Committee, "The right... is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[51]

Second, its content draws on other rights in the Covenant: in the words of the Committee, "This right and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law."[52]

Finally, somehow assuming the relationship between the right to internal self-determination and the right to political participation, the Committee points out that, in their reports, "States parties should describe the constitutional and political processes which in practice allow the exercise of this right."[53]

However, it has been rightly noted that the General Comment's way of referring to internal self-determination is "vague and abstract."[54] Upon analysing certain country reports, the Committee has subsequently recalled that it is a right of all peoples linked to Article 25 of

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[48] *Supra* n. 43, at 681. The still uncertain content of the right to internal self-determination has led some authors to affirm that "it still remains obscure to what extent protecting the right of political self-determination actually requires democratic governance" (S. Van Den Driest, "'Pro-democratic' intervention and the right to political self-determination: the case of operation Iraqi freedom", *NILR* (2010), at 38).

[49] Even less can be found in the periodic reports submitted by the states, which at best enunciate the features of the state's constitutional system and political structure.

[50] CCPR/4/Add.1.

[51] Para. 1.

[52] Para. 2.

[53] Para. 4.

[54] Th. Christakis, *supra* n. 6, at 341.

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the ICCPR.[55] In any case, such reports do not add any relevant information, since they merely enunciate the characteristics of the constitutional system and political structure of the state concerned.

Article 25 was indeed the object of the 1996 Committee's General Comment No. 25. After noting that this provision "lies at the core of democratic government", it points out that "[t]he rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government."[56]

However, the Human Rights Committee has warned that the relationship between the right to self-determination in Article 1 of the ICCPR and other rights enshrined in that same text does not mean that the individual complaint mechanism provided by the Optional Protocol can be used with respect to the former. The Protocol is not applicable to this provision.[57]

Also relevant for this analysis of the practice of supervisory bodies is General Recommendation XXI of the Committee on the Elimination of Racial Discrimination (CERD), on the right to self-determination, adopted in 1996. It stresses once again the relationship between self-determination and human rights:

> "the implementation of the principle of self-determination requires every State to promote, through joint and separate action, universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations"[58]

It also reiterates the relationship with the right to take part in the conduct of public affairs:

> "In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In

[55] See L.M. Sicilianos, *supra* n. 6, at 127-129; Th. Christakis, *supra* n. 6, at 341-347.

[56] Paras. 1 and 2 of the General Comment (CCPR/C/21/Rev.1/Add.7).

[57] As emphasized by A. Jarillo Aldeanueva (*supra* n. 13, at 76), who adds that "given the individual nature of the right, Article 25 of the ICCPR has more specific procedural consequences than Article 1 –referred to self-determination" (*Ibid.*, at 132). This procedural limitation explains why C. Puigdemont's complaint specifies that it is filed in reference to Articles 19, 22, and 25 of the ICCPR, adding that "This application concerns the right to political participation reflected in the cluster of constituent rights set out in articles 19, 22 and 25 of the ICCPR. Although article 1 guarantees the right to self-determination, this application does not invoke article 1 directly. Mr. PUIGDEMONT is not asking the UNHRC to declare its support for the cause of self-determination for the Catalan people. That is not the function of an individual petition under the Optional Protocol. However, the ICCPR does expressly guarantee the right of individuals to argue and advocate in favor of self-determination and constitutional reform, and to stand for election on a pro-independence manifesto. This is guaranteed through the collection of political rights that lie at the heart of this application." (para. 76). Last accessed 16 November 2018.

[58] Para. 3 (HRI/GEN/1/Rev.7).

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> that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation."[59]

It is worth noting that the Committee on Economic, Social and Cultural Rights, in its General Comment No. 21, Right of everyone to take part in cultural life (Article 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), of 2009, stated that this right "is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination (art. 1)."[60]

### (F) INTERNAL SELF-DETERMINATION BEFORE THE ICJ: THE *KOSOVO* CASE

C. Jiménez Piernas has remarked that the Court's treatment of the principle of self-determination in the Kosovo case was "dreadful", although the related documentation produced during the written and oral proceedings makes it possible to know the position of a considerable number of states.[61] Indeed, some asked the ICJ to address the case from a different angle,[62] while others invoked internal self-determination in the general terms explained above: as a right of a state's population, with political content, and to be exercised within a state.[63] Of course, the Canadian Supreme Court's decision was widely cited. Discrepancies arouse concerning the remedial-secession, but that falls beyond the scope of this work.

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[59] *Ibid.*, para. 4.

[60] Para. 2 (E/C.12/GC/21).

[61] C. Jiménez Piernas, "Los principios de soberanía e integridad territorial y de autodeterminación de los pueblos en la opinión consultiva sobre Kosovo: una oportunidad perdida", LXIII *REDI* (2011), at 30.

[62] Albania (Written Comments, paragraph 61), United States of America (Written Comments, Chapter IV, Section II), Norway (Written Comments, paragraph 8), United Kingdom (Written Comments paragraph 10) and the authors of the Unilateral Declaration of Independence (Written contribution, paragraph 8.38).

[63] See Written Statements: Cyprus (paragraph 135), Estonia (paragraph III.2.1), Germany (paragraph VI.2), Netherlands (paragraphs 3.5-3.11); Russian Federation (paragraph VI.2), Ireland (paragraph III.D.30), China (paragraph III), Romania (paragraph III), Egypt (Part IV), Poland (Part VI), Serbia (Chapter 7.III), Switzerland (Part IV.c).ii)), Slovenia (pp. 2-3); Written Comments: Netherlands (paragraph 3), Bolivia (Part. II), Serbia (Chapter 8.D); Oral Statements: Albania (Verbatim record 2009/26, pp. 19-21), Azerbaijan (Verbatim record 2009/27, p. 30), Belarus (Verbatim record 2009/27, p. 29), Bolivia (Verbatim record 2009/28, p. Germany (Verbatim record 2009/26, p. 30), Netherlands (Verbatim record 2009/32, pp. 8-10), Spain (Verbatim record 2001/30, p. 11), Venezuela (Verbatim record 2009/33, pp. 7-8).

As is well known, the Advisory Opinion did not consider it necessary to deal with the scope of self-determination.[64] Judge Yusuf, however, did so in his Separate Opinion in unequivocal terms:

> "In this post-colonial conception, the right of self-determination chiefly operates inside the boundaries of existing States in various forms and guises, particularly as a right of the entire population of the State to determine its own political, economic and social destiny and to choose a representative government; and, equally, as a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against. These rights are to be exercised within the State in which the population or the ethnic group live, and thus constitute internal rights of self-determination. They offer a variety of entitlements to the concerned peoples within the borders of the State without threatening its sovereignty."[65]

### (G) INTERNAL SELF-DETERMINATION IN LEGAL STATEMENTS AND RULINGS ON THE CATALAN ISSUE

The reference made in the Preamble of the Law of the Catalonian Parliament 19/2017, of 6 September, on the self-determination referendum, to the "peoples' right to self-determination as the first of human rights", invoking the 1966 Covenants and the UN Charter, has given rise to certain statements and rulings by the Spanish constitutional bodies in charge of reviewing the regulations and decisions adopted in Catalonia with regard to the so-called *procés*.

In this sense, the Advisory Opinion of the Council of State (*Consejo de Estado*) on the action of unconstitutionality against the said Catalan Act,[66] affirms the following after referring to the UN texts and the ICJ case law:

> "In the current state of affairs, the right to self-determination of the peoples within a sovereign state is therefore limited to their participation in the government of that state through democratic means on equal footing with the rest of the population. It also includes the respect and protection of their fundamental rights and civil liberties, as well as their historical, cultural and linguistic heritage —the so-called "internal self-determination"—, but it does not in any way imply the right to impair the territorial integrity of the state —"external self-determination", using the same terminology— which is reserved to the colonies or non-self-governing territories and to the peoples subject to alien subjugation, domination and exploitation."[67]

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[64] See paras. 82 and 83 of the Advisory Opinion.

[65] Separate Opinion of Judge Yusuf, paragraph 9. In less precise terms, Judge Cançado Trindade also referred to internal self-determination; see para. 184 of his Separate Opinion.

[66] Advisory Opinion 793/2017, of 7 September 2017, last accessed 16 November 2018.

[67] Section IV of the Opinion.

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In its Judgment 114/2017, the Constitutional Court (*Tribunal Constitucional*) also recalled the content of international instruments and the democratic clause, concluding that:

> "It is obvious that such [political] participation, under the Constitution, the Statute of Autonomy and the overall of the legal system, is enjoyed by every Spaniard who benefits from the political status of being Catalan (art. 7 SAC) or, in other words, the Catalan peoples as a whole, as the Constitution notes in its preamble when referring to "peoples of Spain.
>
> The aforementioned is enough to exclude all supposed grounds on international right invoked in the preamble of Law 19/2017 to the 'self-determination' of Catalonia."[68]

Previously, in its Order 122/2015, the Court had disconnected the "right to decide" from "a non-existent right to self-determination."[69] This was partially based on Judgment 42/2014, which had already established that the right to decide could only be conceived as a "political aspiration" so that it may be constitutionally interpreted.[70] This Judgment briefly refers to the Opinion issued by the Canadian Supreme Court to support its position that "in the constitutional order an Autonomous Community may not unilaterally hold a referendum of self-determination in order to decide on its integration in Spain."[71]

To this should be added the considerations set out in Order 24/2017 regarding the democratic principle as well as the political and territorial pluralism enshrined in the Constitution.[72]

By contrast, theoretical considerations on the Catalan issue have not taken into consideration the internal dimension of self-determination with few exceptions,[73] since the debates have focused on aspects that go beyond this dimension. From the secessionist point of view, the current content of internal self-determination under international law is

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[68] STC 114/2017, 17 October 2017, FJ 2, last accessed 16 November 2018; English version available here, last accessed 16 November 2018. The Spanish Constitutional Court (TC) marks out the limits of external self-determination, pointing out that while it is true that both Covenants state that all peoples have the right to self-determination, "[i]t is nevertheless clear that a number of unequivocal decisions issued by the United Nations (...) have limited that right, which is understood as a desire of unilateral access to the independence in those cases of "alien subjugation, domination and exploitation". Apart from them, "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations", as stated in no. 1 and 6 of the Declaration on the granting of independence to colonial countries and peoples, adopted by Resolution 1514 (XV)..."It then cites Declaration 50/6, which reproduces the democratic clause of Resolution 2625 (XXV), not cited by the TC (*ibid.*).

[69] ATC 122/2015, 7 July 2015, FJ 5, last accessed 16 November 2018).

[70] STC 42/2014, 25 March 2014, FJ 3, last accessed 16 November 2018; English version available here, last accessed 16 November 2018, reiterated in STC 259/2015, 2 December 2015, FJ 3, last accessed 16 November 2018; English version available here, last accessed 16 November 2018.

[71] FJ 3. According to the TC, "This is the same conclusion as the one formulated by the Supreme Court in Canada in its pronouncement of 20 August 1998, where it decided that a unilateral secession project presented by one of its provinces was both contrary to the Canadian Constitution and to International Law" (*ibid.*).

[72] ATC 24/2017, 25 March 2017, FJ 8, last accessed 16 November 2018.

[73] Chief among them is X. Pons Rafols, *supra* n. 19.

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insufficient —and hence irrelevant. That explains their selective and fragmented invocations of the ICJ's Advisory Opinion on Kosovo and of the Opinion of the Canadian Supreme Court regarding Quebec's secession,[74] including some gross misrepresentations.[75]

## (H) CONCLUDING REMARKS

From the perspective of structural principles, the internal dimension of self-determination implies the absence of outside interference and has the clear limit of territorial integrity. In the context of the Kosovo case, the Netherlands referred expressively to a right that "is exercised in a manner that preserves international boundaries (internal self-determination)."[76] The Supreme Court of Canada was equally clear when stating that the right to self-determination is normally exercised by peoples, within the framework of an existing state, and according to the principle of the protection of its territorial integrity.

Its content is linked to the manifestations of the principle of democracy, but until now it has only experienced a moderate implementation and always related to the procedural aspects of such principle. The international order does not go far regarding the internal dimension of self-determination. Indeed, beyond the uncontroversial recognition of this dimension and its generic proclamation, it is easier to identify when a government is not representative: when it does not allow the population or part of it to take part in the conduct of public affairs, when minorities are discriminated or when basic human rights are seriously and systematically violated.[77] Debates are thus focused on flagrant breaches and their consequences –in other words, cases that may eventually give way to the classic manifestation of the external dimension of self-determination.

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[74] The blog of the European Journal of International Law has been the stage for this approach. In his post published on October 18, 2017 and titled *Secession and Self-determination in Western Europe: The Case of Catalonia*, M. Weller offered a presentation based in part on the Legal Opinion by an International Commission of Legal Experts commissioned by *Esquerra Republicana de Catalunya*, although warning that the post represents the views of the author (available here). There, M. Weller invokes the ruling of the Canadian Supreme Court in the Quebec case and cites part of its considerations on negotiation as a solution, while at the same time ignoring that this same Court also affirmed that "No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement" (para. 91). He also fails to mention the following statement: "The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination —a people's pursuit of its political, economic, social and cultural development within the framework of an existing state" (para 126).

[75] A prime example of which is the pamphlet by A. De Zayas, former United Nations Independent Expert on the promotion of a democratic and equitable international order, containing not only a biased description of the right to self-determination and its impact on domestic law, but which also neglects the internal dimension of self-determination. Last accessed 16 November 2018.

[76] Written Statement, paragraph 3.5.

[77] D. Raič, *supra* n. 12, at 279-280.

In the last pages of his reference work, A. Cassese asked three questions about the existing international norms on self-determination: whether they have contributed to fueling a new tribalism; whether they are capable of putting a stop to the centrifugal tendency of this tribalism; and whether they may furnish satisfactory solutions to the demands of these "micronationalisms".[78] The answers were in all cases negative, which is why Cassese put forward some *de lege ferenda* proposals, including among others greater international supervision of representative democracy and a more effective protection of ethnic groups and minorities (invoking the Spanish regional legislation as an example to follow).[79]

In the light of the foregoing, we can safely conclude that such proposals —referred in any case to the 1990s context— have not been adopted. Furthermore, legal solutions are not always enough to face the social phenomenon underpinning self-determination, which, as noted by Ph. Allott, galvanizes "high levels of social and psychological energy."[80] In these cases, our role as international law scholars, is to explain the existing law, its content and its boundaries, as well the legal basis (or lack thereof) for certain social demands.[81] On the other hand, in a representative democracy it is up to the politicians to look for solutions within the framework of the rule of law.

[78] *Supra* n. 8, at 339.

[79] *Ibid*., at 339-363; the references to the Spanish system are at 355-356.

[80] Ph. Allott, 'Self-Determination – Absolute Right or Social Poetry?', in Ch. Tomuschat (ed.), *Modern Law of Self-Determination*, *supra* n. 7, at 177-21.

[81] In the words of Th. Christakis, "the only solution for a lawyer is to explore objectively the existing positive law. Depending on one's standpoint, such law may be considered good or bad, moral or immoral. However, our main task is not to assess the morality of the law, but to determine its current status and its consequences. A group of separatists may have sensible arguments on a moral level, without however being entitled to declare secession. Legitimacy is often a subjective matter; lawfulness is objective. Without neglecting the former, our aim is to seek the latter leaving aside our personal preferences" (Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, *supra* n. 8, at 21-22).

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*Secession of States and Self-determination in contemporary International Law*

# Internal Democracy and International Law

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*Abstract*: The main purpose of this paper is to describe the protection and promotion —as well as the grey zones and contradictions— of internal democracy within the international legal system. Firstly, we deal with the relationship between the internal and external (the right to secession) dimensions of self-determination. Secondly, we study the interaction between the internal and international perspectives as far as democracy is concerned: international law certainly promotes liberal regimes within countries but, at the same time, it may distort democratic principles through the erosion of sovereignty and due to the normative and institutional weaknesses of international law itself. Thirdly, we describe the historic evolution, mainly since the end of the Cold War, of democratic entitlement. The fourth section focuses on the ambiguous, dynamic, manipulated and virtuous concept of democracy, and some interrelated notions. Next, we examine the indefinite scope, actors and actions of international cooperation inspired by and oriented towards democracy. Finally, we analyze the current and disquieting assault of authoritarian regimes to liberal democracy.

*Keywords*: Democracy – Self-determination – Human Rights – Rule of law – International cooperation

## (A) RIGHT TO SECESSION AND INTERNAL DEMOCRACY. PRELIMINARY REMARKS

The Charter of the United Nations proclaimed the principle of self-determination of peoples as one of the objectives of the organization without any reference to the domestic right to democracy. This silence symbolized, as Mirkine-Guetzevitch pointed out in 1954, "la triste régression politique-juridique de notre époque".[1]

Since 1945, self-determination has been considered a fundamental right (in the 1966 Covenants) and a peremptory norm (by jurisprudence and diplomacy),[2] and it has been relatively successfully implemented in the framework of the UN. Resolutions 1514 and 1541, adopted by the General Assembly in 1960, shed some light on the scope of the principle, which was set out in general terms: "All the peoples have the right to self-determination; by

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1 B. Mirkine-Guetzevitch, "L'O.N.U.et la doctrine moderne des droits de l'homme. Le droit des peuples à disposer d'eux-mêmes", *Revue Générale de Droit International Public* (1954). 530.

2 *Case concerning East Timor (Portugal v. Australia)*, Judgment (1995) ICJ Reports, 1995; Judgment of the European Court of Justice (Grand Chamber) of 27 February 2018, *Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco* C-266/16, ECLI:EU:C:2018:118.

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virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Self-determination does not necessarily lead to independence and the formation of a new State. Independence is only one of the three possible options, alongside free association and integration with an independent State, among which a people can choose through democratic processes and under international monitoring. The referendum celebrated in New Caledonia on 4 November 2018 confirms the potential of the "free and genuine expression of the will of the people of the territories". It is not necessary to emphasize that this genuine will can be distorted for many reasons.

Moreover, not "all the peoples" actually enjoy this international right. Not every people has a distinct and separate juridical status to ensure its right to decide its secession under international law. As a matter of fact, international law highlights at the same time that self-determination must not dismember or impair the territorial integrity of any State, in spite of the wrong precedent set by the Kosovo case in violation of the letter and the spirit of Resolution 1244 adopted by the Security Council in 1999. Certainly, in international terms, fundamental rights of States are still more appreciated than fundamental rights of peoples. As main creators of international law, States oppose the proliferation of new States, which would further complicate internal and international governance and would encourage other non-state nations to embark upon a breakaway process. Experience and history show that this type of movements usually entails violence and degradation of human dignity, even after the proclamation of the new State, very often a failed State, as the case of South Sudan shows. Many African peoples are still awaiting a second decolonization, this time from the endogenous oppressor, as it is happening in Equatorial Guinea. In such circumstances, governments of new States tend to invoke self-determination of States over self-determination of peoples. The concepts of "State", "nation", and "people" are indeed very susceptible to manipulation, confusion and misunderstanding.

The implosion of the former Soviet Union and Yugoslavia, and its ramifications, proved the existing tensions between nationalism and democracy, despite the common and simultaneous origin of both concepts. In other words, democratic values were challenged by the push towards external self-determination. The "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union", adopted by the European Community and its member States in 1991, in fact subordinated the recognition to the compliance with democratic, peaceful and legal principles.

Besides the defence of territorial integrity, international law, according to Resolution 2625 (XXV) of the General Assembly, denies a right to secession within States "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". This must be properly interpreted in current terms and from an

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international legal prospective as an acknowledgment that a democratic State ought to be preserved from internal separatism. Only in cases of tragic and unjust oppression could a right to secession be granted in favour of an intrastate territory: the so-called remedial secession.

The right to self-determination, once almost exhausted its external dimension (the right to independence), must be essentially conceived in its internal dimension: the right to democracy. Both rights belong to peoples, not to States. The right to democracy belongs, furthermore, to the whole people of a country, not a fraction of it (unless otherwise established by the national constitution), irrespective of the singular idiosyncrasy and the argued national character of a given region. Democratic entitlement is an everlasting and permanent right, never full or definitive, inextricably interlinked with the protection of individuals and groups (including, of course, the freedoms of minorities), and with the rule of law.

In the European scenario, the Venice Commission –the Council of Europe's advisory body for Democracy through Law– has explained that the rule of law must prevail in any breakaway referendum. This is obviously applicable to the Catalonian case, as Xavier Pons has painstakingly clarified.[3] The political connotations of this kind of problems and, of course, the need for a greater involvement of intrastate entities in international governance are a very different issue.

Internal democracy, is, and must continue to be, in spite of the current challenges, the main premise to walk on towards an international community of peoples, and not exclusively of States, as well as a touchstone for the development of other international commons. This way, the first words of the Charter of the United Nations ("We the peoples") would acquire a deeper meaning. This paper focuses on the protection and promotion –and also the grey zones and contradictions- of municipal democratic regimes from a legal international perspective: the internal dimension of the principle of self-determination.

## (B) THE INTERACTION BETWEEN INTERNAL AND INTERNATIONAL APPROACHES TO DEMOCRACY

It is well-known that, as far as foreign policy is concerned, the separation of powers works differently than it does within States, in favor of the executive and to the detriment of the political and legal checks and balances exerted by the legislative and the judiciary.[4]

[3] X. Pons Rafols, *Cataluña: derecho a decidir y derecho internacional* (Reus, Barcelona, 2015).

[4] This phenomenon is also visible in the framework of the European Union. The limits and possibilities of judicial control over the European Foreign and Common Policy are under review in the *Rofnet* judgment of 28 March 2017. C-72/15, ECLI:EU:C:2017:236. The predominance of the councils in this field in respect to the European Parliament's powers is notorious. See Arts. 23 et seq. of the European Union Treaty (TEU).

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This flaw of internal democracy is caused and aggravated by the idiosyncrasy and weaknesses inherent to the international legal order itself: questions concerning the creation and threshold of legal obligation; limitations to international responsibility; voluntary jurisdiction in the framework of free choice of means for the peaceful settlement of disputes, etc. Since decolonization, it is precisely the Third World that has most vigorously claimed a democratic international legal community in order to be more represented in the construction of a new international order, and against the oligarchic nature of the traditional international system. Additionally, within States, international law becomes a centralising factor for international norms and institutions. The State stands as a unity at the expense of a decentralised territorial administration, which is more complex for the management of the international affairs. This is one of the paradoxes of international law: it entails a limitation of national sovereignty and at the same time it supports the State structure for global governance. Another issue is whether popular sovereignty must belong to the State as a whole or it could be fragmented, as argued by the current breakaway movement in Catalonia in spite of the Spanish constitutional provisions.

The lack of democratic credentials is not only a deficiency of the rule of law, but also of international institutions, including the Security Council, the International Monetary Fund, G-7 and G-20. The most developed and sophisticated example of transnational democracy is certainly embodied in the European Union's integration. Notwithstanding its permanent strive to combine municipal and supranational democracy, the democratic deficit haunting the European Union is constantly discussed.[5]

Aside from legal considerations about international relations, we are witnessing the widespread phenomenon of globalization. This movement overpasses internal democracy without a proper transfer of democratic principles to the international community. There is a growing gap between the scope of the polls and the transnational scope of the problems. As the famous Rodrik's trilemma of the world economy explains, it is not possible to achieve democracy, sovereignty and globalization at the same time; only two of these factors may be attained simultaneously.[6] Globalization raises much discontent,[7] ultimately and most acutely in the prosperous world, and shakes the foundation of the social and democratic rule of law. The range of decisions and electoral choices are restricted in favour of a so-called technocracy

[5] The reflection on the democratic nature of the European integration is a recurrent and always updated debate. See, for example, about new ideas to improve the democratic pedigree, S. del Río, "Institutional initiatives for a solid and participatory European democracy" (2018), *Real Instituto Elcano* ARI 60/2018. 27 April 2018.

[6] D. Rodrik, *The Globalization Paradox. Democracy and the Future of World Economy* (Copyrighter Material, New York, 2011)

[7] J. Stiglitz, *Globalization and its discontents*, (Norton & Company, New York, 2002), and by the same author *Globalization and its discontents revisited* (Norton & Company, New York, 2017).

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and a certain immutability of public policies. Citizens seem to remain distant and unconscious of the real centres of power, unaware of who runs the world. There is one more stage of diplomacy, political decisions and public and private interference, which much be considered, for better or for worse: cyberspace. Cyberspace is a global agora with unaccountable algorithms where human dignity and citizenship are at stake, and democracy should adapt to take it into account.[8] Not surprisingly, international instruments related to cyberspace emphasize the need to preserve human rights.[9]

Therefore, it is logical and understandable that, for the sake of democratic values and popular support, the EU has acted to harness globalization, seeking "a Europe that protects" in front of its excesses.[10] The new trade defence measures have been taken within this framework.[11] Another circumstance that vividly affects the scope of municipal democracy and its capacity to international adaptation is, undoubtedly, the intense movement of people across nations. The status of economic and political immigrants, who are often subjected, in legal or factual terms, to a duality of norms and statuses, a second-class condition or even segregation, is particularly relevant. Denying individuals the right to vote or citizenship, and sparking populist or nationalistic streams, are both threats to the dignity or survival of democracy.[12]

Paradoxically, though international law tries, albeit imperfectly, to import democratic principles (transparency, legal security, etc.) to its structure and debilitates the democratic and liberal States due to its own limitations, this works in favour of the promotion and protection, sometimes even imposition, of democratic national regimes. This is for its own good, for the legitimacy and efficiency of the rest of States in these times of decisions and effects with rampant extraterritoriality. With democratic credentials and the free consent of States, international norms become more genuine and more popular, despite the informality permitted within the international system. This internationally-backed movement towards democracy is also carried out despite the fact that an autocracy may theoretically be more sustainable to organize a more foreseeable and more continuous future, less subject to opposition claims and wins. However, for these purposes, we must not forget the *Tinoco* arbitration judgment delivered in 1923: the successor government was bound by all the acts of

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8 A critical point of view in C. O'Neil, *Weapons of Math Destruction*, (Crown Books, New York, 2016).

9 It is the example, already remote in technological terms, of the 2001 Budapest Convention on Cybercrime, drawn up by the Council of Europe.

10 European Commission, Reflection Paper on Harnessing the Globalization, COM (2017) 240, 10 May 2017.

11 European Commission, 36th Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities 2017, COM (2018) 561 Final, 31 July 2018.

12 This is the context surrounding the current dispute Qatar versus United Arab Emirates before the International Court of Justice: the alleged violation and discrimination of Qatar citizens by and in the UAE.

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its predecessor as its constitutionality or legitimacy was deemed irrelevant. The global commons of the international community (peace and security, protection of environment, international cooperation and even integration, the rule of law, human rights) are preserved and boosted further with municipal democratic institutions and values, as confirmed by the Sustainable Development Goals enshrined in the 2030 Agenda, especially Goal 16. Nationalism and authoritarianism are interconnected and both degrade the international principles. Consequently, internal democracy –including the intrastate sphere- and international democracy are essentially synergic and cross-fertilising in their search of democratic multilevel governance. This interdependence is a sign of the growing interaction between domestic and international political and legal thoughts. In fact, a recently published book has provocatively been titled "Is International Law Really International?"[13]

This paper is focused on the aforementioned prospect of the interaction between national and international systems concerning democratic principles; that is, national democracy as a goal of international law.

### (C) A LOOK AT RECENT HISTORY: THE EMERGENCE OF DEMOCRATIC ENTITLEMENT IN INTERNATIONAL LAW

The political regime of a State has never been irrelevant for international relations. From the 20th century Spanish perspective, it is worth reminding the boycott imposed, even by the United Nations, in its first years, to Franco's dictatorship, considered an accomplice of the Nazi regime and, consequently, a threat for international peace and security.

However, the international law of coexistence reigning the Cold War period and grounded in the structural principles enshrined in the General Assembly Resolution 2625 (XXV), adopted in 1970, proclaimed the equal sovereignty of States and non-intervention in the internal affairs of third States. In its 1986 Judgment in the *Nicaragua v. United States* case, the International Court of Justice refused any legal obligation to hold free and plural elections and a right of external interference in the domestic affairs of other States.[14]

The fall of the Communist bloc between the late 1980s and the early 1990s seemed to blur this international law of indifference vis-à-vis national regimes, no longer considered a *domaine réservé*. According to a famous article by Thomas Franck published in 1992, a democratic entitlement, a right to democratic governance was emerging in International

[13] A. Roberts, (Oxford Press, 2017).

[14] *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits, Judgment* (1986) ICJ Reports 1986, p. 14.

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Law.[15] In *Democracia y Derecho internacional*, published in 1994, we discuss this phenomenon and its repercussions on the structural principles of International Law[16].

There was indeed a generalized convergence of political governments —or at least of their explicit values and international commitments— towards Western-styled liberal democracies. Not only post-Soviet States, but also less-developed countries, now less in favour of creating a new political and economic international —and domestic— order. This loss of political neutrality of the international community in respect of national governance affected, not unexpectedly, the European system where "a new era of democracy" was solemnly voiced in the Charter of Paris for a New Europe, adopted in 1990.[17] The regional American order was also influenced and in 1991 the Organization of American States took a decisive political step in favour of the protection of democracy in its "Santiago Commitment to Democracy and Renewal of the Inter-American System", and in 2001 the Inter-American Democratic Charter was adopted at the expense of the other, antagonistic principle of the Continent: non-intervention in internal affairs.[18] It was mainly, and significantly, in the framework of the universal language and action of the United Nations that this transformation of the political and legal mentality took place. For instance, the Security Council decided in 1994 that the *coup d'État* perpetrated in Haiti constituted a breach of the international peace.[19] In 1996, the Secretary-General Boutros-Ghali issued his Agenda for Democratization. Democracy, he said, is today an "ideal that belongs to all humanity".[20] Bearing this in mind, it is not surprising that the first electoral monitoring mission to a sovereign State sent by the UN took place just in 1990, or that the UN Commission on Human Rights, by a vote of 51-0 with 2 abstentions (China and Cuba) promulgated a resolution affirming that "democracy fosters the full realization of all human rights" in 1999, inextricably interconnecting the previous international protection of fundamental rights with the liberal democratic system within countries[21]. Since then, the United Nations has erected a vast and thick legal and organic structure in favour of national democracy: the United Nation Development Programme (UNDP), the United Nations Democracy Fund (UNDEF), the Department of Political Affairs (DPA), etc.

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15 T. Franck: "The Emerging Right to Democracy", *American Journal of International Law* (1992) 46-91. doi.org/10.2307/2203138.

16 J. Roldán Barbero, *Democracia y Derecho internacional* (Civitas, Madrid, 1994).

17 F. Mariño Menéndez, "La Carta de París para una nueva Europa", 18 *Revista de Instituciones Europeas* (1991), 153-176.

18 J. Roldán Barbero, "La Carta Democrática Interamericana aprobada el 11 de septiembre de 2011 por la Asamblea General de la OEA", 54 *Revista Española de Derecho Internacional* (2002) , 459-465.

19 SC Res. 940 (1994) 31 July 1994.

20 B. Boutros-Ghali: *Agenda for Democratization*, 1996.

21 Resolution "Promoting the Right to Democracy", 1999/57, 27 April 1999.

Therefore, in the 1990s, the international system appeared to be the source of legitimacy of municipal governments; domestic democracy was a requirement and an explicit aspiration of international cooperation. This democratic impulse had a horizontal effect on international law as a whole, having an impact on its own foundations, the reformulation of its nuclear principles, the law of treaties, the nature of State sovereignty, the use of force, membership of international organizations, etc. This stream was of course not exempt from ambiguities, contradictions and setbacks in the factual world. In fact, a part of the international scholars, mainly Western, criticized the "risk of imperialism", the new division and discrimination of States between liberal and non-liberal[22] or the messianism and complacency that this tendency entailed.[23]

From the end of the 20th century to the current evolution of the 21st century, legal literature in this field has grown substantially and remains very fertile nowadays.[24] But times are changing: a distinguished political scientist has recently affirmed that the central political issue in 2017 has been the frailty of democracy.[25] On 25 September 2018, UN Secretary-General António Guterres warned that democratic principles are under siege in his opening speech of the 73rd session of the General Assembly. Certainly, the new political conditions and the reality and contrast of municipal and international facts and rules have seriously disrupted the credibility and solidity, but not the essence, of the right and obligation to democracy in the international arena, as we will discuss below.

## (D) DEMOCRACY: DEFINITION AND RELATED CONCEPTS

### (1) A mutable and subjective concept

The dividing line between democracy and dictatorship is becoming more and more blurred in times of fake news, post-truth, general demagogy, propaganda, cheats and alternative facts, times of sharp contrast between legal and factual realities, between facts and words. It is difficult to determine when a democratic system is beginning or ending or whether political upheaval and transformation deserves the qualification of putsch. Almost no political regime

[22] M. Koskenniemi, "Whose Intolerance, which Democracy?", in G. H. Fox, B. R. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), at 436-440.

[23] B. R. Roth: "Evaluating Democratic Progress", in G. H. Fox, B. R. Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, 2000), 493-516.

[24] Besides other titles cited elsewhere, we can highlight here: H. Charlesworth: "Democracy and International Law" (Vol. 371), in *Collected Courses of the Hague Academy of International Law* (2014), 43-152; A. Mangas Martín, *Humanización, democracia y Estado de Derecho en el ordenamiento internacional* (Real Academia de Ciencias Morales Y Políticas, Madrid, 2014); L.-A. Sicilianos, *L'ONU et la démocratization de l'État* (Pedone, Paris, 2000); J. Wouters et alii: "Democracy and International Law ", Monograph, 34 *Netherlands Yearbook of International Law* (2003).

[25] F. Vallespín, "Guerras identitarias de distracción". (2017) *El País*. 29 December 2017.

defines itself as authoritarian or totalitarian. The adjective "democratic" continues to be virtuously and absolutely groundlessly used in the name of States (Democratic Republic of Korea...), the condition of political regimes (Venezuelan *chavismo* is proud of its democratic credentials...) or political parties (Swedish Democrats is the name of a far-right party in Sweden). The Franco regime in Spain considered itself an organic democracy. The proliferation of elections, as further explained below, is no guarantee at all of a clean, sustainable and proper democracy. The twilight zone of the political spectrum gives rise to new oxymoronic political terminology like "elective dictatorships", "illiberal democracies" and "liberal autocracies"[26], "post-democracy"[27] or "democratura". Pierre Rosanvallon considers that our democracies are democratically elected but they do not behave nor are they ruled as such.[28] National regimes are questioned at all levels (regional, local), and, at the same time, they are becoming more and more influential and interlinked to international matters.

Democracy, just for its virtuous connotations, is subject to manipulations and graduations. That is also the case of the related concept "liberal", more attached to the exercise of power than to its origin, as "democracy" is. No democracy is fully, perfectly, undoubtedly, definitively "democratic". Political leaders themselves frequently experience an ideological and pragmatic transformation in their nature and attitudes. The external point of view is increasingly important for the legitimacy of any domestic regime, inter alia for the evaluation of asylum-seekers coming from a certain country. Many international institutes and think tanks issue periodic reports devoted to analysing and categorizing the degree of democratic performance of political regimes. They all point at the liberal backward of our times. According to the 2017 Freedom House Report, 71 countries suffered net declines in political rights and civil liberties, with only 35 registering gains. This marked the 12th consecutive year of decline in global freedom, despite the proliferation of polls...[29]

Sometimes there are important discrepancies between the perception inside and outside the country, basically because the latter is more interested in the formalities and stability of the model whereas the local population legitimizes the political system according mainly to its social results. The case-law of the European Court of Human Rights on the dynamic conception of "democratic society" confirms the volatility and subjectivity of the notion and perception inherent to liberal democracies. A large number of municipal polls are scrutinized and assessed (hailed or blamed) by universal or regional institutions. The international community tends to urge an inclusive government, but refuses to proclaim a single model of

[26] F. Zakaria, "The Rise of Illiberal Democracies", 76 *Foreign Affairs* (1997), at 22. DOI: 10.2307/2004827

[27] A. Ortega, *Recomponer la democracia* (RBA, Barcelona, 2014).

[28] P. Rosanvallon, *Good Government: Democracy beyond Elections* (2018).

[29] In similar terms, the Economist Intelligence Unit's Democracy Index 2017 records the worst decline in global democracy in years.

democracy. Beyond temporary considerations, democracy is also relative to geographical, cultural or historical parameters, although this relativity might be used as a tool of political discrimination towards different countries and populations. The current ideological crisis, the increasing confusion between leftist and rightist axioms and ideals, astonishes public opinion and experts. In some other occasions, the same democratic tools and procedures, such as referenda, parliamentary sessions or, evidently, elections contribute to the legalization of anti-democratic decisions, like the perpetuity of a leader in power, as in the case of Burundi and Chad. Nowadays referenda, considered the quintessence of the direct popular will, are used for irregular purposes and surrounded by blatant manipulations and demagogy, some of them external, as the Brexit referendum or the Hungarian referendum on the migration quotas largely confirmed.

Free and fair elections, held according to international standards and frequently subject to international scrutiny and assessment, are the original and essential act of a genuine democracy.[30] They are not only the genesis, but also a necessary, albeit insufficient, condition for the exercise of power; elections represent a vital element for democratic credentials. And yet, the holding and even the proliferation of polls are a masquerade that conceals authoritarian foundations and purposes of some governments. In Venezuela, for instance, the *chavismo* has organized 20 popular consultations eventually leading to a chaotic and tyrannical political system, which has been the object of targeted sanctions applied by the European Union, after the 2018 presidential elections were "neither fair nor free and their outcome lacked any credibility as the electoral process did not ensure the necessary guarantees for them to be inclusive and democratic". We are facing fake democracies, with vicious campaigns, irregular electoral processes, electoral fraud, legal —and sometimes violent— protests, different levels and causes of turn-out and abstentionism; in other words, democracies without any real pluralism and competition which boost one man-rule and indefinitely abort democratic regeneration. Very often electoral results lead to hideous and pernicious consequences for the country where the election was held and for the international community, which is prone to bypass the verdict of the polls, as happened in Algeria in 1990 or more recently in Tunisia and Egypt in the wake of the so-called Arab Spring. The international community has straightforwardly condemned some election processes, as in the case of the announcement of polls in the separatist Ukrainian republics of Donetsk and Lugansk, occupied territories in Eastern Ukraine. Not to mention the amount of post-electoral conflicts, very often of a violent nature, usually originated as a result of the protests and discrepancies over an electoral process and the official results. Several electoral processes

[30] On this and other correlated ideas see Á. Jarillo Aldeanueva, *Pueblos y democracia* (Tirant lo Blanch, Valencia, 2012).

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are marred by intimidation, violence and corruption. The *ius post-bellum* is sometimes very problematic to manage and ballots do not pacify but spur the distortion of public order and governance. In general terms, we agree with the theory of democratic peace, according to which democracy is normally an instrument of preventive diplomacy, a tool and goal of the peaceful settlement of disputes.

We will now establish certain affinities between the concept of democracy and other related notions

## (2) Certain Concepts Related to Democracy

Political liberalism interacts with 'ECONOMIC LIBERALISM'. Capitalism is of course more criticized than democracy, and has less apologists and less moral strength than democracy[31], but it has turned out to be more resilient in spite of the warnings about its senility and decay. There is a natural connection between the two domains, inviting the citizen/consumer to choose, to "purchase" a "product" and reject the erection of monopolies (also in cyberspace![32]). Capitalism needs legal certainty, but above all it needs stability. That is why economic interests can disrupt and even overthrow a democratic government or system. Democracy becomes this way instrumental since its legitimacy also depends on the social results that it provides. "It's economy, stupid!" one could say. "How much poverty —and inequality— does a democracy bear?" is also a recurrent reflection. We are seeking another social contract. Furthermore, it is also indisputable that we live in times of individualism at the expense of public virtues,[33] and that economic globalization (for instance, free, deregulated and unfair trade) shakes, as indicated above, national democracies; inequality becomes bigger inside internal societies and distorts the credibility of the political liberalism. Companies must observe, but they often do not, democratic and humanitarian guidelines in their internal and external activity. International law, as Sustainable Development Goal 17 exhorts, must underline and improve the fight against this gap that certainly threatens the structure of a modern society and may boost populism. Capitalism is certainly the best, though manifestly imperfect, pattern of social organization, but it must be rationally regulated and tamed through democratic tools: "ordoliberalism". Otherwise the citizens or their data simply become consumers or goods, market dominates the political arena and democracy may turn to a parody, a mockery.

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[31] A clear and solid eulogy and criticism of the anti-globalization movement in J. Norberg, *In Defence of Capitalism* (New York, 2003).

[32] A tough criticism of the digital governance in J. Lanier: *Ten arguments for deleting your social accounts right now* (Copyright Material, New York, 2018).

[33] See as a reference M. Sandel, *Liberalism and the Limits of Justice* (1982).

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Naturally, the notion of HUMAN RIGHTS and the notion of democracy are not only correlated, but, as a matter of fact, inseparable. While democracy points at the origin and organization of power, fundamental rights point to the freedoms of citizens. However, democracy is not just -must not just be- a mere procedural, formal term, but also a substantial and material one.

Article 21 of the Treaty on European Union enumerates the three concepts (democracy, rule of law and protection of human rights) as differentiated but correlative ideas. The jurisprudence of the European Court of Human Rights has also interlinked the three concepts, as it did in its 1979 Sunday Times judgment.[34]

Nevertheless, democracy and human rights are not always coincidental. Nowadays, even in our western world, some decisions voted and backed by the population and taken by legal procedures infringe human rights postulates, especially where rights of aliens are concerned. We live times of serious setbacks and challenges for the democratic and humanitarian principles, but also certain positive breakthroughs are being achieved and encouraging progress is being made. It is the case of rights of homosexual people, in the general interest of the non-discrimination principle. Human rights and the rest of democratic principles must be taken very seriously, for they are under a range of attacks, as is reflected in a fecund social bibliography.[35]

When democracies flagrantly and grossly violate fundamental rights, human rights are useful to unmask this flawed, merely formal, disguised democracy, to denounce the abuse of the popular will. It is true that veteran and refined democracies, like the USA's democracy, maintain and carry out the death penalty, a violation of the right to life. It is also true that beyond the own borders there is a general relaxation of human rights standards. Thirdly, the ratification of human rights treaties does not always guarantee scrupulous respect, alas.[36] Fundamental rights are useful for gauging the quality of democracy. In the current degradation of democracy in our societies there are certain freedoms that are particularly under attack, such as the freedom of press and speech or the independence of the judiciary in Hungary, Poland, Turkey ... The temporary state of emergency imposed in France, Ukraine or Turkey reveals the ordeal or the pretexts of democracies to confront certain challenges without restricting human liberties. On the other hand, democracies may strongly disagree on

[34] Judgment of 26 April 1979, *Sunday Times v. United Kingdom* (1979) Series A. No. 30, 526.

[35] See D. Rieff, "The End of Human Rights?" *Foreign Policy Magazine* (2018). April.

[36] See this discussion in R. Goodman, D. Jinks, "Measuring the Effects of Human Rights Treaties", 14 *European Journal of international Law* (2003), 171-183.

specific aspects regarding human rights, as the agreements between the USA and the EU on the exchange and protection of data corroborate.[37]

The Strasbourg Court, according to the 1950 Rome Convention, often invokes the necessities of a democratic society to ponder the scope and effectiveness of a determined right. In this regional system it is consubstantial that the violation of human rights is occasional, episodic, rather than structural. This is thus a current and deep problem in Russia or Turkey and in the system as a whole. There is of course a hierarchy of human rights and of the infringement of human rights. Certain breaches might represent a crime against humanity. For instance, the current European panorama shows cases of slavery. Before the proliferation of people, acts or parties in Europe against democratic values, the question arises, to what extent must democracy surrender to these trends that benefit from public freedoms to disrupt the very core of democracy? How tolerant must plural democracies be against intolerance? However, the most frequent reality is that dictatorships entail the fall of humanitarian values. As is happening now with the Inter-American Commission on Human Rights regarding the crisis in Nicaragua and Venezuela, the survey encompasses the whole political regime, and not only individual fundamental rights and freedoms. Logically, the level of involvement and of criticism of the international community depends, beyond geostrategic considerations, on the number, frequency, nature and gravity of the breakdown of human rights.

Certainly, several rights, especially the political rights, are more inherent to the electoral genesis and the implementation of a liberal and representative democracy: freedom of assembly and association, freedom of expression...The right to vote is evidently at the core of the system, and its real scope (age, people with disabilities...) is under discussion and objections in many countries and it is the background of some judicial disputes.[38] The internationalization of the movement of people entails at the same time certain internationalization of the electoral campaigns and of the people's vote. The problem is, however, that democracy continues to be enshrined and exercised basically in the internal arena, but must be defended and boosted internationally because it is endowed with an increasing advanced frontier, an extraterritorial dimension.

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[37] The last version is the *Private Shield*, a framework for transatlantic exchange of personal data, which replaced the *Safe Harbour* principles, and is still subject to different political and legal discrepancies between and within the two parties.

[38] The *Matthews* case, centered in the right to suffrage at the European elections by a Gibraltarian, is very significant. This controversy has been subject to study, with different contenders and different approaches, by the European Court of Human Rights and by the European Court of Justice. See Judgment of 18 February 1999, *Matthews v. United Kingdom*, ECHR (1999) 24833/14; and Judgment of the European Court of Justice (Grand Chamber) of 12 September 2006. Kingdom of Spain v United Kingdom, C-145/04, ECLI:EU:2006:543.

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The main novelty of the democratic entitlement of the 1990s, in international terms, has been that democracy begins to be conceived as a collective right itself and an individual right for every citizen, turning the post-war external right to self-determination into an internal right. The right to democracy appears then as a right to political development and as a corollary of the human rights theory: both fields are under international scrutiny and governed by a multilevel regulation. Both international aims are contemplated as complementary and subsidiary of municipal governance. In fact, the international protection of human rights could never be disconnected from the social and political regime of a State. The Universal Declaration, adopted 70 years ago, contained a reference to democracy and to the necessity of a political and social context where human dignity flourishes and is safeguarded.[39] The surrounding and permanent question concerns the presumed universality and immutability of democracy linked to the alleged universality of the "inalienable rights".

The concept of the RULE OF LAW is clearly complementary to democracy because in its profound dimension it inevitably encompasses human rights and free elections. "Wherever law ends, tyranny begins", John Locke wrote. It is true that there may be occasional clashes between humanitarian purposes, popular will and legal provisions (for example, in relation to the salvation and assistance of irregular immigrants or to electoral commitments breaking the law in order to attract votes[40]), but the relationship between these three ideals is mostly natural. The definition and preservation of the rule of law, both internally and internationally, has evidently grown in importance over the last years in the agenda of regional organizations like the EU, the Council of Europe and the OAS and in the agenda of universal organizations, first and foremost the United Nations, but also the IMF and others.[41] Its antagonistic vector, corruption —the essential denial of the Law— is parallelly fought by different international institutions in the municipal law and also within their own organs. Corruption is conceived as a cancer for democracy in a very illicit world, dominated by the dark collusion of public and private interests and the seizure of public aims by private objectives. A part of this corrupted behaviour is linked to the functioning of the electoral system and political parties, but dictatorship is undoubtedly the ultimate form of corruption.

In the following section we will describe the actors, actions, limits and contradictions of the pro-democratic network of the international community. In other words, we will try to determine the scope of the principle of international cooperation in this matter.

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[39] See in particular Arts. 21 and 28.

[40] See Y. Mounk, *The People versus Democracy. Why our Freedom is in Danger & How to Save it* (Cambridge, 2018).

[41] See the data and the reflections, with many contributions, in D. J. Liñán, P. Martín (dirs.), *Estado de Derecho y Unión Europea* (Tecnos, Madrid, 2018).

## (E) THE SCOPE OF INTERNATIONAL PRO-DEMOCRATIC COOPERATION

### (1) General Remarks

The very nature of the pro-democratic tendency in international law is at odds with the mere coexistence intended and restrained by traditional international law. It is cooperation, and even integration, which is required because this tendency entails intra-state involvement, reaching the core of the political sovereignty and intimacy of a State.

It is complex, probably impossible, to determine and to exhaust the scope of international cooperation towards democracy. The deep, genuine intentions of international actors in this field often remain unknown, disguised or mistaken, and the relationship between the different actions launched in this area and the safeguard and promotion of democracy is controversial and intricate. Furthermore, there is a proliferation and dissemination of soft law in this field, giving rise to uncertainties about the legal dimension of this essentially politicized kind of cooperation.[42] Therefore, pro-democratic international cooperation is a transversal area of international law that interacts with the other areas and with its constitutional principles. To a certain extent, it is also a precondition for the rest of areas of cooperation, above all as far as the democratic principle is erected as a *sine qua non* (conditionality) of bilateral relations. There are, of course, certain aspects of international life more or less subject and bound to ideological and political affinities. The provider of democratic principles seeks not only external freedom itself but also its own security and stability, as the current crisis in Venezuela and its neighbouring countries clearly shows. It is also utterly clear that the recent objective, even obsession of fighting insecurity, in particular the curse of terrorism, has weakened the cause of freedom in international relations and relegated it in favor of security. The values of security and liberty are united in many internal and international texts, but usually clash in practice. The ferocious economic competition is also a factor that damages the democratic commitment and authenticity in the international arena.

### (2) The Actors

Traditionally, the international relationship has been implemented from State to State, mainly in intergovernmental terms, but this bilateralism (in reality, the unilateral measures taken against a "democratic" violator) raises the problem and the malaise of the external and unfriendly (or illicit) intrusion and indoctrination in the inner independence and dignity. It is clear, as George Sorensen has explained, that international relations nowadays try to

[42] F. Jiménez García, "El Derecho internacional en mutación. El test "civilizatorio" del estado del Derecho internacional (¿soft law de alta o baja intensidad?) y el régimen de las fuerzas de estabilización de paz", 35 *Revista Electrónica de Estudios Internacionales* (2018). DOI: 10.17103/reei.35.02.

prioritize liberalism of restraint over liberalism of imposition.[43] Truly, action is sometimes implemented not by a democratic government but, paradoxically and perhaps more efficiently, by other autocratic States, which may be more influential over their co-religionist about the pertinence of starting a political reform. In general terms, the power structure is very decisive because only the most powerful or closest States are capable of exerting a real influence, pressure and conditionality on this internal illiberalism. It is, therefore, necessary to pay attention to the current and changing geopolitical dimension in order to verify who can spark a political reform in third States. The identity and capabilities of States is crucial. In this regard, the rise of China and the decay of the western-style societies is very bad news for the cause of democracy as an international value.

The aforementioned flaws of bilateralism/unilateralism boost association among States in order to impose synergic and more efficient and legitimate measures against autocracy.[44] Organized guardianship is always preferable to unilateral and more subjective counter-measures. This association may, and must ideally, be institutionalized within the framework and the statutes of an international organization, both in its internal functioning *vis-à-vis* membership and also in relation to its external decisions and activities. For this purpose, we can consider the valuable coordination between United Nations-European Union-African Union in view of credible general elections in the Democratic Republic of Congo by the end of 2018. Undoubtedly, the European Union model is outstanding and unique, but many other intergovernmental organizations maintain permanent electoral assistance divisions amid many other pro-democratic interventions. The OSCE, for instance, is specialized in this task, even monitoring and criticizing election processes in EU Member States like Hungary. As happens in the whole international legal order, the phase of control and enforcement —the descendant stage— is essential for the credibility and effectiveness of this branch of international relations.

The most outstanding circumstance is that these institutionalized pro-democratic and external activities occur in the universalized system of the United Nations and its family of specialized organisms, confirming the general and cosmopolitan legitimacy and determination of the international community and averting the blame based on a sectarian and "neocolonialist", "eurocentrist" behavior.[45] For the same reason it is always better that a political reform starts and develops in the concerned country. Western countries have

[43] G. Sorensen, *A Liberal World Order in Crisis* (Cornell University Press, 2018).

[44] M. Esteban, L. Simón, "Europe-Japan Cooperation for a Rules-based International Liberal Order", *Real Instituto Elcano*. ARI 10/2018.

[45] See in general terms J. A. Sanahuja Perales, "Reflexividad, emancipación y universalismo: cartografías de las relaciones internacionales", 70 *Revista Española de Derecho Internacional* (2018), 101-125. http://dx.doi.org/10.17103/redi.70.2.2018.1.04

emphasized the universal character of this crusade in order to reject its alleged authoritarian and arrogant character.[46]

For obvious reasons regarding the political and teleological similarities, regionalism is more productive and more ambitious in the pro-democratic commitment. The activity of the regional institutions should be analysed not only according to their constitutional foundations, but also in relation to their effective and practical performance. The OAS, for instance, has been very erratic in this field depending on the geostrategic panorama and even on the personality of its Secretary-General. The ECOWAS (the Economic Community of West African States), initially created for economic purposes, has become very active and very successful in the constitutional crisis in the Gambia in 2017 with a military intervention called "Operation Restore Democracy". The geographic and cultural proximity among the members diminish the reluctance and increase the reasons for a democratic action. In Asia the international and institutional network in favour of freedoms is particularly unfledged.

In our world and times, the role played by individuals in fostering democracy abroad or inside is ramping and very visible. We should consider and pay tribute to the modest fruit vendor who self-immolated, fuelling the discontent and provoking, alongside the cybernetic response from many places, the change towards a more liberal regime in Tunisia in 2011.

Organized civil society, frequently orchestrated and financed from abroad, is a very useful tool for the uprising against dictatorial systems, avoiding straight diplomatic confrontation and intervention, and vaguely evoking the suggestive idea of a world citizenship.

### (3) The Actions

As previously indicated, the procedures and tools that may preserve, protect, encourage, improve or impose a democratic regime in third States are unnumbered and inaccurate. They are so inaccurate that some formulae could be productive or counterproductive in this sense depending on the circumstances: for instance, help to equip and to instruct security forces and army abroad. If we take one particular example: will the external pressure and coercion on Iran spark a new, more democratic establishment or a harder-line one? Organically speaking, does the financial rescue agreed with the IMF give more or less political stability

[46] In the EU Regulation 235/2014, establishing a financial instrument for democracy and human rights worldwide, it is underlined that this policy is based in the Universal Declaration of Human Rights and the two UN Covenants adopted in 1966 (OJ L 77/85, 15 March 2014). However, in some bilateral agreements the wording is more cautious. See Council Decision of 14 May 2012 on the signing, on behalf of the Union, of the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part (OJ L 34, 24 May 2012). In its Art. 1 the compliance is invoked only in reference to the international instruments of human rights in which the parties of the agreement are contracting parties. Additionally, in this and many other international agreements the EU and its partners invoke at the same time principle of non-intervention, providing a certain schizophrenic mix of guiding principles in cooperation.

and freedom to the recipient country?[47] In the next section we will discuss the opposite case: how autocracies currently tend to erode democracies... while pretending to appear as democracies themselves.

The European Court of Justice has supported expansive ways to promote democracy in third countries, signalling that the contribution to a moratorium on small arms and light weapons —and eventually the maintenance of international peace and security— is related to democratic objectives.[48] At the same time, the Luxembourg Court has underlined the close effects of the democracy over another public good, the social development of the people.[49] Indeed, a rational, liberal political system based on the rule of law does not only pursue a philanthropic purpose, but also a technical goal towards the progress.[50]

Political conditionality, i.e. the subordination of bilateral cooperation to the respect of the liberal principles, is especially suitable and practiced when there is an imbalance between the two countries and cooperation is aimed at development: in this way, the provider may influence the recipient in the preconditions of the aid. In any case, though good governance is occasionally a requirement, it must always be a goal of external aid. This is the reason why the EU Regulation 235/2014, which institutes a financing instrument for the promotion and support of democracy and human rights worldwide, allows for assistance to be provided independently of the consent of the governments and public authorities of the third countries concerned.

The European Union has been particularly conspicuous in the interaction between democracy and development with the aforementioned Regulation and its predecessor. The European practice affects both its internal, unilateral measures and its conventional actions where a democratic clause is included, linking the continuity of the cooperation to the maintenance of the democratic record. However, the suspension of the concessions and support has only taken place in a few and flagrant opportunities and after the failure of a political dialogue. Soft diplomacy prevails over tough diplomacy in this field.[51] In the near

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47 E. Paparella, *Il fondo monetario internazionale nell'eurozona. La stretta condizionalità e la sovranità condizionata* (Jovene, Roma, 2018). C-91/05.

48 Judgment of 20 May 2008. Commission v. Council. ECLI:EU:C:2008:288.

49 Judgment of 3 December 1996. Portuguese Republic v. Council. C-268/94. ECLI:EU:C:1996:461.

50 D. Acemoglu, J. A. Robinson, *Why Nations fail. The Origins of Power, Prosperity and Poverty* (2012).

51 Many works are devoted to survey and assess the European policy in this field: J. D. Janer, *La promoción de los derechos humanos y de los principios democráticos en las relaciones exteriores de la Unión Europea: mecanismos jurídicos* (Atelier, Barcelona, 2005); M. C. Muñoz Rodríguez, *Democracia y Derechos humanos en la acción exterior de la Unión Europea* (Reus, Barcelona, 2010). From a particular point of view, R. Marín Aís, "La condicionalidad social en la política comercial común", in L. M. Hinojosa, P. Martín (eds.), *International Market Regulation and the Erosion of the Europeal Political and Social Model* (Thompson/Reuters/Aranzadi, Madrid, 2018). Other works focus on the legal judgment of political conditionality: I. Forcada, *El condicionamiento político y económico de la ayuda oficial al desarrollo* (Tirant lo Blanch, Valencia, 1996).

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future, the European Union must bolster its engagement with the international liberal order, above all after USA's, hopefully transitory, withdrawal from this kind of values. Nevertheless, some opinions allege that Europe must abandon the role of making the world in their own image.[52] The European Union cultivates the principle of "more for more", offering more cooperation according to the democratic progress of its partners. The principles governing its foreign policy match its internal and foundational values (Article 21 TEU), but it is out of question that the international stage entails more hesitations and problems to the thriving of the democratic ideals. The external action of the European Union lacks consistency and visibility, inter alia to coordinate and optimize the pro-democratic actions by the EU and by its member States.[53] Furthermore, the unanimity rule still dominating the European Foreign and Security Policy is a handicap to spur the number and ambition of this sort of European decisions.

Another categorization of the measures aiming at democracy is the dichotomy between positive and negative measures, that is, the traditional dilemma of an ethical, political and legal nature, between the carrot and the stick. Both sorts of measures have different addressees: sometimes the aid is addressed to the opposition or the civil society in order to bypass the autocratic government and to boost its crisis or its fall, occasionally and unofficially considering an eventual putsch or magnicide. As far as restrictive measures are concerned, the recent practice of averting sanctions bound to the whole country and instead imposing targeted sanctions bound to concrete individuals and entities belonging to the circle of the authoritarian power is outstanding. This way, it intends to avoid the penalization of the population struggling under the tyranny. Naturally, the positive measures are less controversial and the EU and 13 third States have just launched the "Good Human Rights Stories initiative" in the framework of the General Assembly of the United Nations, to provide a more optimistic and less severe view of this policy. Positive measures encompass a panoply of initiatives ranging from the diplomatic, financial and political fields (for example, reinforcing the constitutional system or trying to reform it internationally), to the concern about particular human rights issues. It would, however, be a violation of international law to try to interfere in favour of a political option in a pluralistic electoral process. The provision of electoral assistance is also one of the most frequent positive measures, but it is not always successful in peaceful and liberal terms. It is noteworthy to observe what happened in the last Presidential election in Kenya in 2017. The election was praised and validated by

[52] M. Leonard, "L'Europe qui protège: Conceiving the next European Union", *European Council of Foreign Relations*, 30 August 2017.

[53] The Member States usually have consistent national provisions emphasizing the democratic goals of their foreign policies. See, in the Spanish Case, Arts. 2(2) and 24 of the Law 2/2014, of 25 March, of the External Action and Service of the State (*BOE* no.74, 26 March 2014).

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international observers and then annulled by the Kenyan Supreme Court. We must also consider that the post-electoral violent revolts in Kenya and Ivory Coast caused big humanitarian crises leading to the intervention of the International Criminal Court.

In general terms, positive and negative measures are surrounded by political factors and dilemmas: the persistence, and even revival, of the principle of non-intervention in internal affairs, the new geostrategic system, the in-determination on the real willingness of change within the local population, the doubts of Western countries about their own legitimacy to exert this pedagogy, the double standard concerning the response to the anti-democratic tendencies, the doubts about the degree of efficiency of the measures taken, the futile and even counterproductive consequences of the measures, etc.

Democracy within and around the European Union has another interrelated dimension. For example, and very disquietingly, Europe must fight the illiberal streams inside its Member States. It suffers the so-called "Copenhagen dilemma": the EU can have greater influence and put more pressure on candidates than on Member States. The enlargement process represents the intersection between internal and external matters. Besides, the own democratic (or non-democratic) nature of the European integration is a relevant and connected subject, as mentioned earlier, especially regarding its architecture towards foreign policy.[54]

Last, but not least, the European Union itself is subject to international scrutiny. Although it has traditionally been considered a normative power and the best example of the promotion and observance of international law, the European response to its migration flows has resulted in a great deal of criticism in humanitarian issues from governmental and non-governmental organisms. The assault on democratic principles takes place, therefore, from within and from outside the system, putting the internal and external strengths of the democratic values at risk, as we continue to explore from a different prospect.

### (F) THE INTERNATIONAL ASSAULT TO DEMOCRACY. FINAL CONSIDERATIONS

As we have previously indicated, democratic principles and systems have been suffering a visible setback at national level during the last decade.

Although there are some concurrent encouraging events, like the first constitutional and peaceful takeover of Liberia in 2017 since its foundation in 1944, or advances in the status of women, this pessimistic general trend must inevitably be considered by international law. The frequent, and commonly rhetorical and hypocritical, eulogy to democracy cannot hide

[54] J. Santos Vara, S. Rodríguez Sánchez-Tabernero (eds.), *The Democratisation of EU International Relations Through EU Law* (Routledge, 2018)

the absence of a repeated and uniform practice of democratic entitlement. Democratic impulse seems rather to respond to historic and political cycles and waves.[55]

Currently, the enemies of open societies are proliferating, as are the warnings against this phenomenon.[56] Democracy must be defended with a new narrative. Some political processes are not based on the transitional justice towards a liberal system, but the opposite: towards a de-democratization.[57]

Municipal democracies naturally suffer their own and traditional loopholes, but they also endure new attacks from inside with the deterioration of democratic parties and a visible rise of national populist ones. This phenomenon is notorious in the European Union with some member States, particularly Hungary and Poland, forming an illiberal front, now subject to political and judicial procedures before the EU, in search of its own credibility and survival. It is disquieting that this involution, mainly boosted by migration flows, is encouraged and endorsed by a large part of the citizenship and justified as a way of preserving the real European identity and values.[58]

However, attacks on the national and constitutional order are also simultaneously carried out from outside by what has been called a "sharp power", in opposition to the soft power that normally characterizes liberal systems.[59] This kind of intrusion is paradoxically launched by governments that are hostile to the international protection of human rights and are, therefore, in favour of its consideration as a *domaine réservé*. These States are becoming the new interventionists as western States and societies turn to a more cautious vision regarding foreign incursions.[60] Saudi Arabia, which appears more and more reluctant and responsive before external criticism over its regime, is becoming increasingly involved, directly or vicariously, in foreign affairs and conflicts. China, based on the non-interference on domestic matters, is practicing a more assertive foreign policy, thus gaining significant world power and influence. Russia is implementing an inadmissible external intrusion in the political and electoral processes of third countries, notably including the Western hemisphere, trying to distort democracy and the European integration and fostering anti-establishment parties. We

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[55] These cycles would corroborate the sort of analysis made by S. Huntington in "Democracy's Third Wave", *Journal of Democracy* (1991), 12-34. (DOI: 10.1353/jod.2018.0040). On the other hand, undoubtedly, tyranny represents a permanent temptation and curse for the human and social nature. See T. Snyder, *On Tyranny. Twenty Lessons from the Twentieth Century.* (Bodley Head, 2017).

[56] M. Albright, *Fascism. A Warning* (HarperCollins, 2018); R. Riemen, *To Fight against this Age. On Fascism and Humanism* (Copyrighted Material, 2018).

[57] L. Tomini, *When democracies collapse. Assessing Transitions to Non-Democratic Regimes in the Contemporary World* (Routledge, 2018); S. Levitski, D. Ziblat, *How Democracies Die* (Harvard University, 2018).

[58] I. Krastev, "Eastern Europe's Illiberal Revolution", *Foreign Affairs.* May-June 2018.

[59] National Endowment for Democracy, Report on *Sharp Power. Rising Authoritarian Influence,* December-2017.

[60] M. Leonard, "The New Interventionists", *European Council of Foreign Relations.* 2016.

are living times of fake news and fake principles, of general simplification and manipulation. Western and hacked democracies try to defend themselves against the insidious disinformation campaign run through cyberspace where the Internet giants must assume a greater responsibility, without instituting a sort of Orwellian society that restricts freedom of information and expression.[61] This is undoubtedly a national security threat against the rule of law and the dignity of the State, independence and unity, as is explicitly recognized in the new French and Spanish security strategies. The same liberal democracies face a serious challenge to their own traditional values, as the current US political panorama exemplifies, questioning the level of resilience and tolerance of the system and the suitable degree of appeasement: may democracies resort to "undemocratic" means to defend their existence? This is in addition to the lasting Jihadist threat, Jihadism obviously being the more sophisticated and terrible realization of totalitarianism.

Autocracies achieve a bonus of legitimacy by creating an external enemy in their domestic sphere and through the abolition of the independent opposition. Support against the isolationism of autocracies is also an antidemocratic behaviour that undermines the pro-democratic initiatives of Western liberalism, as in the cases of China and Venezuela.

To some extent the current situation can be described as a struggle between tribalism and internationalism, the main present ideological alternative. These movements represent a challenge to, and a revision of, the international liberal order unfolded since 1945, and an amendment to the power structure. It is important, therefore, to read the essay *Postwar* by Tony Judt or the novel *L'ordre du jour* by Éric Vuillard, or to watch the movie, based on a novel, "Remains of the day", in order to realize or remember where we come from and to bear in mind the tragedy inherent to the fanaticism and nationalism. Democracy has also been the best, or the least bad, solution to arrange public matters internally and internationally. A report issued by the OECD about the political and economic landscape in 2060 foresees that the development of a society will depend on the strength of its institutions, law and freedoms.[62] We should neither forget nor despise the legacy of the enlightenment and the progress achieved so far, as the "new optimists" remind us in spite of or just due to the gloomy prospects for human dignity.[63]

[61] D. Fried, A. Polyakova, *Democratic Defence against Disinformation*, (Atlantic Council, 2018).

[62] OECD, "The Long View: Scenarios for the World Economy to 2060" (2018).

[63] S. Pinker, *Enlightenment now: the Case for Reason, Science, Humanism, and Progress* (Penguin Books, 2018).

the SPANISH YEARBOOK of INTERNATIONAL LAW

*Secession of States and Self-determination in contemporary International Law*

# The right to political participation in International Law, independence referendums, and international good practice

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*Abstract*: The object of this study is to analyse how to address secessionist tensions in democratic States based on the fundamental human right to political participation. In this vein, secessionist tensions in democratic States and the indissoluble connection between human rights, democracy and the rule of law are considered. Secondly, the right to political participation in International Law is analysed, and the formulation of this right, its content and scope, and its interaction with other human rights and fundamental freedoms are addressed. Thirdly, international good practice and standards for elections and referendums, and their application to independence referendums, are analysed with particular emphasis on the main principles and democratic safeguards that originate in these good practices.

*Keywords:* Right to political participation – Independence referendums – International good practice

In the framework of the Seminar on "Secession of States and self-determination in contemporary International Law", organised by the *Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*, AEPDIRI [Spanish Association of Professors of International Law and International Relations] held at the University of Alcalá on 12 and 13 April 2018, I gave a presentation on "International standards in electoral processes and referendums." Preparing the presentation and delivering it at the Seminar, and the debates that took place there have led me to refocus and retitle my presentation (while still maintaining the original perspective), dedicating it more specifically to "The right to political participation in International Law, independence referendums, and international good practice." The presentation was included in a further round table on "Processes of secession within the framework of democratic States", where Professor Javier Roldán gave a presentation on "Internal democracy and International Law".

I have organised this contribution into three sections: in the first, I present the general concept behind my approach, which caused me to consider secessionist tensions in democratic States and the indissoluble connection between human rights, democracy and the rule of law (A). In the second section, I analyse the right to political participation in

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International Law, and address the formulation of this right, its content and scope, and its interaction with other human rights and fundamental freedoms (B). In the third, I analyse international good practice and standards for elections and referendums, and their application to independence referendums, with particular emphasis on the main principles and democratic safeguards that originate in these good practices (C).

## (A) SECESSION PROCESSES AND DEMOCRATIC STATES: GENERAL PERSPECTIVE

In order to position the approach that I am attempting to take, and how it fits into the context of the round table and Seminar, appropriately, I will present preliminary considerations on how secessionist tensions are addressed in democratic States (1) and the value and indissoluble nature in International Law of the trio made up of human rights, democracy and the rule of law (2).

### (1) Secessionist tensions in democratic States

My starting point is that this type of tension can exist in States with a long democratic tradition that, precisely because of this tradition, have eventually implemented civilised and democratic responses to accommodate secessionist tensions, so (and it could not be otherwise) they have crafted and articulated the appropriate political, legal and constitutional solutions.[1] This is no obstacle to highlighting, from the start, that States with democratic systems also flatly reject secessionist claims and their purported foundation in a non-existent right of secession, or as an expression of an unenforceable right of the people to self-determination.[2]

A preliminary consideration of how democratic States address secessionist tensions allows me to establish various potential models of response, or political and legal options: holding an independence referendum, action by the supreme or constitutional courts, or proposing significant constitutional reforms.[3]

With respect to the first possibility, I must point out that independence referendums are extremely rare in democratic States, as we are not faced with the situations of colonial domination or foreign occupation referred to by the right of the people to self-determination, nor are there serious violations of human rights or denial of the internal dimension of self-

[1] See A. López Basaguren, "Estado democrático y secesión de territorios. Un análisis comparado sobre el tratamiento democrático de las reclamaciones secesionistas", in *La secesión en España. Bases para un debate desde el País Vasco* (ed. Tecnos, 2014), particularly pp. 40-42.

[2] Conclusion confirmed in *Self-determination and secession in Constitutional Law*, report adopted by the Venice Commission (10-11 December 1999), Document CDL-INF(2000)2, p. 13.

[3] See X. Pons Rafols, *Cataluña: derecho a decidir y derecho internacional* (ed. Reus, Madrid 2015), particularly chapters IV and VI.

determination.[4] This perspective is particularly relevant in the Spanish context and in relation to the political crisis resulting from independence tensions in Catalonia.[5] In this respect, and in recent times and established democracies, only Quebec and Scotland have resorted to the formula of consulting the people in a referendum on independence, although some other democratic States have proposed various referendums, with full constitutional normality, to strengthen autonomy or regional decentralisation that could possibly lead to a future independence process.[6]

Two referendums on secession have been held in the Canadian province of Quebec during various periods when the Quebec Party (*Parti Québécois*, PQ) has held power in the provincial government. The first was held in 1980, with a proposal of "Sovereignty-Association" that was rejected by 59.6% of the electorate; the second, in 1995 and asking another complex question related to a situation that could lead to a unilateral declaration of independence, was about to succeed as it gained the backing of 49.42% of the electorate, some 50,000 votes less than the "no" camp. The narrow margin led the federal Government of Canada to increase political and legal activity to reduce separatist feelings in Quebec, and an element of this was to request the Supreme Court of Canada, by the "Reference" process, for a judicial decision on such a particularly significant political question as Quebec's potential unilateral secession. The "Reference re Secession", adopted in 1998 by the Supreme Court of Canada,[7] has become a genuine international benchmark in this field, and it was even invoked

4 As M. Keating indicates, the Scottish referendum "was a highly unusual event, an agreed popular vote on secession in an advanced industrial democracy" (M. Keating, "The Scottish Independence Referendum and After", *Revista d'Estudis Autonòmics i Federals*, no. 21, 2015, p. 73).

5 This is noted by Castellà Andreu, for example, who points out that very few countries vote on the secession of part of the country, but "secessionist media insist that not being able to vote on secession is antidemocratic and demonstrates the low quality of Spanish democracy" [J.M. Castellà Andreu, "La secesión catalana, entre la política y el derecho", *Anuario de la Facultad de Derecho de la Universidad de Alcalá*, Vol. VII (2014), p. 234].

6 This is the case in Greenland, for example, whose integration into Denmark, an exercise of self-determination of the people, was recognised by United Nations General Assembly Resolution 849 (IX), of 22 November 1954. Although the people's right to self-determination had therefore been exercised and exhausted, this was no barrier to a more substantial autonomy being negotiated with the passage of time and in agreement with the Danish authorities. Therefore, after the referendum held on 25 November 2008 and the new Act on Greenland Self-Government (*Home Rule Act*) of 12 June 2009, Greenland's increased autonomy may actually strengthen further over the next few years (although with many practical difficulties arising from its geographical and social conditions) towards an agreed process of independence from Denmark, as this would not be an exercise of the people's right to self-determination in its external dimension but, in this case, it could be an agreed secession [see K. Göcke, "The 2008 Referendum on Greenland's Autonomy and What It Means for Greenland's Future", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, no. 69 (2009), pp. 103-121].

7 See *Reference Re Secession of Quebec*, 20 August 1998, 161 D.L.R. [Dominion Law Reports] (4th) 385. For *Reference Re Secession*, see (amongst many such studies), analysis by P. Dumberry, "Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada", in M.G. Kohen, *Secession. International Law Perspectives* (Cambridge University Press, Cambridge 2006), pp. 416-452.

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by Spain's Constitutional Court in its *Sentencia* 42/2014, of 25 March, on the people of Catalonia's Declaration of Sovereignty and the Right to Decide.[8] The Reference re Secession was followed by the "Clarity Act", adopted by the federal Parliament of Canada in 2000,[9] which regulates the three successive moments at which the Federation should intervene when faced with a secessionist proposal by a Canadian province: to grant *a priori* approval to the proposed question (its clarity); to evaluate, *a posteriori*, the results obtained (also assessing their clarity); and finally, to establish the requirements for the proposed constitutional reform, if applicable.

In Scotland, and beyond the provisions of the Acts of Union between Scotland and England,[10] the devolution of powers to Scotland resulted in the creation of a government and single-chamber parliament in Scotland, and the first elections to the new Scottish Parliament took place in 1999. In the third elections in 2007, the Scottish National Party (SNP) gained a significant electoral victory that enabled them to govern as a minority for a whole term, during which they drove forward the political proposition for a future referendum on Scottish independence. It was only after the 2011 Scottish elections, when the SNP gained an absolute parliamentary majority in the Holyrood parliament, with 69 of the 129 seats, that they could use their complete democratic legitimacy to propose negotiations with the British Government to enable a referendum on Scottish independence to take place. The complex negotiations culminated in the Edinburgh Agreement of 15 October 2012, which committed to a binding referendum on 18 September 2014, with a binary-type question. The result of the referendum, which enjoyed a very high turnout of 84.6% of the electorate, was 44.7% in favour and 55.3% against.

Another possibility proposed in liberal democracies has been that their constitutional courts should act to redirected secessionist tensions within the framework of their respective constitutions.[11] I am not going to discuss historical scenarios here,[12] but I will simply

[8] For information on this Sentence, see X. Pons Rafols, "Sentencia del Tribunal Constitucional (Pleno) 42/2014, of 25 March 2014", *Revista Española de Derecho Internacional* (2014) 206-210.

[9] With the title, *An Act to Give Effect to the Requirement for Clarity as Set out in the Opinion of the Supreme Court of Canada in the Quebec Secession Reference*, of 15 March 2000, S.C. 2000, c. 26

[10] The Act of Union of 1707, which implemented the Treaty of Union of 1706, stated that "The two kingdoms of Scotland and England shall upon the first day of May next ensuring the date hereof and forever after be united into one kingdom by the name of Great Britain".

[11] See analysis by J.A. Montilla Martos, "El referéndum de secesión en Europa", *Revista de Derecho Constitucional Europeo*, no. 26 (2016) and his distinction between the situation in a flexible constitutional framework (United Kingdom) and the others (Italy, Germany and Spain).

[12] For example, and because it is a classic, I will highlight the decision of the Supreme Court of the United States when, in the *Texas v. White Case*, arising from the civil war, it was clearly established that the Constitution of the United States "in all its provisions, looks to an indestructible Union, composed of indestructible States. When, therefore, Texas became one of the Unites States, she entered into an indissoluble

highlight two recent sentences in constitutional courts in democratic States that have indisputably redirected secessionist tensions. In Italy, the Legislative Assembly of the Region of Veneto approved a law in 2014 (Regional Law 16/2014, of 12 June 2014) to hold a consultative referendum on independence for Veneto[13] that was disputed by the Italian government in the Constitutional Court. The Court issued its judgement on 25 June 2015, reiterating previous decisions and stating that the regional law was "radically incompatible with the fundamental principles of unity and indivisibility of the Republic". It considered that a "referendum initiative that, like the one considered here, is at odds with the unity of the Republic, can never become a legitimate exercise of power by the regional institutions and, therefore, is found to be *extra ordinem*".[14] The legal and political situation was finally turned around with a legal referendum of a consultative nature on autonomy for Veneto that was held on 22 October 2017, with 98% voting in favour of specific conditions and greater autonomy.

In Germany, the Federal Constitutional Court issued a ruling on 16 December 2016, stating that "in the Federal Republic of Germany, a nation-state based on the constituent power of the German people, the *Länder* [the sixteen German states] are not masters of the constitution" (*Herren des grundgesetzes*) and, therefore, they are not authorised to hold an independence referendum, as there is no room in the constitution for secessionist aspirations, which the Court considers violate constitutional order.[15] The ruling responded to an individual case against the Bavarian government's refusal to hold a referendum on Bavarian independence. The Constitutional Court confined itself to rejecting the appeal, as the Basic Law of Bonn makes no provision for any secessionist aspirations, so these fall outside the

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relation. All the obligations of perpetual union, and all the guaranties of republican government in the Union, attached at once to the State. The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. And it was final. The union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through consent of the States" [Texas v. White (1869) 74 US (7 Wallace) 700, 72 (1868), at 726].

[13] The question that was intended to be asked in the referendum was "Vuoi che il Veneto diventi una Repubblica indipendente e sovrana? Si o No?" [Would you like Veneto to become an independent and sovereign Republic. Yes or No?] (see M. Nicolini, "La Asamblea Legislativa de la Región del Véneto aprueba la ley sobre convocatoria del referéndum para la independencia", in *Blog de la Revista Catalana de Dret Públic*, 25 June 2014). It should be noted that an informal consultation on independence was also held in the region between 16 and 21 March 2014, with the participation of over 2.3 million people, with 89.1% in favour of independence.

[14] Para. 7.2 of Judgement 118/2015 of 24 April 2015, of the Italian Constitutional Court.

[15] Decision 2 BvR 349/16 of 16 December 2016, of the Constitutional Court of Germany. For more on this ruling, see F. Sosa Wagner, "Bávaros y referéndum por la independencia", *Revista de Administración Pública*, no. 202, 2017, pp. 157-167, and S. Ragone, "Los *Länder* no son 'Señores de la Constitución': el Tribunal Constitucional federal alemán sobre el referéndum separatista bávaro", *Teoría y Realidad Constitucional*, no. 41, 2018, pp. 407-418.

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constitutional system. It is true that this was an individual case and that the Bavaria Party (*Bayernpartei*), who hold aspirations to independence, have very little electoral support, but the ruling was uncompromising in its assertion that constitutional power lies with the German people. Obviously, no German regional power has attempted to push through their secessionist intentions or proposals for an independence referendum.

Another possible option or model to address secessionist tensions in liberal democracies is through constitutional reform, even continued constitutional reform. The most obvious example of this situation is the case of Belgium, where secessionist tensions led to federalisation of the State from 1993 onwards, through various constitutional reforms. More recently, the constitutional reforms of 2012 and 2014 could lead to a model of confederation, with a progressive, constitutional reduction in the competences of the State. [16] This is, therefore, a model which could potentially dismantle the Belgian legal and constitutional system, but which is also perfectly possible and plausible within democratic and constitutional parameters.

In light of these various potential judicial and political models and options, I feel I should highlight the total contrast with the "non-model" of the secessionist tensions in Catalonia. There has been repeated defiance of Constitutional Court rulings by the autonomous authorities in this non-model; defiance when a referendum was declared illegal, but still held on 1 October 2017, and when a participatory process was also suspended but carried out regardless on 9 November 2014. Laws which clearly threaten and violate the Constitution and the Statute of Autonomy have been adopted; disproportionate violence broke out on the calamitous day of 1 October; an exclusively judicial approach has been taken to tackle the political problem; over two million hopeful people continue to mobilise; a veritable roller-coaster of political events and comings-and-goings has unrolled, with many theatrical moments, but also times of great unease with the impossibility of finding a political solution to the impasse. In this non-model, there has been all of this, certainly, and more, but what has made the Catalan case stand out from the other possible models mentioned, is the immense and absolute failure of "politics". It has been absent throughout and, as of April 2018, it is not expected any time soon.

### (2) Human rights, democracy and the rule of law in International Law

In my initial approach, I found myself of a mind to formulate connections and examples related to particular situations in domestic law (including Spanish), but my focus is on

[16] With respect to Belgium, see A. Mastromarino, "Evaporazione vs. solidificazione: la sfida belga", *Istituzioni del Federalismo. Rivista di studi guiridici e politici*, no. 4, pp. 909-936, and by the same author, "Modificaciones constitucionales en Bélgida. *La sixième réforme de l'État:* un proceso en marcha", *Revista d'Estudis Autonòmics i Federals*, no. 22, October 2015, pp. 64-93.

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International Law and its essential principles relevant to secessionist tensions in democratic States. Therefore, having considered various potential options to channel and provide a legal and political outlet for secessionist tensions in democratic States like Spain, I should now describe, from the International Law perspective, the foundations of a democratic State that respects human rights, and discuss the legal provisions for the concept of the rule of law. As I understand it, we are faced with three concepts that are particularly relevant to secessionist tension because, although there is no doubt about the significant role of the will of the people in the configuration and decisions taken by the public authorities, there is also no doubt that this popular will should be channelled democratically, even if it is seeking independence for a territory belonging to a democratic State. It should, therefore, be addressed politically and conform to the legal mechanisms provided under the rule of law. In this respect, secessionist political forces in Catalonia have put forward an allegedly democratic proposal, which it also endeavours to base on International Law. However, by attempting to formulate the proposal independently of other fundamental democratic principles (both of Constitutional and International Law), they have overlooked the central principle of respect for legality and the rule of law, which can today also be considered an emerging principle of International Law.

The vision that I present not only corresponds to the approaches considered by the various constitutional systems of democratic States, but it also, for my purposes, arises from the recent development of International Law, which has indissolubly linked the concepts of human rights, democracy and the rule of law. A quick summary of this perspective should start with the Universal Declaration of Human Rights (UDHR)[17] and should especially refer to the rapid development of International Law in this area after the end of the cold war. In my opinion, it could be argued that, despite its many flaws and weaknesses, current International Law promotes and protects human rights as a fundamental principle, and binds it to democracy and the rule of law.

This is confirmed, in general, by the many international norms in existence, and the international practices of States and international organisations. The Charter of the United Nations itself stated in 1945 that one of its intentions was "to achieve international cooperation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion",[18] although it did not actually draw up a catalogue of human rights. The Preamble to the Charter also states that "We the peoples of the United Nations determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women [...]", among other principles.

[17] General Assembly Resolution 217 A (III), of 10 December 1948.

[18] Art. 1.3 of the Charter.

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Expressing the interaction between human rights, democracy and the rule of law more clearly, the Preamble to the UDHR emphasises that "it is essential [...] that human rights should be protected by the rule of law". This text, as we know, includes a programmatic wording of the fundamental human rights: civil, political, economic, social and cultural. It clearly describes the concept of democracy, by establishing that "the will of the people shall be the basis of the authority of government" in article 21,[19] along with other aspects of the right to political participation. In other words, the first international statement on human rights (with clear virtuality and absolute relevance today) already highlighted the close relationship between the rights that it proclaimed and the principle of democracy, and the requirement for a legal system to protect those rights. There is no doubt that the rule of law referred to in the Preamble to the Declaration must consist of an internal legal system providing the appropriate judicial and procedural safeguards to enable and guarantee the effectiveness of the human rights proclaimed in the Declaration.

As we also know, there has been a wide range of regulatory developments in International Law since the UDHR, with many international treaties on human rights, either in general terms, such as the International Covenant on Civil and Political Rights (CCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[20] or related to specific rights or protection of particularly vulnerable sectors of the community. For my current purposes, it is enough to indicate that various articles in these two fundamental international covenants allow some restrictions or exceptions with respect to certain rights, as long as these are "provided for by law" and are necessary "in a democratic society". So we are faced with a formulation of human rights in International Law that is undoubtedly linked to democratic regimes and the rule of law, and should lead to them. Article 25 of the CCPR, which I will discuss in more detail later, also sets down the right to political participation and defines it as an essential right of democratic governance.

This development in the international field of human rights reached full swing after the cold war and changes in the international political scene in the 1990s. One of the fundamental milestones in this approach is the Vienna Declaration and Programme of Action, adopted as the culmination of the World Conference on Human Rights held in 1993. As established in the preamble to the Programme of Action, it contemplated the "major changes taking place on the international scene" and highlighted the fundamental principles enshrined in the Charter of the United Nations, with particular reference to "promoting and encouraging

[19] Commentary on article 21 can be found in A. Rosas, "Article 21", in A. Eide *et al.* (ed.), *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, Oslo 1992); and in J.M. Castellá Andreu, "Artículo 21", in X. Pons Rafols (coord.), *La Declaración Universal de Derechos Humanos. Comentario artículo por artículo* (ed. Icaria/ANUE, Barcelona 1998), pp. 349-365.

[20] General Assembly Resolution 2200 (XXI), of 16 December 1966.

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respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity".[21]

From then on, the task of promoting, protecting and safeguarding human rights, and their connection to democracy and the rule of law, especially in the actions of the United Nations itself, has developed even more widely and in a multitude of spheres. In the Millennium Declaration, adopted by the General Assembly in the year 2000, and which would subsequently give rise to the Millennium Development Goals (MDGs), the Heads of State and Government affirmed that "We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development".[22] In my opinion, and without a shadow of a doubt, at the dawn of the twenty-first century, the States were clearly highlighting (in the sphere of International Law, that is) this undeniable conceptual interaction and the indissoluble nature of human rights, democracy and the rule of law.

Anyway, I believe that the most important text is the 2005 *World Summit Outcome*[23] which, for our purposes, affirmed in a section specifically dedicated to "Human rights and the rule of law", that "We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations".[24] Having affirmed these basic propositions, the *World Summit Outcome* also recognised "the need for universal adherence to and implementation of the rule of law at both the national and international levels" and affirmed that "democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives".[25]

The fragments of the Vienna Declaration and Programme of Action and 2005 World Summit Outcome that I have reproduced clearly express an idea that underlies the UDHR itself, is at the heart of my argument, and had previously been highlighted in the doctrine of International Law: this indissoluble connection between human rights, democracy and the rule of law. Protecting human rights is inconceivable without democratic safeguards, democracy is inconceivable without respect for human rights, and human rights and democracy are inconceivable without the rule of law, which becomes the concept and

[21] Para. 9 of the preamble to the Vienna Declaration and Programme of Action, Document A/CONF.157/23.
[22] Millennium Declaration, General Assembly Resolution 55/2, of 8 September 2000, para. 24.
[23] 2005 World Summit Outcome, General Assembly Resolution 60/1, of 16 September 2005.
[24] *Ibid.*, para. 119.
[25] *Ibid.*, para. 134 and 135.

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cornerstone by establishing legal and judicial safeguards for all.[26] As Victoria Abellán indicated over thirty years ago, the rule of law and democratic society constitute the internal safeguards to protect human rights and are the "prerequisites" for international protection of these rights.[27]

In this respect, I think the emergence in International Law of the universal value of democracy and the rule of law can be confirmed, along with some universal and indivisible human rights, and maybe even an emerging right to democratic governance and the rule of law.[28] However, I understand that we are faced with a concept (that seems to me to be crucial and that expresses the possibilities and limitations of the current international situation) in which International Law recognises that democracy should be encouraged and that it is probably the best political model to protect human rights, but the right for each sovereign State to freely determine its political, economic and social development continues to be firmly rooted in International Law, therefore there is not necessarily a single political model that is suitable for all States.

This tension was expressed clearly in the 2005 World Summit Outcome which, as well as the references to human rights and the rule of law which I have already mentioned, stated that "while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and [we] reaffirm the necessity of due respect for sovereignty and the right to self-determination".[29] Also, in the "Declaration on the rule of law at the national and international levels" of 2012,[30] the General Assembly stated that "all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law",[31] although "a broad diversity of national experiences in the area of the rule of law" was also recognised,[32] as occurs with democracy.

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[26] Jacques-Yvan Morin stated that "ni les droits et libertés de la personne ni la démocratisation des sociétés ne sont possibles si le pouvoir politique n'est pas soumis à des règles, c'est-à-dire si l'Etat ne pas 'de droit'" (J.Y. Morin, "L'État de droit: émergence d'un principe du Droit International", *Recueil des Cours*, vol. 254, 1995, p. 447).

[27] See V. Abellán Honrubia, "La protección internacional de los derechos humanos: métodos internacionales y garantías internas", in *Pensamiento jurídico y sociedad internacional. Estudios en honor del profesor Antonio Truyol Serra* (Centro de Estudios Constitucionales, Universidad Complutense, Madrid 1986), pp. 29-58, particularly pp. 31-32.

[28] Th. Franck, "The Emerging Right to Democratic Governance", *American Journal of International Law*, vol. 86, 1992.1, pp. 46-91 can be cited with respect to this concept.

[29] 2005 World Summit Outcome, para. 135.

[30] Adopted by the high-level meeting of the General Assembly on the rule of law at the national and international levels, General Assembly Resolution 67/1, of 24 September 2012.

[31] *Ibid.*, para. 2.

[32] *Ibid.*, para. 10.

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In other words, International Law gathers together some fundamental principles on the subject of human rights, democracy and the rule of law, but it does not endorse or recommend any particular organisational or political model, as this is something that States must determine in their relevant domestic legislation. From the perspective of International Law, a representative democracy is as valid as a more participatory or direct democracy; a legal and constitutional system that enables consultations or referendums is as valid as a system that only provides for periodic elections and no referendums; and a proportional electoral system is as valid as a majority electoral system, to mention only some of the different potential legal and political options related to democracy and the right to political participation. Determining all of these factors, within the framework of the parameters of international human rights law, is strictly a matter for the State's domestic legislation.

Ultimately, I believe that the general principle of International Law (already postulated in the UDHR) that public authorities obtain their legitimacy by the will of the people can be confirmed. This will is the source of democratic legitimacy and can also be expressed in a variety of ways, through elections, or by referendums or consultations. There is also no doubt that the latter is a method that can be particularly appropriate, and the Spanish and Catalan legal systems, for example, provide regulations for referendums and public consultations. It is therefore possible to advance towards a more participatory, direct and inclusive democratic system, but there is nothing in current Spanish legislation or its democratic system that contradicts the provisions of International Law on human rights, democracy and the rule of law.

## (B) THE RIGHT TO POLITICAL PARTICIPATION IN INTERNATIONAL LAW

As part of the general approach that I have described, I will now discuss the right to political participation in International Law, and I shall do this by systematically addressing two aspects: the formulation of this right in various international instruments (1) and their content, scope and interaction with other fundamental human rights (2).

### (1) Formulation of the right to political participation

As I have already mentioned, the UDHR described the fundamental human rights for the first time in an international text, and these include the right to political participation and the essence of the democratic principle, which is covered in article 21. Specifically, this article proclaimed that

> "1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
> 2) Everyone has the right of equal access to public service in his country.

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> 3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".

Article 25 of the CCPR, which is a legally binding text, develops and consolidates this wording, stating:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
> (c) To have access, on general terms of equality, to public service in his country."

A similar text defining these rights to political participation has also been incorporated into other regional human rights instruments. Article 23 ("Right to Participate in Government") of the American Convention on Human Rights, of 22 November 1969,[33] establishes that

> "1. Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country.
> 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."

Article 13 of the African Charter on Human and Peoples' Rights, of 1 June 1981,[34] provides that

> "1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
> 2. Every citizen shall have the right of equal access to the public service of his country.
> 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law."

I should also mention that the High Contracting Parties to the European Convention on Human Rights, adopted by the Council of Europe in 1950 and directly inspired by the UDHR, which was approved a mere two years before,[35] reaffirmed their profound belief in

[33] Available here.

[34] Available here.

[35] Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950. The UDHR is mentioned three times in the Preamble to the Convention.

human rights and fundamental freedoms, which they considered "are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend".[36] However, it was not until 1952 that Additional Protocol No. 1 to the European Convention[37] was adopted. For our purposes, this is particularly relevant as it includes the right to political participation that was not covered by the original text of the European Convention, specifically, the right to free elections. Article 3 of Additional Protocol No. 1 states that

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

My first and most significant observation therefore addresses the limited reference to the right to political participation in the European Convention in relation to the norms established by the universal instruments. This has obviously not prevented the values of democracy and the rule of law, which constitute their statutory and guiding principles, from being fully integrated into the framework of the Council of Europe and its legal and institutional system. These values are now considered a common European legacy, and this idea has been spreading to the rest of the world, making Europe a model to be emulated in the fields of welfare, and development and respect for human rights. From this perspective, I believe that becoming established as a democratic State has become a clearly defined, collective obligation for European States.

Anyway, some essential ideas can be inferred from all of these standard texts for the purposes that I would like to highlight.[38] Firstly, not all dimensions of the right to political participation are attributable to all people, as they are exercised in the scope of domestic legal and constitutional systems, so some of these rights and opportunities may only correspond to the "citizens" or nationals of a particular State, and foreigners living in that State may be deprived of these rights. But, as established by some of these instruments, and stated by the Human Rights Committee in their General Comment No. 25, distinguishing between "citizens in the enjoyment of these rights on the grounds of race, colour, sex, language,

[36] Paragraph 5 of the Preamble to the European Convention.

[37] Protocol of 20 March 1952.

[38] See an analysis of these treaty provisions in G.H. Fox, "The Right to Political Participation in International Law", *Yale Journal of International Law*, vol. 17.2 (1992), particularly pp. 552-570; and E. Bernales Ballesteros, "El derecho humano a la participación política", *Derecho PUCP. Revista de la Facultad de Derecho*, no. 59 (2006), pp. 9-32.

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religion, political or other opinion, national or social origin, property, birth or other status"[39] is expressly prohibited.

On the other hand, these rights to political participation can basically be structured into three dimensions or rights. Firstly, the right to participate in public affairs, which can be exercised directly, via mechanisms of direct participation, or by acting as an elected representative or holder of public office. This right can also be exercised indirectly, through freely elected representatives. Secondly, the right to vote and be elected in periodic, genuine elections held by secret ballot and universal suffrage, which constitutes a partial manifestation of the first dimension, by including the election of representatives and the ability to be freely elected as a representative of the people. Thirdly, the right of equal access to public service also forms part of these rights to political participation. This includes holding public or judicial office or, more generally, working as a public sector employee in the service and the interest of the public.

Lastly, I understand that these provisions also clearly indicate that these rights to political participation should be established by the constitution or in accordance with the provisions of the law, as they come within the scope of domestic legislation. In this respect, the Human Rights Committee has insisted that these rights should be protected by law, as it considers that "the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws", and that all those rights and obligations, including the electoral processes to bring them into effect, should ultimately be guaranteed by law.[40] In other words, International Law certainly promotes democracy, and all the precepts that I have mentioned inspire and stimulate greater democratisation in decision-making processes, but it is the responsibility of domestic legislation to recognise and safeguard those rights. This fact undoubtedly also highlights the restrictions that international political circumstances impose when defining the substantive content of democracy and the rule of law.

### (2) Content and scope of the right to political participation

As I have already mentioned, and according to the wording in article 25 of the CCPR (and other reference legal instruments), the right to political participation can be exercised through "representative democracies" or by "mechanisms of direct participation", although the CCPR does not favour one over the other. Article 25 of the CCPR therefore covers any potential domestic legal and constitutional formula that incorporates this fundamental right to political participation. In this respect, and for my purposes, the right to political participation in

[39] General Comment No. 25 adopted by the Human Rights Committee on 12 July 1996, Document CCPR/C/21/Rev.1/Add.7, para. 3.

[40] *Ibid.*, para. 5 and 9.

International Law can therefore involve mechanisms of direct participation, such as referendums and consultations on questions that are in the public interest, or the right to vote, either for representatives or in referendums. I would like to reiterate the fact that, in the same way as they cover various potential legal and political formulas, international standards "do not impose" any specific democratic political or electoral system, nor do they establish any requirement for direct participation through referendums or consultations. As discussed before, International Law defers to domestic legislation, which should safeguard the rights and obligations established internationally.

For further information on the possibility of mechanisms for direct participation, I should also mention that the Human Rights Committee insisted on two fundamental facts in their General Comment. One of these was that article 25 of the CCPR stated that citizens can participate directly "when they choose or change their constitution or decide public issues through a referendum or other electoral process" and also "by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government", so the Committee limited itself to illustrating some potential formulas for direct participation.[41] In any event, the Committee insisted that there should be no distinction between citizens nor should excessive restrictions be imposed in situations where a form of direct citizen participation has been established. The second was that the Committee also reiterated the idea that the right to vote in elections and referendums (if any) should be established by law, so referendums and consultations are effectively opportunities to directly exercise the right to political participation. However, if they are anticipated, they should be established legally and without any type of discrimination in the domestic legislation of the State.

The jurisprudence of the European Court of Human Rights (ECHR) over article 3 of Additional Protocol No. 1 requires that the right to free elections is both a subjective right and an obligation of the State, and that elections should be held freely, by secret ballot and at regular intervals to choose the legislature, as the Protocol expressly states. This last aspect, in an interpretation that is possibly overly literal of article 3 of the Protocol, has led the ECHR to consider that the right recognised in this provision is not applicable to all electoral processes, and elections to local and regional bodies with no legislative powers are excluded from its scope. In the same way, referendum processes are also excluded, as the Convention does not establish any obligation for the State to consult its population. The State is therefore obliged to hold periodic elections to choose the legislature, but there is no obligation to hold referendums or consultations, not does article 3 of the Protocol provide

[41] *Ibid.*, para. 6.

citizens with any subjective rights in this respect, so the European Convention does not safeguard any general right for the population to be consulted.

Although this consideration could be regarded as controversial, the European Commission on Human Rights already held this opinion in 1975, stating that the British referendum on membership of the European Community "was not an election concerning the choice of legislature" but "was of a purely consultative character and there was no legal obligation to organise such a referendum", with no right to participate in the referendum arising from Article 3 of the Protocol.[42] In the same vein, the ECHR established more recently that the complaint by some Scottish prisoners that they couldn't vote in the Scottish independence referendum was incompatible *ratione materiae* with the provisions of the Convention and its Protocols and must be rejected.[43] Equally, when a complaint was brought before the ECHR regarding the validity of the constitutional referendum held in Turkey on 17 April 2017, the Court held that "it cannot be inferred from the ordinary meaning of the term "elections" in Article 3 that a "referendum" would come within the scope of that provision" and, therefore, this provision does not apply to referendums.[44]

Ultimately, the provisions of International Law and the doctrine of international bodies on human rights have caused, in my opinion, the lack in International Law of any obligation to establish mechanisms of direct participation to exercise the right of political participation or any subjective right of a State's citizens to be called to referendums or consultations in general. In this, as in other related subjects, International Law remits and grants a wide margin of availability to domestic legislation to establish its own provisions and mechanisms.[45] These can also establish reasonable and objective conditions that should not be excessive and should be used for legitimate purposes.[46] The central concept in of all this, I believe, is that the right to political participation should be safeguarded, and domestic legislation should be responsible for implementing this. As the Human Rights Committee indicates in its General Comment, "Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects".[47]

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[42] See Comm. 7096/75, *X v. United Kingdom*, decision of 3 October 1975 [also see J. De Meyer, "Electoral Rights", in R. St. J. Macdonald *et al.* (ed.), *The European System for the Protection of Human Rights* (Martinus Nijhoff Publishers, Dordrecht 1993), p. 556].

[43] See *Moohan v. the United Kingdom*, and *Gillon v. the United Kingdom*, Decision of 13 June 2017.

[44] See *Cumhuriyet Halk Partisi v. Turkey*, Decision of 21 November 2017.

[45] Provisions and mechanisms that are, by definition, diverse and varied. See the Venice Commission report, *Referendums in Europe – An analysis of the legal rules in European States*, study no. 287/2004, CDL-AD (2005)034, of 2 November 2005.

[46] *General Comment*, para. 4, 6, 10, and 14 to 17.

[47] *Ibid.*, para. 1.

By the same token, it should be noted that the right to political participation is closely linked to other fundamental human rights. The wording of the right to political participation clearly indicates that this right is directly linked to the right to equality and freedom from discrimination and, naturally, to fundamental freedoms in a democratic system, such as freedom of expression, of information, opinion, thought, assembly and association.[48] The right to political participation comprises the core of democratic government by the consent of the people, so it is also closely related to (although distinct from) the people's right of self-determination, as this involves the right of the people to freely choose their political status (that is, the form of their constitution or government) and their economic, social and cultural development, as established by article 1.1 of the two International Covenants of 1966.

In this respect, both International Covenants establish a close conceptual and systematic relationship between people's right to self-determination, and human rights.[49] This connection undoubtedly subjectively and conceptually broadens the right to self-determination that extends to all peoples and goes further than the strictly colonial environment, as the relevance of this connection is that the self-determination of peoples is established as a collective human right. As the Human Rights Committee itself recognised when it referred to this article 1.1, the right that this article establishes "is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".[50] In other words, this provision inspired what has come to be known in the doctrine as the internal dimension of the principle of self-determination, closely linked to democracy.[51] Self-determination is exercised inside the State in this internal dimension, so is therefore different from the external dimension, as the latter considers independence to be a potential result of self-determination. As indicated by Javier Roldán, understood "in its democratic

[48] Article 25 makes no mention of it, but I understand that it also incorporates political pluralism, and therefore requires a multiparty system and multiparty elections. Although, as J. Vidmar indicates, "It is far from settled in international law that the right to political participation, either under Article 25 of the ICCPR or under customary international law, requires multiparty elections. Therefore the interdependence between this right and the right of self-determination cannot result in an obligation to hold multiparty elections" [J. Vidmar, "The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin", *Human Rights Law Review*, vol. 10:2 (2010), p. 267].

[49] See P. Andrés Sáenz de Santa María, "La libre determinación de los pueblos en la nueva sociedad internacional", *Cursos Euromediterráneos Bancaja de Derecho Internacional*, vol. I, 1997, pp. 129 ff., and pp. 167-169.

[50] See *General Comment* No. 12, adopted in 1984 by the Human Rights Committee, para. 1, reproduced in Document HRI/GEN/1/Rev.9 (Vol. I). A discussion on this General Comment in P. Thornberry, "The democratic or internal aspect of self-determination with some remarks on federalism", in C. Tomuschat, *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Dordrecht 1993), pp. 111-113.

[51] See the extensive discussion on this subject in T. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (La Documentation Française, París 1999), pp. 335 ff.

connotations, the right of peoples to determine themselves is a continuing principle, a continuous, permanent process of self-government that confers popular legitimacy on the rule of the sovereignty of the State."[52]

Finally, and applying the right to political participation as an essential democratic principle to a comparative law perspective, I should also mention that the democratic principle is neither unique nor isolated, and should be linked to other fundamental principles. In this respect, although the Supreme Court of Canada rejected the pertinence of the principle of people's self-determination in the Reference re Secession, it did establish that the legal basis for a hypothetical secession could be founded on four fundamental constitutional principles of domestic law that should be duly articulated and that form the background and boundaries of the judicial approach: federalism, democracy, constitutionalism and the rule of law and, finally, respect for minorities. None of these principles, not even the democratic principle, should be imposed on the others as an absolute value.[53] Similarly, the Spanish Constitutional Court's aforementioned ruling on the Declaration of Sovereignty and the Right to Decide stated that the so-called right to decide could be interpreted in accordance with the Constitution if it was understood "as a political aspiration that can only be achieved through a process that is constitutionally legal with respect to the principles of 'democratic legitimacy', 'pluralism', and 'legality'", values that are superior in our legal system.[54]

### (c) Independence referendums and good international practice

I will now discuss the application of international standards and good practice for elections and referendums to independence referendums. Firstly, I will address the adoption of these good practices and their legal nature (1), then the main principles and democratic safeguards for referendums, with reference to established practice and the human rights doctrine of international bodies (2).

#### (1) Adopting good international practice on elections and referendums

As I have already mentioned, there is a wide discretionary range in how domestic legislation implements democratic principles and the rule of law, and in the subject that we are currently addressing: the right to political participation. I have already pointed out that International

[52] See J. Roldán Barbero, *Democracia y Derecho Internacional* (ed. Civitas, Madrid 1994), p. 164.

[53] *Reference re Secession*, para. 32 and 90. López Basaguren considers that the Reference re Secession establishes a "new constitutional paradigm", based on the constitutional principles that underlie constitutionally democratic federal systems or systems that include territorial autonomy [see A. López Basaguren, "La secesión de territorios en la Constitución española", *Revista de Derecho de la Unión Europea*, no. 25 (2013), pp. 87-106 and, by the same author, "Estado democrático y secesión de territorios [...]", *op. cit.*, particularly pp. 52 ff.].

[54] Legal basis FJ 3 of judgement STC 42/2014.

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Law does not favour any particular legal and democratic model and, although current international standards consider the possibility of mechanisms of direct participation, they do not specifically establish any process nor include the right to be called to referendum or to be consulted generally on issues of public interest, as the existence and scope of these mechanisms are the responsibility of domestic legislation.

In recent decades, this wide margin of State activity with respect to their democratic legislation and electoral procedures (and referendum processes, where applicable) has been influenced by the emergence of international procedures for assistance and election observation, which have started to generate a considerable body of international standards and criteria for electoral processes and observation of them, including referendum processes.[55] A collection of indicators and standards for observing elections and referendums have therefore arisen, and a substantial body of good international practice soft law has been developed. Some criteria and standards of observation are of a more methodological nature, but others include substantive elements that have inspired electoral legislation and procedures in States that have moved towards democracy or that have come out of conflict situations, which enables us to identify what International Law understands by a democracy ever more clearly. Ultimately, international election observation has great potential to enhance the integrity of election processes by deterring and exposing irregularities and fraud, and by providing recommendations to improve the integrity and effectiveness of electoral and related processes.

Various texts on the subject have been adopted by international organisations, private entities and non-governmental organisations. To highlight just a few, in October 2005, the Secretary General of the United Nations signed a *Declaration of Principles for International Election Observation* and a *Code of Conduct for International Election Observers*, both of which have been adopted by numerous international and non-governmental organisations with authority and activity in this area, and which aim to harmonise the methods and standards of these organisations that observe elections.[56] I should also mention the *International Legal Standards. Guidelines for reviewing the legal framework of elections*, adopted by the

[55] For international observation in general, see Y. Beigbeder, *International monitoring of plebiscites, referenda and national elections: self-determination and transition to democracy* (ed. Martinus Nijhoff Publishers, Dordrecht 1994); A. Badia Martí, *La participación de la ONU en procesos electorales* (ed. McGraw Hill, Madrid 1998); and G.H. Fox, "The Right to Political Participation [...]", *op. cit.*, pp. 570-596.

[56] See the Secretary General's report on *Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization*, Document A/62/293, para. 15. The General Assembly has also repeatedly expressed their appreciation for both declarations (on the last occasion, via General Assembly Resolution 72/164, of 19 December 2017), and both declarations have also been adopted by the Council of Europe and the Venice Commission in Document CDL-AD(2005)036, of 2 November 2005.

Organization for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) and the International Institute for Democracy and Electoral Assistance (IDEA).[57] The many documents adopted by the Inter-Parliamentary Union (IPU) (the organisation that brings together parliamentary institutions around the world), including the *Universal Declaration on Democracy* and *Declaration on Criteria for Free and Fair Elections*, are also worth mentioning.[58] The European Union itself has published a *Compendium of International Standards for Elections*, which aims to help the EU Election Observation Missions and other interested stakeholders to clearly identify the international standards to use when assessing the conduct of elections.[59]

In this same vein, the Council of Europe and its attendance at the events that occurred in Central and Eastern Europe at the end of the cold war should be highlighted. The assistance given these countries to encourage democratisation and respect for the human rights recognised by the European Convention has led in particular to constitutional legislation, elections and referendums, through the work of the European Commission for Democracy through Law, known as the Venice Commission. This Commission was created by the Committee of Ministers of the Council of Europe in 1990[60] as a consultative body made up of independent experts whose "own specific field of action shall be the guarantees offered by law in the service of democracy".[61] Their objective is essentially to broadcast democratic principles and offer assistance in creating coherent constitutional systems, and institutions and mechanisms that allow confidence in justice and the rule of law to be re-established.[62] Its role as a forum for debate and a source of legal assistance has extended outside Europe[63] and has generated a considerable body of reports and decisions on the situation, elections or legal and constitutional changes in many States in the past few years, and codes of conduct and instruments of soft law with general principles of democracy, the rule of law, and election and referendum processes.

The Venice Commission has adopted a range of texts, including *Guidelines for Constitutional Referendums at National Level*,[64] but I would like to discuss two texts in

[57] Originally adopted in 2001, with subsequent complementary developments, and available here.

[58] See their website here.

[59] Fourth edition available here.

[60] By Committee of Ministers' Resolution (90) 6, of 10 May 1990.

[61] Article 1 of Resolution (90) 6.

[62] For general information on the origin and legal nature of the Venice Commission, see S. Salinas Alcega, *La Comisión para la Democracia a través del Derecho (Comisión de Venecia)* (Real Instituto de Estudios Europeos, Zaragoza 1999).

[63] The Council of Europe has 47 Member States, and 61 States participate in the Venice Commission.

[64] *Guidelines for Constitutional Referendums at National Level*, adopted at its 47th Plenary Session on 6-7 July 2001, Document CDL-INF (2001) 10.

particular: the first is the *Code of Good Practice in Electoral Matters*, produced by the Venice Commission in July 2002,[65] and the second, and later, document was also produced by the Commission and is the *Code of Good Practice on Referendums*, which is based on the work of the Council of Europe Parliamentary Assembly[66] itself and contains some guiding principles and an explanatory memorandum.[67] To establish these European standards on referendums, the body of referendum legislation in the European States was also analysed in its entirety, enabling the common principles[68] to be determined. Once the *Code of Good Practice* was approved, the Parliamentary Assembly considered that it could enable the Member States to re-evaluate and, if necessary, revise, their legislation and practice in this area.[69] The Parliamentary Assembly also highlighted that referendums are an "instrument of direct democracy which belong to the European electoral heritage" and they considered them to be "a positive means to enable citizens to participate in the political decision-making process and to bridge the distance between them and the decision makers".[70]

Finally, in addition to all of the above, there is the work of the Venice Commission itself, with its decisions and reports on various referendum processes that clearly make up a statement of European and international standards in the field.[71]

### (2) The main principles and democratic safeguards

I believe that the Venice Commission's codes of conduct, reports and decisions, the ECHR's jurisprudence, the Human Rights Committee's doctrine, and international practices themselves give rise to the main principles and democratic safeguards for independence referendums. Therefore, I will briefly address what I consider to be the seven basic principles and democratic safeguards from an international perspective.[72]

The first of the principles and safeguards that I would like to highlight is the principle of legality: International Law does not recognise any general right to be consulted, so

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[65] *Code of Good Practice in Electoral Matters*. The guidelines were approved at the 51st Plenary Session of the Venice Commission on 5-6 July 2002, and the Explanatory Report was approved at the 52nd Plenary Session on 18-19 October 2002. See *Opinion no. 190/2002*, Document CDL-AD (2002) 23 rev.

[66] See Council of Europe Parliamentary Assembly Recommendation 1704 (2005), of 29 April 2005.

[67] *Code of Good Practice on Referendums*. The Code was adopted by the Venice Commission at their 70th Plenary Session on 16-17 March 2007. See *Study no. 371/2006*, Document CDL-AD(2007)008 rev.

[68] See the aforementioned *Referendums in Europe – An Analysis of the Legal Rules in European States*, Document CDL-AD (2005)034.

[69] Resolution 1592 (2007), of 23 November 2007.

[70] *Ibid*., para. 1 and 2.

[71] See *Compilation of Venice Commission opinions and reports concerning referendums*, Document CDL-AD(2017)002, of 10 March 2017.

[72] I have excluded any particular reference to the events in Catalonia on 9 November 2014 and 1 October 2017. I refer to X. Pons Rafols, *Cataluña: derecho a decidir y* [...], *op. cit.*, particularly chapters 1, 2 and 6 throughout.

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referendums should comply with domestic legislation and be established in the constitution or by legislation.[73] As I mentioned previously, a legal and constitutional system that never, or only exceptionally, provides for referendums is as democratic as one that does provide for them. Referendums are a matter of domestic legal and constitutional tradition that corresponds to the margin of State appreciation. It is even possible, and perfectly plausible for democratic States, to adopt constitutional reforms without holding any constitutional referendum at all.[74] However, the existence of a legal framework is the only mechanism to avoid delegitimising any potential referendum and to ensure that all parties and positions involved have full confidence in how it is held and its results.

A clear expression of the imperative for this principle of legality can be found in the Venice Commission Opinion on the independence referendum held in Crimea on 16 February 2014.[75] The Commission considered that the Autonomous Republic of Crimea did not have the authority to call a referendum, which was also affirmed by the Constitutional Court of Ukraine, therefore a referendum would contravene European standards. The Commission also indicated that the Constitution of Ukraine allows referendums, but not of secession, as Ukraine exists as a unitary State. It would therefore have been necessary to reform the Constitution and, although the Constitution limits the amendments that affect the territorial integrity of the States, the Commission considered that this did not contravene European democratic standards.

The second of the relevant principles or safeguards is that of the legal certainty in respect of the stability and predictability of referendum legislation. The *Code of Good Practice* specifically demands this stability in relation to the existence and composition of the electoral commission or board, and states that fundamental aspects of referendum law cannot be amended less than one year before a referendum is held.[76] This means that referendum legislation should never be adopted expressly for a particular referendum. This is also particularly relevant to election administration and electoral fairness, which are fundamental factors that guarantee referendum credibility. This credibility absolutely must be backed by

[73] As established by Guideline III.1 of the Code of Good Practice on Referendums, "The use of referendums must comply with the legal system as a whole, and especially the procedural rules. In particular, referendums cannot be held if the Constitution or a statute in conformity with the Constitution does not provide for them, for example where the text submitted to a referendum is a matter for Parliament's exclusive jurisdiction".

[74] For example, Czechoslovakia separated into two States (the Czech Republic and Slovakia) without any kind of referendum.

[75] See *Opinion on "Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organize a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 Constitution is compatible with constitutional principles"*, Document CDL-AD(2014)002, of 21 March 2014.

[76] *Code of Good Practice*, Guideline II.2.

an impartial, independent, established and permanent electoral commission or board.[77] The *Code of Good Practice* therefore provides for this demand for legal certainty and a period of stability in referendum legislation. In the case of Crimea, the Venice Commission considered that the extremely short period of 10 days between calling the referendum and holding it, and other circumstance of the case, clearly contravened European democratic standards.[78]

The third factor or democratic guarantee in a referendum process, although it may seem obvious, is the existence of an established electoral roll or register, which is constantly updated, can be challenged and amended, and is under judicial control. This does not mean that the right to vote is absolute, [79] as the State is responsible for establishing the conditions for the right to vote in their domestic legislation. Therefore, there should be a voter register, although restrictions and conditions can be applied, as long as they are based on reasonable and objective criteria[80] which are proportionate and have a legitimate purpose. In this respect, it is perfectly compatible with international standards to restrict the vote to nationals, set a minimum voting age,[81] establish restrictions for people held in prisons, or set prerequisites for residence. On this last point, the Venice Commission *Code of Good Practice* recommends, in general, a minimum residence of six months in order to have the right to vote.[82]

With respect to these considerations on the requirement for prior residence, the complex case of New Caledonia, which has been the subject of various declarations from the Human Rights Committee and the ECHR, can be used as an example. The Nouméa Accord of 1998 provided for a first consultation in that same year (when residence of 10 years in New Caledonia was required) and a future referendum, to be held between 2014 and 2018, which is eventually expected to take place on 4 November 2018 and which will demand (among other alternatives) residence of 20 years. The Human Rights Committee considered that the right to vote "is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable," therefore not all differentiation constitutes discrimination if it is based on objective and reasonable criteria and the purpose sought is legitimate under the Covenant. This was the case for New Caledonia, when adequate links to the territory were demanded for a referendum of self-determination.[83] Equally, the ECHR considered that the rights in article 3 of Protocol 1 are not absolute, but may be subject to

77 *Ibid.*, Guideline II.3.

78 *Loc. cit.*

79 As mentioned in the *Code of Good Practice* Guideline I.1, on the right to vote, "This right may, however, and indeed should, be subject to certain conditions".

80 *General Comment* on article 25, para. 10.

81 This age was set at 16 years old for the Scottish referendum.

82 *Code of Good Practice*, Guideline I.1.

83 See Communication no. 932/2000, *Ms. Marie-Hélène Gillot et al. v. France*, Views of 15 July 2002, Document CCPR/C/75/D/932/2000.

limitations. Therefore, the State has a wide (although not unlimited) margin of appreciation, and particular requirements for residence could be considered to pursue a legitimate purpose in the case of New Caledonia, and those requirements complied with the European Convention.[84]

A fourth and fundamental democratic safeguard is neutrality of the public authorities and equality of opportunity for the supporters and opponents of the proposal to be put to the vote. In this respect, the *Code of Good Practice* establishes that the authorities should provide objective information on the proposals to be submitted to the referendum and they should not influence the result of the vote by excessive and biased campaigns.[85] This neutrality of the public authorities should be demonstrated in the referendum campaign, media coverage, public funding of the campaign and its actors, propaganda and advertising and, finally, in the right to demonstrate on public thoroughfares. In this respect, the impeccable British mechanism that runs an independent Electoral Commission and enables the appointment of registered organisations or multiparty platforms for each of the positions in dispute in a referendum and restricts government propaganda, excluding it entirely in the 28 days immediately before the referendum, should be particularly highlighted.[86]

The fifth significant principle refers to the clarity of the question. The *Code of Good Practice* states that the question must be worded clearly and without ambiguity, it must not be an open question and it must not mislead, or suggest an answer.[87] The question is particularly important: in the Scottish referendum, for example, the Electoral Commission considered that the question that was originally proposed ("Do you agree that Scotland should be an independent country?") was not sufficiently neutral and changed it to "Should Scotland be an independent country?" In the case of Quebec, neither of the two questions asked in the referendums of 1980 and 1995 would pass this international test of clarity today, and this test is also now incorporated into the Canadian Clarity Act.[88]

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[84] Case *of Py v. France*, Judgement of 11 January 2005.

[85] *Code of Good Practice*, Guidelines I.2 and I.3.

[86] The Electoral Commission supervised the Scottish referendum and published a complete report on it: see the *Scottish Independence Referendum. Report on the referendum held on 18 September 2014*.

[87] *Code of Good Practice*, Guideline I.3, para. 1.c.

[88] The question in 1980 was "The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad - in other words, sovereignty - and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?"; and the question in the 1995 referendum was "Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new

A sixth consideration should be formulated in relation to the majorities required, both in participation in the referendum and with respect to the results for these to be considered valid. I should point out here that there is a wide range of minimum participation in domestic provisions for referendums. The Venice Commission in particular recommends that there should be no minimum participation quorum, as this makes opponents abstain instead of voting no; and that there should be no minimum approval quorum either as, if this is not reached but there is a significant majority, it can be very complicated to manage the results of the referendum.[89] The Venice Commission's *Guidelines for Constitutional Referendums at National Level* do recommend a minimum participation by the electorate in constitutional referendums, which seems to indicate that it becomes logical to demand a minimum threshold of participation in important and transcendental matters, thereby creating an exception to the general standard set by the Commission itself.[90] However, it should be noted that the Edinburgh Agreement did not set any minimum level for participation or results in the Scottish independence referendum.

With respect to these considerations, the most relevant case is the Montenegrin independence referendum of 2006. During the referendum process, the Venice Commission proposed certain conditions for the referendum and its results to be valid. These conditions were then accepted by the Council of Europe and the European Union and, obviously, by the Montenegrin authorities, with the backing of the Serbian authorities. In order for the separation to be accepted internationally (a question that was foreseen and regulated specifically by the constitutional regulations of the State of Serbia-Montenegro),[91] it was agreed that the referendum should be governed by a minimum threshold participation of 50% of the electorate and a majority of 55% of voters in favour of independence. Although a very high number voted, reaching 86.6% participation, the minimum threshold of votes in favour was reached by only a few tenths of a point, at 55.6%.[92] For some authors, taking into account

economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?".

[89] *Code of Good Practice*, Guideline III.7.

[90] See analysis by J.M. Castellà Andreu, "Sobre el encaje constitucional del pretendido referéndum de secesión en Cataluña", in E. Sáenz Royo; C. Garrido López (coords.), *La funcionalidad del referéndum en la democracia representativa* (ed. Tirant lo Blanch, Valencia 2017), pp. 129-153, particularly pp. 148-149.

[91] The 2003 Constitution of Serbia-Montenegro enabled the question of separation to be proposed in a referendum whose regulation "shall be passed by a member state bearing in mind the internationally recognized democratic standards", three years after it came into force.

[92] The requirement for a minimum participation had already been foreseen in Montenegrin domestic legislation on referendums (as has occurred in other European countries for referendums to be valid) and the Venice Commission considered that a greater majority than a simple majority of positive votes was necessary to ensure full legitimacy of the result. This was covered in general under Montenegrin law [see *Venice Commission.*

that in other cases in the former Yugoslavia, majorities in favour of independence where overwhelming (80% and 90% of voters), the case of Montenegro was still symptomatic.[93] However, I believe that the relevant point is that the legitimacy of the results was never called into question because the referendum rules had already been established and agreed by all interested parties.

Connected to this, I have already mentioned that the Clarity Act in Canada regulates the three successive moments in which the Federation should intervene when faced by a secessionist proposal by a province: to grant *a priori* approval to the proposed question; evaluate, *a posteriori*, the clarity of the results obtained; and finally, to establish the requirements for the proposed constitutional reform, if applicable. So, with respect to the majorities required to evaluate the clarity of the results, it is the Federal Parliament's responsibility to decide (when the referendum for independence has been held) if there has been a clear majority who wish to separate from Canada, taking into account the majority in favour of secession and the percentage participation in the referendum. The evaluation should be expressed in "qualitative" rather than "quantitative" terms, as indicated by the Supreme Court itself in the Reference re Secession.[94]

Finally, for my seventh point, I must refer to the effects of the referendum, and whether these are binding or purely consultative, which should be clearly stated in the constitution or the legislation.[95] A consultative referendum on independence which had a positive result would probably have enough political weight to lead towards independence. Anyway, with regard to international practice, I believe that an independence referendum can never been taken as an automatic mechanism if the result is positive, as negotiations would have to be started, and these would have their formulas and deadlines. As in all negotiations, compromises would be required, so there would be no predetermined outcome.

In this respect, the Supreme Court of Canada established in the Reference re Secession that, if the population of Quebec was asked a clear question and a large majority of the population responded positively to a new independence project, there would be a legal and constitutional obligation for the federal and Quebec authorities to negotiate constitutional changes to the federal agreement. It is not so much that there would be an obligation to

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*Opinion on the Compatibility of the Existing Legislation in Montenegro concerning the Organisation of Referendums with Applicable International Standards*, Document CDL-AD (2005)041, para. 19-42].

[93] On this subject, and the case of Montenegro and the work of the Venice Commission, see N. Hajjami, "La Commission de Venise et la construction d'Etat: l'exemple du Montenegro", in *L'État de droit en droit international. Colloque de Bruxelles Société française pour le droit ingernationale* (ed. Pedone, París, 2009), particularly pp. 211-212.

[94] It was not in vain that the Supreme Court, in the Reference re Secession, referred to the need for "a 'clear' majority as a qualitative evaluation" (para. 87).

[95] *Code of Good Practice*, Guideline III.8

unequivocally respect the will of the Quebec people and automatically proclaim or establish independence, but rather that there would be an obligation to negotiate the political scope of the decision, and the conditions, wordings and deadlines for this will to come into effect, if appropriate.[96] The Supreme Court of Canada itself recognised that these negotiations "would undoubtedly be difficult" and "no one can predict" their results, as they "would inevitably address a wide range of issues", so the "possibility that they might not lead to an agreement amongst the parties must be recognized".[97] In my opinion, this clearly excludes the legitimation of any unilateral action, so if there is a clear majority responding to a clear question, there would be an obligation for all parties to negotiate, and a breach of this obligation could have significant repercussions on an international scale, eroding the international legitimacy of the party that breached the obligation and did not act in good faith. What is more, the Supreme Court considered that "Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole".[98]

## (D) FINAL REMARKS

In conclusion, I believe that some essential ideas in my argument can be highlighted in relation to secessionist tensions in democratic States, the right to political participation in International Law, and the international standards and good practice applicable to independence referendums.

Firstly, I should reiterate that there is no doubt that democratic States should seek democratic legal and political solutions for potential secessionist tensions, addressing them in a constitutional domestic system and channelling the will of the people democratically. It is clearly a political problem and an issue for domestic law and, as such, should be tackled from a political standpoint and be the responsibility of domestic public authorities, with institutional loyalty and domestic legal and constitutional mechanisms, something which has been seriously lacking in Spain in recent years. In my opinion, International Law never protects (but also never stops protecting) these secessionist tensions, because it understands secession as a pre-juridical phenomenon that is a fact for this legal system. Only in the event of an extreme case of denial of internal self-determination (a situation that is obviously incompatible with a democratic State, where it is unlikely to arise) could an exception be

[96] Because, as the Supreme Court stated, "The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada" (Reference re Secession, para. 92).

[97] *Ibid.*, para. 96 and 97.

[98] *Ibid.*, para. 95.

made and the right to unilateral secession perhaps be justified as a remedy in International Law. Beyond these considerations, there is no right of secession for one part of a State's territory under International Law, and the only legal system that applies is domestic law.

Secondly, I should highlight the fact that democracy and the rule of law are emerging principles in International Law, and it has also recognised the existence of the fundamental human right to political participation that, among its various expressions, can enable direct participation in public issues. So International Law can allow mechanisms of direct political participation, such as referendums, consultations and other means of participation, to be established in domestic legislation. In any event, it is clear from the points I have discussed here that a direct democracy, or one with a high level of participation, is not an obligation or an alternative to representative democracy, as both are admissible under International Law and can be complementary where applicable. This is because their implementation is a matter for domestic legislation, and International Law does not favour one or the other. In my opinion, it is also clear that there is no fundamental human right in International Law to be called to referendum or to be consulted in general, even on constitutional reform or on proposed independence of a part of the territory of a democratic State.

Thirdly, it should be noted that International Law has developed international standards and good practice in elections and referendums over the past few decades, in the form of soft laws that can guide domestic legislation or at least serve as substantive indicators of the democratic quality of these processes. In this respect, in an international system where it is recognised that there is no single model of democracy and that there are diverse practices in the rule of law, these international good practices help configure and implement, for the purposes that I would like to highlight, the main principles and democratic safeguards in referendums, especially independence referendums. These principles and safeguards, which I have organised and summarised (starting with the legal provisions in domestic legislation), have not been taken sufficiently into account during the various events that have taken place in Catalonia recently.

Ultimately, referendums, as mechanisms of direct citizen participation, can be useful to determine the opinion of the people or particularly, in my understanding, to validate certain agreements or political decisions. However, independence referendums are, by definition, asymmetrical (a positive result can become irreversible, but the same does not occur for a negative). In a polarised political situation with a certain degree of social division and an infinite political deadlock, as is the case in Catalonia, they can also be deeply divisive. Rather than a strictly decisive concept, it seems to me that, in many cases (and in the case of Catalonia in particular) it is more useful and necessary to take a more inclusive approach that attempts to achieve more of a majority, wider consensus which should finally be put to a

referendum. In my opinion, and from a political perspective, it would be useful to apply rational and well-founded political and legal criteria, and to act with extreme political prudence and with a high level of responsibility and vision, all qualities which have been too absent, for too long, in Spain.

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*Secession of States and Self-determination in contemporary International Law*

# Does a Right of Remedial Secession exist under International Law?

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*Abstract*: The question of the existence of a right of remedial secession under international law has been raised as a possible solution to serious human rights and international humanitarian law violations. The current controversy lies in determining whether such a right is recognized by a rule of general international law, or whether it should be viewed as only a custom in formation. This paper looks at the reasons that make it possible to speak of a right of remedial secession, the legal basis for such a right, the circumstances in which it might be framed, and international practice in order to determine its status in international law.

*Keywords*: Remedial secession – Human rights violations – International humanitarian law violations – Internal aspect of Self-determination - General International Law

## (A) INTRODUCTION

The existence of a right of remedial secession is one of the issues arising in international law (IL) as a result of the evolution of the principle of self-determination of peoples. The issue reached The Hague when the United Nations General Assembly (UNGA) asked the Court to determine whether the unilateral declaration of independence of Kosovo was in accordance with IL. However, the Court declined to pronounce itself on it. This silence has left open doubts regarding its recognition and scope in IL.

In this article, I share some thoughts that I have had on the matter since the seminar organizers made their original request. The aim is to determine the status of IL regarding remedial secession and try to answer some questions the subject raises, namely: whether it is a right recognized by IL or only a custom in formation; what its legal basis is, or would be; and in what cases and under what conditions it is, or could be, admitted.

To this end, I begin by specifying the reasons that make it possible to speak of a right of remedial secession in the context of the principle of self-determination. I indicate the legal basis for this right, and the circumstances in which it is, or should be, framed. I conclude with a discussion of its status in IL.

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### (B) WHY A RIGHT OF REMEDIAL SECESSION?

The idea of a possible right of remedial secession under IL is a result of IL's neutrality regarding the ways in which new states can emerge. Although IL does not recognize a right of secession to which any people wishing to secede from the state to which they belong may aspire, neither does it prohibit the separation of part of a state's territory[1]. Should that occur, IL is willing to accept new states as long as they meet the essential conditions for statehood.

It is precisely this lack of a right of secession that gives rise to the possibility of a narrower right of *remedial* secession under IL[2], i.e. a right to independence as a means of addressing certain conflictive situations or crises, specifically, those involving massive and systematic human rights and international humanitarian law (IHL) violations.

The linking of this right with the self-determination of peoples is a consequence of how this fundamental principle of IL has evolved. It is related to the legitimacy that the principle grants to the independence of certain peoples (colonial) or situations (occupation) that are contrary to the purposes and principles of the UN Charter.

Although initially the principle of self-determination of peoples was invoked in relation to decolonization and was highly focused on the independence of colonial territories,[3] its efficacy does not end there. On the contrary, its inclusion in the International Covenants on Human

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[1] This point of view is widely shared. In this sense, i.e., A. Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, (Oxford University Press, Oxford, 2004), at 333; J. Crawford, *The Creation of States in International Law*, Second Edition, (Oxford University Press, Oxford, 2006), 388-421, at 388-389; J.F. Escudero Espinosa, *Self-Determination and Humanitarian Secession in International Law*, (Springer, Cham, 2017), at 37-40; CH. Walter and A. Ungern-Sternberg, "Introduction. Self-Determination and Secession in International Law. Perspectives and Trends with Particular Focus on the Commonwealth of Independent States", in CH. Walter and A. Ungern-Sternberg, and K. Abushov, *Self-Determination and Secession in International Law*, (Oxford University Press, Oxford, 2014), 1-9., at p. 3; It is also the position that some States kept up before the Court in the advisory opinion of the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, ICJ Reports*, 2010: Germany (pp. 18-20); France (pp. 35-39), or Ireland (pars. 18-20) that references to teachings of qualified publicist. Also is the position of United Kingdom (pars. 5.12-5.33). Also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports*, (2004), at par. 84; Committee on the Elimination of Racial Discrimination (CERD) in its XXI General Recommendation (1996), par. 6 and the of the Supreme Court of Canada, *Reference re Secession of Quebec*, 1998, 2 S.C.R. 217, par. 112.

[2] An antecedent of the recognition of a limited right of secession is found in 1920 decision of the Commission appointed by the League of Nations in the *Aaland Islands Case*. After refusing the right of a part of the population to separate from the State of which it is a part, as being contrary to the order and stability of international relations and to promote international anarchy, the Commission admitted the separation as an exceptional solution, a last resort, when a State does not show the will or capacity to establish or apply fair and effective guarantees.

[3] This time is called by the Professor Paz Andrés as the apotheosis of the independence. P. Andrés Sáenz de Santamaría, "La libre determinación de los pueblos en la nueva sociedad internacional", en *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Vol I, (1997), 113-203, at 153.

Rights together with the wording used [4] show that the self-determination of peoples is no longer limited to the colonial phenomenon and broaden both its content and its beneficiaries. As Professor Paz Andres notes, the reference to peoples is understood as the set of peoples living in an independent sovereign state[5].

Following its application during decolonization, it was logical to wonder whether self-determination might serve other purposes and principles of the UN and whether independence should be considered the way to achieve them. With regard to the first question, there is no doubt that one of these purposes and principles is the development and encouragement of respect for the human rights and fundamental freedoms of all[6]. It is in this context that the possibility of secession as a remedy for situations involving human rights and IHL violations is raised.

As for the second point, it must be recalled that, whilst all peoples have the right to self-determination, its fulfilment need not necessarily take the form of secession from the state to which a people belong. Such a possibility would be a destabilizing factor for international society and for states themselves[7].

## (C) THE LEGAL BASIS OF THE RIGHT OF REMEDIAL SECESSION

4 Both the International Covenant of Civil and Political Rights and the International Covenant of Economic, Social and Cultural Rights establish in its first disposition that: "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations." (BOE de 30 de abril de 1977).

5 P. Andrés Sáenz de Santamaría, *supra* n. 3, p. 153-154. The development and the evolution of the legal concept of people were advocated by Milan Sahovic, "Codification des principes du Droit International des relations amicales et de la coopération entre les Etas", R. des C., vol 137, (1972), 241-310, at 298-299.

6 Article 1.3 of the UN Charter.

7 In this sense, J.A. Pastor Ridruejo, "Le Droit International à la veille du vingt et unième siècle: normes, faits et valeurs. Cours General de Droit International Public", *R. des C.*, t. 274, (1998), 9-308, at 148; A. Remiro Brotóns, "¿Un derecho internacional de separación del Estado?, Meridiano CERI, diciembre 1996, at 9; R. Riquelme Cortado, *Derecho Internacional. Entre un orden global y fragmentado*, (Biblioteca Nueva, Madrid, 2005), at 163; P. Thornberry, "The Democratic or Internal Aspect of Self-Determination with some remarks on Federalism", in CH. Tomuschat (ed.), *Modern Law of Self Determination*, (Dordrecht, 1993), 101-138, at 118; CH. Tomuschat, "Self-Determination in a Post-Colonial World", in CH. Tomuschat (ed.), *Modern Law of Self Determination*, (Dordrecht, 1993), 1-20, at 10; In this sense many States manifested before the ICJ in the advisory opinion of the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, ICJ Reports*, (2010), at 23.

The main argument in support of the existence of a right of remedial secession can be found in Resolution 2625 (XXV), whose description of the principle of equal rights and self-determination of peoples, as Thornberry observes, goes beyond the colonial context and the obsession with independence[8] to add the following safeguard clause:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

A similar reference, although updated at the time of its adoption, can be found in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993. Paragraph 2 of that document refers to the self-determination of peoples, although in this case it makes no reference to the grounds of discrimination. This toughens the requirement of a representative government[9]. The same wording was used again in the *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*[10].

This safeguard clause links the self-determination of peoples with the territorial integrity of sovereign states in order to emphasize the need for compatibility between them. It also establishes a relationship between the self-determination of peoples and democracy, or the democratic principle, and the protection of human rights. In this regard, it recalls the need for states to conduct themselves in accordance with the aforementioned principles of equal rights and self-determination. Previously, Resolution 2625 (XXV), had provided for the duty of states to promote universal respect and observance of human rights and fundamental freedoms[11].

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8 P. Thornberry, "The principle of self-determination", in C. Warbrick and V. Lowe (eds.), *The United Nations and the Principles of International Law, Essays in memory of Michael Akehurst*, (Routledge, London and New York, 1994), 175-203, at 181. About the Declaration, G. Arangio Ruiz, *The UN Declaration on Friendly Relations and the system of the sources of International Law*, (Sijthoff, Alphen aan den Rijn, 1979).

9 The paragraph 1.2 in fine established that "...this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."

10 A/RES/50/6, of October, 1995. In the same way, the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by de UNGA on December 18, 1992, establishes that "nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and the political independence of States" (art. 8.4).

11 Par. 3 of the provisions related to the principle of equal rights and self-determination of peoples established in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

The relationship drawn in this clause between the self-determination of peoples and territorial integrity has not gone unnoticed[12] and has raised questions regarding a possible clash between two fundamental principles. These questions can be answered by looking at how it was prepared[13] and how it has been interpreted by various treaty bodies responsible for monitoring the implementation of conventional human rights provisions.

As Professor Cassese notes, and other authors have confirmed, the order in which territorial integrity and the requirement of a representative government were ultimately included is not neutral and shows that territorial integrity is an essential value that must be respected by all states[14]. This is clear in Resolution 1514 (XV), or the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, which warned that "[a]ny attempt aimed at the partial or total disruption of the national unity and territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations"[15], and in Resolution 2625 (XXV), which noted that "[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it". As Marcelo Kohen points out, this safeguard clause was not included with the intention of recognizing a right of secession, but rather was drafted bearing in mind the situation of peoples who were victims of racist regimes[16].

Self-determination does not give rise to a right to secede from existing states. Self-determination is, and should be, compatible with the sovereignty and territorial integrity of the state[17]. This need for compatibility was noted in the Helsinki Act of 1975 [18] and in the

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[12] Separate opinion of judge A. A. Cançado Trindade related to the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports*, (2010), 594-595, par. 179 and his references to Sahovic, Arangio Ruiz or Thornberry.

[13] A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal*, (Cambridge University Press, Cambridge, 1995), at 118-120. For an analysis of the elaboration of this clause, see, A.G. López Martín and J.A. Perea Unceta, J.A., Creación de Estados, secesión y reconocimiento, (Tirant lo Blanch, Valencia, 2018), at 161-165.

[14] A. Cassese, *supra* n. 13, pp. 118-119. An opinion generally accepted by the authors, i.e., I. Brownlie, *Principles of International Law*, (7ª ed), (Oxford University Press, Oxford, 2008), at 289; also in 8th ed. of J. Crawford, *Brownlie's Principles of Public International Law*, (Oxford University Press, Oxford, 2012), at 447; M. Shaw, *International Law*, 7ª ed, (Cambridge University Press, Cambridge, 2014), at 377; P. Thornberry, "The Principle of....", *supra* n. 8, at 181-183. Among the commentators of the Declaration see, G. Arangio Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", *R. des C.*, t. 137, (1972), 418-742, at 570-571, and the updated version *The UN Declaration on Friendly Relations and the System of the Sources of International Law*, (Sijthoff, 1979), at 140.

[15] Para. 6 GA Res. 1514 (XV), December 14, 1960.

[16] M. Kohen (ed.), *Secession International Law Perspectives*, (Cambridge University Press, Cambridge, 2006), at 10.

[17] In order to make compatible the principle of sovereignty and the self-determination principle, the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* notes that the territory of a colony or other non-self-governing territory has a status separate and distinct from the territory of the State administering it; and such separate and

Charter of Paris for a New Europe of 1990. It was reiterated, in 1992, by the Secretary-General of the United Nations in his *Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping*[19]. It was pointed out again in 1995, by the African Commission on Human and Peoples' Rights, which, in the *Congrés du peuple katangais c. Zaire* case, accepted that the people of Katanga had a right of self-determination, but warned that it had to be exercised in a way compatible with the sovereignty and territorial integrity of Zaire[20]. In 1998, the Supreme Court of Canada underscored it again, in its decision in the *Re Secession of Quebec* case[21].

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distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination...., but it is not the case of peoples and groups that are part of a State.

[18] The paragraph VIII of the Act noted that: "The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.

[19] In the Report of the Secretary General (A/47/277-S/24111, June 17, 1992) we should read: "17. The foundation-stone of this work (maintaining international peace and security) is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. Commerce, communications and environmental matters transcend administrative borders; but inside those borders is where individuals carry out the first order of their economic, political and social lives. The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve. 18. One requirement for solutions to these problems lies in commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic. The League of Nations provided a machinery for the international protection of minorities. The General Assembly soon will have before it a declaration on the rights of minorities. That instrument, together with the increasingly effective machinery of the United Nations dealing with human rights, should enhance the situation of minorities as well as the stability of States. 19. Globalism and nationalism need not be viewed as opposing trends, doomed to spur each other on to extremes of reaction. The healthy globalization of contemporary life requires in the first instance solid identities and fundamental freedoms. The sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead. Respect for democratic principles at all levels of social existence is crucial: in communities, within States and within the community of States. Our constant duty should be to maintain the integrity of each while finding a balanced design for all".

[20] As the Commission said: "The absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13 (1) of the African Chapter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire" (par. 6). About this issue see, F. Ouguergouz and D.L. Tehindrazanarivelo, "The question of secession in Africa", in, M. Kohen (ed.), *Secession International Law Perspectives*, (Cambridge University Press, Cambridge, 2006), 257-296.

[21] *Re secession of Quebec*, (1998) 2 S.C.R. 217 Supreme Court of Canada, pars. 126-130.

Ensuring the compatibility of the territorial integrity of states and the self-determination of peoples requires distinguishing between the two aspects of the latter noted by the Committee on the Elimination of Racial Discrimination (CERD) in General Recommendation XXI on the right of self-determination, adopted at its forty-eighth session (1996)[22]. In that recommendation, the Committee underlines the need to respect the territorial integrity of states[23], noting:

> "In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation."[24].

The internal aspect of self-determination, aimed at any people, but especially the population of a sovereign state, must be understood as participatory democracy. This implies, first, the people's freedom to choose their political, economic, social and cultural system, which calls for the existence of mechanisms of participation by the people in the adoption of decisions[25]. Second, it requires respect for human rights.

The UNGA had already noted the connection between self-determination and respect for human rights in Resolution 2131 (XX), of 21 December 1965, the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their*

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[22] This Committee pronounced on self-determination because as he noted "ethnic or religious groups or minorities frequently refer to the right to self-determination as a basis for an alleged right to secession". In this connection the Committee wishes to express the following views (par. 1).

[23] In the number 6, the Committee points out this idea and said that: "The Committee emphasizes that, in accordance with the Declaration on Friendly Relations, none of the Committee's actions shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and possessing a Government representing the whole people belonging to the territory, without distinction as to race, creed or color. In the view of the Committee, international law has not recognized a general right of peoples unilaterally to declare secession from a State. In this respect, the Committee follows the views expressed in an Agenda for Peace (paras. 17 and following), namely, that a fragmentation of States may be detrimental to the protection of human rights, as well as to the preservation of peace and security. This does not, however, exclude the possibility of arrangements reached by free agreements of all parties concerned".

[24] Para. 4 of the General Recommendation XXI.

[25] M., Kohen "La création d'Etats en droit international contemporain", in J. Cardona Llorens (dir.), *Cursos Euromediterráneos Bancaja de Derecho Internacional,* Vol VI (2002), 543-636, at 584.

*Independence and Sovereignty*[26]. It had also been noted by some of the monitoring bodies established under various human rights treaties[27]. So obvious is it that self-determination and human rights are connected and mutually reinforcing that every year the UNGA reiterates the importance of the universal realization of the right of peoples to self-determination for the effective guarantee and observance of human rights and for the preservation and promotion of such rights[28]. However, it is one thing to promote respect for the human rights of the members of a people and their self-determination and quite another to consider that only through independence and the creation of a new state can respect for such rights be enforced.

Today, the most important aspects of self-determination are found in this internal aspect and its evolving nature. Its evolution, as a result of the relationship forged between respect for human rights, democracy and the self-determination of peoples, has led to the extension of the right to self-determination to certain groups.

Respect for human rights, including self-determination, and the representative nature of the government, which the Declaration of Principles presents as a guarantee of respect for the political unity and territorial integrity of the state[29], take on special importance when a

[26] The General Assembly emphasized that. "every State has an inalienable right to choose its political, economic, social and cultural system without interference in any form by another State" (par. 5) and that: "all States shall respect of self-determination and independence of peoples and nations to be freely exercised without any foreign pressure and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations" (par. 6).

[27] The general observations and recommendations made by the Human Rights Committee —*General Comment no. 12 right of self-determination* (Article 1)(1984)— and by the Committee for the Elimination of Racial Discrimination —*General Recommendation no. XXI on the right to self-determination* (1996)— warn of the link between the right to self-determination and the corresponding obligations with the other provisions of the Covenant and the rules of International Law.

[28] Under the title of *Universal realization of the right of peoples to self-determination* the General Assembly of United Nations adopts every year a Resolution to insist on the connection between the respect of self-determination and the observance of the others human rights, i.e., A/RES/72/159, 19 December 2017; A/RES/71/183, December 19, 2016; A/RES/70/143, 17 December 2015; A/RES/69/164, 18 December 2014; A/RES/68/153, 18 December 2013. A connection which also is noted by Alfred-Maurice Zayas in his *Interim Report of the Independent Expert on the promotion of a democratic and equitable International Order* (Doc. A/69/272 *Promotion of a democratic and equitable international order*), par. 2 and that the General Observation 12 of the Human Rights Committee affirms; "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights" (par. 1).

[29] In this sense, Eduardo Jiménez de Aréchaga noted that: "an independent and sovereign State which possesses a government representative of the whole of its people is thus safeguarded from any claim to self-determination by a part of its population. *A contrario*, a State possesses a government which does not represent the whole people of the territory and which introduces distinctions as the race, creed or color, is not protected by the safeguard clause and is exposed to actions which, in the name of the principle of self-determination may dismember or impair, totally or in part, its territorial integrity or political unity", E. Jiménez de Aréchaga,

sovereign state's people is made up of distinct groups, whether for reasons of race, religion, language or any other aspect. When these groups are a minority, their members have the right to have their own cultural life, to profess and practice their religion, and to use their own language without discrimination (Articles 2, 25, 26 and 27 of the International Covenant on Civil and Political Rights).

In 2014, the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred-Maurice Zayas, stressed the two aspects of self-determination and its evolving nature, since its exercise is a dynamic process subject to revision and adjustment. In his opinion:

> "... the right of self-determination means that individuals and peoples should be in control of their destinies and should be able to live out their identities, whether within the boundaries of existing States or through independence. More than an outcome, self-determination should be seen as a process subject to revision and adjustment, and its outcome must correspond to the free and voluntary choice of the peoples concerned, within a framework of human rights protection and non-discrimination. Self-determination cannot be understood as a one-time choice, nor does it extinguish with lapse of time because [, l]ike the rights to life, freedom and identity, it is too fundamental to be waived. As an ongoing democratic exercise, self-determination entails a people's equal participation in decision-making, a continuous dialogue by virtue of which parties adjust and readjust their relationship for mutual benefit. It can be exercised at various levels, from enhanced empowerment, regional autonomy and federalism to secession [...]" (par. 3).
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> " [...] For human rights, peace, security and stability to flourish, the relationships between peoples and governmental entities must be based on genuine and continuing consent, on the understanding of a *contrat social* and, if this *contrat* is violated by Government, the people as sovereign have the democratic right to redefine the relationship [...]" (par. 8).

### (D) THE NECESSARY CONDITIONS FOR A RIGHT OF REMEDIAL SECESSION TO EXIST

The possibility of recognizing a right of remedial secession under the principle of self-determination of peoples requires a right-holder in the situation provided for by the aforementioned texts.

The term 'people' has never been conclusively defined; however, it would seem to have two identifying features, one objective, the other subjective. First, a population group is considered a people when it has a common historical tradition, an ethnic or racial identity, cultural homogeneity, linguistic unity, religious or ideological affinity, a territorial connection

"International Law in the Past Third of a Century. General Course in Public International Law", *R. des. C.*, t. 159, (1978), 1-344, at p. 110.

or a common economic life. Second, it must have an awareness of its existence as a people[30] and a willingness to be recognized as such.

In this regard, it should be recalled that, although the term 'people' has not been defined under IL, today, at the tail end of the decolonization process, it is generally used to refer to the population of a sovereign state. This is because, as Marcelo Kohen notes, the legal approach to the concept of people is essentially territorial and thus makes the term 'people' coincide with the population of a sovereign state[31]. However, most states are multi-ethnic or multinational. Therefore, it is possible to identify various ethnic or national groups, minorities or otherwise, that may also be considered holders of the right to self-determination insofar as its internal aspect is concerned[32].

The group deprived of its right to self-determination may include the entire population of the state. Such cases involve situations of widespread tyranny or oppression. Alternatively, it may consist of only part of the population, usually an ethnic or national people with a territorial base. In the context of remedial secession, only the latter case will be considered, as it generally involves a minority whose members have had certain rights recognized (Article 27, International Covenant on Civil and Political Rights) in a way similar to the recognition of the internal aspect of self-determination[33]. Such a situation does not deprive them of their autonomy[34].

In what situations might a right of remedial secession be recognized for these peoples? According to the safeguard clause, they are situations in which the fundamental rights of the population, or part of it, are being violated, including the internal aspect of the right to self-determination. The question then becomes: what degree of violation of rights or lack of governmental representativeness is required to recognize a right of secession? Whilst the terminology used to refer to these situations and the conditions to be met varies, it consistently expresses gravity.

This issue is the subject of great debate in the literature and an exhaustive account would fall beyond the scope of this paper. Briefly, Judge Cançado Trindade may have taken the

[30] It is the idea of people used by M. Kirby in the speech delivered at the International Meeting of Experts on the Rights of Peoples and Self-Determination, organized by UNESCO in Budapest (1991), Provisional Report of the Independent Expert already cited *supra* n. 28, p. 4.

[31] M. Kohen, "La création...." *supra* n. 25, at 585-586.

[32] In this sense i.e., P. Andrés Sáenz de Santamaría, *supra* n. 3, at 152-159; A. Cassese, *supra* n. 13, at 101-108; F. Mariño Menéndez, "Naciones Unidas y el derecho de autodeterminación, in F. Mariño Menéndez (ed), *Balance y perspectivas de Naciones Unidas en el cincuentenario de su creación*, (Dykinson, Madrid, 2016), 77-110, at 87.

[33] P. Andrés Sáenz de Santamaría, supra n. 3, at 194-198.

[34] The United Nations warns that the rights of persons belonging to minorities differ from the right to self-determination. General Observation 23, April 8, 1994, *The rights of minorities* adopted by the Human Rights Committee ant the Doc E/CN.4/Sub.2/AC.5/2005/2, *Commentary to the UN Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities of the Working Group on Minorities.*

greatest pains to exemplify the situation. He speaks of situations of systematic oppression, subjugation and tyranny involving serious violations of fundamental rights —mass killings, torture, forced disappearances, ethnic cleansing, systematic discrimination— that are in breach of the *corpus juris gentium*, as set forth in the UN Charter and the Universal Declaration of Human Rights[35]. The most demanding positions are espoused by those who, in addition to citing serious violations of human rights, deem necessary the existence of an extreme threat to the people's life or survival[36]. Others, such as Cassese, hold that such a situation exists when there is a persistent refusal to recognize the right of the group's members to participate in the decision-making process, their human rights are seriously and systematically trampled, and they are denied the possibility of reaching a peaceful settlement within the framework of the structure of the state[37]. Still others speak of remedial secession in the context of massive and systematic human rights violations[38] or the violation of the internal aspect of the right to self-determination[39]. Judge Yusuf identifies these situations as cases in which a group is subjected to discrimination, persecution and flagrant human rights or humanitarian law violations[40]. At the other end of the spectrum are authors such as Schachter, who cites only the existence of practices of systematic discrimination and the rejection of a reasonable proposal by the government of the state, or Buchanan, who cites massive and systematic human rights violations, but argues that the right also exists when a government violates agreements that afford a certain degree of self-government to a minority group[41].

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35 Paras. 175 y 205 of the separate opinion of judge Cançado Trindade, in which the judge considers that this situation had occurred in Kosovo with respect to the Albanians in the nineties of the last century, par. 181, *ICJ Reports*, (2010), at 593, 605 y 595.

36 CH. Tomuschat, "Secession and self-determination", in M. Kohen (ed.), *Secession International Law Perspectives*, (Cambridge University Press, Cambridge, 2006), 23-45, at 41-42, this author speaks of structural discrimination in the sense of serious damage that affects human lives; D. Murswiek, "The Issue of a Right to Secession – Reconsidered", in CH. Tomuschat (ed.), *Modern Law of Self-Determination*, (Nijhoff, Dordrecht, Boston, London, 1993), 21-40, at 38-39; R. Riquelme Cortado, *supra* n. 7, at 167, that refers to massive and systematic violations of the essential human rights of a people when they threaten their own existence; A. Remiro Brotons, *Derecho Internacional. Curso general*, (Tirant lo Blanch, Valencia, 2010), at 127, speaks of peoples oppressed by genocide, massive violation of their rights, destruction of their identity or serious and systematic political and social discrimination.

37 A. Cassese, supra n. 13, at 101-140. Recently L. Laurinaviciute and L. Bieksa, "The relevance of remedial secession in the post-Soviet 'frozen conflicts'", *International Comparative Jurisprudence*, 1, (2015), 66-75, at 67-69.

38 J. Castellino, *International Law and Self-Determination*, (Nijhoff, The Hague, 2000), at 39-41.

39 A. Tancredi, "A normative "due process" in the creation of States through Secession", in M. Kohen (ed.), *Secession International Law Perspectives*, (Cambridge University Press, Cambridge, 2006), 171-207, at 177.

40 Separate opinion of judge Yusuf, pars. 11 y 12, *ICJ Reports*, (2010), pp 622-623.

41 The opinion of this author was collected by A. Bennet, "When is Secession legitimate?", *Laws526: Comparative Constitutionalism*, (2014), at 21-22. Bennet refers only to human rights violations.

Here it should be noted that most supporters of the right of remedial secession emphasize that secession must be the remedy of last resort[42]. This requirement[43] means that the parties must first have made a good faith effort to solve the problem by all means at their disposal and be willing to compromise.

In short, a variety of expressions have been used to identify the case that would give rise to a possible right of remedial secession. However, in view of the potential consequences, such a case would need to be especially serious. Therefore, it seems timely and prudent to specify the case at issue before analysing the possible existence of a customary IL rule recognizing this right. To this end, the common denominator seems to be the existence of a situation of massive and systematic violation of the fundamental rights of a people that threatens both its survival and that of its members and that can only be resolved through the creation of a new state. What situations might this include? In fact, this case is very similar to the situations once used to speak of the *responsibility to protect*, which the members of the UN unanimously specified as situations involving genocide, war crimes, ethnic cleansing and crimes against humanity[44].

### (E) IS REMEDIAL SECESSION A RIGHT UNDER CUSTOMARY INTERNATIONAL LAW?

At this point, we must ask whether IL has recognized a right of secession as a remedy for peoples who are victims of genocide, war crimes, ethnic cleansing and crimes against humanity. In other words, do they have the right to secede from the state to which they belong in order to form an independent state.

A review of the literature shows a diversity of opinions. Some authors argue in favour of its existence. Others, without stating a clear opinion on the matter, hold that its recognition should be in line with the evolution of IL. They argue that it is subject to the limitations of state sovereignty and the organization of state legitimacy on the basis of the protection of human rights and democracy[45]. Still others are more sceptical[46]. The same diversity can be

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[42] This term was used by Switzerland before the ICJ, Written Statement p. 24.

[43] The most States supporters of the right of remedial secession before the ICJ demanded the concurrence of this requirement. I.e., Germany, 24; Ireland, 9; Netherlands, 9; Russian Federation, 22 and Switzerland, 24. In this sense, CH. Tomuschat, *Modern Law of Self-Determination*, (1993), at 26 and Hannun, "The Specter of Secession: Responding to Claims for Etnic-Self-Determination", *Foreign Affairs*, vol 11, (1998), at 16.

[44] These are three of the four international crimes of competence of the ICC and ethnic cleansing, including, as the UN Secretary General warns, in the Final Document of the World Summit of September 16, 2005 (A/ RES/60, paras 138 and 139), because, although it is not a crime in international law by itself, the acts by which it proceeds may constitute one of the other three crimes, Doc A/ 63/677, *Effective the responsibility to protect. Report of the Secretary General*, para. 3.

[45] CH. Walter and A. Ungern-Sternberg, supra n. 1 at 6.

[46] Crawford, J., supra n. 1, at 415-418; Driest, S. van den, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injusticies?* (Cambridge, 2013), Cap. V y VI, at 189-296.

found in the opinions of the Court's judges. Judge Cançado Trindade believes that populations suffering situations of systematic oppression, subjugation and tyranny have a right to self-determination (understood as secession or independence)[47]. Judge Yusuf argues that the creation of an independent state and questioning of a state's territorial integrity is justified in cases in which a group is subjected to discrimination, persecution and flagrant human rights or humanitarian law violations[48]. In contrast, Judge Koroma holds that positive IL does not recognize a right authorizing an ethnic, linguistic or religious group to separate from the state of which it forms a part without the latter's consent[49].

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[47] In opinion of the Brazilian judge: "Human nature being what it is, systematic oppression has again occurred, in distinct contexts; hence the recurring need, and right, of people to be freed from it. The principle of self-determination has survived decolonization, only to face nowadays new and violent manifestations of systematic oppression of peoples.... It is inmaterial whether, in the framework of these new experiments, self-determination is given the qualification of "remedial" or another qualification. The fact remains that people cannot be targeted for atrocities, cannot live under systematic oppression. The principle of self-determination applies in new situations of systematic oppression, subjugation and tyranny" (par. 175); "No State can invoke territorial integrity in order to commit atrocities (such as the practices of torture, and ethnic cleansing, and massive forced displacement of the population), nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimized" (176) and also ".the entitlement to self-determination of the victimized population emerged, as the claim to territorial integrity could no longer be relied upon by the willing victimizers" (181). Cançado Trindade appeals the principal international instruments of the International Law of Human Rights, highlightst he third paragraph of the Preamble of the Universal Declaration of Human Rights in which it can be read: "Whereas it is essential, if man is not be compeled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law". About the Universal Declaration, pars 201-204.

[48] Separate Opinion of judge Yusuf, pars. 11 y 12. *ICJ Reports*, (2010), 622-623. In opinion of the judge: "This does not, however, mean that international law turns a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their internal right of selfdetermination (as described above), but also subjects them to discrimination, persecution and egregious violations of human rights or humanitarian law. Under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context. Such conditions may be gleaned from various instruments, including the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, which, as stated by the Court in paragraph 80 of the Advisory Opinion, reflects customary international law. The Declaration contains, under the principle of equal rights and self-determination of peoples, the following saving clause.... This provision makes it clear that so long as a sovereign and independent State complies with the principle of equal rights and self-determination of peoples, its territorial integrity and national unity should neither be impaired nor infringed upon. It therefore primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their fragmentation or disintegration due to separatist forces. However, the saving clause in its latter part implies that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State's territorial unity and sovereignty".

[49] Dissenting Opinion of judge Koroma, para. 4: "...International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that

In the proceedings for the advisory opinion of the International Court of Justice regarding the *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, the lack of consensus amongst the interveners was clear. It was possible to distinguish between those who denied the right existed[50] and those in favour of its consolidation. The latter group could be further divided into those who believe it is provided for only very exceptionally and in situations of massive and systematic human rights violations as a last resort[51] and those who did not advocate this latter requirement, viewing secession as a sort of sanction against the state responsible for the serious violation[52]. Additionally, some states, regardless of whether they referred to the right of remedial secession, noted that Kosovo was, in any case, a *sui generis* situation and that the case thus could not be considered a precedent[53]. As Cyprus noted[54], and practice seems to be beginning to bear out, this may not be the case.

Even if there had been consensus amongst the participants before the Court, it might still not have been generalizable. This is because the states intervening before the Court were mostly Western states, essentially European ones. Few Asian, African and Latin American countries intervened before the Court, and only one non-Western one did, namely, Jordan, which spoke in favour of the existence of a right of remedial secession.

The necessary consensus to affirm the existence of an *opinio iuris* that supports the existence of a right of remedial secession in the situations and conditions outlined above is thus lacking. The notion that there exists an international custom that recognizes a right of remedial secession in cases of massive and systemic human rights or IHL violations is not a settled matter nor does there seem to be the necessary consensus to assert its existence and recognition under IL. The ICJ itself so recalled, both with regard to the existence of such a right and the circumstances in which it could be exercised, in its advisory opinion of 22 July 2010[55]. Nevertheless, there are those who cite the Court's opinion and, in particular, the fact

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State's consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed, it amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms. The Court's Opinion will serve as a guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined".

[50] Written Statement to Argentina, Azerbaijan, Bolivia, Burundi, China, Cyprus, Spain, Iran, Serbia, Venezuela and Vietnam.

[51] Written Statement to Estonia, France, Germany, Ireland, Maldives, Netherlands, Romania, Russian Federation and Switzerland.

[52] Written Statement to Poland, par. 6.5.

[53] Written Statement to France, Japan, Latvia, Luxembourg, Maldives and Slovenia,

[54] Written Comments to Cyprus, pars. 28-40.

[55] The ICJ warned that: "…. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers

that it did not condemn Kosovo's unilateral declaration of independence to support the consolidation of a right of remedial secession[56].

With its advisory opinion, the Court has done a disservice to IL and to the stability of states. Indeed, Crimea used the opinion to support its Declaration of Independence on 11 March 2014[57].

Let us imagine now that there was a consensus on the existence of a right of remedial secession in the case of peoples who are victims of genocide, war crimes, ethnic cleansing or crimes against humanity. The question remains of whether there exists the necessary general, constant, uniform and lasting practice to complete the process of custom formation.

In this regard, practice since the adoption of Resolution 2625 (XXV) likewise does little to confirm the existence of a customary law recognizing the right of remedial secession. I refer only to this more recent practice, as the practice prior to the resolution was insufficient and lacked the necessary uniformity[58] for the resolution to be viewed as the crystallization of a customary norm in formation.

A review of secession practice shows that, if one distinguishes between cases of dissolution and secession[59], despite the increase in attempts since 1989, few secession processes have successfully resulted in the creation of a new state. Furthermore, although some cases can be linked to alleged human rights or IHL violations, all have been influenced by other factors that have proved decisive. The most relevant such factor, without a doubt, is the recognition of the new state by the mother state, which usually leads to its recognition by the international community at large.

One possible case of remedial secession is Bangladesh (formerly, East Pakistan), where the Bengali people suffered harsh repression following the unrest resulting from the Pakistani

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upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of "remedial secession and, if so, in what circumstances". In this sense,The Supreme Court of Canada in *re Secession of Quebec*, 1998, 2 S.C.R. 217, pars. 134-135.

[56] A.G. López Martín and J.A. Perea Unceta, *supra* n. 13, p. 189 and R. Falk, "The Kosovo advisory opinion: conflict resolution and precedent", *AJIL*, vol. 105, (2011), 50-60, at 57-58.

[57] A recent analysis of this question may be seen at A. Remiro Brotons, "Derecho y poder en el destino de Crimea, 34 *Anuario Español de Derecho Internacional* (2018), 231-243 [DOI: 10.15581/010.34.231-243].

[58] On the secessions produced before 1979 and accepted by the international community only that of Finland (1917) could be considered a consequence of a discriminatory practice. Others, as Biafra, also with massive and systematic violations of human rights or IHL, did not prosper, A.G. López Martín and J.A. Perea Unceta, *supra* n. 13, pp. 171-174.

[59] In this analysis I have considered as dissolution the process of the creation of Senegal, Singapore (both arise from the dissolution agreed or accepted by the two parties that made up the federation: The Federation of Mali between Senegal and Sudan French and the Federation formed by Malaysia and Singapore), and also the process related to the Former Soviet and Yugoslav Republics.

president's refusal to recognize the result of an election won by the (Bengali) Awani League, transfer power and agree to its autonomist agenda (violation of the internal aspect of the right to self-determination and human rights violations). However, as such situations pose a threat to international peace and security, until India intervened, nobody called for the matter to be examined by the Security Council (SC). India's intervention was decisive in the result, which was accepted by the international community once Pakistan acknowledged the creation of the new state as a *fait accompli*.

The cases of Eritrea and South Sudan, which involved human rights and IHL violations, are also special. They could be considered *separations* or *agreed secessions* due to the existence *in fine* of an agreement between the parties. In both cases, the right to self-determination (of the Eritrean and South Sudanese peoples) had been recognized, and a commitment had been undertaken to hold a referendum on their independence, which took place in 1993 and 2011 respectively.

The key to failed secessions seems to lie, first, in the lack of support from the mother state and, second, in the lack of acceptance by the international community, even in cases involving human rights violations. According to Crawford, the most obvious case is Somaliland, whose independence has been frustrated to a certain extent by the inexistence of a government with which to negotiate, which has also paralyzed some states' reactions[60]. Clearly, the success of a secession requires an agreement between the parties or the mother state's acceptance of it as a *fait accompli*.

There are also cases in which the existence of massive and systematic human rights violations has not led to the secession of the oppressed people. This would include the cases of, for example, the Tamils in Sri Lanka, the Kurds, who are spread out across four states (Turkey, Iraq, Iran and Syria), or the Chechens.

Thus, practice with regard to completed secessions, whether unilateral or agreed, accepted by the international community or otherwise, is insufficient to confirm the existence of a right of remedial secession in cases of massive and systematic human rights or IHL violations, even once all the constraints established for the case are considered[61].

The practice of international organizations likewise reveals a certain reluctance on the part of their bodies to provide arguments in favour of the existence of this right. One need only look to the completed cases of secession that have been rejected by the SC or other international organizations. The SC deplored the establishment of the Turkish Republic of Northern Cyprus on part of the island, urging UN members not to recognize the new

[60] J. Crawford, supra n. 1, p. 417.

[61] Some States that intervened before the ICJ highlighted the inadequacy of the practice. Written Statement to Cyprus, paragraph 153 and Written Statement to Iran paragraph 4.2.

situation[62]. More recently, the UNGA decried the lack of validity of the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol that led to their independence and subsequent incorporation into the Russian Federation. It called upon all states, international organizations and specialized agencies not to recognize any change to their status and to refrain from any act or operation that could be interpreted as an acknowledgment of that modified status[63].

The analysis of both state and institutional practice shows that it lacks the necessary generality and uniformity to be indicative, when viewed in conjunction with *opinio iuris*, of the emergence of a customary norm.

## (F) CONCLUSION

General international law has not yet completed the path to recognizing a right of remedial secession for peoples subjected to massive and systematic violations of human rights and IHL, including the internal aspect of self-determination.

Whether or not this right is recognized will depend on how practice and views of its accordance with law evolve. Meanwhile, it should be borne in mind that the automatic application of rules regarding the self-determination of colonial peoples to other groups could be counterproductive and undermine international stability.

The situations of violence that lie at the root of the cases in which the right of remedial secession would apply are susceptible to manipulation by those seeking to appear as victims to the international community. The determination of whether or not such a situation exists should be left to an impartial body (Human Rights Committee) based on the application of clear objective criteria.

In the meantime, it should be recalled that, like the cases on which the responsibility to protect is based, the situations that would form the basis of a right of remedial secession pose a threat to international peace and security. The SC must be aware of its responsibility in this regard. However, as the Secretary General warned in his 2009 report *Implementing the Responsibility to Protect*, so should the UNGA[64]. The Independent Expert on the Promotion of a Democratic and Equitable International Order proposed that the UNGA consider establishing a special mechanism to monitor the reality of self-determination today, in particular the situation of unrepresented peoples and non-self-governing peoples who are not

[62] SC Res. 541, 18 November 1983.

[63] Resolution 68/262, 27 March 2014, *Territorial Integrity of Ukraine*, pars. 5 and 6. Previously, the GA "*Urges* all parties to pursue immediately the peaceful resolution of the situation with respect to Ukraine through direct political dialogue, to exercise restraint, to refrain from unilateral actions and inflammatory rhetoric that may increase tensions and to engage fully with international mediation efforts", par 3.

[64] Doc A/63/677, 12 January 2009, *Implementing the responsibility to protect. Report of the Secretary General*, pars. 61-63.

currently considered under Article 73 of the Charter. He further proposed assigning more targeted functions to the Fourth Committee of the General Assembly, so as to supervise the proper application of Chapter XI procedures, and to consider tasking the Human Rights Council with the examination of self-determination matters as a permanent item on its agenda or as part of the universal periodic review procedure, especially from the functional perspective of self-determination as a tool to promote international peace and security[65].

[65] Doc A/69/272, par. 87.

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*Secession of States and Self-determination in contemporary International Law*

# Secession and Succession of States: What relationship?

Concepción ESCOBAR HERNÁNDEZ*

*Abstract*: The succession of States has been facing serious difficulties relating to the ambiguity of its legal regime and to the low acceptance of general rules by the international community. The emergence, since the 90s of the 20th century, of new States as a consequence of secessionist processes has increased the complexity of State succession. Defining the relationship between secession and State succession is, thus, a challenge for contemporary international law, which affects even the concept of sovereignty and the principle of effectiveness of statehood. This article offers some reflections on this issue.

*Keywords*: Succession of States – Secession – Effects of secession on nationality – Effects of secession on international organisation membership

## INTRODUCTION

It does not seem possible to address the topic of secession in contemporary international law without simultaneously reflecting on the succession of States. At the very least, it is undeniable that every secession process is ultimately aimed at creating a new State and, as a result, brings about new situations that are directly linked to the issue of succession of States. However, it is also true that, during the 20th century, the thought and interest of both scholars and States in the institution of succession of States has been particularly linked to the decolonization process and, therefore, separated or- at least- not directly linked to the occurrence of secession, understood as the separation of part of the territory and people of an existing State for the purpose of creating a new State.

Nevertheless, the international context emerging since the last decade of the 20th century regarding the birth of new States has changed significantly, as evidenced by a series of events, among which one could mention in particular the dismemberment of the former Yugoslavia and the Soviet Union, the separation of Eritrea from Ethiopia, the unilateral declaration of independence of Kosovo, the birth of South Sudan, or the complex situation in Crimea. In view of these new realities, the question of the succession of States in the case of secession acquires a new meaning capable of re-opening the debate and reflection on this institution of

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international law, but this time from a different perspective that is related to the principle of sovereign equality of States and the respect of territorial integrity understood as part of that principle.

From this perspective, the following pages will be devoted to reviewing the response given by the international community to the issue of State succession, especially through the codification of international law (A), to offering a general reflection on the applicability of the rules pertaining to succession in cases of secession (B), and finally to identifying the issues involved in any succession of States process particularly relevant to secession (C).

## (A) THE PROCESS OF CODIFICATION OF STATE SUCCESSION

As pointed out above, the interest of the international community in State succession has been originally linked to the process of decolonization. Therefore, it is not surprising that the codification of the rules governing this institution took place during the 60s and 70s decades of last century. However, the new secession cases have given rise to the re-emergence of the issue of succession in the last two decades, both from the perspective of official and private codification. A case in point is the recent work on State succession with respect to international responsibility.

Focusing on the so-called "official codification", it should be remembered that the process of codification has essentially taken place within the International Law Commission[1], in whose works three different phases can be identified from the point of view of time and substance. These three phases are an accurate reflection of the changes in the approach of the international community to the issue of succession of States.

During the first phase, ongoing during the 1960s and 1970s, the work of the ILC on State succession focused on three issues: succession in respect to treaties, succession with regard to State property, debt and archives, and succession in respect to membership of international organizations. Only the first two of these three points of attention were followed up by the Commission, which adopted two Draft Articles in 1974[2] and 1981[3]. On the contrary, work on the succession to membership of international organizations was soon abandoned by the

[1] The topic "Succession of States and Governments" was selected by the Commission in 1949 as one of the topics for codification, but without including it in the list of topics to which it gave priority. Only in 1962, after the General Assembly asked the ILC to give priority to this topic, the Commission undertook the study of the Succession of States. It was in 1967 when the ILC decided the appointment of two Special Rapporteurs in charge of succession in respect to treaties and in respect of matters other than treaties. On that occasion, the Commission stressed the importance which State succession had for new States and the international community in view of the phenomenon of decolonization.

[2] See "Draft articles on succession of States in respect of treaties", in *Yearbook of the International Law Commission*, 1974, vol. II, Part One.

[3] See "Draft articles on succession of States in respect of State property, archives and debt", in *Yearbook of the International Law Commission*, 1981, vol. II, Part Two.

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Commission[4]. With regard to the two questions it did address, it is obvious that the Commission had to tackle the special problems brought about by the process of decolonization, with a view to responding to a new reality that had caused serious practical problems that, to a great extent, had not been solved when the Commission began its work. Nevertheless, the Commission did not confine its work to addressing "postcolonial" succession with respect to treaties and with respect to State property, archives and debt. On the contrary, it advanced "all-inclusive" proposals, which will be referred to below.

It was only twelve years later that the interest of the ILC on this issue was revived. It focused on the special problems relating to State succession with respect to nationality[5]. Work on State succession not having a direct link to the process of decolonization was thus initiated. It ended in 1999 with the adoption in second reading of the "Draft Articles on Nationality of Natural Persons in relation to the succession of States"[6]. The different framework in which succession in respect of the nationality of natural persons takes place resulted in the incorporation of certain differences with regard to the previous work of the Commission, namely on the final form of the outcome of the work, and on the types of succession considered by the ILC[7].

Lastly, in 2017 the Commission decided to include the topic of Succession of States in respect of State responsibility in its program of work. This topic is still under study and the work of the Commission may perhaps continue beyond the current *quinquennium*. The topic was taken up by the ILC after the Institute of International Law adopted its 2015 resolution on this same topic[8], in a very specific historical context that relates to the dismemberment of several Eastern European countries and the specific succession-related questions that arise in this situation. At any rate, it cannot be overlooked that the Commission's decision to start dealing with this topic has not been without controversy. Considerable criticism has been voiced by some members of the ILC with regard to the timeliness and appropriateness of addressing this topic from the perspective of codification because of, among other reasons, the casuistry of the practice and of the close links of this problem to the succession processes that took place in Europe at the end of the last century. In any case, be that as it may, it is evident that the decision to address the topic of succession in respect of State responsibility is another step towards an all-inclusive approach to succession that is not directly linked to

4 See *infra*, Section C.

5 The ILC inscribed the topic "Nationality in relation to the succession of States" in its agenda in 1993, and in 1994 appointed a Special Rapporteur. In 1997 it took the decision to limit the scope of the study to the topic "Nationality of natural persons in relation to the succession of States".

6 See *Yearbook of the International Law Commission*, 1997, vol. II, Part Two.

7 See *infra*, Section C.

8 See Resolution on "State Succession in Matters of State Responsibility", in *Yearbook of the Institute of International Law*, Tallinn Session, Vol. 76.

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the process of decolonization (and that is even unrelated to it). It thus reveals even more clearly the importance the succession of States may have with regard to secession.

At any rate, if the works of the Commission are considered as a whole, it must be highlighted that, in dealing with this topic, the Commission has clearly worked under a constant dialectic tension between the definition of general concepts and unifying rules, on the one hand, and the recognition of the diversity of legal regimes depending on the different causes and origins of succession, on the other. On the first level is the very concept of succession, understood as "the replacement of one State by another in the responsibility for the international relations of territory"[9]. On the contrary, an ascertainment of the diversity of factual situations has been reflected in the definition of the legal regime applicable to succession. In this framework, the Commission has not been able to deliver a single and uniform legal regime applicable to any succession with regard to each and every topic that has analysed, and has rather preferred to differentiate- in particular- between succession caused by: i) the separation in respect of part of territory; ii) the appearance of "newly independent States"[10]; iii) uniting and separation of a State; iv) succession in cases of separation of part of a State; and v) dissolution of a State.

The end result of this process of codification that started within the ILC in the 1960s has also been uneven. While the first Draft Articles have become international treaties[11], the Draft Articles on succession in respect of the nationality of natural persons is one of the products of the Commission regarding which the General Assembly has simply taken note[12]. Moreover, even in the two cases where the codification work of the ILC has resulted in the adoption of treaties, it should not be disregarded that the support given by States to such treaties has been scarce and varying, as evidenced by the fact that the Vienna Convention on Succession

9 This definition was included for the first time in the Draft articles on the succession of States in respect of treaties, article 2.1 (b). The same has been reproduced in the Draft articles on succession of States in respect of State property, archives and debts (article 2.1 (a)); on Nationality of Natural Persons in relation to the succession of States (article 2 (a)) and more recently in draft article 2(a) proposed by the Special Rapporteur on succession and State responsibility. The same drafting has been used for defining "succession of States" in the Vienna Convention of 1978 (article 2.1 (a)) and 1983 (article 2.1 (a)) and in the Council of Europe Convention on the avoidance of Statelessness in relation of Station Succession of 2006 (article 1). The Institute of International Law used the same definition in the 2015 Tallinn Resolution (article 2 (a)).

10 With the only exception of Draft articles on Nationality of Natural persons, when the succession caused by the birth of a "newly independent State" was not considered as an autonomous category of succession.

11 See Vienna Convention on Succession of States in respect of Treaties of 23 August 1978, in force since 6 November 1996, and Vienna Convention on Succession of States in respect of State Property, Archives and Debt of 8 April 1983.

12 Regarding the Draft articles on Nationality, the ILC has changed its previous practice and only recommended to the General Assembly to adopt these Draft Articles as a General Assembly Declaration, not as a treaty. However, the General Assembly did not adopt such a Declaration and decided merely to annex the text of the Draft Articles to Resolution 55/153, adopted in 2001.

of States in respect of Treaties has only obtained 22 ratifications, and that the level of support is even lower in the case of the Vienna Convention of Succession of States in respect of State Property, Archives and Debt, which has only obtained 7 ratifications and has not even entered into force.

In the light of these data, and beyond other considerations, it must be highlighted that States seem to have a limited interest in establishing general rules of treaty law concerning State succession. This is reflected, first, in the small number of ratifications obtained by the above-mentioned conventions, but also in the remarkable absence of many States among those that have ratified or acceded to such instruments[13], which is evidence of an existing gulf between the newly independent States and the rest of States- especially the former colonial powers- with regard to the problems of succession. It is even clearer that States have a prudent approach to the issue of establishing a uniform legal regime applicable to succession in respect of the nationality of natural persons. Thus, as has been mentioned above, the General Assembly has decided to simply take note of the Draft Articles, and recommend its consideration, as appropriate, by States when dealing with issues of nationality of natural persons in relation to the succession of States. Moreover, while the General Assembly initially maintained the topic on its agenda, resuming it every three years, it has finally decided not to continue its active consideration unless requested by a State and in light of the development of State practice in these matters[14]. Lastly, regarding the ongoing work on succession in respect of State responsibility, it must be recalled that it is still in an incipient phase and, therefore, it is not possible to assess the final response of the General Assembly. Nevertheless, it should be stressed that there exist different positions on the issue within the Sixth Committee of the General Assembly and that a certain number of States have expressed doubts as to the convenience of codifying this matter.

Setting aside other considerations, it cannot be denied that this brief description of the codification work on State succession reveals at least that this is a highly controversial matter, possibly because it concerns the existence and the very essence of States, and because historical elements of considerable importance come into play. In any case, it must be borne in mind that in spite of the limited interest of States in the codification of general rules relating to succession, it is also true that succession raises important practical problems that

[13] The list of States parties in both Conventions is very illustrative. The Vienna Convention on Succession of States in respect of treaties has been ratified by Bosnia-Herzegovina, Croatia, Cyprus, Czech Republic, Dominica, Ecuador, Egypt, Estonia, Ethiopia, Iraq, Lithuania, Montenegro, Morocco, Moldova, Serbia, Seychelles, Slovakia, Slovenia, Saint Vincent and the Grenadines, Macedonia, Tunisia and Ukraine. The Vienna Convention on Succession of States in respect of State Property, Archives and Debt has been ratified by Croatia, Estonia, Georgia, Liberia, Slovenia, Macedonia and Ukraine.

[14] See General Assembly Resolution 66/92 (2011).

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the States concerned have been forced to tackle, and for which- on most occasions- specific solutions have been sought that were adequate in view of the particular circumstances under which succession took place in each case. The recent approach adopted by the Czech Republic and Slovakia after the dissolution of the former Czechoslovakia and, in particular, by the new republics that emerged after the dismemberment of the former Yugoslavia are good examples of how difficult it is to establish general rules governing all aspects of succession, but also of how necessary it is to establish such rules, especially in connection with a process of secession.

### (B) STATE SUCCESSION AND SECESSION: COMPATIBILITY OR MUTUAL EXCLUSION OF LEGAL REGIMES?

As explained above, the process of codification of State succession has duly considered the diversity of cases in which succession can take place, and —in addition to the succession caused by the decolonization process (newly independent States)— the ILC has clearly distinguished between situations where the predecessor State disappears (dissolution) and situations where it continues to exist. Within this latter situation, the codification work has differentiated two distinct cases, namely the transfer of part of the territory of a State and the separation of part of a State. However, in none of the texts adopted so far has an express reference been made to "secession" as a specific form of succession. Far from that, this term has been carefully avoided in the work of the International Law Commission and in other instruments and treaties relating to State succession, and has been expressly excluded this year on the occasion of the ILC debate about the draft article 7 on succession and responsibility of State proposed by Special Rapporteur Sturma[15]. This is no doubt due to the semantic load of the term "secession", and to its being usually associated with cases of creation or modification of States against, or in disregard of, the principles of international law. This, in turn, has resulted in other, more neutral, terms being considered preferable.

Under these circumstances the issue must be raised whether the rules pertaining to State succession apply or not in cases of secession. The answer to this question is not simple, and must face the added difficulty that all international instruments relating to State succession

[15] Draft article 7 is entitled "secession (separation of part of a State)". As a basis for this proposal, the Special Rapporteur stated in his Second Report that "[c]ases of secession seem to be among the most typical situation of succession (...)", adding that even if the "doctrine usually refers to secession, while the 1978 and 1983 Vienna Convention use the term "separation of part or parts of the territory of a State" (...), there are no different meanings given to these terms. Therefore, they can be used interchangeably" (See A/CN.4/719, paras. 78-79, pp. 21-22). However, this proposal has been the object of important criticism from several members of the ILC, who suggested to omit from draft article 7 any reference to "secession", because the term might be interpreted as including unlawful succession (see, *International Law Commission Report on its 70th session*, 2018, A/73/10, par. 244, p. 278).

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have included a "scope clause" according to which they "apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations"[16].

The wording of this clause is unclear and might lead to the conclusion that, following a literal interpretation, every change in the international responsibility over the territory of a State that is against the principles of international law falls outside the rules pertaining to succession and, as a result, is in a situation of legal anomie. This, in practical terms, would result in the recognition to the States involved of an absolute freedom to regulate the different problems derived from succession, a freedom unbounded by any limits. These States would thus be recognized as having a privileged position that is even more favourable than that recognized to the newly independent States that have emerged from the decolonization process.

Although it is obvious that this interpretation of the scope clause cannot have been intended by the International Law Commission or willed by States, the truth is that it is not possible to find elements that sufficiently account for, or explain why, the Works of the ILC included this provision, or the intended meaning thereof. In practice, a detailed analysis of the debates on the issue held by the Commission in 1972 and 1974 only confirms that opinions were greatly divided on the convenience of keeping or not this provision. And, nevertheless, the ILC finally decided to include it in the Draft articles on State succession in respect of treaties, and decided again to include it in the Draft articles on State succession with respect to State property, archives and debt in 1981, and in the Draft articles on nationality with regard to succession in 1999.

Moreover, the Commission's commentaries to the above draft articles do not contain enough information to explain the reasons for and against keeping or including the provision, and the reasons given by States were not compelling. It can be concluded from such commentaries, if only indirectly, that some of the ILC members were unwilling to accept under the concept of "State succession" the cases in which the transfer of a territory takes place against the rules of international law. For its part, only one State (the United States) intended to derive practical consequences from this provision and pointed out in its commentaries to the Draft articles on succession in respect of treaties that, in case it was kept, it should be made clear that by virtue of that provision a new State whose succession is not in accordance with international law would be bound by the obligations arising from

[16] For the works of the ILC, see Draft Articles on succession of States in respect to treaties, art. 6; Draft articles on succession of States in respect of State property, archives and debt, art. 3; Draft articles on nationality of natural persons in relation to the succession of States, art. 3; and draft article 5 on succession and State responsibility. This clause has been incorporated in the 1978 and 1983 Vienna Conventions (arts. 6 and 3, respectively), and in the IDI Resolution of 2015 (art. 2.2).

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succession, but could not enjoy the rights arising therefrom. At any rate, it must be recalled that such a distinction was not retained in the commentaries[17].

Therefore, the question of the meaning of this scope clause remains open to this day. It has not been elucidated, either, by the International Law Commission when it recently dealt with State succession in respect of international responsibility. During the debates on draft article 5 proposed by the Special Rapporteur, the same debate that took place in 1972 has been re-enacted, and no new contributions have been provided as to what the true meaning of this clause should be, with the sole exception of the assertion contained in the Second Report by the Special Rapporteur that "[p]erhaps, articles 6 and 3 of the 1978 and 1983 Vienna Convention should be best understood as referring to the principle that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal""[18]. In any case, it must be stressed that, once again, the opinions of the members of the ILC have been divided[19].

At any rate, if all the circumstances surrounding the adoption of the scope clause, as well as the very content of the international legal instruments governing succession, are considered, it cannot be deduced from the scope clause that a succession originated in an act of secession falls outside the rules governing State succession. This is due to a number of reasons that will be briefly listed: i) the rules of succession are meant to apply once the emergence or modification of a State has occurred and is effective, and therefore "the replacement of one State by another in the responsibility for the international relations of territory" has taken place; ii) the rules relating to succession are not intended to assess the legality of the emergence or modification of a State, but only to establish the legal consequences of succession; iii) secession is not to be necessarily understood, under all circumstances, as being contrary to international law, because it may have been permitted by the predecessor State or agreed upon by the predecessor State and the new State; and iv) where secession results in the emergence or modification of a State by virtue of the application of the principle of effectiveness, a replacement in the aforementioned international responsibility must have taken place, and such a change can only be classified as a case of State succession.

The central issue in the relationship between succession and secession is a different one, namely what type of succession would secession be and, therefore, which legal regime would be applicable thereto. From this perspective, the answer must necessarily remain open and will require a case-by-case analysis, with the sole exception of the "newly independent States",

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17 See *Yearbook of the International Law Commission*, 1974, Vol. II, Parte One, p. 181.

18 See A/CN.4/719, par. 29, pp. 9-10.

19 See *ILC Report on its 70th Session*, A/73/10, para 240, p. 276.

a case which has been defined to apply to the former colonial and non-autonomous territories and which, by definition, does not imply the separation of part of the sovereign territory of a pre-existing State[20]. Likewise, the rules relating to the Unification of States would neither seem to be applicable, but the rules governing succession in cases of separation of parts of a State, transfer of part of the territory of a State and dissolution of a State would apply.

### (C) PARTICULARLY RELEVANT QUESTIONS RELATING TO SECESSION

Once it is admitted that the rules of State succession apply to cases of secession, it does not seem possible- in principle- to exclude the application of some of its legal manifestations. Far from that, in a case of State succession originated in a secession the matters that would be affected and require a legal response would be the same as in any other case. However, it is true that recent practice has revealed that State succession in cases of secession is particularly problematic with regard to two specific topics, namely the nationality of natural persons and membership of international organizations. In none of these two topics a treaty has been adopted to date at universal level, and with regard to the second topic not even a process of codification has been carried out within the International Law Commission, or any other body. For this reason, a more detailed examination of these two topics can be found below.

With regard to succession in respect of nationality, it must be stressed that this topic has been addressed both at the universal and the regional level. At the universal level, as pointed out above, the ILC adopted the Draft articles on State succession in respect of the nationality of natural persons in 1999. At the regional level, the issue of nationality has been addressed in particular in the Council of Europe, as a consequence of the problems that emerged after the dismemberment of the Soviet Union and the Former Yugoslavia. In this framework, the European Commission for Democracy through Law (Venice Commission) has addressed the issues related to nationality in respect to succession of States since 1991, and has adopted a number of interesting documents, among which the "Guidelines for State practice in the field of Nationality and State Succession"[21] and the "Declaration on the consequences of State succession for nationality of natural persons"[22] must be highlighted. From a normative perspective, these works have been reflected in the adoption of the "European Convention of

[20] "Newly independent State" has been defined as "a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible" (see, 1974 Vienna Convention, art. 2.1 (f) and 1983 Vienna Convention, art. 2.1. (e)).

[21] Doc. CDL-NAT (1996) 001 rev.

[22] Doc. CDL-NAT (1996) 007 rev. See also the "Explanatory report on the declaration", doc. CDL-NAT (1996) 008 rev. For a general overview of the work of the Venice Commission on this topic, see "Consequences of State succession for nationality", doc. CDL-INF (97) 1.

Nationality" of 1997[23], and the "Council of Europe Convention on the avoidance of Statelessness in relation to State succession" of 2006[24].

Both at universal and regional level, the question of succession in respect of nationality has been addressed outside of the process of decolonization, so the emphasis has not been put on the case of newly independent States, and the question has undergone important changes in the aftermath of the fall of the Berlin wall and the dismemberment of the Soviet Union and the former Yugoslavia. In any case, neither at the universal level nor at the regional level has a wide positive reaction of States taken place.

Be that as it may, in both cases the approach to the topic of succession in respect of nationality has adopted a common pattern of identification of the basic criteria applying to this topic, which can be summarized as follows: i) referral to the place of habitual residence as the basic criterion to determine the nationality of natural persons; ii) exclusion of any link between citizenship and ethnic, religious or political affiliation of individuals as valid basis for the acquisition or rejection of nationality; iii) recognition of the choice of the individual as the primary rule in case of existence of more than one possible nationality; and iv) prohibition of discrimination and avoidance of statelessness as a result of the process of succession. Due to the application of the above criteria, in case of separation of part of the territory of a pre-existing State the general rule would be a kind of clean slate principle that would favour the extinction of the nationality of the predecessor State, and its replacement by the nationality of the successor State, except if the individuals concerned embraced a different option. At any rate, this general rule would have to be applied in a way that prevents discrimination and the appearance of cases of statelessness. The application of these criteria is directly affected by the need to guarantee the full enjoyment of human rights, so that the change of nationality of natural persons does not result in a violation of their fundamental rights.

Nevertheless, the identification of an applicable general rule has not prevented the emergence of important problems in practice, especially as a result of the independence of the Baltic republics and, above all, in the context of the process of dismemberment of the former

[23] The European Convention on Nationality (Convention 166) entered into force on 1st March 2000, having been ratified until now by 21 States (Austria, Bosnia and Herzegovina, Bulgaria, Czech Republic, Denmark, Finland, Germany, Hungary, Iceland, Luxembourg, Montenegro, Netherlands, Norway, Portugal, Republic of Moldova, Romania, Slovak Republic, Sweden, The former Yugoslav Republic of Macedonia and Ukraine). The Convention refers to nationality as a hole, setting up some general rules on succession of States and nationality in Chapter VI.

[24] The Council of Europe Convention on avoidance of Statelessness in relation to State succession (Convention 200) built on the principles set up by the European Convention on Nationality. The Convention entered into force on 1st may 2009, having been ratified by seven States (Austria, Hungary, Luxembourg, Montenegro, Netherlands, Norway, and Republic of Moldova).

Yugoslavia, which have produced an increase of statelessness in some of the successor States as a result of the application of their domestic legislation. A good example of this negative practice has been the case of Slovenia where "erasure legislation" led to a pronouncement by the European Court which considered national legislation and practice as being contrary to the European Convention of Human Rights[25].

This problem has arisen again in connection with the claims of secession of Scotland and Catalonia, where —nonetheless— succession formulas in respect of nationality have been sought that are hardly compatible with the rules of international law, since they are based on the unilateral establishment of cases of dual nationality[26]. Moreover, the secessionist claims of these two territories have given rise to a new set of problems, namely the effects that the change of nationality of natural persons would have on the legal regime that would apply to the concerned individuals within the European Union. These problems can only be solved from the perspective of the loss of the "citizen-of-the-Union" status, even if from both pro-secession territories "bridge" formulas have been proposed that would allegedly permit the preservation of that privileged legal status of natural persons in spite of secession.

The interest of the international community on the relationship between succession and membership of an international organization has been very reduced. As already mentioned in the introduction to this article, the problem of State succession in membership of an international organization was included in the first program of work of the International Law Commission on State succession. This, however, yielded a mere study by the General Secretariat that was not followed up by the ILC[27]. In fact, when the Commission addressed this topic, the problem of the acquisition of membership of an international organization by new States was closely linked to the process of decolonization, and the approach to this question was determined by the willingness of the organized international community to promote the full application of the right to self-determination of peoples. From this perspective, the admission of new members, especially to the United Nations, took place automatically, in a manner completely detached from the concept of State succession.

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[25] See *Kurić and Others v. Slovenia*, application nº 26828/06, Grand Chamber, Judgement of 26 June 2012.

[26] Such a rule of dual nationality has been included in article 9 of the so-called Law of the Catalonian Parliament 20/2017, of 8 September, of Juridical Transition and founding of the Republic, declared as null and unconstitutional by Judgment 124/2017, of 8 November, of the Constitutional Court.

[27] See "The succession of States in relation to membership in the United Nations: memorandum prepared by the Secretariat", doc. A/CN.4/149 y Add. 1, in *Yearbook of the International Law Commission*, 1962, vol. II. In 1967, the Commission decided to leave aside for the time being this topic, because it was considered that this aspect of the general topic of Succession of States and Governments related both to succession in respect of treaties and to relations between States and international organizations, two topics already in the Program of work of the ILC (See, *Yearbook of the International Law Commission*, 1967, vol. II, Chapter III, paras. 36-41).

By contrast, the new situations that emerged in the last decade of the last century have forced international organizations to consider the issue of membership also in connection with State succession. However, this social context has not given rise to the adoption of a uniform legal regime applicable to State succession with regard to membership of international organizations. On the contrary, the response given by international organizations has continued to be characterized by a case-by-case approach, in which political considerations have prevailed when establishing the process of admission as new members of the States emerging from the dismemberment of former member States, or from the secession of part of the territory of a pre-existing member State. For instance, the different treatment given within the United Nations to the admission of States that emerged from the dismemberment of the Soviet Union and to the admission of the successor States of the former Yugoslavia, or to the States emerging from the dismemberment of the former Czechoslovakia, is a good example of this case-by-case approach essentially based on political considerations. On the other hand, the application to South Sudan of rules similar to those applied in the process of admission of newly independent States is evidence of the essentially political dimension characterizing the question of State succession in relation to membership of an international organization.

In this context, it is extremely difficult to envisage international organizations as being about to modify this approach vis-a-vis the new secessionist claims in certain European territories like Scotland, Catalonia or Kosovo. With regard to the first two cases, the reaction of the EU Institutions has revealed the full rejection of any conceivable rule of State "succession" if secession became effective in any of these territories. On the other hand, the practice shows how, even in the case of an effective secession, as in Kosovo, the acquisition of membership is not dependent on any rule of succession- a discarded solution- but on the application of the ordinary rules of admission of new members, which submits the final decision of the organization to the political will of member States.

## FINAL CONSIDERATIONS

As can be inferred from the content of the preceding pages, the institution of State succession still faces serious problems relating to the lack of definition of its legal regime and to acceptance by part of the international community in this first part of the 21st century. Its close link to the concept of the State and the variety of causes giving rise to State succession no doubt helps to account for the multi-faceted image of succession, and favour what is basically a case-by-case approach to every situation of succession to be found in practice.

Moreover, the concept of secession and its legal regime do not follow a uniform model and are not met with the same response from States, probably because of their close relation to,

and impact on, basic principles of contemporary international law such as sovereign equality, territorial integrity and non-intervention in internal affairs. At any rate, one cannot ignore the fact that every secession process is meant to result in the emergence of a State and the modification of a pre-existing State. And that, therefore, the necessary conditions are present to understand that secession, when effective, can result in State succession.

Defining the relationship between secession and State succession is a challenge for contemporary international law which affects even the concept of sovereignty and the principle of the effectiveness of statehood. Nevertheless, in spite of this (or perhaps precisely because of this), it does not seem possible to find a response to this problem that radically departs from the case-by-case approach that has prevailed to date. Perhaps, as in so many other areas of social reality, the wisest and most prudent approach is to look for specific solutions to specific cases, and to avoid an attempt to generalization which, in practice, could create more problems than it could solve.

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*Secession of States and Self-determination in contemporary International Law*

# Processes of secession and succession of States in the post-Soviet space with attention to the so-called "de facto States"

Antoni BLANC ALTEMIR*

*Abstract*: The dissolution of the USSR in late 1991 is undoubtedly one of the most significant events in international society of the late twentieth century. This led to the emergence of fifteen new states and as a result, to the appearance of different processes of succession of states. However, the end of the USSR did not mean the end of territorial, ethnic or national tensions, which were sometimes cruelly manifested in the new recently constituted States, causing secession processes that have led to the emergence of de facto States and that have been perpetuated over time with the support of Russia.

*Keywords*: Post-Soviet space – Succession of States – Frozen conflicts – de facto States

## (A) PRELIMINARY CONSIDERATIONS ON THE PROCESS OF DISSOLUTION AND SUCCESSION OF THE USSR

### (1) The process of dissolution of the Soviet Union

The disintegration of the Soviet Union (USSR) was the result of a serious deterioration of economic mechanisms within a framework of progressive questioning of the current political system, enhanced by the environment of timid reforms that made *perestroika* and the information transparency policy which facilitated the *glasnost* possible. On the other hand, the demands of the Republics became increasingly insistent in demanding the application of their rights, which fictitiously recognized the Soviet Constitution. In effect, the 1977 Constitution recognized the principle of self-determination, the right of the republics to freely separate and to even maintain full external relations. These rights would be maintained in the successive constitutional reforms. However, in reality, the Soviet state was a rigid unitary and centralist state of federal appearance under the strict discipline of the Communist Party [1], which maintained, in this way, within its vast borders, a mosaic of peoples, cultures and languages.

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1 On the complex "national question" in the Soviet Union, see, among others G. Smith (Ed.), *The nationalities question in the Soviet Union* (Longman, London-New York, 1990); M. Lesage, *La crise du fédéralisme soviétique* (La Documentation française, Paris, 1990); H.R. Huttenbach (Dir.), *Soviet Nationality Policies*. (Mansell, London, 1990).

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When the repression ceased, the republics regained prominence and, with it, they recovered growing spheres of power. In turn, the created the appearance of nationalist conflicts that sometimes manifested themselves in a bloody manner. For instance, at the end of 1986, in Alma-Ata and other cities in Kazakhstan were incidents that caused dozens of deaths; in 1987, the incidents took place in Kyrgyzstan and then Azerbaijan, where anti-Armenian pogroms were held, following the anti-Azeri manifestations of Yerevan, capital of Armenia. The long string of conflicts continued in the Baltic Republics, in Georgia, or in Uzbekistan, among others. [2]

The nationalist vindications were very quickly generalized in various republics, a factor that would very soon become essential, although not unique, in the accelerated crisis affecting the Union. [3] The proclamation of sovereignty by the republics and the supremacy of their laws over those of the USSR in the second half of 1990, not only in all the federated republics but also in several autonomous republics of Russia, such as Karelia, Bashkiria and Yakutia and even by some minorities without administrative autonomy [4], as well as the refusal —massive in some cases— to join the Soviet army, accelerated the process of disintegration. The reaction of the conservative forces in the autumn of 1990, for which Gorbachev tried grasp control the situation again could not stop the disintegration.

The consensus to declare the dissolution of the USSR was already growing among the Presidents of the new emerging States. It was only necessary to find a legal formula for independence to be declared. The overwhelming result in favour of independence in the Ukrainian referendum, its recognition by the Russian Federation and the abrogation of the 1922 Union Treaty by the Parliaments of Ukraine, Russia and Belarus, proved that the project of any form of union was definitively ruled out and the consensus to dissolve the USSR was firm and definitive. Surprisingly, the Soviet implosion took place in a few months and barely aroused any opposition; there was no generalized explosion of violence, even though, as noted before, the root causes were coming from afar.

Once the objective of dissolving the USSR had been achieved and after rejecting Gorbachev's last attempt to approve the Treaty of the Union, the President of the Russian Federation, Boris Yeltsin, attempted to re-establish the links between the three Slavic Republics.

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[2] On the origin and development of different kinds of conflicts which appeared in the territory of the former USSR, see A. Blanc Altemir, *Conflictos territoriales, interétnicos y nacionales en los Estados surgidos de la antigua Unión Soviética* (Tirant lo Blanch, Valencia, 2003).

[3] See A. Cucó, *El despertar de las naciones. La ruptura de la Unión Soviética y la cuestión nacional.* (Servei de Publicacions. Universitat de València, 1999), p. 35.

[4] The "sovereignty fever" reached the point that by the end of 1990, all the federated republics, including Russia, had declared their sovereignty. However, these declarations were not stopped here, since sixteen autonomous republics - of a total of twenty - did the same, as well as five of the autonomous regions and four of the ten autonomous districts. Even two districts of Moscow and some companies declared their sovereignty. Cfr. R. Lomme, Ph. Méchet «Le dépérissement de l'État soviétique», 55/4 *Politique Étrangère*, (1990), pp. 799-812.

He had to overcome the initial resistance of Ukraine, which was afraid that Russia would maintain its hegemony in the structure resulting from the disintegration of the USSR due to its history, its language, demography, territory, economic potential and military superiority.

With these premises, on December 8, 1991, the Presidents of the Russian Federation, Belarus and Ukraine signed the Agreement on the Foundation of the Commonwealth of Independent States (CIS) in Minsk, which should lay the foundations for the new structure that would follow the USSR, once its continuity was definitively discarded. [5]

## (2) Identity, continuity and succession of the States in the post-Soviet space. The interaction between recognition and succession of States

However, it should be noted that not all territorial changes necessarily imply the disappearance of the preceding State, because in certain cases, and despite important mutations that affect the constituent elements of a State, particularly the territory, the State does not disappear and continues to exist. In these cases, the continuity of the preceding State prevents the succession or, in other words, its substitution by another State. In short, the preceding State maintains its identity despite the fact that its territory and population have diminished or increased significantly.

Continuity and identity would therefore constitute two intimately related although differing notions. [6] As Czaplinski affirms, the notion of state identity is fictitious because it is an identity of international subjectivity and not an identity of territory, population or state power. In his opinion, which I share, the identity of States would be determined by the comparison of two state entities in two different moments, while the continuity would derive from the existence of a State without interruption during a certain period of time. From this perspective, if the continuity of a State is accepted, its identity cannot be questioned. However, the interruption of the continuity of a state, due to the cessation of its existence, would generally exclude all identity. [7]

On our part, we consider that the expression "continuity in the identity", used by some authors [8] reflects the situation more accurately created by the possible territorial

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[5] On the process of creation, legal nature and characteristics of the CIS, see A. Blanc Altemir, *La herencia soviética. La Comunidad de Estados Independientes y los problemas sucesorios* (Tecnos, Madrid, 2004), pp. 26-94.

[6] For K. Marek, it would be two inseparable notions, the first one being the result of the second. K. Marek, *Identity and Continuity of States in Public International Law* (Droz, Genève, 1954) , pp. 4-6. For Cansacchi, a State would continue to exist in the event of being the same international subject without interruption. G. Cansacchi, "Identité et continuité des sujets internationaux", 130 *RCADI*, (1970-II), pp. 7-11.

[7] W. Czaplinski, "La continuité, l'identité et la succession d'États-Evaluation de cas récents", *RBDI*, (1993/2), p. 374.

[8] See in particular J.A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones internacionales*, (6ª ed. Tecnos, Madrid, 1996) 312-314; J.M. Ortega Terol, "Aspectos teóricos y prácticos de la continuidad en la identidad del Estado", XV *ADI*, (1999), pp. 273-323.

transformations that States can suffer. It merges the two elements which could be affected: the temporal dimension of the State and the preservation of its international legal personality.

The principle of continuity of the State operates as a presumption in the field of international subjectivity, a fact that is almost unanimously accepted by the majority of renowned scholars in this discipline. [9] The application of this principle would justify both the continuity in the state identity in those cases in which there are changes in the organs of government of the State, and in those insignificant alterations that affect the rest of the constituent elements of a state entity, i.e. the territory and the population. From this perspective, the State would continue to exist from an international legal point of view unless its actual dissolution could be verified, that is, the cessation of its own existence.

There would, therefore, be a series of situations that would not have an impact on the continuity in the identity of a State, that is, on its international legal personality. Consequently, certain territorial changes, which could be manifested both in the form of acquisitions and losses of territory, would not affect the continuity in the identity of a State. [10] However, other alterations, in particular the loss of sovereignty or very significant loss of territory to the point that it would affect the minimum territory necessary for its own existence, would in fact have an unquestionable effect on their legal personality and would therefore negatively affect the continuity in the identity of that State. [11]

However, it is unquestionable that the loss of independence or sovereignty, as a constituent element of greater significance from the perspective of International Law, would mean the disappearance of the State and with it any possible continuity of its identity. Nonetheless, in the event that the loss of sovereignty has occurred for reasons which are not accepted by international legal standards - such as an annexation - and that independence is later recovered, as in the case of the Baltic States in relation to the former USSR, we would find ourselves confronting a case of recovery of the identity, without solution of continuity, of the reappeared States. This way, the new States of Estonia, Latvia and Lithuania would continue in the identity

[9] See among others, J.L. Kunz, "Identity of States under International Law", 49, *AJIL*, (1955) at 68; J. Crawford, "The Criteria for Statehood in International Law", 48 *BYIL*, (1977), p. 139.

[10] History offers us many examples in this regard: the continuity in the identity of the former colonial States (Spain, France, Belgium, United Kingdom, etc.) was not questioned despite the loss of important territories after the different decolonization processes. The twentieth century also offers us numerous cases derived, in particular, from the dissolution of the Ottoman and Austro-Hungarian empires. The most renowned scholars in this discipline accept in a practically unanimous way that the continuity in the identity of a State is not affected by certain territorial modifications. See J. Crawford, *The Creation of States in International Law*, (Clarendon Press, Oxford, 1979), p. 404.

[11] See H. Bokor-Szego, "Naissance et disparition des Etats dans le droit international contemporain", *Acta Jurídica Scientarum Hungaricae*, (1983), p. 355.

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of the homonymous States that disappeared in 1940 as a result of the annexation operated by the USSR. It was considered illegal from the perspective of International Law.

If we place ourselves in the perspective of the original State, in which the territory subject to a partial modification was based, it is more likely that it would continue to exist since the modification would not have altered its continuity. This means that we would be facing a continuity in identity. Nevertheless, in the event that the territorial alterations have been significant and they have implied a State's dissolution, leading to the creation of two or more new States, it would be discussed whether one of them is considered as a continuator of the disappeared State (as in the case of the Russian Federation with respect to the USSR) and the rest would be considered new States, i.e. successors, or whether all of them are considered new and none of them is recognized as a continuator (as in the case of the former Socialist Federal Republic of Yugoslavia or Czechoslovakia).

Although the majority of scholars distinguish between succession and continuity of the States, the differences are diluted when one passes from the theoretical to practical analysis, as the dissolution of the USSR demonstrates. The identity and the continuity are opposed to the succession: the former is based on the persistence of the State in question while the succession implies its disappearance and substitution by a new one.

In the case of the USSR, the three phenomena which were previously analysed are present at the same time: the identity without continuity of the Baltic States; the continuity of the USSR by the Russian Federation; and finally, the succession of the other eleven republics of the USSR, with a particular situation for Belarus [12] and Ukraine within the framework of belonging to the International Organizations (in particular to the United Nations).

There is an obvious interaction between the succession and continuity of States, on one hand, and in recognition, on the other. In relation to the extent to which the state projects itself to the new subjects (States) that appear as a consequence of a territorial transformation (succession) and to its own intention to continue being a legal personality, which is associated with the acceptance of its status as a continuator by the other States.

As recognition is a political act, even though it has unquestionable legal effects, States have the freedom to set the conditions under which they recognize the new subject. These conditions, however, are limited by the respect of International Law, as it was established by the then European Community. [13]

[12] From now on, we will refer to Belarus to designate the new State constituted from the former Soviet Socialist Republic of Belarus.

[13] Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', adopted by the EC in the Extraordinary Ministerial Meeting of the European Political Cooperation (EPC) on December 16, 1991. Cf. *Actividades, Textos y Documentos de la Política Exterior Española*, (1991), pp. 915-916.

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Along with these guidelines adopted for the new states of Eastern Europe and the USSR, the European Community within its recognition policy distinguished between three legal statutes of States, which were product of the dismemberment of the USSR. This was the stance adopted by the majority of international organizations and non-member states: (a) The case of the Baltic republics; (b) The case of the Russian Federation; and (c) The case of the other independent States in the territory of the former USSR.

In connection with the first case, we will only refer to the fact that the Baltic States were recognized as continuators in the identity of the homonymous States which existed until 1940, the year when they were annexed by the USSR. The classification of the succession of States which was operationalised, in the light of the Vienna Conventions on succession in respect of the 1978 treaties and on succession in respect of property, archives and debts of 1983, would be a separation of States. However, from the moment Estonia, Latvia and Lithuania did not accept this qualification, they presented themselves, as Professor Paz Andrés has pointed out, as "resuming, without continuity, the international legal personality of the three States annexed in 1940". [14] We are therefore faced with a case of restoration of the independence of the former Baltic States, whose legal personality has been perpetuated over time. [15] And from this point of view, Estonia, Latvia and Lithuania would continue as the States annexed by the USSR in 1940. This was the stance adopted not only by the States in question, but also by the Member States of the European Community, stating that "the Community and its Member States warmly welcome the restoration of the sovereignty of the Baltic States that they had lost in 1940 ..." [16].

As affirmed by Tatsiana Ushakova [17], the Baltic republics did not participate in the process of distribution of the goods and rights of the former USSR, operating in this way with full coherence. However, the practice in terms of treaties has been more contradictory. Whereas in some cases the republics have maintained valid agreements concluded by the former USSR after 1940, in other cases, they have denied them and have invoked the doctrine of the *tabula*

[14] See P. Andrés Sáenz de Santa María, "Problemas actuales de la sucesión de Estados", *Cursos de Derecho Internacional de Vitoria-Gasteiz*, Servicio Editorial de la Universidad del PaísVasco-Edit. Tecnos, Madrid, (1994), pp. 157-214, p. 178. The Baltic States are, therefore, a particular manifestation of what Crawford calls "identity without continuity". J. Crawford, *The Creation of States in International Law* (Clarendon Press, Oxford, 1979), p. 407.

[15] As stated by Bothe and Schmidt, a precedent of this conception be the case of Austria which even though it was part of the German Empire between 1938 and 1945, it recovered its independence later on. M. Bothe et Ch. Schmidt, "Sur quelques questions de succession posées par la dissolution de l'URSS et celle de la Yugoslavie", *96 RGDIP*, (1992/4), pp. 822- 823.

[16] "Declaración de los Doce sobre los países bálticos". Bruselas, 27 de agosto de 1991. Cf. *Actividades, Textos y Documentos de la Política Exterior Española*, (1991), pp. 881-882.

[17] T. Ushakova, *La sucesión de Estados en materia de bienes, archivos y deudas; el caso de la URSS*, (Editorial Universitaria Ramón Areces, Universidad de Alcalá, Madrid, 2006), p. 48.

*rasa*. This concept is in principle linked to the succession of recently independent States. Many of the treaties and agreements prior to 1940 have not been able to be restored due to the long period of time that had elapsed.

Regarding the recognition of the Russian Federation as a continuing State of the USSR, it should be noted that when the dissolution formally took place, the identity between the Russian Federation and the USSR was an established fact, accepted as such by the international community. [18] The different position of the Russian Federation, as a continuing State of the former USSR, and of the other Republics, as successor States, has been assumed not only by the Russian Federation itself, which officially maintained this interpretation from the beginning, but also by the rest of the States whose attitude in favour of this continuity has been practically unanimous.

The position adopted by the Member States of the European Community reflected in the Declaration on the future status of Russia and other former Soviet Republics, formulated on December 23, 1991, was particularly marked as they "confirm that international rights and obligations of the former USSR, including those derived from the Charter of the United Nations, will continue to be exercised by Russia. They welcomed the acceptance of these commitments and responsibilities by the Russian Government and on this basis they would continue their dealings with Russia, taking into account the modification of their constitutional status". [19]

Certainly, the legal consequences differ considerably in the event that the Russian Federation was the continuing under the identity of the former Soviet Union or simply its successor. Indeed, in the first case, the recognition by the other States of the international community [20] would be unnecessary and the Russian Federation would assume the legal position of its predecessor in terms of rights and obligations. However, if it was its successor, the other states would need to recognise the new state and the Russian Federation would need to recognise and accept both its rights and obligations. This would be limited to the framework established by the rules governing the succession of States. In any case, the thesis of continuity in the identity of the predecessor State —Soviet Union— for its most essential part —Russian

[18] The tendency to identify the Russian Federation with the Soviet Union was constant, even from long before. See L. Antonowicz, "The Disintegration of the USSR from the Point of View of International Law", *PYIL*, vol. 19, (1991-1992), p. 9.

[19] "Declaración de los Doce sobre el futuro ¨status¨ de Rusia y otras ex-Repúblicas soviéticas", La Haya-Bruselas, 23 de diciembre de 1991. Cf. *Actividades, Textos y Documentos de la Política Exterior Española*, (1991), pp. 918-919.

[20] As stated by B. Stern: "S'il y a continuation, cela signifie que l'État reste identique à lui même, et que, en principe, il n'y a donc pas besoin de reconnaissance, contrairement à ce qui se passe en cas de succession, oú apparaît un nouvel État qui doît être reconnu». B. Stern, "La succession d'États», 262 *RCADI*, (1996), pp. 15-436, p. 59.

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Federation— is rather in line with the international practice and with the interests of the international community, which prefers that the relations between the old State and the outside world are not extinguished and are maintained by the continuing State, thereby providing greater security and stability in international relations. [21]

The stance stating that the Russian Federation was the continuing in the identity of the former USSR was based not only on the statements made by the Russian authorities, in which the term continuator was systematically used instead of successor, but also in the fact that the Alma-Ata Declaration, which involved the members of the newly constituted CIS, decided that Russia should be the continuation of the USSR in its capacity as a member of the United Nations. This included its position as a permanent member in the Security Council, as well as of other international organizations. This claim was accepted by all the members of the United Nations as well as other international organizations. In our opinion, this fact constitutes a determining factor to consider the Russian Federation as a continuation in the identity of the former USSR. [22]

In contrast, with the exception of Ukraine and Belarus the other former Soviet republics had to reapply for membership as members, as original members of the United Nations. Also, the diplomatic representations accredited in Moscow continued exercising their representative functions before the Russian Federation. Thus, it can be said that the "essence" of the former USSR persisted in the Russian Federation because, as stated by Koskenniemi and Letho, it was its backbone in terms of population, territory, GDP or nuclear weapons.

As for the recognition of other States in the territory of the former USSR as successors, it should be noted that after the aforementioned Alma-Ata Declaration, the international community recognized the new independent States with the exception of the Russian Federation for the reasons given. The Member States of the European Community followed the guidelines incorporated in the also aforementioned Declaration of December 16, 1991, which conditioned the recognition to the acceptance by the new States of a series of fundamental rules of International Law.

The recognition, as a step previous to the establishment of diplomatic relations, was made only with respect to the split republics of the USSR, but not with respect to the Russian Federation, which was considered a continuation of the former USSR. For this reason, the

[21] H. Bokor-Szegö, "Questions of State Indentity and State Succession in Eastern and Central Europe", in M. Mark (Ed.): *Succession of States*, (Martinus Nijhoff Publishers, The Hague/London/Boston, 1999), p. 99; T. Ushakova, *La sucesión de Estados en materia de bienes, archivos y deudas; el caso de la URSS*, (Editorial Universitaria Ramón Areces, Universidad de Alcalá, Madrid, 2006), p. 50.

[22] In the same line, see V.D. Degan, "Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe", 279 *RCADI*, (1999), p. 306.

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effects of the succession clearly reached the eleven remaining States, and the Baltic States were also excluded for the reasons that have been mentioned.

However, it is important to point out the particular situation of Ukraine and Belarus, which, as we have noted, were founding States of the United Nations and retained their status as members of that organization and of other organizations of the system in which they participated independently of the USSR. [23] In contrast, these two States had to go through the usual admission procedure for the organizations of the system of the United Nations in which only the USSR was a part.

With regards to international treaties, it must be remembered that in the aforementioned Declaration of the European Community on the future statute of Russia and other former Soviet republics, was reiterated as one of the conditions for recognition to guarantee the fulfilment of the commitments of the USSR; in particular those derived from the Conventional Forces in Europe treaty and those related to the sole control of nuclear weapons and their non-proliferation.

In short, we can hold that the international legal personality of the States that emerged from the former USSR did not present problems by proclaiming themselves as independent States and successors of the USSR and as recognized by the international community.

### (B) THE CURRENT STATUTE OF THE DENOMINATED "DE FACTO STATES" IN THE POST-SOVIET SPACE

Prior to the demise of the USSR at the end of 1991, the progressive weakening of the Soviet central power had boosted the emergence of ethnic conflicts. The most remote causes of these conflicts are to be sought both in the policy of the nationalities sponsored by Stalin with the consequent aberrant plot of internal borders [24], as in the effects, often perverse, of the territorial division of labour. It has been quite rightly pointed out [25], the peculiarities of the Soviet empire made it difficult to fully dismantle it, and once it was consummated, regional interdependencies and specificities determined that the disappearance of the USSR did not automatically mean the disappearance of the former Soviet space. Russia, mainly through the CIS, occupied this

[23] In this sense, see A. Blanc Altemir, "La successione nella condizione di membro delle organizzazioni internazionali alla luce della recente prassi internazionali", LXII *La Comunità Internazionale*, (2007/1), pp. 84-85.

[24] The borders between the federated Republics were modified ninety-four times during the URSS. F. Valdés, O. Tarasov, "La Comunidad de Estados Independientes: génesis y perspectivas", *Política Exterior*, 33 (1993), p. 31.

[25] C. Aguilera de Prat, "Rusia y la CEI: ¿relaciones de política exterior o interior?, 42 *Revista CIDOB d'Afers Internacionals*, (1998), p. 7. In his opinion, the Russian empire, which was first Tsarist and then Soviet, was characterized by being a contiguous geographical entity —unlike the "traditional" empires such as the Spanish or the British that were transoceanic— and that was progressively configured with the Slavic and Turkochan territorial annexations.

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empty space by means of its economic and military supremacy which has acted as a mechanism to contain conflicts, although with unequal success.

The disappearance of the USSR and the consequent access of the Republics to independence did not mean the end of territorial, ethnic or national tensions. The reason being that although many of them originated within the USSR, their true causes went beyond the political and historical framework in which they were born and developed. [26] In effect, if we compare the situation of the conflicts, present or latent, which existed at the end of the Soviet period, that is to say in 1990-1991, with the evolution of the following years, once the disintegration and the appearance of the new independent States had taken place, we can observe that, in itself, this did not provoke an improvement of the conflictive situations, instead in many occasions, they were aggravated. [27] Therefore, we can state that although the process of succession occurred in a relatively organised way, it should be noted that the dissolution of the USSR did not satisfy all the nationalist movements that existed within it and ended up multiplying the conflicts of ethnic and identity character. In some cases these had already been manifested even before the creation of the USSR but had remained dormant during the USSR existence and reappeared at times in a violent manner in the final era that led to its demise. Also, it should be noted that the aggravation of existing ethnic tensions also added to the problem of Russian citizens who remained outside the borders of the new Russian Federation.

In a more or less simultaneous way and coinciding with the progressive Soviet disintegration and the first post-Soviet period, the conflicts of South Ossetia, Abkhazia, Transnistria and in the Nagorno-Karabakh took place. These had different roots and dynamics: while the first three had a very marked ethnic component, the Transnistrian conflict was rather related to political and economic factors, but with similar results, as they all ended with the birth of de facto States thanks to the support of Russia (and of Armenia in the Nagorno-Karabakh conflict). Russia was the heir to the USSR and as such contributed to the weakening of the post-Soviet states affected by these processes of secession and guaranteed an enormous capacity for interference in their political life: this happened in Moldova (in the conflict of Transnistria) or Georgia (South Ossetia and Abkhazia) and more recently in Ukraine (Donbass conflict, after the annexation of Crimea).

At the same time, as the process of disintegration of the USSR consecrated the independence of the fifteen Soviet Socialist Republics (SSR), some territories with identity peculiarities that

[26] A. Cucó, *El despertar de las naciones. La ruptura de la Unión Soviética y la cuestión nacional.* (Servei de Publicacions de la Universitat de Valencia, 1999), p. 19.

[27] At the beginning of 1993, the Russian Army General Staff counted a total of seventy real or potential conflicts in the post-Soviet space. Of them, about thirty would correspond to the territory of the Russian Federation. A. Nenarokov, "La question nationale: paix civile ou guerre civile?", in V. Garros (Dir.): *Russie post-soviétique: la fatigue de l'histoire?*, (Complexe, Bruxelles, 1995), p. 96.

did not possess the status of SSR, tried to accept being new States. In some cases, such as those of Gagauzia in Moldova [28], Crimea in Ukraine or Tatarstan in Russia, the new post-Soviet metropolises knew how correct, at least initially, the pro-independence aspirations in a relatively peaceful way and were able to integrate these territories into the new architecture of the respective States offering them different degrees of self-government.

On other occasions, the secessionist entities managed to consolidate their independence after defeating the metropolitan states militarily. Thus, Transnistria managed to underpin its secession from Moldova; Nagorno-Karabakh from Azerbaijan; South Ossetia and Abkhazia of Georgia and Chechnya of the Russian Federation. While Chechnya would end up returning to the discipline of Moscow after the Russian victory in a second war [29], the other four territories maintained their independence to this day and have provided themselves of the institutions and instruments which are characteristic of nation-states without substantial changes in their situation of little or no international recognition. [30] To characterize this complex reality, numerous terminologies have been created: States not recognized or partially recognized; pseudo-States; semi-states; quasi-States; States subject to dispute or contested; de facto States; protracted conflicts, forgotten conflicts; frozen conflicts [31] among others.

In our opinion, the most appropriate term to define the complex reality that we analyse is "de facto State"[32], which Scott Pegg applies to secessionist territories where a government with sufficient popular support controls and provides services to the population for a prolonged period of time. [33]

The war in the East of Ukraine, in the Donbass region, where the self-proclaimed popular republics of Donetsk and Lugansk are located, has once again placed the so-called "de facto States" in the foreground as one of the possible solutions to this new conflict in the Ukrainian

[28] From now on we will refer to Moldova to designate the new State constituted from the former Moldovan Soviet Socialist Republic.

[29] A. Blanc Altemir, "El conflicto de Chechenia: implicaciones en el ámbito del Derecho Internacional Humanitario y de los Derechos Humanos", VI *Cursos de Derechos Humanos de Donostia-San Sebastián*, Servicio Editorial de la Universidad del País Vasco, (2005), pp. 67-148.

[30] N. Caspersen, "Playing the Recognition Game: External Actors and De Facto States", 44 *The International Spectator. Italian Journal of International Affairs*, (2009), pp. 47-60.

[31] C. Ciobanu, "Frozen and Forgotten Conflicts in the Post-Soviet States: Genesis, Political Economy and Prospects for Solution", (United States Institute of Peace, Virgina State University, Richmond, 2008); J. Coyle, *Russia's Border Wars and frozen Conflits*, (Palgrave Macmillan, New York, 2017).

[32] We agree on the appropriateness of this denomination with R. Martín de la Guardia, R. González Martín, C. García Andrés, *Conflictos postsoviéticos. De la secesión de Transnistria a la desmembración de Ucrania*, (Dykinson, Madrid, 2017), p. 16.

[33] S. Pegg, *International Society and the* De Facto *State*, (Aldershot, Ashgate Publishers, 1998). In this sense, cf. D. Lynch, *Engaging Eurasia's Separatist States. Unresolved Conflicts and* De Facto *States* (United States Institute of Peace Press, Washington, 2004).

East is precisely the conformation of a de facto State in the image of what happened in the other four territories mentioned.

To situate ourselves we will analyse, although very briefly for obvious reasons of space, the situation of the existing conflicts in the post-Soviet space that have led to the progressive consolidation of the so-called de facto States, starting with those located in European territory, Donbass in Ukraine and Transnistria in Moldova, and continuing with those located in the Caucasus, South Ossetia and Abkhazia in Georgia and Nagorno-Karabakh in Azerbaijan.

### (1) The Donbass conflict in Ukraine

The increase in protests and demonstrations in Kiev and in the main cities of the country, under the framework of the so-called Maidan, resulted in the flight of the Ukrainian President Yanukovych to Russia on February 22, 2014, as well as his subsequent dismissal by the Parliament and the appointment of a new president, Alexander Turchinov.[34] Russia did not accept the legitimacy of the new government, which she referred to as a coup, and warned that forcing Ukraine to choose between the EU, which had already recognized the new government, and Russia, would seriously harm the country's territorial integrity. In fact, protests against new authorities and in favour of independence began to be detected in some regions of eastern Ukraine. The clearest case, however, could be observed on February 26, 2014 in Crimea, where protesters called for the incorporation of the peninsula to the Russian Federation.

Despite the appeals for calm to maintain the territorial integrity of the country, on March 1, 2014 the Crimean authorities asked Russia to send troops to restore security in the area, as they did not consider the Ukrainian Army as their own. At the request of President Putin, the Duma authorized the deployment of troops in Crimea whereas in other areas in the East, which were mostly Russian-speaking, there were protests against the new government of Kiev and in favour of an approximation to Russia.

The so-called aid to Crimea by Russia consisted rather in an occupation of the territory, which was welcomed with enthusiasm by the majority of the population. The EU, in addition to the G-7, strongly condemned the violation of the sovereignty and territorial integrity of Ukraine by the Russian armed forces and reminded Russia of the commitment it had made to respect that integrity in the bilateral Treaty of Friendship, Cooperation and Mutual Assistance of 1997, demanding the immediate withdrawal of its army from Crimea.

[34] For an exhaustive analysis of the events that took place during the Maidan and its consequences, see, among others, R. Bermejo García, *La vuelta de Ucrania a la madre-patria*, (Tirant lo Blanch, Valencia, 2015); F. Ruiz González, "Ucrania: revolución y guerra civil. Una visión alternativa de la crisis". Instituto Español de Estudios Estratégicos, *Documento Marco* 19/2014, (November 13, 2014), J.M. Faramiñán Gilbert, "Ucrania, sobre la línea roja", Real Instituto Elcano. *Documento de Trabajo* 17/2014, (December 30, 2014).

However, far from becoming more stable, the situation in Crimea was increasingly complicated, as its Parliament had voted in favour of the annexation to Russia and had convened over a referendum on March 16, 2014 in which citizens would choose whether they wanted to belong to Russia or Ukraine. The EU declared that it was an illegal referendum, as it violated the democratic constitution valid in Ukraine. However, the warnings were fruitless as the process went ahead and on March 16, almost 97% of the population of Crimea voted in favour of unification with Russia [35] and President Putin recognised the results in the ballot boxes.

The declaration of independence made on March 17, the day after the referendum, replaced the Autonomous Republic of Crimea (integrated in Ukraine) by the (independent) Republic of Crimea, and after appealing to the United Nations and to all the States in the world to request recognition as an independent State, requested to be included as a new republic of the Russian Federation.

This unilateral declaration of independence was intended to pave the way for its integration into Russia through a bilateral international agreement, adopted and signed by Russia and Crimea as two subjects with full international legal subjectivity. The formalization of the merging process required the recognition of the independence of Crimea by Russia, the signing of the bilateral treaty that should be submitted to the Constitutional Court of the Russian Federation, and the subsequent voting in the two chambers of the Russian Parliament (Duma and Senate) and the signature of the Russian President.

All the proceedings were carried out with unusual celerity and on March 18, only two days after the referendum, the annexation-merging was effective with the signing of the bilateral treaty between President Putin, the first Minister of the New Republic of Crimea, the President of the Parliament of Crimea and the Mayor of Sevastopol while they waited for the process of approval of the Parliament and the Russian Constitutional Court.

The parallelism that Russia alleged between the cases of Kosovo and Crimea, which led President Putin and his Foreign Minister Sergey Lavrov to state that "if Kosovo was a special case, Crimea is also a special case" [36], presents some reservations that should be noted. It is true

[35] To the first question: "Are you in favour of the reunification of Crimea with Russia in the rights of the Russian Federation?" 96.77% voted in favour, and to the second question: "Are you in favour of restoring the Constitution of the Republic of Crimea of 1992 and the status of Crimea as part of Ukraine planned in it?", only 2.51% voted in favour. See Foundation Robert Schuman, 617 *La Carta*, (March, 18 2014).

[36] Both Putin, in his telephone conversations with Obama or other Western leaders particularly from the EU, and the Foreign Minister Lavrov frequently used this parallelism. In the meeting that the heads of American and Russian diplomacy, Kerry and Lavrov, held in London to approximate positions on the crisis of Ukraine and the situation in Crimea, Lavrov used once again the precedent of Kosovo as a justification for Russian action in Crimea, adding that "Crimea is much more important than the Falklands for the United Kingdom or the Comoros for France". See *El País*, March 15, 2014, p. 3.

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that in both cases we find parts of the territory of a State from which they decided to separate unilaterally, and also in both cases the population settled in that territory represents an ethnic majority different from the dominant ethnic group in the original State. In addition, in both cases there was an external military intervention without prior authorization from the United Nations Security Council, and both clearly violated the domestic law of the State to which they belonged (Serbia and Ukraine).

There are, however, remarkable differences such as the fact that in Kosovo, Serbia perpetrated massive and systematic violations of human rights that were described as ethnic cleansing, a fact that was not produced in Crimea by Ukraine. This circumstance would justify the exceptional nature of Kosovo for some, or at least give it moral legitimacy. Even though it is true that we can accept this "moral legitimacy", which is not present in the Crimean case, international legality seems to be outside of both situations. In Kosovo, it is due to the existence of the Resolution 1244 of the Security Council that guaranteed the territorial integrity of Serbia. Serbia's aggression against the Kosovar population occurred nine years before the declaration of Kosovo's unilateral independence, whose territory was under the mandate of the United Nations at that time. In Crimea, it is due to the circumstances surrounding the Russian intervention, the call and realization of the referendum and the subsequent annexation.

At the same time, the situation in Donbass, in the East of Ukraine, continued to deteriorate from the beginning of April 2014. Many pro-Russian demonstrations took place in different eastern cities, particularly in the Donetsk and Lugansk regions, including the occupation of official buildings. In both regions, the insurgents fixed May 11 as the date to hold a referendum similar to that of Crimea. Both the Government of Ukraine and the EU accused Russia of being behind these uprisings in favour of fracturing the country.

The presidential elections in Ukraine were held on the scheduled date (May 25, 2014). The independent candidate Petro Poroshenko, who was supported by the Ukrainian Democratic Alliance for Reform (UDAR), widely won the first round and obtained 54% of the votes. The elections were held without incidents, except in the Donbass, with a total participation slightly over 55%. [37]

However, within hours of communicating the official result of the presidential elections, the armed rebel groups that had taken power in the Donetsk province took control of the capital's international airport. This fact triggered a series of events that would lead to the self-proclaimed republics of Donetsk and Lugansk, whose eyes were gazing towards Moscow, because they

[37] A list of the candidates and parties that attended the presidential elections on May 25 can be seen in C. Deloy, "Petro Porochenko (indépendant) favori de l'élection presidentielle en Ukraine", *Fondation Robert Schuman. Election présidentielle en Ukraine*, (May 25, 2014).

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intended to forge an alliance with Russia, which again cast serious doubts on Ukraine's national sovereignty.

This atmosphere, which was full of deep disagreements, coincided with the destruction of a plane in the Donestk region, on July 18, 2014, from Amsterdam to Kuala Lumpur (Malaysia) and caused the death of 298 people, among whom there were numerous EU citizens. This turned the Ukrainian conflict into a global event. [38]

On the other hand, the pro-Russian rebels, encouraged by the unwillingness of President Putin to dialogue with his Ukrainian counterpart, expressed their decision not to accept the authority of Kiev. With this new situation, which was marked by the military victories of the pro-Russian separatists, the Minsk conversations were held at the beginning of September 2014 and were sponsored by the OSCE. Russia, the rebels from the East of Ukraine and the Government of Kiev participated in these conversations.

The recent military victories of the pro-Russian separatist rebels marked the start of the Minsk talks, which after several days of negotiations led on September 5, 2014 to the signing of a protocol of twelve points. These points included the immediate truce declaration which was verified by the OSCE. The OSCE would also control the border between Ukraine and Russia as well as the creation of a security zone in the border areas; immediate release of all prisoners and persons illegally detained; decentralization of power and creation of an autonomous government in the Donetsk and Lugansk regions, where, on the other hand, measures would be taken to improve the humanitarian situation, and later on, early local elections would be held.

The Ukrainian outlook at the end of 2014 left little room for optimism: the structural economic crisis was accompanied by the civil conflict in the East, which placed the country in a situation of fragility. Crimea appeared in this scenario as a missing link despite sanctions were imposed on Russia by the EU. [39] At the same time, the negotiations carried out among France, Germany, Ukraine and Russia to stabilize the conflict in the Donbass resulted in the Agreement of Minsk on February 12, 2015. The Agreement consisted of 13 points that recovered the spirit of the previous Protocol signed in September and included a ceasefire, which was

[38] The diplomatic confrontation between Ukraine and Russia was reproduced in October 2015 when, after lengthy investigations, the Government of the Netherlands determined that a Russian-made missile had been the cause of the demolition of the plane in eastern Ukraine in July 2014. In this line, on May 24, 2018, the International Commission of Inquiry, made up by Australia, Belgium, Malaysia, the Netherlands and Ukraine, determined that a Russian shuttle fired the missile that shot MH17. Far from accepting these conclusions the Kremlin continued to blame the Ukrainian State forces for the tragedy.

[39] On its application and impact, see A. Blanc Altemir, "The European Union-Russian Federation Relations: Multidimensionality in the Complexity", in A. Blanc Altemir, A. (Dir.): *The European Union and the BRICS (Brazil, Russia, China, India and South Africa)*, (Thomson Reuters Aranzadi, 2015), pp. 91-109.

initially respected but was repeatedly violated by both parties in the framework of a conflict in which and until that moment, several thousands of people had been killed.

In reality, there was little room for optimism in connection with the commitments of the new Minsk Agreement due to the difficulty of finding balance in a country such as Ukraine, which was deeply divided. The challenge of becoming a fully democratic and European State seemed to be difficult to solve, not only because of the existing deep division, but also because of three other problems that have persisted since Ukraine's independence: corruption, lack of rule of law and economic crisis.

By the end of 2015, the breach of the Minsk Agreements was evident: Ukraine had not carried out a constitutional reform to give a special status to the eastern insurgent regions, while Russia continued its interference in these regions through all kinds of aids, including economic ones. Undoubtedly, what happened in the Donbass region was becoming increasingly similar to other conflicts entrenched in territories of the former USSR, such as Transnistria, Abkhazia and South Ossetia or Nagorno-Karabakh.

This situation of instability, which has become permanent in Ukraine, operates in favour of the insurgents' interests and of the Russian interference in the area. The pro-Russian authorities of these separatist regions have announced that they would issue their own passports as a preliminary step to issuing Russian passports, as it is already the case in the regions of Transnistria, Abkhazia and Ossetia. Similarly, in the self-proclaimed popular republics of Donetsk and Lugansk the rouble has replaced the hryvnia and the trade with Russia has replaced the trade with the rest of Ukraine.

The control of the institutional power and of the main economic sectors of the country in the hands of the political and economic oligarchy that comes from the end of the communist era, together with the constant Russian pressure, makes it very difficult for the reforms proposed by the new prime minister, Vladimir Groisman, to prosper. Among these reforms, the fight against widespread corruption stands out as well as a closer approach to the EU. On the other hand, the Kiev Government does not have sufficient military capacity to end the pro-Russian insurgency. Meanwhile, the instability favours the interests of Russia that include the obstruction of the normalization of the country and mainly the delay and hindering of the approximation of Ukraine to the EU. [40] In short, it seems clear that Putin's attempts to place Ukraine under its orbit once and for all are aimed at creating a security belt on the perimeter of its border, adding its influence to the one that is already exercised in Transnistria, as well as in Abkhazia and South Ossetia.

[40] See R. Martín de la Guardia, R. González Martín, C. García Andrés, *Conflictos postsoviéticos. De la secesión de Transnistria a la desmembración de Ucrania*, (Dykinson, Madrid, 2017), p. 131.

## (2) The Transnistrian conflict in Moldova

Transnistria is located on the narrow strip of land between the Moldovan stretch of the Dniester river and Ukraine. A border of around four hundred kilometres with each of its neighbours delimits a modest territory of slightly more than 4,000 km2 and a population of 505,000 inhabitants according to the last census of 2014, a population which has progressively diminished in number in recent years. This represents approximately 12% of the population and the area officially attributed to the Republic of Moldova. The ethnic composition of the population also differs significantly from the rest of the country. While the majority of the population belong to the Moldovan ethnic group (or Romanian if you prefer), in Transnistria, Moldovans, Russians and Ukrainians have a similar weight, which is around 30%.

The de facto State of Transistria or Vltava Republic of Pridnestrovie has been built upon the basis of a past which differs from that of the western border of the Dniester. Such historical peculiarities are the basis of the identity construction of the Transnistrian Republic and one of the root causes of the conflict together with the Russian geopolitical interests, the fear of the "Rumanization" of Moldova in the framework of the collapse of the USSR and the unequal socio-economic development of both margins of the Dniester.

After the Supreme Soviet of Moldova proclaimed its independence in August 1991 [41] the Russophone minorities of the Transnistria region proclaimed the Republic of Transnistria on September 2 of the same year, and they began to create their own institutions with the support of the XIV Soviet Army stationed Tiraspol, the capital city. [42] The justification of this measure must be sought both in ethnic and political or ideological reasons [43] and was mainly motivated by the fear of the Russophone population to an integration of the new Moldovan State in Romania, which would have threatened their privileges, and also provoked a "Rumanization" of what they historically considered as a territory linked to Russia.

The Supreme Soviet of the soviet socialist Republic of Moldova annulled the declarations of independence of Transnistria and Gagauzia for being unconstitutional. In this last territory, the Gagauz [44] accepted a self-government status, which facilitated the understanding in December 1994. However, in Transnistria the conflict became worse as a confederation between

[41] As early as June 1990, the Soviet of the Moldovan republic had declared for the first time the independence of Moldova from the USSR. In September of the same year, Gagauzia and Transnistria proclaimed their independence regarding Moldova.

[42] V. Socor, "Russian Forces in Moldova", 1/34 *RFE/RE Research Report*, (28 August 1992), pp. 38-43.

[43] CH. King, *Post-Soviet Moldova. A Bordeland in Transition.* (Royal Institute of International Affairs, London, 1995).

[44] The Gagauz people are Turks of Christian religion concentrated in the Moldovan territory bordering the Ukrainian region of Odessa where they settled in the late eighteenth century (an area in which some 150,000 live today).

the three territories (Transnistria, Gagauzia and Moldova) was claimed, an option which was immediately rejected by the Moldovan government.

The armed conflict was inevitable due to the systematic disobedience to the requests of the Moldovan central government. The identity but not ethnic conflict which consisted in a brief war between June and July 1992 led to hundreds of deaths and thousands of refugee. The Moldovan State had to accept this situation for its obvious inferiority to the XIV Soviet Army stationed in the area of the Transnistria that supported the rebels. The opposing sides were, on the one hand, the Russophone separatist militias, with the human and logistical support of the XIV Russian Army settled in the region, as well as by volunteers arriving from all points of the former USSR, mainly Cossacks arrived from the South of Russia. [45] On the other hand, the Moldovan Army was in the process of being established and, although they enjoyed great sympathy in Romania, they lacked external support.

The secessionist militias, which were better equipped and trained, inflicted numerous defeats on a government army with scarce resources. After a period of open conflict, the Moldovan President Snegur, who felt pressured by the need of energetic supply and raw materials, which came mainly from Russia, and who was afraid that the open military confrontation could spread to Gagauzia, which was also in the process of secession, tried by all means to negotiate a ceasefire.

With the signing in July 1992 of a ceasefire between Moldova and the Russian Federation, the doors were opened for the deadlock of the conflict and the maintenance of the de facto independence of the self-proclaimed Vltava Republic of Pridnestrovie, after adopting its own Constitution in 1991.

Around the border of the Dniester, a security area was established with the aim of maintaining peace. Three battalions, a Russian one, a Moldovan one and a Transnistrial one, have been participating in it to this day. Since then, the negotiation processes (within the Conference for Security and Cooperation in Europe, after the OSCE, with Moldova, Russia and Ukraine) and the proposals to end the conflict have been as numerous as modest have been the progresses made.

Such issues as the future status of Transnistria and the sharing of powers with the government of Moldova as well as the role of the various international actors in the process, in particular the withdrawal of Russian troops from that territory [46], have ended up frustrating half a dozen of serious proposals which have been presented to date. [47]

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[45] V. Socor,"Creeping Putsch in Eastern Moldova". *RFE/RL Research Report*, (17 January 1992), pp. 8-13.

[46] There are currently about 1,500 Russian soldiers, a lot less than the 10,000 who were there in 1992. However, this are enough to balance the military power of with the state of Moldova.

[47] A detailed analysis can be seen in J.A. López Jiménez, "El despliegue geopolítico de la Federación Rusa: El *near abroad* y los conflictos congelados", in J.A. López Jiménez, J. Morales Hernández, *La política exterior de*

Transnistria is an area of strategic interest for Russia and although it has not officially recognized it, given the threat of Moldova to leave the CIS if such recognition occurred, Transnistria has continued to maintain its status as a de facto State, thanks to the political, military and economic support from Russian (the latter in the form of subsidies and humanitarian aid). Undoubtedly, this support responds to much broader interests than the emotional ties and the will to protect Russians from outside Russia, which have so often been used by the Kremlin to justify its influence on the national sovereignty of some ex-Soviet countries.

Once de facto independence was achieved, the leading group hastened to set in motion a process of identity construction sustained by the control of the media and the educational system, thus forging a trans-national identity closely related with the notion of the "Great Russia". Certainly, it can be affirmed that this process of "transnistrization" is the best guarantee to perpetuate the de facto independence of this territory. For Russian foreign policy, Transnistria is an important tool and due to its geographical location, it also has an undeniable strategic value: the border of the Dniester delimits areas of influence and the presence of the Russian military in the area is undoubtedly extremely important.

### (3) The conflicts of Abkhazia and South Ossetia in Georgia

The proclamation of independence by Georgia occurred for the first time in May 1918, after making sure that they would be protected from the German occupation forces. The Republic of Georgia was recognized by a total of 22 States, including France and Great Britain, and was represented at the Paris Peace Conference.

In 1921, the Red Army, led by Stalin and Ordzhonikidze who are both from Georgia, established the Soviet regime in Georgia, which would be integrated into the Soviet Republic of Transcaucasia together with Armenia and Azerbaijan. Later on, in 1936, Georgia would be recognized as a Federal Republic within the USSR. Gorbachev came to power and the first feelings of liberalization facilitated the resurgence of the nationalist movements not only in Georgia and other republics of the USSR but also within some of them. This was the case of Georgia. It is worth mentioning that, in addition to the Georgian nationalist movement which demanded the secession from the USSR, and which had shown great dynamism, there were also secessionist movements in some regions of the country such as Abkhazia and South Ossetia that shortly after would provoke the conflicts that we are going to refer to.

#### (a) *South Ossetia*

*Rusia. Los conflictos congelados y la construcción de un orden internacional multipolar*, (Dykinson, Madrid, 2017), p. 133.

Ossetia has been traditionally linked to Russia, not only in the 19th century, when together with Armenia and Georgia was integrated into the Russian Empire, but also from the Sovietization of the Caucasus, a process in which it had an active participation. In 1922 the autonomous region of South Ossetia was created within the framework of the Georgian Soviet Socialist Republic, and in 1924 the autonomous region of North Ossetia (8,000 km2 and 630,000 inhabitants) integrated into the Russian Soviet Socialist Republic. At the end of the eighties, the region of South Ossetia with some 4,000 km2 and about 100,000 inhabitants, began a process of claiming greater autonomy from the Georgian central power. Georgia's central government refusal to grant greater autonomy led to a progressive radicalization that led to the proclamation of the Republic of South Ossetia independent from Georgia in September 1990.

The Georgian Supreme Soviet invalidated this decision and dissolved the autonomous region, which provoked an authentic civil war between Ossetians and Georgians. The intervention of the Soviet troops, which were clearly in favour of the Ossetians, in the spring of 1991, did not prevent the continuation of the fighting, which caused hundreds of deaths and tens of thousands of refugees.

The signing of an agreement between the Russian President Yeltsin and the Georgian President Gamsakhurdia for the withdrawal of the Soviet troops, as well as a ceasefire and the return of the refugees did not prevent that on December 22, 1991, once consummated the Soviet disintegration, the Ossetian Parliament would proclaim the independence that would confirm the subsequent referendum of January 19, 1992 with 90% of the positive votes (although the important Georgian minority boycotted the vote), and the adoption of a Constitution.

The declaration of a truce between the parties in June 1992 with the participation of Russia, led to an agreement involving the cessation of hostilities and the deployment of a tripartite peace force composed of Russians, Ossetians and Georgians who occupied a line of separation between the combatant parties. The situation in the self-proclaimed Independent Republic of South Ossetia, which lacked international recognition, remained frozen, even though it was similar to a de facto independence until August 2008, when the Georgian President Saakhashvili sent the Army to "recover" the South Ossetian rebel territory.

Russia came to the defence of South Ossetia and sent its army to repel the invasion entering the Georgian territory and arriving until Tbilisi, the capital city, in what has been referred to as "the five-day war". The truce was reached under the auspices of the EU, which signed an agreement between the French President Sarkozy —who held the six month presidency of the EU— and the Russian President Medveded. The talks began in Geneva in October 2008 and counted on the participation of Russia, Georgia, South Ossetia, Abkhazia, the United States of America, the EU, the OSCE and the UN. However, up to date there has not been any further progress than the prevention of conflicts thanks to the deployment of an EU

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Observation Mission. Russia transformed the former "peacekeeping missions" which had existed before the war in August 2008, into a full-fledged military presence. The military presence, in addition to reassuring Ossetians and Abkhazians, ensured Moscow's geostrategic interests in the face of an eventual, but distant, enlargement of the NATO in the Caucasus.

(b) *Abkhazia*

The region of Abkhazia, with an extension of 8,700 km2, is located in the Northwest of Georgia and shares a border with Russia in the North, and the Black Sea in the South and West. The total population was, according to the last Soviet census of 1989, 525,000 inhabitants, of which 47% were Georgian and only 17% were Abkhazians (the rest were Armenians and Russians). The cause of this demographic imbalance, which determined that the Abkhazians were traditionally minorities in their own territory, lies in the two waves of mass deportation that they suffered towards the Ottoman Empire in 1866 and 1878.

During the 19th century, Abkhazia was a Russian protectorate that soon became part of the empire. Three years after the independence of Georgia in 1918, and the subsequent Sovietization of the region, the Soviet Republic of Abkhazia was created. In 1930, it became an autonomous Republic within Georgia. The centralization process carried out by the Georgian Government provoked misgivings in the Abkhaz Republic, which constituted a permanent factor of radicalization and instability. At the same time, the Soviet central power subliminally supported the Abkhaz claims as a way of maintaining and controlling the rebellious Georgia within the USSR.

Following Georgia's declaration of sovereignty from the USSR in March 1990, Abkhazia did the same from Georgia in August 1990. This caused great tensions in Tbilisi which considered such a decision null and void. The situation would lead to an armed intervention by the Georgian army as two years later and shortly after Georgia's accession to independence, Abkhazia insisted on its secessionist demands which could be summarised in returning to the Constitution of 1925, which meant that Abkhazia would be a sovereign Republic, and in proposing to Tbilisi the signing of a treaty of union.

The entry of Georgian troops in Abkhazia, in August 1992, triggered the division of this Republic into two different parts: one controlled by the Georgians and based in Sukhumi; and another one with an Abkhazian government in Gudauta. However, the successive Abkhazian offensives, favoured by the active neutrality of the Russian army and by the poor preparation of the central army [48], managed to reduce the Georgian positions and even take the Abkhazian

[48] Another factor that explains the military success of the Abkhazian rebel troops in front of the government troops is the participation of numerous combatants from Russia, Transnistria or Armenia and especially the Confederation of the Peoples of the Caucasus, created in 1991 by representatives of fourteen Caucasian peoples in order to create a Caucasian state that would span from the Black Sea to the Caspian Sea. The Abkhaz government

capital city in October 1993. This fact caused the exodus of more than 300,000 people. [49] This was described as an authentic ethnic cleansing by the Security Council[50], which had previously decided to establish the United Nations Observer Mission in Georgia (UNOMIG) in its Resolution 858 (1993) of 24 August.

With the aim of curbing the secessionist wave that was advancing on several fronts, Georgia opted to join the CIS, a possibility that it had initially rejected. This incorporation was due to an attempt to rein the Russian support for the Abkhaz secessionists back. Indeed, we must consider that the Russian-Georgian relations were poisoned, not only by the massive enlistment in the Abkhazian ranks of citizens from the Russian Federation, mainly Caucasians, but also by the "active neutrality" of the Russian Army in favour of the Abkhaz rebels. The integration of Georgia into the CIS and the signing of a treaty of friendship and cooperation with Russia were an attempt to change the situation and to open a new period of greater understanding with the Russians.

This fact motivated the sending of Russian interposition troops under the mandate of the CIS in mid-1994. At the end of that year, the Supreme Abkhazian Soviet adopted its own Constitution declaring Abkhazia a democratic and sovereign State. This fact, despite not being recognized by the international community, added more tension to the conflict.

### (c) *The evolution of both territories after the war in August 2008*

The breach of the six-point peace plan by Russia, which involved the withdrawal of its armed forces from the territory of South Ossetia, was criticized by both the United Nations and the EU. The criticisms, also made by France and Germany, extended to the recognition of the independence of both territories (South Ossetia and Abkhazia) by Russia, which was clearly incompatible with Resolution 1808 (2008) of 15 April 2008 that reasserted the territorial integrity of Georgia, as well as the mandate of its Mission –UNOMIG.

From that moment, Russia, which alleged the precedent of Kosovo, initiated a series of actions with the aim of consolidating the independence of both territories: firstly, an aid plan covering all areas, military, commercial, energy and infrastructures; secondly, the granting of

recognized foreign combatants the right to access "Abkhaz citizenship" after six months of service in the rebel forces. Cfr. R. Yakemtchouk, "Les conflits de territoire et de frontière dans les États de l'ex-URSS", *A.F.D.I.*, (1993), pp. 427-428.

[49] They constituted three quarters of the total population. Knowing their minority position, the Abkhaz separatists provoked the departure of the non-Abkhaz population with the aim of changing the ethnic composition of the autonomous Republic, which is why the Abkhaz secessionists have systematically rejected the commitment to adopt concrete schedules for the repatriation of refugees and people displaced to their places of origin. V.Y. Ghebali, *L'OSCE dans l'Europe post-communiste, 1990-1996. Vers une identité paneuropéenne de sécurité*. (Bruylant, Bruxelles, 1996), p. 282.

[50] SC Res 876 (1993) of October, 19.

passports and Russian citizenship to the applicants at the same time that it promoted the displacement of the Georgian population from the Ossetian and Abkhaz localities. These practices were already initiated in the military conflict of August 2008 [51] and were reported in several reports by the OSCE and by various non-governmental organizations as they presented the characteristics of an ethnic cleansing.

The Geneva talks, within the framework of the OSCE, have not had positive results for the interests of Georgia. On the contrary, they have contributed to the consolidation of the interests of the secessionist entities and of Russia itself[52], which was weaving a network of treaties and agreements with both separatist entities but without culminating, at least for the moment, the integration of both territories in the Russian Federation.

On the other hand, the action of other international organizations involved in the conflict, such as the United Nations and the EU, did not go beyond symbolic demonstrations that further reflect, if possible, its impotence. Regarding the UN, it should be mentioned that the different attempts of the Security Council to adopt a resolution condemning the Russian intervention (which recognized the Georgian territorial integrity in the face of the recognition made by Russia in relation to South Ossetia and Abkhazia) have systematically come up against the Russian veto as it would approve a first renewal of the mandate of UNOMIG but later veto a second renewal in June 2009.

In connection with the EU, besides the deployment of the Observation Mission in Georgia in 2008, it has reasserted its support for the sovereignty and territorial integrity of Georgia within internationally recognized borders. The recent appointments of the new EU special representative for the South Caucasus and the Crisis in Georgia, as well as the new Head of the EU Observer Mission, are clear signs of the EU's commitment to resolving the conflict, in the framework of the ceasefire agreement of August 12, 2008 and the Geneva talks. The coming into effect of the EU-Georgia Association Agreement on July 1, 2016, which includes a free trade area of broad and deep scope, establishes an Association Council to supervise its application. At its last meeting in February 2018, the Council expressed concern about the continued application of the so-called "integration treaties" signed by Russia and the independent entities of Abkhazia and South Ossetia, as well as for the opening of customs in Sukhumi, capital city of Abkhazia and Akhalgori, in the east of South Ossetia, and for the holding of a referendum in South Ossetia, which resulted into 80% of favourable votes to

[51] J. Wheatley, "Managing ethnic diversity in Georgia: one step forward, two steps back", 28 *Central Asian Survey*, (2009), pp. 119-134.

[52] A. Makarychev, "Russia, NATO, and the Color Revolutions: Discursive Traps, 47 *Russian Politics and Law*, (2009), pp. 40-51.

proceed with the change of name of the separatist entity to that of the Republic of South Ossetia —the State of Alania.

This being the case, and before the verifiable manifestation of impotence that the EU seems to adopt in these territories, everything seems to indicate that there are few or rather null possibilities of changing the current status quo towards a scenario which is more favourable to the interests of Georgia, given the progressive consolidation of both secessionist territories as separate de facto States.

### (4) The Nagorno-Karabakh conflict in Azerbaijan

Nagorno-Karabakh comprises of 4,400 Km2 and 160,000 inhabitants located in the State of Azerbaijan. It was conquered from Persia by Tsarist Russia, which declared it a Russian province in 1805, as well as other territories constituted by the rest of Azerbaijan and Armenia. From the beginning, the establishment of a statute for the enclave of the Nagorno-Karabakh posed serious difficulties.[53] When the Turks left these territories, Azerbaijan claimed them, even those that were mostly populated by Armenians, as in the case of the Nagorno-Karabakh. Later on, the British, who were present in the Caucasus, encountered the same problem and before leaving these territories, in 1919 they decided to place the enclave under the authority of an Azeri governor, in front of the protests of the Armenians who were the majority Armenians in the enclave.

The new Soviet power, established throughout the Caucasus, decided in 1920 to militarily occupy the Nagorno-Karabakh until deciding its future, given the high instability that reigned in this territory. Later on, Azerbaijan renounced the disputed provinces, yielding the Nagorno-Karabakh and the regions of Nakhichevan and Zangezur to the Soviet Armenia. [54] With the support of Turkey, the Azeris responded the decision of their leaders with great demonstrations. This fact caused that the Soviet regime definitively placed the Nagorno-Karabakh and Nakhchivan under the authority of Azerbaijan [55], leaving the Zangezur corridor under Armenian control. In 1923, Azerbaijan granted the status of autonomous region to Nagorno-Karabakh, and in 1924 it granted the status of autonomous republic to Nakhchivan, which was

[53] The Upper Karabakh constitutes a "mythical territory" in which both the Armenian and Azeri people identify the history of their respective origins. This determines that both peoples claim historical rights over the same "sacralized land" - *hogh* in Armenian, *toprag* in Azeri – which is written and declined with a possessive in both languages. See A.Ter Minassian, "L'Arménie et le conflit du Haut-Karabagh", in M. R. Djalili (Dir.), *Le Caucase post-soviétique: la transition dans le conflit*. (Bruylant-LGDJ, Bruxelles-Paris, 1995), p. 67.

[54] Nakhichevan is currently an autonomous Republic of Azerbaijan. It is located in the territory of Armenia, it has an area of 5,500 km2 and a population of some 300,000 inhabitants. Nakhichevan is separated from the rest of Azerbaijan by the Armenian corridor of Zangezur.

[55] The position adopted by Moscow in favour of Azerbaijan was due to its desire to maintain good relations with Turkey, traditionally allied with the Azeris, attracting, in addition, the sympathies of other Muslim peoples integrated into the Soviet Union, similarly to what the British had done years before.

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populated at that time by 40% of Armenians. From 1922 to 1936, Armenia and Azerbaijan, together with Georgia, made up the Federation of Transcaucasia and later on they became federated republics of the USSR.

This conflict is prior to the constitution of the Soviet state and is another example, undoubtedly the most tragic, of the always difficult relations between Armenians and Azeris. However, the animosity between the two peoples remained latent until the end of the Soviet era, as in other cases. Indeed, at the beginning of 1988, massive demonstrations took place in Yerevan, the Armenian capital city, and in Stepanakert, the capital city of the enclave, demanding the integration of Nagorno-Karabakh in Armenia. The Parliament of the Nagorno-Karabakh region requested in February of the same year its "reunification" with Armenia, which was firmly rejected by the Supreme Soviet of Moscow, fearing that the modification of the Armenian-Azeri border constituted a dangerous precedent for other conflicts that began to emerge in the immense Soviet territory. However, this refusal did not ease the situation, because in June of the same year, 1988, the Armenian Parliament voted for a declaration demanding the integration of the Nagorno-Karabakh to Armenia, which would be rejected by the Supreme Soviet of Azerbaijan and once again by the Presidium of the Supreme Soviet of the USSR, claiming that in accordance with article 78 of the Soviet Constitution, the territory of a federated Republic could not be modified without its consent.

After terminating the direct administration of the enclave, the Supreme Soviet of the USSR decided to return the Nagorno-Karabakh to Azerbaijan. However, given the worsening of the situation, it decided to declare the state of emergency in the enclave. After the failed coup d'état in Moscow and the proclamations of independence of Armenia and Azerbaijan in 1991, the Karabakh State became an independent republic in September 1991. The result of the referendum was 99% in favour of the secessionist option. The proclamation of independence, which was carried out at the beginning of 1992, was rejected by the Azerbaijani Parliament and at the same time it cancelled its statute of autonomy.

From this moment on, the situation evolved towards a real armed conflict, despite the intervention of the United Nations and the OSCE, as well as the mediation attempts of Russia, Kazakhstan, Turkey and Iran, and of other States and international organizations. The Armenians of the Nagorno-Karabakh accumulated military victories in front of the Azerbaijani government troops, thanks to the support of Armenia, the greater motivation and the climate of political instability that reigned in Azerbaijan.

Despite Russia's attempts to mediate the conflict, military operations continued and the military successes of the Armenians of the location allowed to open separate corridors, extending the conflict beyond the enclave. In this way, at the end of 1993, the Armenian forces controlled not only the whole of the Karabakh, but 20% of the total Azerbaijan, that is to say

more than ten thousand km2. The number of refugees continued to grow massively, a fact that was a matter of concern of the Security Council of the United Nations. [56] Between the end of 1993 and the beginning of 1994 an Azeri counter-offensive, strongly supported by Afghan mercenaries, managed to stop the advance of the rebel forces. From that moment, there were new attempts to reach a ceasefire agreement, which was finally proclaimed in May of the same year.

The conflict, which had its most virulent development between 1991 and 1994, entered a new phase favoured by the relative success of the ceasefire and the significance of the different negotiating channels and initiatives. These, however, did not lead to a definitive solution to the present, given the polarized positions of the parties. The Azeri demand respect for the integrity of the territory, which stands against the right of self-determination demanded by the Armenians in the Nagorno-Karabakh, who have the support of Armenia.

Initiatives arising outside of the "Minsk Group" of the OSCE, which was created in 1992 and restructured in 1995 with the creation of a shared co-presidency[57], were carried out over the past twenty-five years by a series of Western States, such as the United States, Germany, the United Kingdom, France and Russia, with particular interests in the exploitation of Azerbaijani hydrocarbons, have not made significant progress or changes in the positions of the parties.[58] This situation of impasse was allowed to "freeze" the conflict and to evolve towards the consideration of Nagorno-Karabakh as an independent de facto self-denominated Nagorno-Karabakh Republic (or more recently Republic of Artsakh) which is very close to the Republic of Armenia and even employs its currency: the dram.

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[56] The Security Council repeatedly expressed its concern over the escalation of the conflict in a series of Resolutions adopted in 1993: Resolution 822 (1993), of April 29; Resolution 853 (1993), of July 29; Resolution 874 (1993), of October 14 and Resolution 884 (1993), of November 12. In these resolutions, which were drafted in similar terms, the Council expresses its concern over the continuation of the conflict and condemns, as well, the taking of territories by the Armenian militias, reaffirming the sovereignty and integrity of Azerbaijan and the rest of States in the region, as well as the inviolability of borders and the inadmissibility of the use of force for the acquisition of territories. Since 1994, the Security Council has merely welcomed the agreement reached by both sides for the cessation of hostilities and the theoretical progress of the negotiations within the framework of the Minsk Group.

[57] It was initially established between Russia and Sweden and it was amended in 1997 by the co-presidency between the United States, Russia and France.

[58] Among the numerous proposals and pacification plans that have not prospered, the French initiative to recover an old American proposal (initially developed in 1992 by Paul Goble, former senior official of the US State Department) should be highlighted. This initiative was based on the exchange of territories but adapted to the present moment. This would be based on the recognition by Azerbaijan of the independence of the Nagorno-Karabakh and the transfer to Armenia of the Lachyn corridor that links it to the secessionist enclave, in exchange for the Armenian district of Meghri, located on the border with Iran, which was transferred to Azerbaijan, thus uniting its territory with Nakhichevan, from which it is separated by the same district. See J. Gueyras, "Le conflit du Caucase sud dans l'impasse. Impossible troc entre Arménie et Azerbaïdjan". *Le monde diplomatique*, (March 2001), p. 12.

Currently, the negotiating process within the framework of the aforementioned OSCE Minsk Group, which includes the participation of both contenders, is paralyzed because the two parties do not accept changing their positions. Azerbaijan insists that Armenian troops must leave the region and the displaced must return to their places of origin. Armenia resists admitting that the Karabakh is in legal terms a part of Azerbaijan and it argues that the declaration of independence of the secessionist territory was practically coeval with that of Azerbaijan. Recently, in April 2016, there were new armed clashes in the region which involved the death of two hundred Armenian and Azeri soldiers, which implied the recovery by Azerbaijan of a small strategic enclave. Later on, the conflict has stagnated again but thanks to oil and gas, Azerbaijan has been gaining economic weight and its military budget is already higher than the entire budget of Armenia.

On the other hand, and due to Nagorno-Karabakh, Armenia has been marginalized from the new hydrocarbon transport routes such as the BTC pipeline (Baku-Tbilisi-Ceiyhan) through Georgia; also, its continued marginalization in the new communication routes between Turkey and Baku, via Georgia have been isolating it. Azerbaijan has the unconditional support of Turkey and Armenia enjoys a Russian position, which has been traditionally closer to its thesis than to that of Azerbaijan. The limited role played by the EU in the conflict [59] is also noteworthy.

In addition, Armenia is part of the Collective Security Treaty, sponsored by Russia, which guarantees Russian military aid in case one of its members is attacked. However, Moscow has warned that the territory of Nagorno-Karabakh would not enter this security guarantee because it is not internationally recognized as Armenian territory, which is interpreted as an attempt by Russia to keep certain equidistance between Armenia and Azerbaijan (which does not prevent Russia from selling heavy weapons to both of them) despite his traditional proximity to Armenia.

### (C) IN CONCLUSION: THE DE FACTO STATES IN THE POST-SOVIET SPACE, A LOST LINK WITH WORKS IN FAVOUR OF THE INTERESTS OF RUSSIA

[59] Apart from some specific actions such as the signing in 1999 of the Cooperation and Association Agreements with Armenia and Azerbaijan or the creation of the Special Representative for the South Caucasus in 2003. From that year, the EU would extend its cooperation policy with the region in the framework of the European Neighbourhood Policy and the Eastern Partnership, starting in 2009. On the other hand, it should be noted that the Action Plans signed by the EU with both republics in 2006 include a proposal for a peaceful solution to the conflict in the Nagorno-Karabakh region. To read its content, see J.A. López Jiménez, "El conflicto de Nagorno-Karabaj: disputa territorial entre Armenia y Azerbaiyán", in J.A. López Jiménez, J. Morales Hernández, *La política exterior de Rusia. Los conflictos congelados y la construcción de un orden internacional multipolar*, (Dykinson, Madrid, 2017), pp. 186-187.

If we consider defining characteristics of statehood (population, territory, effective government and capacity to establish relations with other States) and accept that the political existence of the State is independent of its recognition by other States, there can be little objection to the characterization as States of the 4 post-Soviet secessionist territories (Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh). However, the Donbass would be in an impasse towards its progressive characterization as a de facto State. In fact, all these territories function as political systems of a state nature as they are independent and have full sovereignty over their territory. Various conflicts have occurred in the past and can be considered "frozen" in the present. They lack the legitimization, support and recognition of the international community, which places them in an indefinite and a difficult to classify situation. This situation presents the rupture between internal and external sovereignty and also between statehood, understood empirically, and its legal constitution.

The clash between national sovereignty and the right of self-determination, and the refusal of the international community to recognize new territorial entities have placed these de facto States in a legal limbo, far from their recognition as de jure States. The precedent of Kosovo has been invoked by the secessionist movements of these territories with the support of Russia, sheltering in situations that are not based on pure colonial emancipation. However, the international community and its most representative international organizations have repeatedly recognized the territorial integrity of the States in which these territories are located, thus avoiding a generalization of the recognition of the right to self-determination which is recognised in processes of decolonization.

The recentralization of power in recent decades and the possibility of using more economic resources for its policy have allowed Russia to recover part of its lost vigour. Together with the support of a fervent nationalism which is widespread among the Russian society it has also managed to maintain vigilance in those problematic border areas of the Caucasus and Eastern Europe. In this way, the Russian presence in the nearby territories abroad and its participation in frozen conflicts has become part of the objectives of Russia's foreign policy. The justification for this Russian regional presence is based both on the need to fill the gap created by the disappearance of the USSR and on the intention to preserve the interests of the Russian or Russophone population in these territories. These arguments will be part of the Russian interventionist rhetoric until the present.

With the aim of recovering its capacity for action in its immediate area of influence, and at the same time sabotaging any attempt to approach the West, Russia has not hesitated to use both energy and open conflict as means of pressure. This has been confirmed in its recognition of South Ossetia and Abkhazia as de facto States, something similar to what it has done with the case of Transnistria and also in a more forceful way, with the annexation of Crimea. The

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indisputable reinforcement of Russia as a regional power, which is projected in its strong support for the so-called de facto states, is undoubtedly part of a much more ambitious aspiration to recover definitively its status as a great power which has capacity to have global influence.

The feeling that Russia has been relegated from the international scene, widely deployed from the upper echelons of Russian power, has been permeating the majority of the Russian population and with it, the perception of suspicion, resentment or rejection towards the West. This has allowed the Kremlin to intensify a victimise discourse towards its interior and to draw at the same time a series of red lines in what it considers its area of influence, justifying its interventionist rhetoric and foreign policy towards the abroad territories as well as its participation in all the frozen conflicts, using the question of Kosovo as a backdrop.

Undoubtedly, the post-Soviet conflicts are framed within a scenario of geopolitical conflict between Russia and the West, which necessarily implies that the progressive increase in tensions between these actors in recent years has been reflected in the secessionist territories. The war in South Ossetia, and Russia's subsequent recognition of this territory and Abkhazia as de facto States, the escalation of tensions in Nagorno-Karabakh and the recent events in Ukraine reflect a very tense atmosphere that complicates finding solutions for the open disputes. These solutions will undoubtedly come by means of the negotiation between the international actors involved.

In this context, the local realities that characterize each of the post-Soviet conflicts and that are key in any plausible attempt to solve them, have been increasingly influenced by the great game of international geopolitics. At the same time, in the secessionist territories, the elites committed to maintaining the status quo have been consolidated, which implies the deadlock and progressive freezing of conflicts with the unconditional support of Russia.

As we have seen, Putin's Russia has progressively achieved its goal of becoming a world power. Due to its wealth of energy resources and its military power, Russian can afford maintaining policies that are not dependent on external pressures. Undoubtedly, the improvement of Russia's position in recent times on the international scene is a verifiable fact which is partially due to the high prices of hydrocarbons. These provided Russia with enormous profits and have been also used as powerful instruments in its foreign policy.

To conclude, we can state that the so-called post-Soviet de facto States, which have created the "Community of unrecognized States", provide important services to the interests of Russia. At the internal level, they allow him to obtain a remarkable political yield between the wide social sectors that generally identified themselves with the Russian nationalism. In connection with the foreign policy, these conflicts allow Russia to compensate and try to limit the pro-

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Western tendencies of many of the territories that had traditionally been part of its area of influence, using the instruments it considers appropriate in each case, including the use of force.

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*Secession of States and Self-determination in contemporary International Law*

# The European Union and the Principle of Self-determination of peoples: Territories with Special Status in the European Union and Pending Cases of Decolonization

José Manuel SOBRINO HEREDIA*

*Abstract*: The European Union gives special status to a number of countries and territories that maintain particular political and administrative ties with several of its Member States. Despite the diversity of these entities, it is possible to identify two main trends in them. On the one hand, the ones that want to pursuit political and administrative assimilation with their metropolises, and, on the other hand, the others that would like a greater autonomy or even independence from the states on which they depend. The present paper will examine these trends and processes. The First Part will focus on the current legal basis for outermost regions and overseas countries and territories in the EU law and in the Member States' domestic law. The Second Part will examine how the special situations of these entities have led, in some cases, to their assimilation with the state on which they depend, in others, to a greater autonomy, and, in still others, to independence.

*Keywords*: European Union - Self-Determination of Peoples - Territories with Special Status – Decolonization - Referendum.

## INTRODUCTION

Since it was founded, the European Union has given special treatment to a number of countries and territories that, as a result of historical, political or geographic circumstances, maintained and, in some cases, continue to maintain particular political and administrative ties with several of its Member States. In the intervening years, the number of such territories has varied considerably, largely due to the process of decolonization that allowed many of them to achieve independence and change their relationships with the EU.[1] Nevertheless, there remains a diverse group of territories scattered around the world with a special status within the Union. Some are part of it; others are not. Consequently, the European legal system applies to them to varying degrees.

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1 As these overseas countries and territories achieved independence, they concluded or acceded to partnership and development cooperation agreements with the EU, which, since the first Yaoundé Convention, signed in 1963, up to the current Cotonou Partnership Agreement, signed in 2000, have afforded them special treatment.

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Each of these territories, which give the EU its planetary dimension, has its own special features. They differ in terms of their economic situation, populations and political-administrative organization. Many share a remoteness from the European continent, insularity, small size, the consequences of climate change, demographic growth or emigration.[2] Their political-administrative statuses are diverse, and they are subject to different jurisdictions, which vary depending on their links to the states on which they depend. They are also given different names: territorial collectivities, autonomous communities, departments, countries, autonomous regions, territories, etc. Moreover, many of them are home to autonomist or separatist movements that advocate for greater autonomy or, directly, independence based on the principle of self-determination of peoples.

Despite the diversity of these territories, and the unique histories and geographies that have given rise to their specific characteristics and socio-economic and political evolution, it is possible to identify two main trends in them. On the one hand, the ones that want to pursuit political and administrative assimilation with their metropolises, and, on the other hand, the others that would like a greater autonomy or even independence from the states on which they depend. This dichotomy has been visible in the various plebiscites and referenda held in many of these territories to date, and its consequences have been felt not only in the affected Member States themselves, but also within the EU as a whole.

No provision of the Treaties related to these categories of territories makes any reference to the principle of self-determination of peoples, but rather to the commitment to promote their economic and social advancement, along the lines of Article 73 of the UN Charter. For the EU, the statuses of these territories are an internal matter for the Member States. In accordance with Article 4.2 TEU, it has thus respected, without interfering in, the ways in which these Member States, in keeping with their political and constitutional structures, have organized their relations with their overseas territories. Where applicable, it has also facilitated these processes to grant greater autonomy or independence in accordance with international law. In other words, the EU has only intervened to regulate the legal, political and economic consequences of these processes for the European legal system.[3] Hence, the granting by the Union to these territories of a special or differentiated status is in no case, from the perspective of EU law, the prior step to their separation from the states on which they depend. Rather, it is the recognition of their special political-administrative status within those states and, therefore, their unique inclusion within the territorial scope of application of that law.

[2] Most have a GDP 30 to 50% lower than that of their European metropolises, although they are relatively prosperous islands compared to their closest neighbours.

[3] J. Martín y Pérez de Nanclares: "Reflexiones jurídicas a propósito de una eventual declaración unilateral de independencia de Cataluña: un escenario político jurídicamente inviable", Real Instituto Elcano, 24 September 2015, at 22-23.

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At present, territories with special status in the EU can basically be grouped into two categories: Outermost Regions (ORs) and Overseas Countries and Territories (OCTs). The former, with a few exceptions, are subject to European law (Articles 349 and 355 TFEU). In contrast, the latter are subject not to EU law, but to a particular association regime (Articles 198 to 204 TFEU). In the former, a trend can be found towards assimilation with the Member State on which they depend, whilst the latter are home to movements of varying degrees of intensity in favour of greater autonomy or, even, independence. Notwithstanding these differences, supporters of both integration and rupture with the metropolis can be found in both groups.

The present paper will examine these trends and processes affecting the territories with special status in the EU. The first part will explore the current legal basis for ORs and OCTs in EU law and in the Member States' domestic law (A). The second part will look at how this situation has led, in some case, to the assimilation of these territories with the state on which they depend, in others, to greater autonomy, and, in still others, to independence (B).

## (A) THE LEGAL BASIS FOR TERRITORIES WITH SPECIAL STATUS IN EU LAW AND MEMBER STATES' DOMESTIC LAW

### (1) Territories with Special Status in EU Law

Regardless of what the overseas territories are called in the Member States' domestic law, EU law, as noted, distinguishes between outermost regions (ORs) and overseas countries and territories (OCTs). Additionally, several Member States include entities with particular or special legal statuses, which, in turn, has consequences for the EU. This situation is complicated by the fact that, over the course of their history, the legal status of these territories can change, shifting from one category to another.

#### (a) *Outermost Regions*

The EU has nine ORs. They consist of islands, archipelagos, and a continental territory and are located in the Caribbean basin, the West Atlantic and the Indian Ocean or in territory close to the Amazon rainforest. They have a population of around 5 million people and account for a large part of the EU's maritime territory (some 25 million km²). They differ from each other, and each has its own specific needs. They are mentioned in Article 349 TFEU and include territorial collectivities, departments, regions and autonomous communities, namely: Guadeloupe and Réunion (2 French regions); Mayotte and Saint Martin (2 French overseas departments); French Guiana and Martinique (2 French territorial collectivities); Madeira and the Azores (2 Portuguese autonomous regions); and the Canary Islands (1 Spanish autonomous community).

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These regions, despite being separated by thousands of kilometres from the European continent, are an integral part of the Union. They are subject to EU law and to all the rights and duties associated with EU membership, except where otherwise provided by specific derogations or measures.[4] The ORs' special status has been recognized in the EU's treaties since 1999. Since 2009, it has been recognized in the aforementioned Article 349 TFEU,[5] which warns that these regions have special characteristics that differ from the rest of the EU and constrain their economic and social development, placing special emphasis on factors such as their remoteness, insularity, small size, difficulty topography and climate, and economic dependence on a few products. This enables the adoption, within the European legal framework, of specific measures adapted to these special characteristics.[6] This provision applies in combination with Article 355.1 TFEU. In addition to referencing the specific nature of the measures to be applied to these regions, it helps define the territorial scope of EU law. As Ziller has noted, the EU legal regime applicable to the ORs is that of integration-adaptation, meaning that EU law is normally applicable to these territories, unless otherwise expressly provided.[7]

Another provision referring to the special status of the ORs is Article 107.3 (a) TFEU, which assimilates it to that of areas with an abnormally low standard of living or serious underemployment and, thus, considers aid to promote their economic development compatible with the internal market. Meanwhile, the EU must consider the ORs' interests in matters falling within its sphere of competence, such as trade, fisheries, agriculture, etc., that are particularly sensitive sectors for them.

These regions are home to processes of assimilation, autonomy and independence with regard to the states on which they depend. In the European archipelagos in the Western Atlantic (the Canary Islands, the Azores and Madeira), there is predominantly a movement

4 The applicability to the ORs of specific and/or derogating legislative and non-legislative measures with regard to a variety of European policies, considering their specific economic and social situations, determines the components of their special status within the EU. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank. "A stronger and renewed strategic partnership with the EU's outermost regions", COM (2017) 623 Final, 25 October 2017.

5 On the legal and political framework of the ORs in the EU, see, amongst others: P. Guillaumin, "La dimension ultrapériphérique de l'Union européenne", in J.-D. Hache (ed.), *Quel statut pour les îles d'Europe?* (L'Harmattan, Paris, 2000) 103-127; I. Omarjee, "Les régions ultrapériphériques", in *Répertoire de droit communautaire* Vol. IV (Dalloz, 2005 edition) 1-16; J.M. Sobrino Heredia and M. Sobrido Prieto, "Las regiones ultraperiféricas", 5 *Revista Hacienda Canaria* (Consejería de Economía y Hacienda, Gobierno de Canarias, October 2003) 5-36.

6 The judgment of the Court of Justice of the EU of 15 December 2014, C132/14, in European Parliament and European Commission v Council of the European Union, clarified the scope of Article 349 TFEU.

7 J. Ziller, "Les États européens et les territoires ultra-marins placés sous leur souveraineté", 35 *Nouveaux Cahiers du Conseil constitutionnel* (April 2012) at 1.

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towards assimilation. In contrast, all three trends co-exist in the French regions, with the predominance of any one depending on the internal situation of the region in question.

### (b) *Overseas Countries and Territories*

The EU also maintains special relations with other territories that, although scattered across the world, are linked to four of its Member States by special ties.[8] We are referring to the overseas countries and territories (OCTs) to which the Union grants the status of associated territories, as provided for in Part IV TFEU (Articles 198-204). They are not independent states, because they still have special relations with Denmark, France, the Netherlands or the United Kingdom (Article 198 TFEU). Neither are they part of the EU or the single market, nor does EU law automatically apply to them. Nevertheless, the Union seeks to promote their economic and social development and to establish close economic relations with them. Whilst EU law does not apply to the OCTs, the principles relating to individuals (in particular, EU citizenship and human rights) do, albeit only if these individuals have the full nationality of an EU country,[9] in particular, the right to participate in the elections to the European Parliament.[10] Additionally, they receive resources from the 11th European Development Fund (EDF) for 2014-2020 and benefit from the aid of the European Investment Bank (EIB). The TFEU and its secondary law do not automatically apply to the OCTs, except for some provisions that explicitly state otherwise. Additionally, the degree of self-government and individual powers of the various OCTs depends on their special relationship with the Member State to which they are linked.

Annex II TFEU lists the 21 OCTs to which the provisions of Part IV TFEU apply. They are as follows: Greenland; New Caledonia and Dependencies; French Polynesia; French Southern and Antarctic Territories; Wallis and Fortuna Islands; Saint Pierre and Miquelon; Saint Barthélemy; Aruba; West Indies (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten); Anguilla; Cayman Islands; Falkland Islands; South Georgia and the South Sandwich Islands;

[8] European Commission, "Green paper - Future relations between the EU and the overseas countries and territories", *COM (2008) 383 final*, Brussels, 23 May 2008.

[9] Under Article 17 of the Treaty establishing the European Community, every person holding the nationality of a Member State shall be a citizen of the Union. In fact, all nationals of Greenland and of the French and Dutch overseas countries and territories (OCTs) also automatically hold the nationality of the corresponding Member State, making them EU citizens. Since 21 May 2002, the citizens of all British OCTs are also British citizens, but they may renounce that citizenship and be only British Overseas Territories citizens.

[10] The CJEU ruled against the Netherlands for not granting the inhabitants of Aruba the right to vote in European elections. Judgment of 12 September 2016, C-300/04, M. G. Eman and O.B. Sevinger v College van burgemeester en wethouders van Den Haag.

Montserrat; Pitcairn; Saint Helena and Dependencies; British Antarctic Territory; British Indian Ocean Territory; Turks and Caicos Islands; British Virgin Islands; and Bermuda.[11]

The OCTs have a total population of just over one million people. The most populous countries and territories are New Caledonia and French Polynesia, each of which has a population of around 270,000 people. At the other extreme, some OCTs are barely inhabited at all, or only inhabited by scientists and military personnel. That is the case of the French and British Antarctic Territories, the Pitcairn Islands and the Sandwich Islands. This large demographic disparity is further compounded by a large geographic disparity. Greenland, for instance, is a sprawling territory, spanning more than 2 million km$^2$. In contrast, other islands are very small, such as the Pitcairn Islands in the Pacific, which have a total area of only 47 km$^2$.

Article 199 TFEU lays out the objectives of the association with the OCTs, related to trade, investments and the right of establishment of nationals and companies. Additionally, since 1 January 2014, these relations have been governed by the Overseas Association Decision [Council Decision 2013/755/EU, of 25 November 2013, on the association of the overseas countries and territories with the European Union],[12] which emphasizes that "the solidarity between the Union and the OCTs should be based on their unique relationship and their belonging to the same 'European family'". In short, it is an association conceived of as a framework for policy dialogue and cooperation on issues of mutual interest (Article 5.1 of the Decision). Furthermore, "[i]n pursuing these objectives, the association shall respect the fundamental principles of liberty, democracy, human rights and fundamental freedoms, the rule of law, good governance and sustainable development, all of which are common to the OCTs and the Member States to which they are linked" (Article 3.3 of the Decision). From an institutional perspective, the dialogue between the EU and the OCTs is channelled through an annual forum and regular trilateral meetings between the Commission, all the OCTs, and the Member States to which they are linked, and meetings of associates (the Commission, individual OCTs, and the corresponding Member States).

In short, as non-European territories that have special relations with a Member State, the OCTs are excluded from the territorial scope of EU law. However, they are included within the personal scope of EU law, as their nationals, with a few exceptions, have EU citizenship. Therefore, they have inherited an ambivalent situation, marked by a differentiated and specific integration, but also by de facto and, at times, *de jure* assimilation to third countries.[13] Moreover, as will be seen below, all have witnessed the emergence of movements seeking to strengthen

[11] Although Bermuda has the status of a British overseas territory, it chose not to apply to the EU for that same status. Consequently, the association regime was not applicable in that territory. Under the TFEU, Bermuda could apply to be recognized by the EU with the status of OCT, which occurred in 2014.

[12] OJ L344, 19 December 2013, at 1.

[13] T. M'Saïdié, *Les pays et territoires d'outre-mer dans l'Union Européenne* (E. Bruylant, Brussels, 2013).

their integration with the metropolis, attain a higher level of autonomy, or even achieve independence.

### (c) *Other Territories with a Differentiated Status*

Finally, there is a group of territories that, although they do not fall within the categories of ORs or OCTs, has a differentiated status in the EU due to their special constitutional links with various Member States. These are very diverse territorial entities, mostly of them are located on the European continent with very different degrees of autonomy with regard to the Member States on which they depend. These territories include: the Åland Islands; two German localities (Büsingen am Hochrhein and Heligoland); two Italian localities (Campione d'Italia and Livigno); two Spanish autonomous cities (Ceuta and Melilla[14]); one British overseas territory (Gibraltar[15]); one Greek autonomous territory (Mount Athos); and the British Sovereign Base Areas of Akrotiri and Dhekelia in Cyprus.[16]

### (d) *Changes in the Special Status*

EU law includes rules that allow changes in the special status that the Union grants to these territories in the event of political-administrative changes in their relations with the states on which the depend. These rules are intended either to facilitate the transformation of ORs into OCTs or vice versa or to provide for a possible independence. However, the changes themselves are the sole responsibility of the Member States; the Union simply facilitates the processes, without interfering in them.

Thus, Article 355.6 TFEU, the so-called "*passerelle* clause", makes it possible to change the status of these territories without amending the Treaties. It does so by enabling the European Council, on the initiative of the Member State concerned, to adopt a decision amending the

[14] The autonomous cities of Ceuta and Melilla each have their own Statute of Autonomy, passed, respectively, by Organic Laws 1/1995 and 2/1995, 13 March 1995, as provided under Art. 144.b of the Spanish Constitution. They are part of the European Union with certain mainly customs- and tax-related exceptions. This specific treatment was expressly provided for in the Act of Accession of Spain and Portugal to the European Communities (Arts. 25 and 155 of the Act of Accession and Protocol 2).

[15] Gibraltar is a European territory whose foreign relations are assumed by a Member State. The 1972 Treaty of Accession of the United Kingdom establishes a special status for Gibraltar. Gibraltar is not an integral part of the United Kingdom, but rather a territory under British sovereignty, for whose external relations the United Kingdom is responsible. Therefore, in accordance with Art. 355.3 TFEU, EU law is applicable to it, with some exceptions, including those provided for in the Act of Accession of the United Kingdom, which excludes Gibraltar from the common customs territory and the Common Commercial Policy, the Common Agricultural Policy, the Common Fisheries Policy, and the obligation to collect value-added tax (VAT). Gibraltar is not part of the Schengen Area.

[16] There are also some territories that, although they maintain constitutional ties with Member States, do not have them with the EU, but rather remain legally unrelated to it. They are the Faroe Islands (Denmark) and the so-called British crown dependencies (Isles of Man, Guernsey and Jersey).

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status with regard to the EU of a Danish, French or Dutch OCT. Additionally, Article 97 of the Overseas Association Decision provides for the possibility and consequences that an OCT might become independent, leave the association or become an OR.

It was through the aforementioned "*passerelle* clause" that Mayotte —which became a French department in March 2011— came to have the status of an OR. Under that article, France submitted a request to change the status to the European Council, which unanimously decided to accept Mayotte's transformation into an OR as of 1 January 2011. This could also happen in the Netherlands Antilles, whose political-administrative status was changed in the 2010 constitutional reform. Some of the territories became Dutch municipalities, whilst others became independent countries within the Kingdom of Holland, opening up the possibility that their current status of OCTs could be transformed into ORs.

The opposite occurred with regard to the French overseas collectivity of Saint Barthélemy, which, until 2011, was an OR. However, given its remoteness from the metropolitan territory, its specific legal status, its close economic relations with partners in the Americas, and the emphasis it places on tourism, France requested a change in its status, turning Saint Barthélemy into one of the Union's OCTs.

It is also worth recalling that, following the results of the 1982 referendum in favour of Greenland's withdrawal from the EEC, the Danish government – as the party responsible for doing so – submitted a memorandum to the EC Council of Ministers. Denmark proposed a series of amendments to the Treaties in order to add Greenland to the list of OCTs listed at the time in Annex IV of the EEC Treaty. The 1984 treaty enabled this transformation. EU law ceased to be applied in Greenlandic territory, and relations with Greenland instead came to be governed by the association regime. As is well known, this transformation was not accompanied by Greenland's secession from the Kingdom of Denmark, of which it continues to be a part. However, it did result in a reduction of the territorial scope of EU law. In contrast, if the process had entailed Greenland's separation from Denmark, based on existing practice with regard to OCTs that have become independent, or on the very specific precedent of Algeria,[17] it would have signified its transformation into a third country with regard to the Union and the termination of the association regime.

[17] Algeria was specifically mentioned, as a French department (part of the French Republic), in the Treaty of Rome (1957). It fell under the territorial scope of the TEEC, with the "modulations" provided for in Art. 227, a case of "partial application" of the treaties. Algeria's independence in 1962 meant its exit from the EEC, although this outcome had not been provided for in EEC Treaty. The withdrawal was never formalized in any treaty. Indeed, for years, Algeria continued to be mentioned within the territorial scope of European law, until the reference was eliminated from the text in the Treaty of Maastricht in 1992, when France modified the scope of its territory with the tacit consent of the other Member States.

With regard to these cases and how they might apply to new similar situations, as practice has shown, the initiative corresponds to the Member State concerned, and the execution of the process falls within the scope of its sovereignty. Therefore, in the author's view, neither the Commission nor the Council should assess the advisability of such requests for changes in the status of such regions and territories, or of their potential independence. Rather, the European institutions' actions should be limited to making the necessary amendments to EU law to accommodate such political-administrative changes.

### (2) Territories with Special Status in Member States' Domestic Law

#### (a) *French Overseas Territories*

Several territorial collectivities, the legacy of France's colonial past, still maintain different political-administrative ties with the French Republic. These "*poussières impériales*" have different degrees of autonomy with regard to continental France and maintain their special local features. In all, overseas France comprises twelve such territories: Saint Martin, Saint Barthélemy, Guadeloupe and Martinique, in the Caribbean and West Indies; French Guiana in South America; Saint Pierre and Miquelon, in North America; French Polynesia and the islands of Wallis and Futuna, New Caledonia and Clipperton in the Pacific Ocean; Mayotte and Réunion in the Indian Ocean; and, finally, the French Southern and Antarctic Territories.[18]

They are classified according to three political statuses: overseas departments (*départements d'outre-mer* or DOMs), overseas territories (*territoires d'outre-mer* or TOMs), and territorial collectivities (*collectivités territoriales* or CTs). The DOMs have been considered French departments since 1946. Law 821171, 31 December 1982, granted them the status of mono-departmental regions, turning them into overseas regions (ORs) and, thus, the overseas departments and regions (*départements et régions d'outre-mer* or DROMs) that are part of the EU. These regions are subject to French law, the inhabitants are entitled to vote, the currency is the euro and the education system is the same as in metropolitan France. They also have the same powers as the metropolitan regions.[19] Under Article 73 of the French Constitution, the DROMs are subject to the system of legislative assimilation. They exercise the legal powers common to the departments and regions, but also participate in international negotiations and have greater right of initiative. The DROMs include, amongst others, France's oldest colonies:

[18] Some 2.6 million people live in the overseas departments and territories, 1.2 million of whom are minors. This overseas portion of France makes it the country with the largest extension of jurisdictional waters, after the United Sates and ahead of Australia. The French EEZs span a total of 11 million km². Some 97% of this surface is overseas.

[19] A. Roux, "L'évolution constitutionnelle du statut des départements d'outre-mer", (30 January 2017). See also: L. Bleriot, "Les départements et régions d'outre-mer: un statut á la carte", 113 *Pouvoirs* (2005). F. Lucharie, *Le statut constitutionnel de la France d'outre-mer* (Ed. Economica, Paris, 1992).

Guadeloupe, Martinique, French Guiana, Réunion and Mayotte. As noted above, the latter acquired the status of DROM in 2011, making it the 101st French department. In 2016, Martinique and Guiana also became single collectivities.

As for the TOMs, following the 2003 reform of the French Constitution, they became overseas collectivities (*collectivités d'outre-mer* or COMs), which gave them greater autonomy. A COM is a French administrative division that includes the territories governed by Article 74 of the French Constitution, corresponding to the former overseas territories and other collectivities with special statuses. There are five COMs. On 27 February 2004, French Polynesia negotiated a special status by the name of "overseas country" (*pays d'outre-mer*), granting it a certain level of self-government, with a president and diplomatic representation in the Pacific area. Saint Barthélemy and Saint Martin, formerly part of the DOM of Guadeloupe, became autonomous collectivities on 22 February 2007. Saint Pierre and Miquelon, formerly a DOM, became a territorial collectivity in 1985; they have a status similar to that of the departments, with a general council. Finally, Wallis and Futuna, in the Pacific Ocean, also has a specific status. A former TOM, it became a COM following the 1961 reform of the Constitution. It is the only inhabited French territory that is not subdivided into communes or municipalities. Furthermore, it is made up of three traditional monarchies. The COMs and the French Southern and Antarctic Territories[20] have a special status with regard to the EU. They have autonomy in customs and tax matters and their own social welfare systems. France provides their security.

New Caledonia, which is governed by Title XIII of the French Constitution, is a *sui generis* collectivity with a status falling somewhere between that of an independent country and an overseas community. It has a territorial congress and a territorial government, which is responsible for matters such as health, taxes, customs, education, etc. It holds local elections and has speaking and voting rights in the French national assembly. As in French Polynesia, the currency is the Pacific franc. Articles 76 and 77 of Title XIII introduce the 1998 Nouméa Accord, which defines the state powers transferred to the institutions of New Caledonia, the rules of procedure of those institutions, the rules concerning citizenship, the electoral regime,

[20] The French Southern and Antarctic Territories (*Terres australes et antarctiques françaises* or TAAF) comprise the Crozet and Kerguelen archipelagos, the islands of Saint Paul and Amsterdam (in the sub-Antarctic zone), the Adélie Land (Antarctica), and the Scattered Islands (Europa, Glorioso Islands, Juan de Nova, Bassas da India and Tromelin) in the Indian Ocean. They have no permanent population, but rather bases that are home to 4 to 100 people (scientists, technical and military personnel, and meteorologists). The military personnel and meteorologists stationed in the Scattered Islands are rotated every 30 to 45 days. The islands also host scientists. The bases in the three sub-Antarctic districts and Adélie Land host between 20 and 100 people (scientists and technical staff) for periods ranging from six months to a year. The TAAF are French overseas collectivities with administrative and financial autonomy. They are under the authority of a Prefect, who also represents the French government and is in charge of the collectivity.

employment and personal status, as well as the conditions and time limits for the people concerned in New Caledonia to vote on the attainment of full sovereignty.

Unlike the DROMs, the COMs and New Caledonia are subject to the principle of legislative speciality, governed, respectively, by Articles 74 and 77 of the Constitution: an organic law determines the status of each community and lists the laws that apply to it. The local assemblies may draft regulations within the scope of the law, excluding sovereign affairs.

Clipperton Island, off the Pacific coast of Mexico, is uninhabited and is directly administered by the French government in Paris.[21]

Little by little, institutional diversity is becoming the norm in the French overseas territories. Each territory benefits from the political system best aligned with its own reality, seeking greater autonomy, without necessarily implying its complete detachment from France, supported by its relations with the metropolis on the basis of a multifunctional democracy. Otherwise, the French Constitution, insofar as it applies to the matter at hand, provides for the possibility of the independence of these territories, based on the right to self-determination (Article 5.3 of the 1958 Constitution, supplemented by paragraph 2 of the Preamble of that Constitution). Thus, a possible future secession of New Caledonia or French Polynesia would not encounter constitutional barriers; rather, they are French territories that, due to their specific characteristics, could become sovereign states.[22] However, this would be achieved via processes agreed upon with the competent authorities of the Republic and would in no case be unilateral processes of independence.

### (b) *Dutch Overseas Territories*

The Kingdom of the Netherlands consists of four "independent countries": the Netherlands, Aruba, Curaçao and Sint Maarten. The latter three territories are in the Caribbean and, together with the islands of Saba, Bonaire and Sint Eustatius, are the last territories in America linked to this European country. This group of islands was formerly known as the Netherlands Antilles.

In 1986, Aruba, which has a population of just over 100,000 inhabitants, became an independent country within the Kingdom. In 2010, Curaçao, with a population of 145,000, and Sint Maarten, with a population of 37,000, followed in its footsteps. However, despite their status as "independent countries", these territories are not fully independent. The king of The Netherlands is the head of state and, although they have autonomy in internal affairs, the

[21] French sovereignty over the island was recognized in an arbitral award rendered by the King of Italy in 1931. However, this sovereignty has not been enshrined in the French constitution or by any legislative act of the country.

[22] In the past, this enabled the independence, following local referenda, of Comoros (1974) and Djibouti (1997). F. Luchaire, "La France d'outre-mer et la République", 3 *Revue Française d'Administration Publique* (2007), at 6.

foreign policy and defence of Aruba, Sint Maarten and Curaçao continue to depend on this European country. All the inhabitants of the Dutch territories, regardless of whether they were born in Europe or the Caribbean, have the same type of Dutch passport.

The other Dutch islands in the Caribbean (Bonaire, Saba and Sint Eustatius) adopted, also in 2010, the status of "special municipalities" within the Netherlands, making them an integral part of the country with the same status as a European territory. At present, things have reached a certain impasse. The Federation of the Netherlands Antilles should have been dissolved by 1 July 2007, but the reform has been indefinitely postponed. The island territories of Bonaire, Saba and Sint Eustatius should have become Dutch municipalities with a special status, but their situation is not yet clearly defined. The Dutch constitutional framework would allow the independence of these territories. However, faced with that possibility, the various territories concerned have preferred either reinforced autonomy or assimilation with the metropolis,[23] perhaps due to the challenges faced by other territories in the region that chose independence from the Netherlands in the past.

### (c) *British Overseas Territories*

These are the remains of what was once the British Empire. Although they can be found in almost every corner of the world, the majority are in the Americas: Anguilla, Bermuda, the British Virgin Islands, Montserrat, the Cayman Islands, the Turks and Caicos Islands, the Falkland Islands, and South Georgia and the South Sandwich Islands. The UN Special Committee on Decolonization considers colonies all of these territories, except South Georgia and South Sandwich Islands, which do not have a stable population. The Falkland Islands and South Georgia and the South Sandwich Islands are moreover the subject of a long-standing dispute between the UK and Argentina, which claims sovereignty over them. This is also obviously the case with Gibraltar, which, since the Treaty of Utrecht of 1713 and its transformation, first, into a British colony in 1830 and, then, into an overseas territory in 1969, has led to fraught relations between the UK and Spain.

From a political viewpoint, these enclaves are British territories, whose status derives from the British Overseas Territories Act of 2002.[24] However, they are not part of the United Kingdom, which, strictly speaking, refers to Great Britain and Northern Ireland. They are

[23] D. Kochenov, "Le Droit européen et le (con) fédéralisme néerlandais: une dynamique en évolution progressive", in J-Y. Faberon et al. (eds.): *Destin des collectivités politiques d'Océanie* (PUAM, Aix-en-Provence, 2011).

[24] Under the 2002 Act, with certain exceptions, any person who was a British Overseas Territories citizen when the law came into force on 21 May 2002 would automatically become a British citizen, with the right to establish him or herself in the United Kingdom (which would grant that person European citizenship). Any person who subsequently acquires British Overseas Territory citizenship may apply for British nationality, which the Secretary of State may grant as he or she sees fit.

semi-autonomous territories that are difficult to classify. The UK oversees foreign policy, domestic police and security, some financial aspects, the public service and, more generally, "good governance". The territories are responsible for everything else: economic policy, immigration, healthcare, education, etc. Despite this autonomy, Queen Elizabeth II is the head of state and London sets the sovereign policy. These territories issue their own passports, and their inhabitants are British Overseas Territories citizens. However, since 2002, they have had the right to acquire British citizenship.

It should be noted that the British Overseas Territories are not the same as the Commonwealth, nor are they crown dependencies, such as the Channel Islands (Jersey and Guernsey) or the Isle of Man. A British crown dependency is under the sovereignty of the monarch of the United Kingdom but is not part of it and does not belong to the European Union. The Commonwealth of Nations is made up of 53 independent countries. Since 1950, it has not entailed any submission to the British crown. As noted, the British Overseas Territories are under British sovereignty, but are not part of the United Kingdom. They are not directly administered by the British government, but rather have their own. The UK is responsible for aspects related to sovereignty. These territories are not represented in the British Parliament. Each one has a governor appointed by the British monarch, who acts as the representative of "Her Majesty's Government". The governors have powers with regard to security in the territory and representation between the territory and the British government. They are generally from the UK, although some are naturals of the territory they govern.

Movements for self-determination are a minority in these places, as seen in the various plebiscites held in them on the matter: in Bermuda, Anguilla, the Turks and Caicos Islands, etc. Additionally, some of these enclaves are territories whose population has been expelled or displaced, as occurred on Diego Garcia Island[25], or with populations has been implanted by the United Kingdom (e.g. in Gibraltar the "Llanitos", and in the Malvinas/Falkland Islands the "Kelpers"). They thus obviously support a policy of assimilation with the metropolis and, therefore, are unlikely to give rise to pro-independence movements.

The British "constitutional" framework allows for the independence of these territories. The UK government considers that, when appropriate, it will help each territory achieve independence, provided that the population has expressed its will to do so clearly and constitutionally. In fact, in one case (Turks and Caicos Islands), this has already occurred. However, the country concerned ultimately reversed course, preferring a status of home rule, without cutting relations with the metropolis.

[25] A. Pigrau Solé, "El caso de la isla de Diego García: Territorios sin Derecho internacional, personas sin derecho" 31 *Revista Electrónica de Estudios Internacionales* (2016) 1-36 [DOI: 10.17103/reei.31.01]

### (d) *Territories Dependent on Denmark*

In the Danish case, there are two territories with special statuses. The first is the Faroe Islands, which maintain constitutional links with the Kingdom of Denmark, but not with the EU, which, *de jure*, is unrelated to them. The other is Greenland, which has the special status of an OCT.

In the case of the Faroe Islands, its citizens have voted on separation multiple times and, after 70 years, remain divided on the issue. In 1946, the region voted on independence. The "Yes" vote narrowly won, receiving 50.73% of the total 11,640 votes cast, which represented a turnout of 67.5% at the time. Copenhagen rejected the separation outright, arguing that the margin was too slim. Nor were the Faroese separatists able to agree on how to implement it. This was for one main reason: two of the three most populous islands had voted for continued union with Denmark. The crown dissolved the island assembly and called new elections. The unionists increased their ranks and won. The independence movement ended up settling, two years later, for a home-rule agreement that granted the islands absolute power in all matters except defence, foreign affairs, the judiciary, and exchange policy. Seventy years on, the strength of the Faroese independence movement remains unchanged. In the most recent elections, held in 2015, the total share of the vote going to separatist parties was exactly the same as the "Yes" vote in the 1946 referendum: 50.7%. Pro-independence parties won 17 of the 33 seats in a record-setting election, with a turnout of 88.8%. However, the most voted party was unionist: the social democratic SDP. The result was a coalition government of separatist and unionist parties that shared a common goal: to draft a new Constitution, including the right to self-determination of the Faroe Islands, on which the people of the islands would vote on 25 April 2018. However, the plan was ultimately postponed indefinitely, due to a lack of agreement between the Islands' parties on the content of the future constitution.

With regard to Greenland, it is the largest island in the world and the largest territory in the Americas under the sovereignty of a European state. Greenland, which is home to around 60,000 people, is an autonomous country within the Kingdom of Denmark. In 1814, it became a Danish colony, but that status has undergone changes. In 1953, it became a Danish overseas territory, and in 1979, it obtained its own parliament and limited self-government. When Denmark was negotiating its accession to the European Communities, this territory did not have a statute of autonomy. However, disregarding Greenlanders' reservations, the Danish authorities decided to include it in the Communities anyway, in the country's Treaty of Accession, signed in 1972 and in force since 1973. This was not the case with the Faroe Islands, which already had a statute of autonomy at the time, and thus never joined the Communities.

Years later, Greenland also obtained a statute of autonomy within the context of the Danish state, which transferred to it nearly all the powers exercised to date by the Danish authorities

and entered into force on 1 May 1979. Based on the statute, the Greenland Parliament decided, in 1981, to hold a "non-binding referendum" on continued membership in the EC. The referendum was held on 23 February 1982, and the majority (52% vs 46.1%) voted in favour of Greenland's exit from the Community. The Danish government – as the competent authority to do so – submitted a memorandum to the EC Council of Ministers, proposing amendments to the Treaties. Denmark submitted the inclusion of Greenland to the list of OCTs (Annex IV of the EEC Treaty) and negotiated an agreement with three similar articles for the three treaties (EEC, ECSC, EAEC), providing that "This Treaty shall not apply to Greenland", together with other modifications. This situation changed again in 2008, when Greenlanders voted in favour of greater autonomy, which was achieved through the passage of the Home Rule Act of 21 June 2009, another step towards greater self-government. The territory is home to a large independence movement, represented by most of the political parties (except the conservative party), which advocate secession from Denmark.

Although from a constitutional point of view, the independence of the Faroe Islands and Greenland is possible, the fact of the matter is that the Danish authorities have reacted swiftly and decisively whenever such possibilities might have occurred, demanding that the option be supported by a sufficiently representative percentage of the population, which, to date, has not been the case.

### (e) *Territories Belonging to Portugal*

The Azores are an archipelago located in the North Atlantic, about 1,500 km west of Lisbon and 3,600 km east of North America. They have a surface area of 2,322 km² and a population of 245,766 inhabitants. Since 1976, the Azores have been an autonomous region of Portugal. As such, they have their own regional government and parliament, elected by direct universal suffrage and with broad legislative and political powers. The seat of the regional government is in Ponta Delgada (São Miguel), and that of the parliament, in Horta (Faial).

Madeira is an Atlantic archipelago located 900 km southwest of Portugal (1,000 km from Lisbon) and 550 km west of the African coast (Agadir). It has a surface area of 801.52 km² and a population of 256,424 inhabitants. Since 1976, Madeira has also been an autonomous region of the Republic of Portugal. It is governed by a specific political and administrative regime: the statute of an autonomous region. It has its own governing bodies: a legislative assembly and a regional government. The seat of the regional government is in Funchal.

Portugal is a unitary and centralized state, of which its overseas territories are an integral part. However, the Azores and Madeira have a status that sharply differentiates them from the metropolitan territory. Under the Portuguese Constitution, they are "autonomous regions", a status that affords them broad internal autonomy, in terms of both legislative and executive

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powers (Article 6). Beyond that, the Portuguese Constitution does not provide for the separation of the constituent territories of the Republic.

### (f) *Territories Belonging to Spain*

The Canary Islands are an Atlantic archipelago made up of seven islands, located northwest of the Sahara and 2,000 km from Madrid. They have a surface area of 7,447 km² and a population of 2,135,722 inhabitants. The Canary Islands are part of the Spanish system of self-governing regions or "autonomous communities" (*comunidades autónomas*) within a parliamentary monarchy defined in the 1978 Constitution. They have their own regional government and a parliament consisting of 60 seats. They are divided into two provinces: Las Palmas and Santa Cruz de Tenerife.

The Spanish Constitution likewise does not contain support for unilateral procedures of independence. On the contrary, it makes express mention of the territorial integrity of the state and its indivisibility (Article 2). It additionally provides for a mechanism for forcing an autonomous community to comply with its constitutional obligations in extreme cases of breach or of serious harm to the general interests of Spain (Article 155).

## (B) INVOCATION OF THE PRINCIPLE OF SELF-DETERMINATION OF PEOPLES IN TERRITORIES WITH SPECIAL STATUS

In view of the diversity of the overseas territories' situations, the EU has always maintained the same position, namely, that they are, as noted, internal questions and processes of its Member States. It is the Member States who are firstly and primarily responsible for the economic and social development of their respective overseas territories. They also have the power to establish or modify the political and administrative links that they have with these entities, in accordance with their constitutional systems. Of course, in so doing, they must bear in mind the undergirding values of the process of European integration, set out in Article 2 TFEU, as well as the provisions of international law applicable to such relations, in particular, those referring to non-self-governing territories and decolonization processes.

With regard to the latter, it should be recalled that on 14 December 1960, UN General Assembly Resolution 1514 (XV) paved the way for the decolonization of dozens of territories. The Declaration on the Granting of Independence to Colonial Countries and Peoples provided that all peoples have the right to self-determination. It further proclaimed the need to bring colonialism "to a speedy and unconditional end". Two years later, the UN created the Special Committee on Decolonization and, although 80 former colonies have since achieved independence, 17 territories have yet to be decolonized. Most of them continue to have specific relations with certain Member States of the European Union and have a special status within it. This is the case of: Anguilla; Bermuda; Gibraltar; the Cayman Islands; the Falkland Islands;

the Turks and Caicos Islands; the British Virgin Islands; Montserrat; New Caledonia; French Polynesia; Pitcairn; and Saint Helena.

Some of these territories have been on the Special Committee's list since its creation; others were added only recently, such as French Polynesia (2013); and still others, such as the Turks and Caicos Islands, remain on the list even though the respective metropolis granted them independence, because they renounced it. In addition to this, there is the peculiar situation of Gibraltar, which, in the wake of the new 2006 Constitution and the subsequent referendum, considers that the circumstances for its removal from the list have been met, although this claim has not yet been acknowledged by the UN.

To be removed from the list, the territory in question has to: achieve independence, fully join the country on which it depends, or become a free state associated with it. To this end, it must be given the opportunity to decide, with guarantees, on the type of relations it wishes to maintain with the parent state. Indeed, plebiscites and referenda have already been held on this question in both OCTs and other territories with special status, such as Anguilla, Bermuda, the Turks and Caicos Islands, the New Caledonia, or, most controversially, Gibraltar and the Falkland Islands. With regard to all these situations, it is worth recalling that the UN General Assembly is responsible for the decision to remove a non-self-governing country from the list of territories subjected to the process of decolonization, not the administering power or the administered territory itself.

Moreover, the list does not include all the ORs and overseas territories, in which issues of autonomy, assimilation or independence have been raised with varying degrees of intensity. In some cases, the population of these regions and territories has furthermore already been asked to vote on the type of link it wishes to maintain with the parent state (Mayotte, Wallis and Futuna, Anguilla, Bermuda, Guadeloupe, Martinique, etc.). Additionally, the evolution, in recent years, of the political, economic and social situation of some of these entities has generated debate and tensions, both in the metropolises and in the affected regions and territories themselves. They have seen calls for more autonomous development and even full independence, based on the principle of self-determination. Of course, there are also movements advocating the fullest possible assimilation with the respective metropolis.

### (1) Assimilationist, Autonomist and Separatist Movements in the Territories with Special Status

#### (a) *In the French Overseas Territories*

The popularity of nationalist movements in these enclaves has fluctuated. After gaining strength in the 1970s and 1980s, their influence seems to have declined at the turn of the 21st century. There are currently no major independence movements in France's Latin American

territories.[26] There used to be one in Guiana, especially in the 1970s, and another in Guadeloupe, also in that decade. In Martinique, they have always been present, but support for them is limited and remains level. All of these territories have political parties and leaders who advocate these goals, some of whom, such as the Martinican Alfred Marie-Jeanne, have played, and continue to play, a prominent political role. However, the fact of the matter is that whenever the question has been put to a vote, the people, as will be seen, have come out against increased autonomy from France.

Sometimes, social conflicts are confounded with political ones. Such situations can give rise to autonomist or separatist trends. However, in general, the peoples of these territories seek greater involvement by the metropolis in the economic and social development of their regions and more proactive policies to combat illegal immigration and insecurity. In the social sphere, the lack of economic prospects has resulted in episodes of unrest and conflict in recent years in the DROMs. For instance, in 2009, the French Caribbean was rocked by a general strike to protest low wages and the scarcity and high prices of basic commodities. It began in the Guadeloupe archipelago and soon spread to neighbouring Martinique. The strike took place in a context in which the economic crisis in Europe had led to a dramatic decline in tourism, the main source of revenue for the Caribbean islands, resulting in an unsustainable situation. After a month of paralysis and riots that led the metropolis to send police reinforcements to the islands, the French government agreed to increase wages and meet the Caribbean population's main demands. The recent riots in French Guiana have once again exposed a problem involving the overseas population. On 25 March 2017, a general strike was called, spurred on by the Guianese unions and a group calling itself the 500 Brothers. The aim was to denounce the situation of marginalization in which the territory was maintained by the metropolis, which, according to the strikers, invested a disproportionate amount of money in the space centre – whose activity accounts for 15% of the Guianese GDP – but little in the rest of the territory. They also called for increased law enforcement, as well as other social improvements.[27] Ultimately, the French government agreed to sign the Guiana Agreement, undertaking to invest heavily in the underfunded areas.

Similar situations have occurred multiple times on Réunion. Here, too, the reason was the high cost of living with respect to wages and the resulting precariousness. This territory is home to a more autonomist than separatist movement, initially formed around the Communist Party of Réunion (*Parti Communiste Réunionnais* or PCR), founded in 1962. In 1978, the UN

[26] A.-P. Blérald, *La Question nationale en Guadeloupe et en Martinique* (L'Harmattan, Paris, 1988).

[27] For the 27 days that the strike lasted, riots swept Guiana, which was left completely isolated: the space centre was occupied, delaying the launch of two European satellites, and access to both the airport and port was blocked.

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came out in favour of the island's full independence, thereby internationalizing the debate. In 1979, in the elections to the European Parliament, Paul Vergés, leader of the PCR, laid out his thesis of bicolonialism, denouncing that, in addition to being dominated by France, Réunion was also subject to the interests of the EC. In 1980, Jean-Baptiste Ponama, a regional figure, founded the Movement for the Independence of Réunion (*Mouvement pour l'indépendance de la Réunion* or MIR). In 1992, Camille Sudre, who advocated greater home rule, won the regional elections, with the support of the PCR. The French courts annulled the elections due to alleged irregularities and prohibited Sudre from standing again. In the regional elections of 1993, the "Free-DOM list", led by his wife, Marguerite Sudre, won. More recently, in the last two decades, the more openly separatist movements have coalesced around the Popular Front for National Liberation (Lorganizasion Popilèr po libèr nout Péi or LPLP), whose demands have been echoed by the African Union. It also advocates the island's inclusion on the UN's list of non-self-governing territories. On 5 November 2017, this party proclaimed not independence, but rather the existence of the State of Réunion. The declaration had virtually no impact.

Nor has neighbouring Mayotte been free of conflict. This small island decided to remain a part of France in 1976 and, in 2011, it became a department and region.[28] It has been the poorest one ever since. In April 2016, the island was paralysed by a general strike under the slogan "Real Equality", causing riots that lasted two weeks. The islanders' main demands were equal labour rights to those in the metropolis, greater social benefits and improved public infrastructures in the spheres of energy, education and healthcare. The Overseas Ministry was ultimately forced to reach an agreement with the main unions. However, the agreement has not managed to dispel the social unrest completely. Social tensions persist, aggravated by uncontrolled immigration, particularly from the neighbouring Comoro Islands, a country that continues to claim sovereignty over Mayotte.

Such tensions also occurred in French Polynesia. A French protectorate since 1842 and a colony since 1880, it became an overseas territory in 1946 and, in 2003, an overseas collectivity.[29] Since 2004, it has had a status of reinforced autonomy. It has a democratically elected parliament and an autonomous government that administers public affairs. Its citizens are French citizens. For decades, autonomist, separatist and assimilationist or unionist movements have competed for the country's future.

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[28] G. Ciavarini, *Mayotte et l'Union Européenne: entre PTOM et RUP*, (European Commission, Brussels, 20 July 2004).

[29] French Polynesia, located 18,000 km from Europe, spans a vast marine zone in the South Pacific with an area comparable to Europe's (5.5 million km$^2$). It has 118 inhabited islands, comprising 3,600 km$^2$ of dry land, grouped into five archipelagos: the Society Islands, the Marquesas Islands, the Gambier Islands, the Austral Islands, and the Tuamotu Islands. J.-Y. Faberon (ed.), *Destin des collectivités politiques d'Océanie* (Ed. Presses Universitaires d'Aix-Marseille, Aix-en-Provence, 2011).

The first nationalist movement took shape with the founding, by Pouvanaa Oopa in 1947, of the Democratic Rally of the Tahitian People (Rassemblement démocratique des populations tahitiennes or RDPT), which, although it did not openly call for independence, did support greater self-government and the fight against capitalism. The RDPT was dissolved in 1963, but it re-emerged in 1965 as Pupu Here Aia, led by John Teariki. These movements were strengthened by the decision by General de Gaulle, in 1961, to locate a Pacific (Nuclear) Test Centre in the territory. This policy was continued during his successor Pompidou's presidency and remained unchanged until 1977, when, under President Giscard d'Estaing, a series of events, including a serious crisis (1976) and Oopa's death (1977), prompted a change. On the political front, the 1970s were marked by the emergence of independence movements, in particular, the socialist Mana Te Nunaa, founded in 1975 by Jacques Drollet, and the FLP-Tavini Huiraatira, founded in 1977 by Oscar Temaru. Within the autonomist current, Jean Juventin, mayor of Papeete in 1977, played a prominent role as the leader of Pupu Here Aia after the death of Teariki (1983). Attention should also be called to the Te Ea Api division, whose secretary general, Émile Vernaudon, founded the Aia Api party in 1982. In 1977, the Tahitian Union became Tahoeraa Huiraatira (Popular Rally) within the framework of the RPR. This party then evolved towards autonomist positions. In 2004, UPLD was formed, a pro-independence coalition dominated by Temaru's Tavini Huiraatira. Ever since, it has been the main Polynesian separatist party, establishing itself as an important political force in French Polynesia. It developed a nationalist ideology with the ultimate goal of fostering the territory's political evolution out of the French Republic and replacing French Polynesia with an independent state, to be called Tahiti Nui (Big Tahiti).[30] In 2013, Temaru, the French Polynesian separatist leader, and his closest advisors achieved the territory's re-inclusion on the UN's list of non-self-governing territories. Since then, pro-independence representatives have been travelling regularly to New York to attend various committee meetings and advance their cause: sovereignty and decolonization of French Polynesia.[31] On 17 March 2017, France and French Polynesia signed an agreement, whereby, in addition to a commitment to address the consequences of the nuclear tests, the French government agreed to work with the European institutions to improve the association regime, support Polynesia's integration in its regional environment, and increase funding.

In general, this territory is home to two opposing trends: a unionist movement, and a movement advocating self-determination, although not necessarily independence, but rather

[30] On these questions, see: S. Al Wardi, *Tahiti Nui ou les dérives de l'autonomie* (Ed. L'Harmattan, Paris, 2008).

[31] In this order of things, mention should be made of the claim that the separatist party, Tavini Huiraatira, seeks to bring before the International Court of Justice for "violation of the nuclear non-proliferation agreement" by France, which would be joined or parallel to that filed by the Marshall Islands in 2014.

greater and deeper autonomy. Indeed, that is the option that has received the strongest support at the polls.[32]

New Caledonia, which lies some 16,000 km away from the metropolis, has been French since 1853. In 1946, it became a French overseas territory, but the local self-government that it was granted favoured the population of European origin. This situation was exacerbated in 1962 by the independence of Algeria and the ensuing influx to the islands of (largely ultranationalist) *pieds noirs*. In 1970, the native population led a series of strikes and occupations. The emergence of independent countries such as Samoa, Fiji or Tonga, coupled with the rejection of Gaullist centralism, gave rise to a pro-independence movement. In 1975, the Party of Kanak Liberation, or Palika, was founded and, later, the Independence Front (*Front Indépendantiste*), a coalition of parties and movements formed with the goal of winning the territorial elections. The following decade, it was reconstituted as the Kanak Socialist National Liberation Front (*Front de Libération Nationale Kanake et Socialiste* or FLNKS).

In the 1980s, tensions erupted between the Kanak and European communities. In 1984, the National Assembly legislated a special framework for self-government, but rejected pro-independence amendments. This led to elections and a referendum. However, the FLNKS claimed that the electoral roll favoured the metropolis. It called upon people to boycott the referendum and proclaim independence, whilst at the same time creating a "provisional government" to force secession. This, in turn, led to "*les évènements*", four years of riots and political conflicts with both the metropolis and the unionists. The upheaval culminated in the taking of hostages on the island of Uvea, where 4 gendarmes were killed and 27 held hostage. Paris reacted with Operation Victor, which freed the hostages; 19 separatists and 2 soldiers were killed. The action shone a spotlight on the New Caledonian conflict, which was verging on civil war, and the need to find a solution. On 26 June 1988, the Matignon-Oudinot Agreements were signed. Under the historic agreements, economic and social improvements would be made for the Kanak community over a period of ten years, during which time no independence referendum would be called. The agreements were approved by French voters in a referendum held on 6 November 1988, although turnout was low. Ten years later, on 5 May 1998, the Nouméa Accord was signed, establishing a progressive decolonization. The Accord provided for the transfer of certain powers from France to New Caledonia in many areas, except defence, security, the judiciary, the currency and external relations. The Accord further provided for a referendum on New Caledonia's accession to full sovereignty, to be held no earlier than 2014 and no later than 2019. In case of a negative vote, a second and, possibly, a third referendum could be held. After two negative votes, a new agreement would be negotiated.

[32] In the territorial elections of March 2013, 70% of the vote went to autonomist parties, awarding them 47 of the 57 seats vs 10 for pro-independence parties.

In the meantime, the Nouméa Accord facilitated the transfers that would ensure "near sovereignty" within 15 or 20 years. The French Constitution was amended and, as seen, Title XIII ("Transitional Provisions Pertaining to New Caledonia") was added. The new Title grants the territory a form of organization adapted to its own identity, constituting an original model, created to define the distribution of sovereignty with France. Its citizens are French citizens. It is thus an overseas collectivity with a special status, which benefits in particular from a certain political autonomy. Since 1988, it has been divided into three provinces with representatives in Congress. The role of this assembly is mainly to appoint the members of the government of New Caledonia. The president represents the archipelago and heads the government. The French state is represented by the High Commissioner of the Republic, whose role is similar to that of the Prefects. Since 1988, New Caledonia has also had a traditional Senate, which is the guardian and champion of the Kanak identity.

The presence of autonomist and separatist movements in France's overseas departments, collectivities and territories has not displaced other approaches, more aimed at assimilation or integration with the metropolis. In general, there is no real will to separate from metropolitan France, as the revenue that these territories receive in the form of contributions from the state is quite substantial and allows them to maintain their hegemony over other independent islands, such as Haiti, Vanuatu or the Comoros. In the view of much of the population of the French overseas territories, these islands are examples of other former colonies in which independence has led to misery, poverty, violence, mafias, political instability, etc. This would suggest that, in these territories, including those, such as New Caledonia or French Polynesia, in which the separatist processes are farthest along, most of the population does not see independence as a real solution, at least in the short or medium term.

### (b) *In the British Overseas Territories*

Very diverse situations can be found in the British Overseas Territories. The Caribbean territories, consisting of islands and archipelagos, are home to pro-independence movements that seek to continue the emancipation movement that, since the 1960s, has separated many territories in the region from the United Kingdom. Some of the leaders and parties support independence, as in Anguilla, others seek greater autonomy, as in the Virgin Islands, and in one case they even advocate for secession from the United Kingdom and association with Canada (Turks and Caicos Islands). However, as the various plebiscites and elections held in these territories show, in general, the popular support for these movements and leaders is on the wane, and the inhabitants of the territories wish to maintain the current status quo. There are multiple reasons for this. In the author's view, one of the most powerful has been the transformation of many of these territories into tax havens.

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In the case of Anguilla, various events led to its secession from Saint Kitts and Nevis in 1967, resulting in a de facto independence, which, in turn, led to the intervention of the British armed forces in 1969 to regain control. In 1971, the United Kingdom increased the island's autonomy, approving a Constitution that established a parliamentary government and created the position of "Governor" —appointed by the British Crown— responsible for defence, external affairs, internal security, public services, the judiciary and the audit office. In Bermuda, the Progressive Labour Party represents the political current in favour of independence from the United Kingdom, although it lacks widespread popular support. In the 1995 referendum, the independence option was defeated by a considerable margin (74% of the population voted against it). However, the Bermuda Industrial Union and the Progressive Labour Party (then in the opposition) had called for a boycott of the referendum, which had an unquantified impact on the result. Currently, opponents of independence are the majority; the population values financial security above all else. This is because, unlike other islands, Bermudians have a high standard of living, pay no income tax, and do not bear the cost of their external representation. A similar case can be found in the Cayman Islands, which, in 1972, were granted broad autonomy in internal matters by a new Constitution, and which, also like the others, are exempted from taxes, making them a profitable financial enclave.[33]

Montserrat has been governed by an administrator appointed by the United Kingdom since 1960. In the 1973 elections, the People's Liberation Movement gained strength, and, in 1979, the new Chief Minister, John Osborne, announced independence for 1982. Opponents of independence refused, arguing that tourism and remittances would not cover the balance of trade deficit —which was assumed by the United Kingdom. The independence never arrived. In addition, the problems continued. In 1995 and 1996, the volcanic eruptions of Chances Peak wreaked havoc on the economy. Thousands of people were evacuated, and the Chief Minister, David Brandt, called for an investigation into the British attitude of depopulating Montserrat rather than aiding those who wished to stay there. In early 2002, London passed legislation granting British citizenship to its dependencies. Many inhabitants of Montserrat took advantage to emigrate, further decreasing the chances of independence.

The Turks and Caicos Islands were administered from the Bahamas until 1848. In 1874, they were annexed to Jamaica, which became independent in 1962. In 1972, the islands received their own Governor, and the 1976 Constitution granted them home rule and established a Legislative

[33] In 1987, 515 banks were registered there. In 1996, the capture of Mexican drug traffickers exposed the involvement of the islands' banking system in major money laundering operations. According to an analysis by Tax Justice Network —endorsed by scholars, activists and NGOs— Switzerland, the Cayman Islands and Luxembourg occupied the podium in 2010 for the most active "opaque jurisdictions". This opacity is very profitable for them: their economy is one of the soundest in the Caribbean, and of the 40,000 companies registered in their territory, nearly 700 are banks and foundations that handle billions of euros and dollars.

Council, Executive Council, Supreme Court and Court of Appeals. On this island, too, drug trafficking and money laundering caused serious problems. Norman Saunders, the former Chief Minister, in office since 1980, and his Development Minister, Stafford Missick, were arrested in Miami, in 1985, when they were trying to create an international drug trafficking ring using the islands as a bridge between the US and South America. London responded by suspending the territory's constitutional government and assuming direct control until general elections, held in 1988, restored a certain level of self-government to the islands.

Finally, in 1872, the British Virgin Islands were incorporated into the British colony of the Leeward Islands, which was administered under a federal system. Although the federation was dissolved in July 1956, they remained under their control until 1960, when they became an independent territory, with an Administrator appointed by the crown. In 1977, the Constitution was amended to increase the self-government, but the responsibility for defence, internal security and external relations remained in British hands. The islands followed the usual trend for these overseas territories: they are a tax haven, which, more than once, has been suspected of receiving revenue from drug trafficking.

In addition to these territories, the UN's list of non-self-governing territories includes other British Overseas Territories. Although differentiated, for the purposes of the present study, they can be characterized by the fact that they are disputed by the UK and other countries (namely, Argentina and Spain) and by the fact that their current population is the result of British colonization. These territories are the Falkland Islands and Gibraltar. Because of the composition of their populations, they are not home to separatist movements, but rather integrationists seeking greater assimilation with the UK. However, these processes are covered by the British government's statement of respect for the right of self-determination of the territories' inhabitants.

The Falkland Islands, an archipelago some 400 nautical miles off the Argentine coast, was not historically settled. It was occupied by the British in 1833, when only three dozen people inhabited the islands. After World War II, the UN's Committee on Decolonization included the islands amongst the non-self-governing territories but established that, in their case, the principle of self-determination did not apply, because the inhabitants were British and, thus, dependent on the metropolis. The British government, however, considers that it promotes the islanders' right to self-determination. In 2009, a new Constitution came into force granting the local population the right to self-government in all areas except defence and external affairs. On 10 and 11 March 2013, the inhabitants of the archipelago voted to remain a "British overseas territory". The UN was not involved in the vote. In any case, it is highly doubtful that the inhabitants of the islands constitute a people with the right to self-determination, as reflected in more than 40 resolutions of the UN General Assembly and the Committee on

Decolonization, in particular, Resolution 40/21 of 27 November 1985, in which the General Assembly rejected this possibility outright.

Briefly, the situation of the other contested territory, disputed by Spain and the United Kingdom, is similar. Gibraltar is a British overseas territory with broad self-government. It had been part of Castile since the second half of the 15th century. However, in 1704, the Rock was occupied by the Anglo-Dutch squadron that supported Charles III in the War of the Spanish Succession. It was ultimately ceded under the Treaty of Utrecht in 1713, although the area of the isthmus was illegally occupied by the British and maintained to the present day. The occupation of Gibraltar entailed the displacement of most of its population and their replacement by a population subsequently implanted by the United Kingdom. Spain has tried to recover it, but the local population is opposed. In 1967, a plebiscite supported colonial dependence; only 44 of the 12,757 voters voted for accession to Spain. In 1969, a new Constitution reaffirmed the English link, transferring internal affairs to an executive to be elected by the Gibraltarians whilst reserving external affairs and defence for the Crown. Spain closed its borders until 1985. In 2002, 99% of voters came out against shared sovereignty in another plebiscite not recognized by the UN. And, in 2006, a new Constitution was adopted, accepted by the population in a referendum. It does not mention the principle of self-determination, nor is there any reduction in British sovereignty over Gibraltar: the UK retains full international responsibility for the territory. Its economy has been based on services to the British Defence Ministry, although, since 1988, tax legislation —making it VAT free and placing it outside the customs union— has been passed making it a controversial tax haven and offshore financial centre with no small share of controversy.

Finally, there are Saint Helena, Ascension and Tristan da Cunha, British island territories in the South Atlantic. They have their own executive and legislative bodies, although they are subordinated to Governors appointed by the metropolis. In December of 1984, the UN General Assembly, with the opposing votes of London and Washington, urged Great Britain to bolster the islands' economy – based on the fisheries industry, crafts and forestry – and raise awareness amongst the inhabitants of their right to become independent. It also challenged the presence of a military base, as they are prohibited in non-self-governing territories.[34] In January 1989, a Constitution came into force that granted more powers to the local assembly of Saint Helena.

### (c) *In the Dutch Overseas Territories*

In Curaçao, which, since 2010, has been an autonomous country within the Kingdom of the Netherlands, there is a strong pro-independence movement, whose main spokesperson is the

[34] R. Bissio (dir.), *Guía del mundo 1999-2000. El mundo visto desde el sur* (Instituto del Tercer Mundo, Montevideo, 2000), at 507.

Sovereign People party, which has a significant presence in the territory's institutions and share of votes in the parliamentary elections. From the incidents of 1969 until the more recent events of 2017, the territory has experienced situations of tension and violence that have led the Dutch government to reinforce its military presence there in order to restore public order. The Dutch government found the legal formula to intervene in the island in Articles 43 and 51 of the Charter for the Kingdom of the Netherlands (1954), the document governing the relations of Curaçao, Aruba and Sint Maarten with the metropolis. According to these provisions, the safeguarding of rights, freedoms, legal certainty and good governance are an affair of the realm, which may act whenever a local body flouts the law. On 3 April, the Netherlands gave full powers to the Governor to hold elections. It did so through a rule drafted by the Minister of the Interior and signed by the King. It was the Hague's most emphatic intervention in one of its former colonies since they had attained the status of independent countries.

The case of the Netherlands Antilles poses the paradox of a parent state that is willing, even clearly determined, to grant independence to territories that, in contrast, do not want it.

### (d) *In the Portuguese and Spanish ORs*

Both of the Portuguese ORs, the Azores and Madeira, are home to low-grade pro-independence movements. These movements reached their peak activity in the 1970s, when democracy was restored in Portugal. In Madeira, the most active movement was the Madeira Archipelago Liberation Front (*Frente de Libertação do Arquipélago da Madeira* or FLAMA), founded in 1974, which carried out various armed actions from 1974 to 1976. The same years also saw the emergence of the Azores Liberation Front movement in the Azores, which called for the archipelago's independence. Neither of these movements is represented in the parliaments of either of the Portuguese autonomous regions. Furthermore, Portuguese law prohibits these types of movements and parties, insofar as Article 9 of the Law on Political Parties (Organic Law 2/2003, 22 August 2003) provides that "the formation of political parties that, through their name or programme objectives, are of a regional nature or scope is not permitted". In short, the establishment of democracy in the country considerably reduced pro-independence sentiment, transforming it into a drive towards increased autonomy.

With regard to the Canary Islands, which have had a Statute of Autonomy since 1982, various federalist, autonomist and separatist movements have co-existed in the archipelago since the late 19th century. The early 20th century saw the emergence of the Autonomist People's Party (*Partido Popular Autonomista*), which spoke of a "colonial reality". In the 1920s, the Canarian Nationalist Party (*Partido Nacionalista Canario*) was founded. It was eventually dissolved and, in the 1980s, gave rise to the Canarian Coalition (*Coalición Canaria*) party, which has a significant presence in the autonomous community's government. In 1964, the Movement for the Self-Determination and Independence of the Canary Archipelago (*Movimiento Por la*

*Autodeterminación e Independencia del Archipiélago Canario* or MPAIAC) was founded in Algeria. This radical group espoused armed struggle. Its leader, Antonio Cubillo, would become one of the preeminent figures of Canarian nationalism. Following his expulsion from the Movement, he went on to found the National Congress of the Canary Islands (*Congreso Nacional de Canarias* or CNC). These movements have experienced tensions and internal schisms and, in many cases, their current activity is negligible or non-existent. Today, many organizations and political parties describe themselves as nationalists, although not all of them support the independence of the Canary Islands.[35] As for the Spanish Constitution of 1978, as noted, any unilateral process of independence can be ruled out, since national sovereignty is vested in the Spanish people (Article 1.2) and based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards (Art. 2).

### (2) Plebiscites and Referenda in Special-Status Territories

As seen thus far, many of the territories with special status in the EU have held one or more plebiscites throughout their history on the links their people would like to have with the Member States on which they depend. There are also other outstanding processes that are not yet over.

#### (a) *The Self-Determination Referendum in New Caledonia*

As noted, the UN's Special Committee on Decolonization includes New Caledonia on its list of non-self-governing countries. One way to be removed from this list is to hold a referendum, with sufficient guarantees, for the people of the territory to decide on their future. In this regard, in November 2017, the French government and representatives of New Caledonia reached a political compromise, in the context of the Nouméa Accord, to work out the details of a referendum on self-determination, to be held by November 2018. It will not be the first time the territory has held a referendum on its future. It did so in 1987, when, following a boycott by the pro-independence forces, the "No" campaign won, with 98% of the vote.

The Nouméa Accord launched a process of "progressive decolonization", which is to culminate in a referendum on whether or not the territorial collectivity should remain within France, i.e. on the transfer to New Caledonia of sovereign powers, access to a full international status, and the transformation of citizenship into a nationality. First, the New Caledonian Congress had to set the date of the referendum; otherwise, it would fall to the French government to do so. In this regard, on 19 March 2018, the New Caledonian Congress decided,

[35] In this regard, in the successive regional elections, the ceiling of votes for openly pro-independence parties has been less than 10,000, whilst the autonomist parties have garnered more than 160,000 votes, and national parties more than 350,000.

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by 38 votes to 14, on 4 November 2018 as the date for the referendum. The exact question to be put to vote still had to be decided, a matter fraught with tension and controversy of its own.

Calling the referendum has been a delicate mission due to the strong tensions that persist between the communities. The Kanaks, the indigenous Melanesian inhabitants, account for a bit more than 40% of the population. Europeans, especially the French, pejoratively called "Caldoches", make up slightly less than a third of the islands' 270,000 inhabitants. Then there are other communities and a fairly large interethnic population. The racial melting pot is thus complex, and it is difficult to determine the exact ethnic breakdown. Hence, one of the thorniest issues is the electoral roll. The first hurtle to be overcome is for the Kanaka aborigines and the Caldoche population to reach an agreement on it. To this end, the French and Caledonian authorities agreed to register 11,000 more people on the electoral role for the referendum, one of the most controversial points. They have also specified the polling stations to be used for the referendum, the presence of international observers, and the proxy vote. The electoral rolls are limited to people who have resided in the territory uninterruptedly since 1994, although there are discrepancies over whether or not those born on the island should be registered.[36]

On 28 March 2018, the French government unveiled the question that voters will be asked in the referendum to the territory's political parties at a meeting in Paris following the related talks. It will be worded as follows: "Do you want New Caledonia to accede to full sovereignty and become independent?" This wording will be submitted to the Council of State for approval. The pro-independence camp wanted the question to refer to "full sovereignty" rather than independence, whilst the right-wing groups that advocate ties to France wanted to pose a choice between "independence" and "remaining in France".

Most surveys have shown that a majority of the inhabitants want to maintain the archipelago's links to the French metropolis, as the current situation affords them almost complete autonomy in the management of their affairs, except for sovereign powers, and moreover allows them to receive various types of solidarity funds from France. This opinion has taken shape in the so-called "loyalist" view, based on opposition to losing the French identity and, especially, on the fear that New Caledonia will become a sort of Vanuatu or Papua

[36] The pro-independence parties have sought to allow only Kanaks to vote in the referendum, but the coalition government has dismissed the proposal in favour of allowing all residents of the island to vote, which would benefit its position. The French Supreme Court found that only registered residents of New Caledonia since 1998 or those who could offer proof that they had lived there since 1988 could vote. It thus ruled, as noted above, in favour of the loyalists. Both the FLNKS and the other pro-independence parties have denounced that this way of preparing the electoral roll is harmful to their interests. On the other hand, giving the vote, as they proposed, only to ethnic Kanaka would be a major triumph for the pro-independence cause. Compounding the matter, the latter have denounced that more than 6,000 people voted irregularly in the 2014 elections, since, according to them, the provisions agreed by the Supreme Court were not respected.

New Guinea, countries that, in this faction's view, have become impoverished since their emancipation. In addition, they cite the considerable financial support that the metropolis gives to New Caledonia (close to one billion dollars a year), especially since the Nouméa Accord, and the protective role it plays, in particular against China, which, as the world's largest importer of nickel, regards the islands as a future satellite country. In contrast, the Kanaks mostly support secession. Their argument is mainly based on the danger that the demographic balance could tip in favour of non-native ethnicities and that the metropolis could withdraw its economic support in the near future, causing the local financial system to collapse.

The independence referendum was held on 4 November 2018. The result was 56.4% not favourable to independence and 43.6% in favour to independence. The turnout was 81% of the 174.995 voters eligible to vote. However, the Nouméa Accord provides for the possibility of holding up to two more referenda if the result is unfavourable to independence. Faced with the stagnation of the situation, which could drag on for more than ten years, the French authorities are tabling alternative proposals. The first would be the creation of an associated state, similar to the relationship that, in the region, links the Cook Islands and the Federated States of Micronesia to New Zealand and the United States, respectively. In this regard, Article 88 of the French Constitution authorizes France to enter into agreements with states that wish to associate with it. The second option would be the creation of a federated state, which would make it possible to meet the demands of both parties: a state for those who want independence and maintenance within the Republic for those who do not. This path would require amendment of the constitution to create a federal link between the Republic and only one of its territories, establishing an uncommonly original asymmetric federalism with no equivalent in the rest of the world.

### (b) *Other Plebiscites Resulting in Greater Assimilation, Reinforced Autonomy or a Step towards Independence*

Virtually all overseas territories that have special status in the EU have held plebiscites on the future of their relations with the parent states. In general, the results have been favourable to greater integration with the metropolis, to a lesser extent to increased autonomy, and, exceptionally, to independence.

Thus, in the French overseas territories, supporters of assimilation with metropolitan France have won the majority of referenda and plebiscites that have been held. This is what happened in French Guiana, Martinique and Guadeloupe. In the latter, a 2003 referendum asked Guadeloupeans whether they wanted the island to become a territorial collectivity, which would have given the regional government greater autonomy. The proposal was rejected by 73% of the voters. In simultaneous referenda, Saint Martin and Saint Barthélemy voted to become territorial collectivities, separating themselves administratively and politically from

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Guadeloupe. With regard to French Guiana and Martinique, simultaneous referenda were held on 10 January 2010 on a potential change in the territories' political-administrative status within the French Republic. The question was similar: Do you approve of the territory's transformation into an overseas collectivity governed by Article 74 of the Constitution, endowed with a particular form of organization that takes into account its own interests with due regard for the general interest of the Republic? In the case of Guiana, 69.8% of voters rejected the proposal for greater autonomy. In the case of Martinique, 79.31% of voters did.

Developments in Mayotte have been very particular. In 1974, in an independence referendum in the Comoros, 96% of the inhabitants of the islands of Grande Comore, Anjouan and Mohéli voted for independence, whilst 64% of the inhabitants of Mayotte voted to remain in the French Republic. In 1975, the Comoro Islands formed a new independent state, with the exception of Mayotte, which remained French. In a second local referendum held in Mayotte on 8 February 1976, 99.4% of voters voted to remain in France. In March 2009, another referendum was held in Mayotte on its accession to the status of French department. The "Yes" vote won, making it, as already noted, the 101st French department.

The case of Wallis and Futuna dates back further. In 1961, the South Pacific archipelago voted to remain an overseas territory within the French Republic.

With regard to the British Overseas Territories, there is a clear difference between the plebiscites held in the Falkland Islands and Gibraltar and those held in the other territories. A pro-independence outcome was highly unlikely in the referenda held in the Falkland Islands in 2013[37] and Gibraltar in 2006,[38] given the make-up of their populations (implanted by the administering power) and the surrounding international context (claims by Argentina and Spain, respectively). These were plebiscites that had little to do with the referenda conducted under UN supervision, and contravened numerous General Assembly resolutions on the matter. Instead, they were local plebiscites held within the British political-administrative framework for the purpose of adapting the constitutional relations between the territories and the United Kingdom, by, amongst other things, granting them a greater degree of autonomy and grounding them under the British Overseas Territory Act.

[37] 1,672 people were entitled to vote, 155 of whom (9.2%) did not. Of those who did, 1,513 voted for the islands to continue to be administered by the British government (99.83% of the votes), whilst 3 people (0.17% of the votes) voted for a change in the status quo. However, the latter vote cannot be interpreted as endorsing a single option, since the change might refer to a call for full independence, restoration of the sovereignty of the islands to Argentina, or other possible legal alternatives, which would only have been formally presented if the vote to remain under British administration had not been the majority option.

[38] In which a new constitution was approved for the territory, endowing it with a greater capacity for self-government and ensuring a more independent judiciary, although the United Kingdom's sovereignty was maintained.

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Other British Overseas Territories have also held referenda. In the referenda held in Anguilla and Bermuda (16 August 1995), the independence option lost. Specifically, in Bermuda, voters were asked to choose between independence and remaining a British overseas territory: 73.6% voted against independence and 25.7% for it, with a turnout of 58.8%. The case of the Turks and Caicos Islands was peculiar. Although they were granted independence in 1982, they preferred to retain their status as a British overseas territory.

In general, the British Overseas Territories have chosen to deepen their self-government rather than call for independence. The reason is due to their small size and populations, coupled with their status as tax havens and the importance for them of tourism. These factors are in addition to the weakness, if not outright non-viability, of numerous island and archipelagic countries in their geographic environments.

With regard to the Danish overseas territories, it is worth recalling that on 25 November 2008, a referendum was held in Greenland on greater self-government and a broadening of the territory's statute of autonomy, including the right to self-determination. The "Yes" vote won, with 75.54% of the inhabitants voting in favour, and the new Act on Greenland Self-Government entered into force on 21 June 2009. Thus, Greenland will now decide on strategic areas such the judiciary, as well as on a possible future self-determination, Greenlanders will have control over their resources (such as oil and gas), and Greenlandic will become the sole official language. Meanwhile, Denmark will continue to be responsible for foreign policy.[39] Another possible decision could be the total independence of Greenland, giving rise to a new sovereign state. However, there is no specific date for this, as the Greenlandic population and authorities understand that such an option is not viable in the short term. The objective would be to hold an independence referendum by 2020.

As for the Faroe Islands, as noted, they had called a referendum on a new constitution that would include the right to self-determination for 25 April 2018. Moreover, another referendum on the territory's independence or integration within Denmark is also planned. The Faroese would also be asked to vote on their accession to supranational organizations, such as the

[39] The Statute of Autonomy of Greenland entered into force on 21 June 2009, Greenland's National Day, granting it jurisdiction over the police, the courts and the coast guard and establishing Greenlandic, an Inuit language, as the official language. It also granted it the right to control its own resources. Any bill related to Greenland must be submitted to the Greenlandic Parliament for it to issue an opinion before the vote by the Danish Parliament. Likewise, draft decrees are subject to the prior advisory opinion of the government of Greenland. Foreign policy, defence and monetary policy continue to be the responsibility of the Danish government. A court made up of two representatives of the Danish government, two representatives of the Greenlandic government, and three members of the Danish Supreme Court appointed by the president of the country has jurisdiction over disputes related to the separation of powers. The Greenlandic government may participate in international negotiations on matters that concern it exclusively, except on issues of defence and security. The Greenlandic government may send representatives to Danish diplomatic missions abroad to promote Greenlandic interests.

European Union, of which the archipelago is not a member. This new constitution would pave the way to independence. It would define the archipelago as a nation and would lay out its rights and obligations as a people, including the right to self-determination. However, the fact of the matter is that, for internal reasons, the referendum has been postponed indefinitely.

In the case of the Danish dependencies, which already have very broad autonomy, the population is divided with regard to proclaiming independence. This is coupled with a clear and highly pragmatic concern not to lose the considerable subsidies that Denmark grants them each year. Indeed, the economy of these territories, like those of most territories with special status, largely depends on the subsidies granted by the government of the parent state.

Finally, unlike the French, British, Danish and Dutch overseas territories, independence has never been foreseen for either the Canary Islands or the Azores Islands or Madeira. Their populations are considered an integral part of the states in which they are included.

## FINAL CONSIDERATIONS

The EU grants some thirty territories scattered around the world a special status for the simple reason that they maintain a particular link with one of its Member States. The moment that link is severed, these territories become third parties with respect to the Union. Whether or not to maintain these constitutional links —which vary depending on the territory and the Member State— is a sovereign power of the Member States. The Union merely takes note in order to adapt the territorial scope of application of European law.

The examination of the internal situations of these territories and the referenda held in them on the future of their relations with the corresponding metropolises shows that, in general, the most popular option is assimilation or greater integration with the parent state. This is followed by movements in favour of greater autonomy, with only a very small minority currently supporting secessionist solutions and total independence.

The reasons for this are manifold: the lack of a truly indigenous population (Falkland Islands or Gibraltar), fear of being absorbed by a problematic third state (Mayotte with regard to the Comoro Islands), the need for economic contributions from the metropolis (virtually all the territories), fear of political instability and/or ethnic clashes (French Polynesia or New Caledonia), concern over the potential secession of parts of their territory (most of the archipelagos have doubts regarding their internal soundness and the islands do not trust each other, e.g. New Caledonia and the Loyalty Islands or the Marquesas Islands and the Society Islands); or fear of becoming an unviable nation (as has occurred in several cases in their respective regions, such as: Vanuatu for various reasons; the micro states in the Pacific that cede their sovereignty to foreign powers; or Haiti, Suriname and Guyana, whose citizens emigrate or seek refuge, precisely in the overseas territories). In short, many of these territories

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with special statuses share the same fear of the "day after" independence, recalling what happened in neighbouring countries that leapt blindly into the void when their respective metropolises withdrew from all administration, virtually overnight.

However, these trends could change, especially with regard to the French overseas territories, which are the largest in terms of both geographical size and population. The recent referendum held in New Caledonia was not clearly favourable to the unionists. Therefore, it could have a domino effect in these territories, which, like Polynesia, are currently seeing a rise in pro-independence movements. This trend may be further strengthened by the social and economic crises that many of them are currently undergoing and that, according to local public opinion, are viewed with a growing lack of interest by the states on which they depend.

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*Secession of States and Self-determination in contemporary International Law*

# EU Missions and Secessionist Conflicts

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*Abstract*: The European Union has deployed missions, mostly via the ESDP, in separatist conflicts – from Macedonia to Aceh (Indonesia) and from Kosovo to Georgia or Moldova – as one of the instruments with which to apply its policies in these areas. Except in the case of Kosovo, the EU's activity in these cases, tied to the principle of territorial integrity, has faced a dilemma relating to the impact of its peace missions: non-recognition and engagement. This policy combines the non-recognition of the secessionist entities with the desire to engage with them in a variety of relationships. This work asks whether the EU has ended up contributing to these secessionist conflicts reaching deadlock.

*Keywords*: EU Missions – Secessionist conflicts – Non-recognition and engagement – Europeanization

## (A) INTRODUCTION

The European Union (EU) has come up against a number of conflicts of a secessionist nature, both in Europe and in more distant locations. However, the EU is not exactly a stranger to dealing with conflicts of this type. We do not need reminding of its active participation in the former Yugoslavia's dissolution process. It also seems appropriate to recall the existence of a country within the EU, Cyprus, with its divided territory and community settled in the north of the island —whose recognition is impossible. The Commission attempted to implement various instruments that would assist in the future application of European Law or facilitate trade between the Turkish and Cypriot communities. Even the option of applying a preferential trade agreement was considered, but this was blocked by the Cypriot veto, which argued that this would mean recognising the Turkish Republic of Northern Cyprus.[1] This case raises a dilemma that will create urgency in the EU when dealing with secessionist conflicts, and which is based on a pairing of engagement and non-recognition, a policy that must combine the non-recognition of secessionist entities with the desire to establish a number of different relations in order to mitigate against isolation and the consequences that this can entail.

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1 D. Bouris and G. Kyris, 'Europeanisation, Sovereignty and Contested Status: The EU in Northern Cyprus and Palestine', 19 *The British Journal of Politics an International Relations*, (2017), Nº 4, at 760.

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As Nicu Popescu claims, from the Balkans to the Middle East and from the South Caucasus to Western Sahara, the European Union is surrounded by conflicts that affect its security.[2] Perhaps just as dramatically, the 2003 European Security Strategy,[3] the Solana document, already recognized this by arguing that regional conflicts constituted one of the main threats to the Union's security. The document mentioned certain areas, such as Kashmir or Korea, and made less direct references to conflicts that are closer to home, or "violent or entrenched conflicts that also persist on our borders (and) threaten regional stability." The Report on the Implementation of the European Security Strategy of 11 December 2008[4] was much more explicit; in the chapter on the EU's efforts to contribute to stability in Europe and beyond its borders, it included specific references to some of the secessionist scenarios in which the EU had already been present, mentioning specifically the deployment of crisis management missions. In particular, references were made to the situation in Georgia, in relation to Abkhazia and South Ossetia, given the recent war between the Caucasian country and Russia, and the Transnistria conflict in Moldova. And naturally, Kosovo, with reference to EULEX, the largest civil mission of the ESDP until that date. The EU's enlargement in 2004 had brought some of these conflicts significantly closer to the new European frontiers, making it even more pressing to find a more proactive approach in terms of security. The EU's Global Strategy, the strategic document "Shared Vision, Common Action: A Stronger Europe"[5], presented in June 2016 by Federica Mogherini, the High Representative of the Union for Foreign Affairs and Security Policy in a political climate quite different from that of 2003 (or in 2008), and noted by the European Council, contains several noteworthy sections.

On the one hand, it expresses the Union's commitment to the solution of prolonged disputes in the Eastern Partnership countries; on the other, when referring to the European security order, which states that the territorial integrity of States and the inviolability of their borders is key, Russia is explicitly targeted as a major strategic challenge for the EU, requiring a consistent and unitary approach as the cornerstone of the Union's policy towards Russia. While it is true that the document was written in the heat of the crisis in Ukraine and the annexation of Crimea by Russia, it should not be forgotten that this country has had some degree of political, and in some cases physical, military presence in most of the secessionist conflicts in which the EU has deployed crisis management missions. However,

[2] N. Popescu, 'EU and the Eastern Neighbourhood: Reluctant Involvement in Conflict Resolution', 14 *European Foreign Affairs Review*, (2009), at 457.

[3] Available here.

[4] Report on the Implementation of the European Security Strategy – Providing Security in a Changing World, 11 December 2008, S407/08, available here.

[5] Available here.

the strategic document of 2016 contains specific references to the deployment of military operations and civilian missions, as a reaction to international crises, although these are referred to in general terms, without any indication as to when they would be use in secessionist conflicts. Also mentioned are the need for rapid responses in accordance with the Charter of the United Nations, the requirement to rationalize the institutional structure, strengthening operational planning and constructing close connections between civilian and military missions, when deployed in the same scenario. It can thus be concluded that the EU's strategic vision, both that contained in the 2003 Solana document —produced before the secessionist conflicts that we will examine here— and that expressed in the 2016 Mogherini document, does not include a specific approach by the EU to long-term secessionist conflicts.

Most of the secessionist conflicts with which the EU has been associated share common features, or at least those located near to it geographically. According to Sebastián Relitz[6], many of these conflicts are long-standing, intergenerational, with various problems associated with their continuation; and feature both phases of relative calm and violent episodes of varying intensity. They also generate an emotional polarization that is reflected in segregation and in the search for reprisals. Lastly several unsuccessful attempts at external mediation have been made. For Dimitris Papadimitriou and Petar Petrov[7], who use the concept of "contested statehood", these conflicts share some or all of the following characteristics: an internationally recognized authority that fails to maintain effective control over part of its territory; secondly, a de facto authority that has declared independence on the disputed territory, but has not obtained international recognition, for example by the United Nations admitting it as a Member State; and thirdly, the capacity of the de jure government or de facto government is compromised by the weakness of its state apparatus. This description applies to the conflicts in Transnistria in Moldova, Ossetia in Georgia and Kosovo in Serbia, where the European Union has deployed crisis management missions, and which we will analyse in this paper. To a lesser extent, we will also examine the case of areas of the Albanian presence in the FRYM bordering Kosovo, whose separatist tensions have not crystallized in a region governed by de facto authorities, as in the previous cases. And the same will be done with the Aceh conflict in Indonesia, although in this case the EU is dealing with the final breaths of a secessionist scenario that's on the road to recovery out of respect for this country's territorial integrity.

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6 S. Relitz, 'De Facto Status in the European Neighbourhood: Between Russian Domination and the European (Dis)Engagement. The Case of Abkhazia'.

7 D. Papadimitriou and P. Petrov, 'Whose Rule, Whose Law? Contested Statehood, External Leverage and the European Union's Rule of Law Mision in Kosovo', 50 *Journal of Common Market Studies* (2012), Nº 5, at 749.

Secessionist conflicts vary in nature, and have been at differing stages of development at the time of EU intervention. The case of Aceh (Indonesia) —where the EU's involvement and the deployment of its mission occurred when the secessionist conflict was already over, and all that remained was to implement the commitment that the parties had already agreed on— is different from the Georgian conflict, where the EU observation mission aimed to monitor the ceasefire signed by Russia and Georgia after the military intervention of the former in South Ossetia, which has since become a de facto State. And, of course, it is vastly different from the case of Kosovo, where the European mission is coupled with the unilateral declaration of independence.

EU missions have been carried out in a number of other scenarios related to secessionist movements to a greater or lesser degree; for example, that of Sahel and, in particular, Mali. The presence of armed jihadist movements like Ansar Dine and Al Qaeda in the Islamic Maghreb (AQIM) combined with the previous Tuareg armed rebellion, piloted by the National Movement for the Liberation of Azawad, which aimed to segregate the north of the country. Ansar Dine, meanwhile, sought to impose Sharia law throughout Mali. In fact, the Tuareg rebellion, which began in early 2012 and succeeded in proclaiming Azawadi independence, ended following confrontations with Islamist militias; the Tuareg were expelled and control of the territory was taken by the jihadist organizations. The conflict, initially separatist, originated with an attempt to establish a branch of the Islamic caliphate in Mali. The Mission deployed by the EU, a military initiative within the framework of the Common Security and Defence Policy, aimed to assist with the training of the Mali armed forces (EUTM Mali), and was approved by the Council through Decision 2013/34/CFSP of 17 January[8], and thus had no connection with the initial Tuareg separatist attempt in northern Mali. The Decision itself stated that EUTM Mali's ultimate goal was to help the army restore Mali's territorial integrity and reduce the threat posed by terrorist groups, but without the EU mission participating at any time in combat operations. The conflict in which EUTM Mali intervened had thus lost its initial secessionist aspect and, for that reason, we will exclude its analysis in the present work.[9]

However, as Nicu Popescu asserts[10], both the cases in which the deployment of a mission has occurred and those in which the European Union has refrained from doing so are so significant for the correct assessment of the ESDP in this area. One secessionist conflict case

8 OJ L 14, 18.1.2013, at 19.

9 Regarding EUTM Mali, L. García Martín, 'La PCSD a través de las operaciones de gestión de crisis de la Unión Europea: estudio de caso de la EUTM Mali', Instituto Español de Estudios Estratégicos, Documento de opinión Nº 21/2014.

10 N. Popescu, 'EU and the Eastern Neighbourhood: Reluctant Involvement in Conflict Resolution', *supra* note 2, at 461.

where the EU has opted for non-involvement is that of Nagorno-Karabakh. Here, the ambiguity of the EU's position is well illustrated by the fact respect for Azerbaijan's territorial integrity was included in the EU-Azerbaijan Action Plan[11], while respecting the principle of self-determination of peoples was included in the corresponding EU-Armenia Action Plan.[12] In the latter, in priority area 7, contributing to the settlement of the Nagorno-Karabakh conflict, it was stated that "political support to the OSCE Minsk Group" should be increased "on the basis of international norms and principles, including the principle of self-determination of peoples". Azerbaijani scepticism about the role the EU could play in the conflict also grew as Kosovo was recognised by increasing numbers of EU Member States, making the occurrence of a similar process in Nagorno-Karabakh with the support of the EU seem possible. By the same token, Armenia would accept the EU's role if it led to recognition by the enclave's authorities. The lack of a shared commitment that is decided by both sides of the conflict has the effect of repelling the EU's greater involvement.[13] In addition, from the ranks of the Member States, one of them, France —which has a leading role in the OSCE Minsk Group, which spearheads negotiations for the conflict— is opposed to further EU intervention.[14] For all these reasons, unlike what happens in other secessionist conflicts, including those from the same geographical area, and even with Russia's lesser role and interest, the EU does not press for the deployment of a peace mission.

The EU operations and missions in secessionist conflicts that we shall explore, which have been deployed since 2003, represent one small part of the total number of missions deployed by the EU since that date, of which there have been more than thirty, be they civil, military or a combination of the two. This work aims to look specifically at this deployment in secessionist scenarios, with a view to identifying the impact it may have on those conflicts, and if they end up having a unifying effect in the country where these "de facto states" have broken off. Or whether their final effect is to legitimize secessionist intentions, as a kind of camouflaged recognition of those paralysed territories. Therefore, we will pay most attention to the conflicts' political circumstances that are brought to the fore in the deployment of the EU mission, to its legal framework as a concerted decision made by the State in whose territory it will be deployed and by the Council of the Union, and to the rules and objectives each of the missions will fulfil. We will give little attention, however, to other aspects of EU missions, such their structure, internal organization, planning or financing issues.

11 Available here.

12 Available here.

13 N. Popescu, 'EU and the Eastern Neighbourhood: Reluctant Involvement in Conflict Resolution', *supra* note 2, at 472.

14 D. Helly, 'EU's Influence in Its Eastern Neighbourhood: The Case of Crisis Management in the Southern Caucasus', 7 *European Political Economy Review* (2007), 102-117.

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The deployment of EU Missions in these conflicts cannot be judged in isolation. Such missions are merely one more method in the instruments available to the EU for managing those international crises in which it seeks to involve itself. It is thus a more general process in which, as indicated by Dimitris Papadimitriou and Petar Petrov[15], among the measures deployed by the EU in secessionist conflicts, other than dispatching civil or military missions to provide security, are the following: firstly, exercising intense diplomatic activity, including mediation efforts for solving the conflict in question; secondly, providing humanitarian aid and generally rebuilding areas affected by the conflict – which may come from European programs associated with larger political initiatives, such as the European Neighbourhood Policy; thirdly, promising EU membership as a means of pacification; and, fourthly, exercising executive powers in the contested territory, as part of the peaceful settlement of the conflict.

Regarding the promise of EU membership, this is not feasible for all states where secessionist conflicts develop, sometimes even when the will of those states is unmistakeably integrationist. This is the case in the South Caucasus countries, which since 2009 have had to content themselves with association agreements originating from the Eastern dimension of the European Neighbourhood Policy.

### (B) OPERATIONS CONCORDIA, IN THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA (MARCH-DECEMBER 2003): THE EU'S FIRST MILITARY OPERATION.

It can be argued that the first military operation deployed by the EU, Operation EUFOR CONCORDIA, in the Former Yugoslav Republic of Macedonia (hereinafter FYROM), between March and December 2003, related to separatist tensions —in this case those arising between that country's Slavic majority and Albanian minority.[16] Indeed, at the end of the 1990s, the Albanians of Macedonia felt increasingly that they were being marginalized and discriminated against, which suggested this to be present in the structure of the Macedonian State. Added to this were tensions caused by the crisis in Kosovo, which ended up triggering an influx of refugees into FYROM territory, despite its unpreparedness and lack of capacity for reception. The Macedonian majority, meanwhile, believed that the Albanians were concealing a secessionist agenda. The armed confrontation arose in early 2001 when members of the National Liberation Army (UÇK), the armed wing of rebel Albanians, deployed attacks in the border area between Kosovo and Serbia, and around the city of Tetovo. During the conflict in Kosovo and the Preservo valley in Serbia, many Albanian refugees had moved

[15] D. Papadimitriou and P. Petrov, 'Whose Rule, Whose Law? Contested Statehood, External Leverage and the European Union's Rule of Law Mission in Kosovo', *supra* note 7, 749-751.

[16] C. Mace, 'Operation Concordia. Developing a 'European' Approach to Crisis Management?', 11 *International Peacekeeping*, (Autumn 2004), Nº 3, 474-490.

to FYROM, taking advantage of the porosity of its borders; this also included UÇK fighters. The military confrontations lasted until June 25, when NATO's efforts with the UÇK achieved its withdrawal and joint EU-NATO actions with the Macedonian government led to the signing of the definitive peace agreement, the Ohrid Framework Agreement, on August 13, 2001. Both sides were convinced that while the FYROM would not accept any secessionist fickleness by the Albanian side, nor the questioning of its unitary character, it would recognise the Macedonian population's multi-ethnic composition.

Therefore, the Ohrid Framework Agreement[17] established in article 1 as basic principles the need to preserve both the FYROM's sovereignty and its territorial integrity, declaring that there would be no territorial solutions to ethnic issues. Along with this, the agreement affirmed that the multi-ethnic character of Macedonian society should be preserved and reflected in public life. Article 2.1 of the agreement gave NATO authority to monitor the establishment of a clear and unconditional ceasefire and described the armed groups' commitment to a voluntary disarmament. Annex C of the Agreement, regarding implementation and confidence-building measures, expressed the parties' invitation to the international community to facilitate, monitor and assist in the application of its provisions, and specifically references coordination efforts in that area of the European Union. This triggered a swift reaction by the international community: on September 26, 2001, the United Nations Security Council adopted resolution 1371 (2001)[18], which, firstly, welcomed EU and OSCE efforts to contribute to the application of the Framework Agreement and, secondly, supported the establishment of a multinational security presence in the former Yugoslav Republic of Macedonia at the request of its Government to contribute to the security of observers. NATO, meanwhile, deployed up to three operations.[19] The first was "Essential Harvest", in which all Atlantic Alliance member states participated from August 27 to September 2001, and whose objective was the disarmament of the Albanian groups and the destruction of their arsenals.[20] The second, "Amber Fox", between September 27, 2001 and December 15, 2002, had the mission to protect EU and OSCE observers who were monitoring compliance with the Ohrid Framework Agreement. [21] The third, "Allied Harmony", which took place between December 2002 and March 2003, was finally replaced by the EU Concordia operation, following a request made by the FYROM president on January 17, 2003. Allied Harmony, and therefore also Operation Concordia, was tasked with a double

17 Available here.

18 Available here.

19 See M. A. Acosta Sánchez, *La Política Europea de Seguridad y Defensa y la gestión de crisis internacionales. Las operaciones Petersberg*, (Dykinson, Madrid, 2008), 235-236.

20 Available here.

21 Available here.

objective: to support international observers and to assisting the FYROM government in maintaining security and order in the country.

The arrival, therefore, of the EU peace mission, which was based upon the Council's Joint Action 2003/92/CFSP of January 27, 2003, aside from government invitation, ended in a sufficiently peaceful scenario. Its contingent comprised 350 lightly armed soldiers from 26 countries, including all EU nations bar Denmark and Ireland. France, with the largest contingent at 145 members, assumed the role of lead nation, and this role which was transferred to EUROFOR on September 30, 2003. As a military mission, it had to draw upon NATO's planning and logistics capabilities, which came after the collaboration mechanisms between NATO and the EU known as Berlin plus were concluded; these were adopted in an agreement on March 17, 2003, a few days before the launch of Concordia. The link between NATO and the EU also made Operation Concordia more robust and credible in the eyes of the Macedonians, which guaranteed continuity from previous NATO operations.[22]

The operation's duration[23] was initially scheduled for six months, from March 31 to September 15, 2003, but was later extended until December 15 of that year, following the request of the FYROM president and the subsequent Council Decision 2003/563/CFSP, in which NATO also agreed to also prolong its additional resources available to EU. Throughout this period, and as stated in its preamble, the Council Joint Action 2003/92/CFSP, Operation Concordia was complemented by an EU contribution based upon "a broad approach with activities to address the whole range of rule of law aspects, including institutional building programmes and police activities." Thus, it will "contribute to the overall peace implementation in the former Yugoslav Republic of Macedonia as well as to the achievements of the Union's overall policy in the region, notably the stabilisation and association process". This issue was clearly stated by the European Parliament in its resolution of 12 March, 2003[24] and indicates that it is difficult to judge EU peace operations separately from the EU's other actions in that same conflict.

Operation Concordia demonstrated the EU's ability to deploy a military mission, albeit a minor one, with the support of the Atlantic Alliance. It also, therefore, served to verify the correct operation of relations between the two organizations. From the perspective of the secessionist conflict, it could also be argued that there has not been a breakthrough, as it had previously been mitigated by the Ohrid Framework Agreement and by the deployment of the three NATO operations that preceded Operation Concordia. On a similar topic, the

[22] C. Mace, 'Operation Concordia. Developing a 'European' Approach...', *supra* note 16, at 481.

[23] See the data provided by M. A. Acosta Sánchez, *La Política Europea de Seguridad y Defensa y la gestión de crisis internacionales...*, *supra* note 19, at 239.

[24] OJ C 61, 10 March 2004.

Commission's contribution within the framework of the stabilization and association policy, that is, the "Europeanization" of crisis management, should also be assessed.

(C) EUPOL PROXIMA, IN THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA (DECEMBER 2003-DECEMBER 2005)/THE EU POLICE ADVISORY TEAM, EUPAT (DECEMBER 2005-JUNE 2006).

Operation Concordia was replaced by EUPOL Proxima, a police operation which was deployed for two years. This action also decreased significantly as the initially secessionist conflict was mitigated by another police mission, the EU Police Advisory Team, EUPAT, which was much smaller.

As Isabelle Ioannides maintains[25], in late 2002 the situation in FYROM was still fragile. Weapons proliferation was occurring privately, with an absence of law enforcement in areas dominated by the Albanian minority; as a result, the country's progress towards stability was very slow. The police even had to be redeployed to areas where the crisis had begun in 2001. In this context, improving police relations with the Albanian minority was a top-priority matter. Consequently, once the Concordia period expired, on the request of the FYROM president, formulated on 16 September, 2003, it was replaced by a civilian crisis management mission, the Proxima mission. This was decided through Council Joint Action 2003/681/CFSP.[26] Furthermore, an agreement was concluded between the EU and FYROM on the Mission's status and activities, which was annexed to Council Decision 2004/75/CFSP, of 11 December, 2003.[27] Article 3 of the Joint Action established that the EUPOL Proxima mission was a composite of several tasks: the consolidation of law and order, including the fight against organized crime, focusing on sensitive areas; the practical implementation of the comprehensive reform of the Ministry of Interior, including the police; the operational transition towards, and the creation of a border police; and the work of the local police in building trust in the population. But, as indicated in the same article 3, the aim was to support through monitoring and mentoring. However, article 8 of the agreement on the status and activities of the Mission gave the right to establish an armed protection element of 30 police officers to manage exceptional cases in order to protect EUPOL Proxima personnel.

It was, therefore, a civil and crisis management mission involving some 200 members, coming from all EU Member States, except Malta and Ireland, as well as Bulgaria, Romania, Turkey, Norway, Ukraine and Switzerland. The legitimacy of the mission, which was not only a continuation of Operation Concordia, but only in time, since its nature changed from

[25] I. Ioannides, 'EUPOL PROXIMA/EUPAT (FYROM)', G. Grevi, D. Helly and D. Kehoane (eds.), *European Security and Defence Policy. The first 10 years (1999-2009)*, (EU Institute for Security Studies, Paris, 2009), at 189.

[26] OJ L 249, 1 October 2003, at 66.

[27] OJ L 16, 23 January 2004, at 65.

military to civilian, coming, of course, from the Ohrid Framework Agreement. It was not the first, but the second EU police operation within the ESDP framework; the EU Police Mission (EUPM) had previously been deployed in Bosnia and Herzegovina between January 1, 2003 and December 31, 2011. As María Julia Barceló argues[28], the objectives set by the mission were very ambitious, since it was not only about contributing to the consolidation of the rule of law and public order in the country, but also developing of an effective, professional, democratic and multi-ethnic police force. One sign that it has had some success is the extension of EUPOL Proxima to another, much smaller, mission.

That other mission was formed by the European Union's Police Advisory Team, which was the result of consultations between the EU and the FYROM government when EUPOL Proxima's operation drew to a close. It was created through Council Joint Action 2005/826/CFSP, with the aim of further supporting the development of an efficient and professional police service (Article 1.2), and lasting from December 15, 2005 to June 14, 2006. There were 29 EU police experts, contributed by 16 Member States: Germany, Austria, Belgium, Cyprus, Denmark, Spain, Finland, France, Greece, Hungary, Italy, Latvia, Slovakia, Slovenia, United Kingdom and Sweden. The experts supervised and apprehended the police on priority issues in the areas of border police, public peace and order and accountability, and the fight against corruption and organized crime. Supervision focused on high-ranking officers and officers.

Through the various missions it has developed in Macedonia, the EU has manifested its success. There is no doubt that Macedonia has made substantial progress in areas of conflict and the country's security since its deployment, although the crucial contributions made by further operations carried out by NATO before the deployment of EUFOR Concordia should not be forgotten.[29] Also, the decreasing sequence of the three missions' mandates supports the idea of an improvement to the situation, and that the conflict has not become entrenched or reached the levels of those that will be examined further down. Contributing to this are not only the EU missions, with their limited mandates in the police sector, but also Macedonia's objective of Europeanization: this country has been a candidate for EU membership since December 2005.

### (D) SEPARATISM IN ACEH (INDONESIA): THE EU'S ACEH MONITORING MISSION

[28] M. Julià Barceló, *Las misiones de paz de la Unión Europea. Fundamentos jurídicos, origen y desarrollo, sistema organizativo, procedimiento de creación y seguimiento y acuerdos internacionales de ejecución*, (LLM thesis on file at the Universidad Oberta de Cataluña), Barcelona, 2012, p. 442.

[29] I. Ioannides, 'Police Mission in Macedonia', M. Emerson and E. Gross (eds.), *Evaluating the EU's Crisis Missions in the Balkans*, (Centre for European Policy Studies, Brussels, 2007), at 114.

Another of the scenarios in which the European Union has deployed a peace mission, in this case one of a civil nature, has been in Indonesia, with regard to the separatist conflict in Aceh. The Aceh Monitoring Mission (AMM), approved on September 9 2005 by Council Joint Action 2005/643/CFSP, was the result of the Memorandum of Understanding reached by those party to the conflict, the Indonesia government and the Free Aceh Movement (GAM), on August 15, 2005. This Memorandum ended a conflict that had developed three decades earlier and whose peaceful culmination contributed to the country's recovery from the devastating tsunami in 2004, leading all sides of the conflict to work towards peace and reconstruction.[30] Part 5 of the aforementioned Memorandum contemplated the creation of the AMM, which would be established by the European Union and by the ASEAN countries with a view to implementing the commitments derived from the Memorandum itself.

How and why had the EU's arrival and the configuration of its first peace mission taken place in such a distant land as Asia? The EU's presence in the area had already been felt, prior to the AMM action, and not only with reconstruction tasks in Aceh. Through its member states, the EU has been the largest direct investor in Indonesia, and is the country's second largest trading partner after Japan. In addition, the EU considers Indonesia as a key player in the Asia-Pacific region, a favourable ground for promoting democracy, good governance and respect for human rights, and a constructive partner in the fight against transnational terrorism.[31]

This facilitated the EU's path, given that, in the end, it was the only organization that attracted a consensus from the conflict's two sides. The Indonesian government preferred ASEAN, while rejecting the United Nations because of experiences from the East Timor case. The GAM, meanwhile, wanting to ensure the maximum internationalization from the conflict, opted for the EU, while not seeming to fully support the ASEAN, at least as the only organization intervening in the conflict's resolution. The ASEAN also seemed to be lacking in the necessary capabilities to develop the mission alone. As Kirsten E. Schulze says[32], ties were made with the EU because the peace process that had previously been launched, the Helsinki Process, which involved the Finnish NGO Crisis Management Initiative, included

[30] S. Anderson, 'Why EU promotion is at odds with successful crisis management: Public relations, news coverage, and the Aceh Monitoring Mission', EU Centre in Singapore, Working paper Nº 10, September 2012, at 2.

[31] Gunaryadi, 'The EU in the peace process for Aceh', *Asia Europe Journal*, (April 2006), Vol. 4, Issue 1, 89-90.

[32] K. E. Schulze, 'Mission Not So Impossible: The AMM and the Transition from Conflict to Peace in Aceh, 2005-2006', S. Rajaratnam School of International Studies, Working Paper nº 131, 29 june 2007.

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the former Finnish president Martti Ahtisaari. It was he who suggested that it might be appropriate for the EU and ASEAN to intervene in managing the crisis.[33]

In line with the view the EU had developed of Indonesia as a preferred trading partner, its status as an ASEAN reference country and trusted partner in the fight against transnational terrorism, its choice for Indonesia's territorial integrity and its non-support of the GAM's secessionist claims in Aceh were clear. In this line, and as is traditional in the CFSP, the position of the Member State that best knew Indonesia, the Netherlands —which supported the need for stability in the region and of having an Indonesian partner with a strong government— was followed.[34]

But within the EU, not all the Member States were clear about the benefit of deploying a mission in such distant lands. As Giovanni Grevi[35] maintains, at the beginning, faced with a silent majority that did not consider it to be a priority, only countries like Finland, Sweden, the Netherlands and France pressed for the mission's deployment. The others understood that the EU would be better off concentrating its efforts on the stability of the Balkans or on providing security to its immediate surroundings. Finally, when the mission was favourably decided, among the reasons were that tested the functioning of the ESDP's crisis management mechanism and that it contributed to the EU's perception as a global player that was able to provide security beyond the immediate circle of its neighbouring countries.

On July 12, 2005, the Indonesian government addressed the EU to formalize the invitation to participate in the Aceh Monitoring Mission, while also requesting this from certain ASEAN countries, specifically governments from Brunei, Malaysia, the Philippines, Singapore and Thailand. Support for EU participation was likewise expressed by the Free Aceh Movement (GAM). The legality requirement of obtaining the consent of the State of the territory in order to be able to deploy this non-coercive mission was thus fulfilled. The mission was approved by Council Joint Action 2005/643/CFSP of 9 September[36], which expressed interest in a united, democratic, stable and prosperous Indonesia and the EU's respect for the Asian country's territorial integrity, expressing satisfaction at the intention voiced by the Indonesian president to grant special autonomy to Aceh.

The European Union's Observation Mission in Aceh, called the Aceh Monitoring Mission (AMM) and its first mission in Asia, expressed its mandate in article 2 of its Joint Action. In

[33] S. Anderson, 'Why EU promotion is at odds with successful crisis management: Public relations, news coverage, and the Aceh Monitoring Mission', EU Centre in Singapore, Working Paper Nº 10, September 2012, at 2.

[34] Gunaryadi, 'The EU in the peace process for Aceh', *supra* note 31, at 97.

[35] G. Grevi, 'The Aceh Monitoring Mission: towards integrated crisis management', P-A. Barud and G. Grevi, *The EU mission in Aceh: implementing peace*, European Union Institute for Security Studies, Occasional Paper, nº 61, December 2005, at 22.

[36] OJ L 234, 10 September 2005, at 13.

accordance with this, the AMM was to supervise the implementation of the commitments between the Indonesian government and the GAM, as specified in the Memorandum of Understanding that both parties signed. The mandate was included in paragraph 2 of article 2, following exactly what was already laid out in the Memorandum. The AMM's commitments were to: a) monitor the demobilization of GAM and the decommissioning of its weapons; b) monitor the relocation of "non-organic" military forces and police troops; c) monitor the reintegration of active GAM members; d) monitor the human rights situation and provide assistance in this field; e) monitor the legislative change process; f) resolve controversial amnesty cases; g) investigate and rule on the complaints and alleged violations of the Memorandum; and, h) establish and maintain of liaison and good cooperation between the parties.

Participating in this mission —which was of a civil nature but included experts with military training in order to perform the weapons decommissioning and confiscation tasks— were all EU member countries, plus Norway and Switzerland, as well as the five aforementioned ASEAN member states. Although these countries contributed to the mission with a large number of members —95 ASEAN countries for the EU's 125 at the mission's most active point—[37] the leading role was assumed by the EU, and this was also perceived on the ground. Deployment took place on September 15, 2005, for an initial period of six months, which was subsequently extended until December 15, 2006.

The mission proved successful, playing an important role in the management of the secessionist crisis. However, that crisis had already been substantially weakened, and the Helsinki Process, which culminated with the Memorandum of Understanding, had simply taken its course in a situation combining the 2004 tsunami catastrophe, a traditionally weak GAM and an Indonesian government with renewed democratic credentials. In this sense, the EU emphatically supported the principle of Indonesian territorial integrity from the outset, and collaborated in settling a secessionist conflict that was at its terminal phase. The EU's participation was inclusive and agreed by both parties from the beginning, and sought by the GAM. The Mission's success was also linked to its impartiality during the development and implementation of its mandate, and both parties' commitment to the process and its functions. And yet, as Xira Ruiz Campillo[38] warns, for the people of Aceh, the AMM played a vital role in the promotion and strengthening of peace, focusing primarily on security issues such as: monitoring the amnesty of GAM prisoners, confiscating and destructing their

[37] K. E. Schulze, 'The Aceh Monitoring Mission', G. Grevi, D. Nelly and D. Keohane (eds.), *European Security and Defence Policy. The First 10 years (1999-2009)*, (European Union Institute for Security Studies, Paris, 2009), at 267.

[38] X. Ruiz Campillo, *Las misiones civiles de la Política Europea de Seguridad y Defensa: Evolución 2003-2006*, (LLM thesis on file at the Universidad Complutense de Madrid), 2007, p. 389.

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weapons, redeploying of Indonesian forces and reintegrating fighters. In addition, the AMM was responsible for overseeing the political process, which included the first direct elections. One area which lacked progress was that of human rights; the mission ended without Indonesia establishing a Human Rights Court or a Truth and Reconciliation Commission.[39]

### (E) THE BORDER ASSISTANCE MISSION TO MOLDOVA AND UKRAINE AND THE TRANSNISTRIAN CONFLICT

The conflict in Transnistria arose in the heat of the USSR's break-up and the creation of Moldova, when separatists in the region proclaimed their independence in 1990, and ending up fighting with the Moldovan army in 1992. Although a ceasefire was agreed that same year, the conflict later became entrenched, with the territory transformed into a "de facto State" with Russia's support but without international recognition. Russia was heavily involved from the start, as it had troops in the region from before the conflict – the 14th Army – which have remained stationed in Transnistria until the present time. In addition, it was not devoid of economic interest and investment in the region, where Russian businessmen took advantage of the different customs procedures between Moldova and Transnistria, having introduced goods over the border. Because of its heavy involvement, Russia participated in not only the mediation leading to the ceasefire, but in the subsequent settlement process, known as the "Permanent Conference for Political Questions in the Framework of the Negotiating Process on the Transdniestrian Settlement", or 5+2 process. In it, together with Russia, were Moldova, Ukraine, the OSCE and the Transnistria region itself, plus the EU and the United States as observers. This process, which has been marked by fluctuations and has languished at times, was reactivated in 2011 on the occasion of the Russian-German initiative, which focused on the Meseberg Memorandum[40], but which has not, however, managed to move the process towards an agreed solution.

We are thus dealing with a secessionist conflict where the action or, as the case may be, the inaction of the European Union and its Member States is strongly mediated by Russian interests and even by the presence of armed contingents of that country, that support the separatist ambitions. However, such a sticking point appears as a result of progress towards the East due both to enlargement and to the European Neighbourhood Policy, that is, the projection of the European model and Russia's perception of this fact as a threat to its hinterland.

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[39] K. E. Schulze, 'The Aceh Monitoring Mission', G. Grevi, D. Nelly and D. Keohane (eds.), *European Security and Defence Policy*, *supra* note 37, 270-271.

[40] S. Wolf, 'The Transnistrian Issue: Moving Beyond the Statu quo', Directorate –General for External Policies, European Parliament, 2012, at 6.

Against this backdrop EU's Border Assistance Mission, the EUBAM Moldova-Ukraine, was developed, which was not created until the end of 2005. The EU's involvement in the Transdniestria conflict was, in fact, minimal until 2003. At that time, as Marius Vahl[41] points out, the possibility was discussed of the EU organizing a post-conflict operation in Transnistria within the framework of the European Common Security and Defence Policy. It was discussed by the Political and Security Committee on several occasions, who had made proposals to both the European Union Institute for Security Studies and the Dutch OSCE Presidency. But there was no progress in that regard.

Ukraine and Moldova engaged in mutual negotiations that year, with the aim of securing customs control on Transnistria's long border, in light of the high levels of smuggling that occurred there. In March of that year, the Commission joined the negotiations, whose objective was twofold: a ban on the export of goods originating in Transnistria that did not bear a Moldovan customs stamp and customs control regarding this matter at the border. The formal request to the EU was delayed until 2005, when on 2 June, the presidents of Moldova and Ukraine addressed a joint letter to the President of the Commission and the High Representative for the CFSP. This requested technical assistance for a customs control agreement and an effective customs control mechanism on the Transnistrian section of the Ukrainian-Moldovan border. Following a fact-finding mission from the European side, it concluded that both countries needed to agree on the mission's mandate and role. For that reason, the Memorandum of Understanding on the EU Border Assistance Mission was agreed between the Commission and the governments of Ukraine and Moldova on 7 October, 2005.[42] The Memorandum established that the Mission would provide practical advice on matters relating to the border, customs and revenue, but that it would be authorised to enforce the Moldovan or Ukrainian legislation, abstaining from any action not compatible with its consultative nature. The objectives, described in the Annex to the Memorandum, aimed to build up appropriate operational and institutional capacity in both countries to ensure effective border control and surveillance and to improve transnational cooperation on border management. But, in addition, the Mission was entrusted with another overall objective: to contribute to settling the Transnistria conflict "by strengthening border control and border surveillance in Moldova and Ukraine, thus reducing possible security threats originating from this region." Among the specific objectives, one added the Mission's involvement in this task, confirming that it should make a positive contribution towards the settlement of the conflict in Transnistria and, if this were achieved, to promote the consolidation of the settlement.

[41] M. Vahl, 'The Europeanisation of the Transnistrian Conflict', CEPS Policy Brief, Nº 73/March 2005, at 2.
[42] Available here.

What makes this matter unusual is that the contribution to the conflict's solution was not based on the Mission's political involvement in the negotiation process, but arose precisely from the consequences of its border control management, thus reducing possible security threats, due the presumption that the elites of the secessionist territory had ties with and were benefitting from illegal smuggling across de facto borders. By combatting smuggling, the EU Mission sought to reduce these elites' interest in maintaining the separatist status quo.

Therefore, the Mission's configuration meant its nature was twofold; it was a hybrid mission involving both technical assistance and security-related political matters. On the one hand, the Commission was responsible for the Mission's financing, management and execution, although this in close cooperation with the political supervision from the Council and the contribution of the Member States.[43] It was not, therefore, a mission within the ESDP framework, despite having a minor component relating to security, which ultimately proved to be absolutely residual. As Madalina Dobrescu maintains[44], in this sense, EUBAM should be considered as a novelty within the toolkit available to the EU for civil administration, rather than an ESDP mission – although the Council is assured of the exercising of political supervision – or an exclusively Commission-managed operation, due to the participation of the Member States. Of them, only Ireland, Luxembourg, Malta, Spain and Sweden have not participated. By contrast, countries have been added, with members sent to the Mission from Georgia, Kazakhstan and Tajikistan. What did occur, with the CFSP's own instruments, was that the EUSR's mandate for Moldova was amended, through Joint Action 2005/776/CFSP, to include the objective of enhancing "the effectiveness of border and customs controls and border surveillance activities in Moldova and Ukraine along their common border, with a particular focus on the Transnistrian section, notably through an EU Border Mission".[45]

In theory, the Mission's work has ensured international cooperation between Moldova and Ukraine in their approach to customs standards and European legislation. In a first phase, this has translated to contributing to the facilitation of economic relations between Moldova itself and Transnistria. In this regard, it can be assumed that the EU Mission's role, which in that phase has normalized the customs regime between Moldova and Transnistria, could effectively have guaranteed interpretable steps to bring closer a solution to the conflict. But

[43] G. Dura, 'EUBAM Moldova.Ukraine. The EU Border Asistance Mission to the Republic of Moldova and Ukraine', G. Grevi, D. Nelly and D. Keohane (eds.), *European Security and Defence Policy. The First 10 years (1999-2009)*, (European Union Institute for Security Studies, Paris, 2009), 279-280.

[44] M. Dobrescu, 'EU security practices in Eastern Europe: Extending European risks or managing risks?", Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration, 2015, Nº2/15, at 7.

[45] OJ L 292, 8 November 2005, at 13.

circumstances changed when the Moldova-EU Association Agreement, which included the creation of a free trade area, came into operation, because the Transnistrian authorities had opposed the agreement, probably through fear of the Russian reaction and its retaliatory measures if they agreed to join the free trade area. From this moment onwards, the EU Mission's activity, aimed at facilitating the implementation of the Moldova-EU Association Agreement, assisting this country in strengthening the control of its internal border with Transnistria, helped achieve the opposite effect of that in the previous stage, where the undertaking had been to guarantee the porosity of the border, and therefore contact between the opposing sides. Therefore, as Madalina Dobrescu warns, Moldova's requirement to strengthen its internal border in order to comply with the free trade area deriving from the Association Agreement, combined with the tasks of the EU Mission on the border between Moldova and Ukraine for the same purpose "showed how one of the EU's civilian missions deployed in the Eastern Neighbourhood has inadvertently contributed to promoting the status quo in the Transnistrian conflict and in some cases even fuelled growing tensions."

Being a Mission, not so much of the ESDP, because the political activities in the negotiation process were alien to it, and only its contribution to the conflict solution seemed to come from the consequence of contributing to fiscal harmonization and customs checkpoint at the frontier, it seems that the negative effect on settling the secessionist problem is more a result of the EU's Europeanizing ambition through its European Neighbourhood Policy.

### (f) Secession in Kosovo and EU Mission: EULEX Kosovo (februray 2008-June 2018)

In theory, other EU Missions have had to deal with separatist conflicts to which the EU position has been guarantor of the principle of the States territorial integrity where such secessionist attempts were lodged, but in the case of Kosovo the situation U-turns. In effect, the position of the EU and of most of the Member States will make a major contribution to giving acceptance to independence in a secessionist conflict without maintaining the Serbian state's territorial unity. And the EU Mission EULEX Kosovo will be key to achieving that goal. In addition, the EU's decisions in this conflict will give little respect to the international community agencies' position, particularly the Security Council, whose resolution 1244 (1999), of 10 June, forms the background for international legality. Kosovo had been under international administration since 1999, established through the United Nations Interim Administration Mission in Kosovo (UNMIK) after the NATO bombing of Serbia. Resolution 1244 (1999) had given the United Nations mission a mandate on Kosovo's administration, including matters relating to justice and the police. These it remained responsible for, including granting functions to the self-government authorities following the

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adoption of the Constitutional Framework for self-government on 15 May, 2001[46], which was passed by the Special Representative of the United Nations Secretary-General. Under this Framework, some powers were transferred to Kosovo's provisional self-government institutions, which included a parliament, a president responsible for foreign affairs, a government —including a prime minister— a judicial system and thirty municipalities.[47] As stated by Dimitris Papadimitriou and Petar Petrov[48], the Kosovan authorities were limited by their inability to perform their functions in the northern area of the Serbian minority, because that minority organized their own self-government, in close connection with Serbia.

According to resolution 1244 (1999), the presence of the UNMIK in Kosovo, which was still bearing on the majority of the responsibilities, including exercising police functions and rebuilding the judicial system, was joined by other organizations: the OSCE dealt with areas such as democratization and human rights; the UNHCR coordinated humanitarian assistance to the displaced and the European Union was involved with economic reconstruction. However, the ultimate decisions on all issues rested with the United Nations Special Representative.[49]

As early as October 2005, the need for the continued presence of an international police force with executive powers, as well as international judges and prosecutors to deal with cases involving war crimes, organized crime, corruption and interethnicity, was still clear.[50] This especially in the wake of the interethnic disturbances that had occurred in March 2004.

Moreover, negotiations on Kosovo's final status began on 20 February, 2006, which sought a new Security Council resolution to replace resolution 1244 (1999) and establish a definitive solution to the situation in Kosovo. Previously, in November 2005, a representative of the United Nations had been appointed as United Nations envoy on Kosovo's status for that purpose: Martti Ahtisaari. The cornerstone of the dissent in the international community regarding Kosovo was the "Comprehensive Proposal for the Kosovo Status Settlement," also known as the Ahtisaari Plan[51], presented on March 26, 2007, which fostered an internationally supervised Kosovan independence. The Plan was supported by the Kosovo authorities and rejected by Serbia. It was never accepted by the Security Council – despite the support of the United States, France and Great Britain – because of Russia and China's reluctance to

[46] UNMIK/REG/2001/9, 15 May 2001.

[47] Ibid.

[48] D. Papadimitriou and P. Petrov, 'Whose Rule, Whose Law? Contested Statehood, External Leverage and the European Union's Rule of Law Mission in Kosovo', *supra* note 7, at 754.

[49] E. de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX', 103 *AJIL*, Nº 1, (Jan. 2009), at 84.

[50] Report on the situation in Kosovo, dated October 7, 2005, by Kai Eide, Special Envoy of the Secretary General of the United Nations, in UN Doc. S / 2005/635, at 40.

[51] S/2007/168/add. 1.

support this path towards Kosovan independence, despite it being internationally supervised. It's worth noting that the Ahtisaari Plan was already in favour of an ESDP mission for Kosovo, under the direction of the EUSR, with powers in the rule of law field, including in particular judicial, police, border control and customs matters.[52]

During discussions within EU institutions starting in February, 2005 about their contribution to Kosovo's case, it was decided that a relevant role must be played, that such a role should not be identical to that deployed by the UNMIK, that such a role should be deployed in the field of the rule of law and that it should be done as soon as possible.[53] The EULEX Kosovo Mission had prior preparation, consisting of the deployment of an advance team, the EU Planning Team (EUPT Kosovo) whose objective, according to its instrument of establishment, Council Joint Action 2006/304/CFSP[54], was to "ensure a smooth transition between selected tasks of UNMIK and a possible EU crisis management operation". The dispatch of EPUT Kosovo had previously been suggested by the Special Representative of the United Nations Secretary-General in a letter to the High Representative of the CFSP dated 4 April, 2006.[55] In addition, the Kosovo's self-government authorities not received the EPUT Kosovo favourably but also agreed to the future possibility of an ESDP mission in the field of the Rule of Law.[56] In the Joint Action (recital 13), the Council took care to specify that "the establishment of an EUPT Kosovo will not in any way or form prejudge the outcome of the future status process or any other subsequent decision by the EU to launch an ESDP mission in Kosovo". But this care was disregarded at the time of determining its functions because, as Araceli Mangas Martín[57] has warned, EPUE Kosovo's acknowledged purpose was to displace UNMIK, either by advising on transferring powers to local authorities, or planning the transfer of UNMIK's tasks to "a future EU crisis management operation, in the field of the rule of law and other areas that might be identified by the Council in the context of the future status process" (Article 2.3 of the Council Joint Action 2006/304/CFSP). However, that the EU's intention was to acquire a leading role in Kosovo, even at the expense of the UNMIK's presence, could be interpreted in two ways. Firstly, that such willingness to increase its visibility was independent of the decision on Kosovo's future status, in line with the contents of recital 11 of Joint Action 2006/304/CFSP. Secondly, that

52 Annex IX, art. 2, point 2.3 of the Ahtisaari Plan.

53 D. Papadimitriou and P. Petrov, 'Whose Rule, Whose Law? Contested Statehood, External Leverage and the European Union's Rule of Law Mission in Kosovo', *supra* note 7, at 755.

54 OJ L 112, 24 June 2006.

55 As mentioned in recital 11 of Joint Action 2006/304 / CFSP.

56 Recital 12 of Joint Action 2006/304 / CFSP.

57 A. Mangas Martín, 'Kosovo y Unión Europea: Una secesión planificada', *REDI*, vol. LXIII (2011), 1, at 115.

the deployment of EPUT Kosovo was in that sense not innocent, and was intended to facilitate the secessionist option: Kosovo's independence.

What was the EU's position on Kosovo's international status when EUPT Kosovo was approved and deployed? As Araceli Mangas Martín has noted[58], the European Council and the Council's pronouncements, at least until November 2006, had rejected recourse to a unilateral solution such as that which would eventually apply in Kosovo. This author makes references specifically the Council Decision of 30 November, 2006 which grants exceptional financial assistance to Kosovo from the Community, the preamble of which included a mention of Security Council Resolution 1244 (1999), stating that it was on track, "pending a final settlement, of a substantial degree of autonomy and self-government in Kosovo."[59] But, months before, the Joint Action that created EPUT Kosovo, despite containing an extensive preambular reference to resolution 1244 (1999) had been purged of any position regarding Kosovo's status, which should be assessed as a landslide that abandoned the arguments supporting territorial integrity. Why was this Joint Action not used to express the EU's faith in this principle for the future of Kosovo? Its failure to do this can only be interpreted as a settling of dissent from member states on Kosovo's international status. There was, of course, an express mention of support for Martti Ahtisaari, as the Council had declared on 12 December, 2005. Given that the United Nations Envoy was already developing his mandate, can we presume that his choice to conceive Kosovo as a special case and to give it the solution of independence under international control was already known in the EU, and assumed by the majority of its member states?

That the Ahtisaari Plan was known to its last extremes is shown by the fact that the EU combined EPUT Kosovo with the deployment of another team, mentioned in the Plan. This was the ICM/EUSR Team, or EU team, which contribute to the establishment of a possible International Civilian Mission in Kosovo, including the EU Special Representative (EUSR) component. This Team was approved through Joint Action 2006/623/CFSP, of 15 September.[60] It was intended to work in cooperation with the international community, and therefore in close collaboration with UNMIK, and with the Kosovan authorities. Sometime later, when the initial action was up for renewal on 31 July, 2017, the name International Civil Mission was changed to International Civilian Office, which put it one step further in line with the Ahtisaari Plan, which also used this term. In fact, in the recital of Joint Action 2007/517/PESC, of July 16[61], which carried out the said change, the Ahtisaari Plan, which was

[58] Ibid. 105-112.
[59] OJ L 339, 6 December 2006, at 36.
[60] OJ L 253, 16 September 2006, at 29.
[61] OJ L 190, 21 Julio 2007.

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never accepted, was openly recognized as a rationale. As Araceli Mangas Martín warns[62], this International Civil Office —which never had the Security Council's support, and which remains outside resolution 1244 (1999)— had no other legal basis than the Constitution of Kosovo, which was moreover a true reflection of the Ahtisaari Plan.

In a scenario that continued to be marked by the lack of agreement on the final status of Kosovo, given the blockade that was the Security Council on that issue, the EU approved the development of EULEX Kosovo just days before the unilateral declaration of independence was adopted, on February 17, 2008. Joint Action 2008/124/CFSP, of February 4, was adopted, as Araceli Mangas maintains, "knowing for sure that this (the unilateral declaration of independence) would take place without authorization from the United Nations"[63]. The declaration was not exactly agreed unanimously, given the absolute opposition from five Member States —Cyprus, Slovakia, Spain, Greece and Romania. Despite this, the Joint Action was adopted thanks to the constructive abstention of the five countries mentioned in article 27.3 TEU. Why was EULEX Kosovo still deployed? There is no doubt that, among the majority of the Member States that supported independence, the whole idea was that not doing so would show the EU to be incapable of acting, and acting with one voice, in the face of a crisis that was developing on European soil.[64]

Kosovo declared its independence unilaterally by adopting the Ahtisaari Plan as the basis of its Constitution. And, in the same vein, the foundation and the mandate of EULEX Kosovo draw from the provisions in that Plan that referred to the development of the EU mission. Indeed, as to its foundation, Joint Action 2008/124/CFSP could not take shelter under the protection of a new Security Council resolution, given that it was never adopted, so had to continue using resolution 1244 (1999). In its recitals, it therefore simply recalled the paragraphs of the United Nations resolution which authorized the Secretary General to establish – with the assistance of the competent international organizations – an international civil presence in Kosovo, and in which it welcomed the work initiated by the EU in the framework of economic development and stability in the region affected by the Kosovo crisis (paragraphs 10 and 17). But were those mentions enough to legitimize EULEX Kosovo as a mission authorized by the Security Council? EULEX Kosovo was not, of course, a mission established by the United Nations Secretary-General but by the EU itself. Without the endorsement of a Security Council resolution, EULEX Kosovo would need the consent of all the parties involved in the area it was to be deployed. This required the consent of the

[62] A. Mangas Martín, 'Kosovo y Unión Europea: Una secesión planificada', *supra note 57*, at 116.

[63] Ibid, at 117.

[64] R. Muharremi, 'The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law', 70 ZaöRV (2010), at 366.

territorial state of the United Nations which was still Serbia – inasmuch as it had assumed the administration of Kosovo, and of the Kosovar authorities themselves.

And most importantly, for that reason – because it lacked legal basis – it could not affect UNMIK and its competence deployment that was made on the basis of resolution 1244 (1999). Quite the opposite occurred: the reality of the EULEX Kosovo mandate affected both UNMIK's competences and its mandate, which had to be restructured. The mandate of EULEX Kosovo, as determined in article 2 of Joint Action 2008/124/CFSP was to "assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices". Regarding the nature of its tasks, the same article explained that EULEX Kosovo would fulfil its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities. Among the functions set out in article 3 for the fulfilment of the mandate included in article 2, some would lead to the displacement of UNMIK. As Robert Muharremi argues[65], the "legalization" of EULEX Kosovo did not take place until months after its initial deployment, when in November 2008 the United Nations Secretary-General informed of Serbia's acceptance of certain conditions – the six-point plan – for the reconfiguration of UNMIK and for the EU Mission to go ahead.[66] These were: that the Mission had to respect resolution 1244 (1999)'s framework, act under the authority and according to the United Nations' neutrality status and inform it of its activity. The Secretary-General's six-point plan, which the Kosovo authorities initially rejected but later accepted, included the fact that the Kosovar authorities would not deploy police, judicial or customs powers in the area where the Serbian minority was located, and that these would remain under United Nations control.

In theory, therefore, following six-point plan's acceptance, EULEX Kosovo was forced to play a neutral role in Kosovo's situation and international status, whose unilateral declaration of independence had already been made. This situation contrasted with the paradox that loomed over the EU Special Representative for Kosovo —named as per Joint Action 2008/123/CFSP of 4 February[67]— which also combined the role of International Civilian Representative, a proposal included in the Ahtisaari Plan and received by the Kosovo Constitution, but never endorsed by the United Nations. As EUSR, this individual provided

[65] Id., at 370.

[66] E. Milano, 'Il trasferimento di funzioni da UNMIK a EULEX in Kosovo', 91 *Rivista di Diritto Internazionale* (2008) 967-990.

[67] OJ L 42, 16 February 2008, at 88.

local political guidance to EULEX Kosovo, and was to remain neutral; while the role of International Civilian Representative was geared towards consolidating independence. Somewhere between those two plains sat, to a certain extent, EULEX Kosovo, whose own mandate was that it would assist the institutions of Kosovo "in their progress towards sustainability and accountability", which did not stop meaning making contributions to consolidate state structures after the unilateral declaration of independence. But the greatest opposition to the commitment that placed EULEX Kosovo under the UN mandate came, as Erika de Wet suggests[68], from the Albanian-Kosovar community represented by its government, which made cooperation between UNMIK and EULEX Kosovo very difficult and facilitated the replacement of the former by the latter. However, the Serbian minority's persistent opposition in northern Kosovo led to EULEX Kosovo's failure to operate there in the early days of the mission's deployment.

Going beyond our judgement of how effective EULEX Kosovo was in its achieving its goals, among other things, if it has contributed to the conflict's prevention and appeasement, what matters is whether its presence and subsequent deployment has contributed to legitimizing Kosovo's secessionist yearnings. Some have argued that one of its primary political objectives was to find a way of displacing UNMIK and thus create a mission that would point to an independent Kosovo, which corresponded with the idea of Western European aspirations.[69] Tasked with fulfilling the Ahtisaari Plan, the EU mission would have served, therefore, as a support for avoiding an uncomfortable and neutral United Nations' presence and, once the displacement of UNMIK was achieved, and without due regard to the promised "neutrality", to deepen the path towards Kosovo's independence, as desired by the United States and most EU Member States, even despite of the opposition of the five countries that ended up accepting its deployment as a lesser evil.

### (G) THE EUROPEAN UNION MISSION IN GEORGIA (SEPTEMBER 2008-DECEMBER 2018)

The war in Georgia started on 7 August, 2008, and was triggered by this country's attempt to recover the secessionist territories of South Ossetia and Abkhazia. In Abkhazia, the Georgian military operation was not carried out, given its failure in South Ossetia. The war ended in five days, following a hasty reaction from Russia, who since the ceasefire of 1992 had stationed troops in those territories, under the umbrella of CIS peace operation. It is in this context that the EU, mediator in the task of reaching a ceasefire and peace agreement

[68] E. de Wet, 'The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of EULEX', *supra* note 49, at 96.

[69] R. Zupancic, N. Pejic, B. Grilj and A. Peen Rodt, 'The European Union Rule of Law Mission in Kosovo: An Effective Conflict Prevention and Peace-Building Mission?', *Journal of Balkan and Near Eastern Studies*, (2017), at 6.

developed, at Georgia's request, a mission to observe the ceasefire. On the basis of a proposal by the EU Presidency, held by France, the six-point Ceasefire Agreement, was accepted by Russia and Georgia on 12 August, 2008. The plan referred plainly to the cessation of hostilities on all sides, to the guarantee of access to humanitarian aid and to the withdrawal of Georgian and Russian troops to their positions before the conflict. The fifth point, referring to the withdrawal of Russian troops, included the following: "While awaiting an international mechanism, Russian peacekeeping forces will implement additional security measures". There was no mention in the agreement of Georgia's territorial integrity.

The EU mission, EUMM Georgia, was approved by the Council on 3 September, 2008, in accordance with Joint Action 2008/736/CFSP of 15 September, and was deployed on 1 October of that year. Its mandate extends until 14 December, 2018. EUMM was not the only mission deployed in Georgia by the EU. Previously, in 2000, the EU was already involved in border issues, when the Council approved, at the request of the Georgian President Shevardnadze, on 10 April 2000, Joint Action 2000/456/CFSP.[70] This aimed to facilitate assistance for strengthening the capacities of the Georgian authorities to, through their Border Guard, provide support and protection to the Observation Mission that the OSCE deployed on the border between Georgia and the Chechen Republic of the Russian Federation. The material requirements of the Georgian Border Guard led to this European Union measure, which was implemented by the Commission and subsequently renewed several times.[71] Later, on 28 June, 2004, the ESDP EUJUST THEMIS mission was launched —the European Union's Rule of Law Mission in Georgia— following Joint Action 2004/523/CFSP.[72] This Mission, the first on this issue deployed by the EU, aimed to support the transition process in Georgia and prevent the security situation there, which the Council considered stable at that time, from deteriorating. It focused its intervention on reform to the criminal justice process in Georgia. It had no connection with the Georgian secessionist territories of Abkhazia and South Ossetia. Its tasks drew to a close on 14 April, 2005.

The EU's presence in Georgia had been fluctuating considerably since 1992. As Maria Raquel Freire and Licínia Simao [73] maintain, throughout the 1990s relations were underdeveloped and low on both parties' agendas in terms of security, with Georgia more closely linked to both the United States and NATO. Of course, the EU was one of the main contributors of all types of aid (e.g. technical and humanitarian), and at the end of the decade,

[70] OJ L 183, 22 July 2000, at 3.

[71] See Joint Actions 2001/568 / CFSP, of July 26 (in OJ L 202, of 27 July 2001) and 2002/373 / CFSP, of 21 May (in OJ L 134, of 22 May 2002).

[72] OJ L 228, 29 June 2004, at 21.

[73] M. Raquel Freire y L. Simao, 'The EU in Georgia: Building Security?', Janeiro de 2013, oficina nº 396, Centro de Estudios Sociais, Universidade de Coimbra, at 6.

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began to establish close contractual relations with Georgia. Among these were the Partnership and Cooperation Agreement in 1999, to the Association Agreement which entered into force in 2016 and implemented a free trade area. All this within the European Neighbourhood Policy launched in 2003, with its more specific 2009 initiative, the Eastern Partnership.[74] The inclusion of the Caucasus countries in the European Neighbourhood Policy and the window of opportunity opened by 2003's Rose Revolution, the events engendered a shift in the area of security in relations between the EU and Georgia.

However, the EU's involvement in resolving the conflicts in Abkhazia and Ossetia, which was not via Europeanization, but through direct intervention in matters of security and defence, was not so decisive, before the outbreak of the 2008 war, despite the willingness of the Georgian authorities, in particular after the Rose Revolution of 2003, to achieve a greater degree of European presence.[75] In any case, on 7 July, 2003, the Council appointed an EU Special Representative for the South Caucasus through Joint Action 2003/496/CFSP[76], whose mandate included preventing conflicts peacebuilding in the region and assisting the various organizations and processes in the area (particularly the United Nations and the OSCE). A year later, after Russia had vetoed the continuation of the OSCE's Border Monitoring Operation (BMO) between Russia and Georgia, it invited the EU to take over. But the EU's fear that Russia considered this an affront prevented the initiative from crystallizing, which showed the clear division between Member States in favour of greater involvement in resolving the Georgian conflicts —the Baltic countries, Sweden, the Netherlands, the United Kingdom and Ireland— and those preferred not to upset Russia or not delve into the eastward projection of the EU —France, Germany, Portugal, Spain, Italy, Greece and Austria.[77]

However, after considering several options, it was decided that a Border Support Team be created within the structure of the EUSR for the South Caucasus. This team was made up of three members when the deployment took place in April 2005, although subsequently its number was increased to thirteen. As regards its mandate, Joint Action 2005/582/CFSP of 28 July[78], which modified that of the EUSR for the South Caucasus, mentioned the support team and the tasks to be addressed. Among these were: "provide the European Union with reporting and a continued assessment of the border situation and to facilitate confidence-building between Georgia and the Russian Federation", "assist the Georgian Border Guard" and "work with the Georgian authorities to increase communication between Tbilisi and the

74 To gauge the dimensions of the EU's relations with Georgia, see here.
75 N. Popescu, 'EU and the Eastern Neighbourhood', *supra* note 2, at 465.
76 OJ L 169, 8 July 2003, at 74.
77 N. Popescu, 'EU and the Eastern Neighbourhood', *supra* note 2, 465-466.
78 OJ L 199, 29 July 2005, at 92.

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border", excluding Abkhazia and South Ossetia. As Nicu Popescu maintains[79], over time the EUSR Border Support Team in the South Caucasus has ended up becoming comparable in personnel and involvement to ESDP missions elsewhere, the only difference being that this has been an invisible mission. Nicu Popescu[80] also referred to the controversial but highly significant initiative, the attempt to extend the EUSR Border Support Team's mandate to perform work in Abkhazia and South Ossetia. Greece vetoed this for two years —with the veto lifted in early 2008— given the possibility that such activity would be troublesome for Russia. The EU's intention was a minor preview of the policy later deployed by the EU and known as "non-recognition and engagement" to the secessionist territories. In effect, it was intended to internationalize some areas of cooperation with the strongly Russia-dependent "de facto" states, to decrease Russia's influence and increase the EU's, bypassing international recognition and therefore without the need to question Georgia's territorial integrity.

It was the war of 2008 and the Georgian request which made possible the creation and deployment of EUMM Georgia, because both cases looked to the EU to play bigger role in resolving the conflict. But that was not all; as it has been argued[81], the consensus among the Member States that swift action should be taken, which led to EUMM Georgia being approved without delay and in record time, was due to a combination of factors: firstly, the clear perception that it was a full-scale crisis on EU soil; secondly, the French presidency's decisive action; thirdly, relations with Russia, which the conflict was affecting, enabling this country to accept the EU's role in a conflict located in the post-Soviet space for the first time; and, fourthly, that the United States was unable to act as mediator. In this way, the EU's role as security provider in Georgia was confirmed. In cooperation with the OSCE, a platform was created for the Geneva negotiations, in which the EU, the OSCE, the United Nations and the United States took part, together with Georgia and Russia. At Russia's request, Abkhazia and South Ossetia were included in the negotiating framework, with occurred despite reluctance from Georgia, if only because the EU and the OSCE agreed to it.[82]

EUMM Georgia is a civil mission, of consolidation and peace-building, to observe and supervise the aforementioned six-point Agreement of August 12, 2008 and the subsequent Implementation Agreement on 8 September, 2008. The Mission's mandate was specified in article 2 of Joint Action 2008/736/CFSP, under which civil monitoring of the parties' actions

[79] N. Popescu, 'Europe's Unrecognised Neighbours. The EU in Abkhazia and South Ossetia', CEPS Working Document Nº 260/March 2007, at 12.

[80] N. Popescu, 'EU and the Eastern Neighbourhood', *supra* note 2, 467-468.

[81] M. R. Freire y Licínia Simao, 'The EU in Georgia: Building Security?', *supra* note 73, at 14.

[82] N. Mikhelidze, 'The Geneva Talks over Georgia's Territorial Conflicts: Achievements and Challenges', *Documenti IAI*, 2010, 10 (25), at 10.

was to be provided, including full compliance with the six-point Agreement and the subsequent implementing measures "throughout Georgia". This raises some interesting questions, and on the secessionist territories too. Neither of the authorities in Ossetia or Abkhazia stepped in to grant consent for the deployment of the EU Mission. Should they have? Since the EU was in favour of the principle of territorial integrity in Georgia, as no other option was possible, seeking the consent of these countries to implement deployment and perform the Mission's activities in the territories that were not controlled by the Georgian government, and which had been recognized by the Russian Federation as independent republics straight after the end of the war, would have given those with secessionist ambitions the green light. This doubt has been raised[83], with mention also to the precedent of the EU Monitoring Mission in Aceh (Indonesia). But this case, which we examined earlier, does not have a clear parallel with that of Georgia, because in Indonesia, the Aceh separatist conflict was settled and the EU Mission was set to contribute to this settlement, with the consent of both the separatists and the Indonesian government. This was not, of course, what happened in Georgia, where the situation in Abkhazia and South Ossetia was that of secessionist territories where de facto authorities had control, with the support of Russia and excluding the presence of the Georgian authorities. While in Aceh, the Free Aceh Movement (GAM)'s consent to the EU's presence had permitted its demobilization and decommissioning, within the framework of the Memorandum of Understanding – which in its own preamble recognized the unitary nature of Indonesia as a state – a hypothetical consent from the secessionist authorities to the EU Mission would have had the Georgian six-point Agreement as a framework, precisely that whose compliance the EU had to monitor, in which there was no mention of maintaining Georgia's territorial integrity. As the EU itself states, except in specific cases, the de facto authorities of Abkhazia and South Ossetia have not authorized EUMM access to the territories under their control.[84] It has been logically argued that this was a reaction to the EU's refusal to recognize the two secessionist entities.[85]

In addition, Joint Action 2008/736/CFSP specified that the EU Mission was to act in close coordination with the United Nations and the OSCE which, at the time of the outbreak, and in the case of the former, from back in 1992, both had missions in the area. Indeed, the United Nations had deployed the United Nations Observer Mission in Georgia

[83] This is what María Julià Barceló considers in her excellent work 'La Misión de observación de la UE en Georgia: ¿Instrumentos para el reconocimiento de territorios secesionistas?', en 18 Revista Electrónica de Estudios Internacionales, (2009).

[84] See further information available here.

[85] B. Gaweda and M. Siddi, 'No settlement without a proactive policy: The European Union and the secessionist conflicts in the post-Soviet space', IEP Policy Briefs on Enlargement and Neighbourhood, Nº 5/2012, Institut für Europäische Politik, at 5.

(UNOMIG) in 1993, while the OSCE Mission in Georgia had been in existence since 1992. Neither of them survived the political pressures resulting from the 2008 conflict and, most importantly, the Russian objective of recognizing the independence of Abkhazia and South Ossetia.[86] The OSCE Mission ended on 30 June, 2009, without accepting the Russian request for it to be split into two missions —one for Abkhazia and the other for South Ossetia— which would entail the recognition of these "de facto states".[87] Fifteen days before, the Security Council had failed to extend the UNOMIG mandate and thus, in the Georgian context, the EU was the only Mission left on the ground.

It is also interesting to note that the European Parliament, which had supported EUMM Georgia's creation in its resolution of 3 September, 2008, required "a UN or OSCE mandate for an ESDP peace mission" (paragraph 20).[88] Of course, no mandate from these organizations ratified the EU Mission's presence, but this was not strictly speaking required in terms of international legality, since it was a post-conflict operation without the use of armed force which, in addition, was deployed in a country whose government had not only consented, but requested, it. The six-point Agreement between Georgia and Russia certainly mentioned an international mechanism that would replace the forces of a country that had been deployed in the secessionist territories since 1992 as CIS peacekeeping forces, but for various reason the EUMM Georgia was not such a mechanism – the most relevant being the scantiness of his mandate.

The most visible component of the EU Mission's stabilization work, irrespective of its command structure, headquarters and offices, is the patrolling of the areas adjacent to the administrative boundary lines of the secessionist regions. But beyond its success, which must, of course, be measured in light of its limited mandate, it is worth highlighting its relationship with the persistent continuation of the status quo and the lack of progress towards a political solution that would lead to those territories being reintegrated into Georgia's sovereignty. Should such a diagnosis fall on the duty of the EUMM Georgia? Would this mean admitting that its very existence and the fulfilment of its functions have contributed to steps only being taken in the direction of maintaining those "de facto states"? We cannot judge this contribution without looking at the overall context of Georgia's secessionist conflicts, as well the EU's position in that country and its policy, which should also be considered in its entirety. Firstly, it is worth remembering Russia's position in these conflicts: this country accepted the proposed ceasefire once all its objectives had been achieved, including territorial

[86] R.G. Whitman and S. Wolf, 'The EU as a conflict manager? The case of Georgia and its implications', 86 *International Affairs* (2010), 1, at 93.

[87] M. Julià Barceló, 'La Misión de observación de la UE en Georgia...', *supra* note 83, at 8.

[88] European Parliament resolution of 3 September 2008 on the situation in Georgia, P6-TA-2008-0396.

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control of the secessionist enclaves. It maintained its military presence, even if it was as CIS peacekeeping forces. It achieved, with time, the withdrawal of other non-EU peace missions and accepted EUMM Georgia's very limited presence and activity, which in Abkhazia and South Ossetia was prevented by the de facto authorities because of not proceeding with international recognition, which Russia *had* done. It interpreted Kosovo's unilateral declaration of independence and its early and swift recognition by most EU Member States as a precedent that legitimized – in terms of the self-determination of peoples and against the territorial integrity presented by Georgia – the independence of "de facto states". In addition, its strong control over the secessionist territories' political elites, based on a deep economic dependence, kept the status quo.

Faced with this situation, the EU's capabilities, including its Mission, would have struggled to change the status quo. Starting with the internal divisions among its Member States, whose heavily divided countries did not, for a variety of reasons, wish to disturb Russia, or suspected that France's agenda would dominate in terms of the policy to follow in Georgia. It is little wonder that although there was a European Union Special Representative for the South Caucasus, in September 2008, in a clear concession to the French position in the conflict, the French diplomat Pierre Morel, who was then acting as the EU Representative for Central Asia, was appointed as EU Representative for the crisis in Georgia, adding this mandate to the one already held.

However, the EU's political orientation towards Georgia's separatist regions shifted in December 2009 when the Council approved the non-recognition and engagement policy for these enclaves, with the aim of de-isolating these communities – an isolation to which Russia had contributed through its acts and omissions. The basis of the proposal was in a nonpaper that was never publicised, so as not to raise the public profile of the newly adopted policy and, in addition, it had also been the idea of the EUSR for the Caucasus South, whose broad mandate allowed it to carry out interactions with the authorities of Abkhazia and South Ossetia.[89] It was, as Sabine Fischer maintains[90], to develop a policy based on two cornerstones that would open a political and legal space where the EU could interact with the separatist entities without compromising its adherence to the defence of Georgia's territorial integrity. Elements of the aforementioned policy allegedly outlined in the non-paper, which Sabine Fischer reports, are, aside from the firm commitment that Georgia's territorial integrity and sovereignty provide the framework for the measures that the EU adopts with respect to the separatist entities, the EU's interest in contacting these territories' de facto authorities to

[89] T. de Waal, 'Enhancing the EU's Engagement with Separatist Territories', Carnegie Europe, 2017.

[90] S. Fischer, 'The EU's non-recognition and engagement policy towards Abkhazia and South Ossetia', European Union Institute for Security Studies Seminar Reports, December, 2010.

develop measures that promote trust, conflict resolution and humanitarian assistance; contacts with civil society and the population of both enclaves to overcome their international isolation, through confidence-building measures, particularly in the spheres of human rights, civil society and economic integration; contact with the Georgian authorities on Abkhazia and South Ossetia when necessary, and also contact with the Russian forces stationed in the separatist territories, to the extent that they are responsible actors in the application of International Humanitarian Law.

From the perspective offered by the development of the EU's non-recognition and engagement policy, viewed with suspicion by the Georgian authorities as an activity that tending towards a growing recognition of such entities – which is denied by the respect of the EU towards its territorial integrity – the value judgment about whether the EUMM Georgia's activity participates in that same collateral effect that legitimizes the recognition of Abkhazia and Ossetia is diluted somewhat. Certainly, Russia permits the EU's presence because of its weakness and the shallow depth of the negotiating mandate. But this, in principle, has nothing to do with the return of the secessionist entities to Georgia's obedience. It cannot be argued that the EU's non-recognition of secessionist entities has taken steps backwards. In contrast, there is no limit to changing a situation in which these two projects of national construction, protected by Russia, show no signs of weakening: two "de facto states" whose fortune can hardly change an operation like EUMM Georgia. To this operation's credit, it appears to have contributed to the stabilization of the situation that was created after the war between Georgia and Russia, to the withdrawal of Russian troops, to the demobilization around Ossetia's administrative boundary lines and the return of those displaced by the conflict. In short, it did what was asked of it. As with the rest of the Missions, even with their success or failure to carry out their mandates, the presence of an EU Mission is not only not a substitute for politics, but cannot even be interpreted as such, unless it contains an instrument for guaranteeing security.

## (H) CONCLUSION

The five conflicts that we have examined, and in which the EU has deployed civil or military missions, all corresponding to the ESDP —except in the case of EUBAM Moldova— are secessionist. They involving States with territories conceived as "de facto states" in three cases —Moldova, Georgia and Kosovo— while in the other two, Macedonia and Indonesia, secession has not been achieved. Does the EU have a comprehensive strategy to follow when faced with this type of conflict? It might seem that, at a minimum, this would be based on respect for the states' territorial integrity and, therefore, on the non-recognition of secessionist entities that persist as "de facto states". The 2003 European Security Strategy,

still referring to regional conflicts as the main threat to security, did not state specifically a position of EU support for territorial integrity as it did not give full detail of the type of conflict or take the side of those of a secessionist nature. The EU Global Strategy, however —the Mogherini document— did go into greater detail and confirmed that the States' territorial integrity and the inviolability of borders was one of the key elements of the European security order. We must remember that the Action Plans of Moldova, Azerbaijan and Georgia do incorporate the principle of territorial integrity in their respective countries, and the inviolability of their borders, as a basis for the solution of their secessionist conflicts and that the Armenian Action Plan, however, invokes the principle of self-determination of peoples. With regard to Macedonia, the Ohrid Agreement, which instituted in its article 1 the need to preserve the FYROM's territorial integrity, was endorsed by the EU in the Council Decision of 18 February, 2008, on the principles, priorities and conditions contained in the Accession Partnership for membership with the FYROM.[91] As for Indonesia, Council Joint Action 2005/643/CFSP recalled that on 11 October, 2004, the Council had reiterated its interest in a united, democratic, stable and prosperous Indonesia and had restated its respect for the Asian country's territorial integrity.[92] However, the repeated description that, for the EU, Kosovo has been a special case seems to be an exception to other case of unshakeable faith in the principle of territorial integrity.

But a strategy is more than just a mention of a principle, however relevant it may be. It requires, at least, a position to be taken on the relations with the State affected by the secessionist process and a principled position on how to treat the community that seeks secession and, in three of our cases, behaves as "de facto state". It requires, therefore, a previous decision on whether the non-recognition of such a political community, which results from a respect for the State's territorial integrity, should be accompanied by a lack of any other type of relationship. Or whether you opt for providing aid and establishing political and economic relations, a policy that risks ending up legitimizing the secessionist community and perpetuates the status quo. Bruno Coppieters[93] supports the theory that, when faced with this type of secessionist conflict, the EU has lacked a strategy. He recalls, for example, CFSP High Representative Javier Solana playing an active role in facilitating the agreement between Serbia and Montenegro that allowed the referendum on Montenegro's independence in 2006. Although he argued that it would not constitute a precedent for the EU, two years later, the *sui generis* case of Kosovo, did also not seem to set any precedent, as

[91] OJ L 80, 19 March 2008, at 35.

[92] OJ L 234, 10 September 2005, at 13, recital 2.

[93] B. Coppieters, 'The EU's Policies towards Contested States', D. Muro and E. Woertz (eds.), *Secession and Counter-secession. An International Relations Perspective*, CIDOB, Barcelona, 2018, at 38.

proclaimed by the European Council on 14 December, 2007.[94] In sum, the EU's reaction in these incidences and, thus, the deployment of missions – including the decision on the type of mission – has not been the result of a studied and previous strategy, but of contingent political options. And the same should apply to cases in which, as in the case of Nagorno-Karabakh, the will to not engage in the secessionist conflict has prevailed.

However, in a broader sense, and with reference to the deployment of monitoring missions, the EU has had a Concept for such missions since 2003.[95] It features heavily a trait that can be drawn from the EU's involvement in these secessionist conflicts; the intentional choice of understanding that deploying missions is just another instrument among a wide range of intervention possibilities. And that this instrument must be accompanied by other measures. The EU Concept thus suggests that the mission is part of a larger EU effort to prevent or resolve a conflict. In a stricter sense, the EU has opted for integrated crisis management, as Giovanni Grevi[96] suggests that it must, of which its intervention in the Aceh conflict is a good example. However, in secessionist conflicts on European soil, the integrated crisis response has gone much further, to the point of drawing up a policy of deliberate Europeanization to be applied in States with secessionist territories. This policy, derived from the European Neighbourhood Policy, is specified in its eastern dimension and applies to Moldova and Georgia, among other countries.

This policy has brought about two consequences, one related to the formulation of the policy to be developed with the secessionist enclaves and the other in relation to Russia. The two matters are evidently interconnected. Not including, for obvious reasons, the case of Aceh (Indonesia), and also that of the FYROM, the other secessionist episodes have a common feature that has irreversibly obstructed the position of the EU and its Member States: Russia's involvement. If Russia viewed with suspicion the Europeanist drift of the former republics of the Soviet Union in Eastern Europe and the Caucasus, it did so to an even greater extent after the deployment of the European Neighbourhood Policy and its corollary to the east. Not disquieting Russia has been a position of quite a few EU Member States, which explains both their actions and some of their abstentions. If Russia has accepted an EU mission in Georgia, it has been because of its strong position of power after the ceasefire of the 2008 war and because EUMM Georgia's mandate was so lightweight. Relations have been deteriorating in this area, something which has been exacerbated by the conflict in Ukraine.[97]

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[94] See Presidency Conclusions, European Council, Brussels, 14 December 2007, par. 69.

[95] Available here.

[96] G. Grevi, 'The Aceh Monitoring Mission...', *supra* note 35, at 33.

[97] M. Isabel Nieto, 'Rusia y la estrategia global de la Unión Europea', 42 *Revista UNISCI*, (octubre, 2016), 197-216.

Regarding relations with the secessionist entities, apart from the case of Kosovo, the non-recognition and engagement policy, deployed in Georgia as of 2009, and before in Transnistria, also raises doubts, both about its effectiveness and about the persistence of conflicts. The objective may well be to resolve the conflicts on the basis of territorial integration, but nothing was advanced in the cases indicated. And this regardless of the deployment of EU missions, especially since they are one further instrument of EU policy in the area.

Why has the EU intervened through its missions, and no other organizations, in the crises we have examined? Why has the EU been formally invited, but not the other organizations? In the cases at hand, and as Hadewych Hazelzet[98] maintains, a combination of two reasons justifies the EU's comparative advantage. Firstly, because the United Nations and other organizations such as the OSCE either do not show willing, or are not politically capable of acting at a specific moment in the secessionist conflict. This was the case for the United Nations following Kosovo's unilateral declaration of independence and of the OSCE in Georgia after the 2008 war. Secondly, because the EU is perceived as being especially entitled to help in resolving the conflict (Macedonia, Georgia or Kosovo) or because it is considered more neutral than the United Nations in the eyes of the State of the territory. This is the case for the Aceh case in Indonesia. But also, because it is considered weaker and less legitimate than the other organizations, as the Georgia case shows.

Considering the strategic objectives and associated expectations, Russia's presence and, mainly, the EU missions' exiguous mandates, what impact have the missions we have examined had on separatist conflicts? From a general perspective, it may be useful to follow the opinion of Thierry Tardy[99] here, for whom, except EULEX Kosovo, civilian missions have provided limited support to third countries, which has diminished their strategic impact. Again, Kosovo is a separate case, because EULEX Kosovo is a relevant instrument on the path towards strengthening independence, and towards implementing the Ahtisaari Plan. In the case of the FYROM missions, with the situation affecting security in the Albanian minority areas to a larger extent resolved by operations deployed by NATO, the EU missions, with their limited mandates in the police sector have not helped to halt the secessionist demands. The same can be said of the successes of the EU Mission in Aceh, although the secessionist conflict, at the time of its deployment, had lost much of its meaning, which has contributed to its settlement. The most compromised cases are those of Moldova and Georgia, because in both of these it has been argued that, although indirectly, the two

[98] H. Hazelzet, 'The added value of CSDP operations', European Union Institute for Security Studies, Brief Issue Nº 31/2013, September 2013, at 2.

[99] T. Tardy, 'Civilian CSDP: What next?', European Union Institute for Security Studies, Brief Issue Nº 32/2016, November 2016, at 2.

missions have been able to contribute in some way to the maintenance of the secessionist status quo. However, this is probably due more than anything to the Europeanization policy game and the application of the non-recognition and engagement policy towards these enclaves.

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*Secession of States and Self-determination in contemporary International Law*

# Doctrinal Reflections on the Concept of People in International Law

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*Abstract*: The concept of people has been subject of a broad doctrinal debate on its elements during the last decades. Its links to the decolonization process and the evolution of the internal dimension of the principle of self-determination have reinforced the importance of the academic discussion. There is not a univocal meaning of the term people and the old question of "what is a people" is still very controversial for the International Law. This article examines most relevant doctrinal reflections on the elements and characteristics of the concept. The doctrinal analysis must be conceived as a preliminary task of great relevance for the later examination of the principle of self-determination.

Keywords: People – Self-determination – Decolonization – Identity – People's rights

The concept of people has been very controversial in International Law during the last decades. This paper focuses on that doctrinal debate about the concept of people, aside from the international practice and the comparative constitutional law. The progressive enlargement of the right of self-determination, in particular through the internal dimension, compels to update the original debate on the elements of this concept. It must be analysed in connection with other notions, like the right of self-determination and the concept of popular sovereignty.

In a historical perspective, the genesis of the concept can be traced back to the first emancipation movements of the European colonies. Some authors have emphasized the historical importance that the School of Salamanca had with respect to the indigenous populations of America.[1] The preamble to the Charter of the United Nations begins with the

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1 See N. Lerner, *Groups Rights and Discrimination in International Law* (Kluwer International Law, The Hague, 2003), at 7; J. Summers, *Peoples and International law*, (Martinus Nijhoff, Leiden, 2007), at 14; W. M. Reisman, 'Sovereignty and human rights in contemporary international law', in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, Cambridge, 2000), at 240; and A. Mangas Martín *et al.*, *La Escuela de Salamanca y el derecho internacional en América. Del pasado al futuro* (Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales, Salamanca, 1993).

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historic quote "we the peoples of the United Nations".[2] This mention must be studied jointly with Articles 3 and 4 that maintain the exclusive role of the states to be members of the Organization together with the affirmation of the principle of non-intervention (recognized in Article 2(4)). With respect to self-determination of peoples, Article 1(2) comprises among the purposes of the Organization "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". This represented a first step in the course towards the self-determination of peoples carried out by the Organization to this day.

The development of the process of decolonization promoted by some great powers (such as the United States and the former Soviet Union) and by the General Assembly through successive milestones such as Resolutions 1514 (XV), 1541 (XV) and 2625 (XXV) is well known.[3] However, the concept of people is relevant in both the internal and the external dimension of the process. Indeed, in the analysis of the right of self-determination of peoples subject to foreign colonial domination (external dimension of self-determination) it is crucial to determine the elements of the colonial territories. Likewise, before any debate about the scope and limits of any eventual identity claim of a certain intra-state community, it is essential to set the preconditions or minimum identity requirements of that community.

## (A) A CHAMELEONIC CONCEPT

To fulfil the purposes of Article 1(2), Chapter XII (International Trusteeship System) and Chapter XIII (The Trusteeship Council) of the Charter[4] designed an entire administration system controlled by the United Nations under three types of territories: the territories under mandate, the territories segregated of the countries defeated in the Second World War and those who voluntarily wanted to be administered (trust territories). Despite the establishment of this administration system, some authors such as Pérez González, criticized

[2] See R. Wolfrum, 'Preamble', in Bruno Simma and Daniel-Erasmus, *The Charter of the United Nations, A commentary*, Vol.I (Oxford University Press, New York, 2002), at 34: "The first seven words of the Preamble caused considerable debate at the San Francisco Conference. These words indicate that the Charter is an agreement among the peoples of the United Nations, a formulation analogous to the Preamble of the United States Constitution"; and J.-P. Cot and A. Pellet (eds), *La Charte de Nations Unies. Commentaire article par article* (Economica, Bruylant, Paris, 2005), at 306.

[3] About the decolonization process, see P. Andrés Sáenz de Santa María, 'La libre determinación de los pueblos en la nueva sociedad internacional', I *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1997), at 113-204; and J. Soroeta Liceras, 'El derecho a la libre determinación de los pueblos en el siglo XXI: entre la realidad y el deseo', Nº1 *Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz* (2011) at 451-502.

[4] Once this body successfully completed its mandate, the General Assembly agreed in 2005 to remove the chapters of the Charter that referred to its activities. See GA Res. 60/1, 2005 World Summit Outcome, 24 October 2005, par. 176: "Considering that the Trusteeship Council no longer meets and has no remaining functions, we should delete Chapter XIII of the Charter and references to the Council in Chapter XII."

the incomplete development of the principle of self-determination in the Charter itself, "due, no doubt, to political reasons, among them the resistance of some victorious powers of war, with the United Kingdom at the head with vast colonial possessions in whose conservation they were interested".[5]

In addition, the Declaration on Non-Self-Governing Territories was included in Chapter XI of the Charter of the United Nations. The first part of this Declaration remarks the commitment of the Members of the United Nations to "promote to the utmost [...] the well-being of the inhabitants of these territories" as well as "to develop self-government". The mention made in the same article to "assist them in the progressive development of their free political institutions" referred implicitly to the impulse in favour of the self-determination of the Non-Self-Governing Territories. The fiduciary administration system, together with the equal sovereignty of the states, conformed the legal framework that allowed the development of the principle of self-determination.

The Universal Declaration of Human Rights, concurrently, does not mention in its articles the rights of peoples, since most of its clauses begin with the references to "everyone"; with some exceptions such as Article 21(3) referred to "the will of the people" and other precepts of the declaration, such as Article 27(1) mentioning the" cultural life of the community "or Article 29 on the "duties to the community".[6] Therefore, the starting point of our reasoning is that the international legal order does not assume a fully accepted and clearly defined concept of the notion people. Hence, the concept itself has not clearly defined limits nor a unanimous meaning and scope. This lack of a consistent and universal definition has led some authors to describe the concept of people as "chameleonic".[7]

A first approach to the concept could lead us to compare it with the traditional conception of the state as a subject of the international legal order with the elements that we usually identify in the field of International Law. For some authors, this would be the *Kelsenian* approach to the concept *matching* the peoples with the states[8] but that perception does not

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[5] M. Pérez González, "La subjetividad internacional (II): la personalidad internacional de otros sujetos", in M. Diez de Velasco *et al.*, *Instituciones de Derecho Internacional Público* (Tecnos, Madrid, 2013), at 299 (we translate).

[6] Van Boven justified this lack in the fear of many States to include references to the concept of the people that could recall the totalitarian practices of Nazism. See T. Van Boven, 'Human Rights and Rights of Peoples', 6 *European Journal of International Law* (1995), 1-476, at 10. [doi: 10.1093/ejil/6.1.461]

[7] See A. Michalska, 'Rights of peoples to Self-determination in International Law', in William L. Twining (ed), *Issues of Self-determination* (Aberdeen University Press, Aberdeen, 1991), at 73: "The notion 'people' has been used in international instruments in many contexts. Yet, at the same time, no definition of that notion is provided by international law. Jouve is right in saying that 'people, c'est en quelque sorte, un mot camaleon'."

[8] Abi-Saab commented on this position in his Course of the Hague Academy: "Kelsen réduit la référence au principe dans l'article 1, paragraphe 2, à une autre formulation, plus idéologique ou politique, du principe de l'égalité souveraine des Etats, le vidant ainsi de toute substance et de 'valeur ajoutée' normative. Cette

correspond to the true spirit of the San Francisco Charter.[9] A careful reading of Article 1(2) of the Charter denotes the discrepancy between both concepts, since the paragraph distinguishes between "nations" and "peoples". In addition, it must be underlined the prevailing doctrine that influenced the Chapter II which preserved the exclusive competence of the states to become members of the Organization. This distinction between the rights of peoples and the obligations assumed by states is also observed in the articles of the New York Pacts, whose first article recognizes, at the same time, the right of peoples to self-determination and the obligation of states to promote its exercise.[10]

### (B) A COMPLEX CONCEPT

The particular questions to answer are: What is a people? What are the elements of the people? From a theoretical perspective, the answers could be considered as legal prerequisites to determine when (a certain community) is conforming *or not* a people in the sense *accepted* by the International Law. But, the international society and the principle of effectiveness have confirmed that the international subjectivity is not always in line with the legal presumptions. In particular, the internal dimension of the right of self-determination has encouraged the debate about the components, requisites and characteristics of the peoples.

In this regard, there is prolific literature on the meaning of the notion people[11] and we align ourselves with the doctrine presented by the authors Ruiloba[12] and Pastor.[13] They

interprétation caricaturale ne cadre cependant ni avec le texte clair, ni avec les travaux préparatoires, ni avec le contexte de la Charte." (G. Abi-Saab, 'Cours général de droit international public', 207 *Collected Courses of the Hague Academy of International Law*, 1987, at 394).

[9] See T. Musgrave, *Self Determination and national minorities* (Clarendon Press, Oxford, 1997), at 149.

[10] See GA Res. 2200A (XXI), 16 December 1966, International Covenant on Civil and Political Rights, (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art.1: "All peoples have the right of self-determination [...] The States Parties to the present Covenant [...] shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

[11] See Churchill, W., *The People's Rights* (Jonathan Cape, Londres, 1970); P. Alston, *Peoples' Rights* (Oxford University Press, Oxford, 2001); J. Crawford (ed)., *The Rights of peoples* (Clarendon Press, Oxford, 1988); A. Cassese, *Pour un Droit des Peuples. Essais sur la Déclaration d'Alger* (Berger Levraut, Paris, 1978); T. Frank, 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice', 90(3) *The American Journal of International Law* (1996), at 359-383 [doi:10.2307/2204063]; A. Rosas, 'So-Called Rights of the Third Generation', in Asbjørn Eide, Catarina Krause, and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, Dordrecht, 1995), at 243-246; B. Kingsbury, 'Claims by Non-State Groups in International Law', 25(3) *Cornell International Law Journal* (1992), at 481-513; M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', 43(2) *The International and Comparative Law Quarterly* (1994), at 241-269.

[12] E. Ruiloba Santana, 'Una nueva categoría en el panorama de la subjetividad internacional: el concepto de pueblo', M. Diez de Velasco *et al.*, *Estudios de Derecho Internacional. Homenaje al profesor Miaja de la Muela*, Vol.I, (Tecnos, Madrid, 1979) at 303-336.

adopted an adequate approach to the factual reality of the international society and to the constraints of the International Law. The doctrine of these authors can be summarized in the following notes.

### (1) Similarities and differences

There are certain similarities and differences between the traditional concept of nation and the notion of people. Under this framework, the doctrines developed in the first part of the twentieth century regarding nationalities and minorities are noteworthy. The work of professor Ruiloba summarized and synthesized properly the similarities and differences between the two concepts and examined the link amid the principle of nationalities and the self-determination of peoples.[14]

### (2) Eclectic approach

Faced to the two traditional conceptions of the German (objective theory) and the French (subjective theory) schools,[15] it is convenient to adopt an eclectic (or synthetic) position. Professor Ruiloba explained this eclectic opinion in the following lines:

> "The collective will to live as an independent nation, or the conscience of constituting a differentiated nation or people, is, therefore, a *necessary* element to the concept of people or nation. It is not, however, *enough*. An objective basis is required. [...] There is not an essential or defining element that, when concurring, whatever the intensity of its presence, indicates qualitatively when a human group is an authentic people [...] A people, like a nation, it is therefore a human group socially and historically differentiated by a complex of factors, some objectives and others subjective, whose relative presence is different from some cases to others, and that, together, can lead to a greater or less differentiation also *according to the cases*."[16]

### (3) Political factors

To assess the different circumstances (objective and subjective elements) and, above all, to qualify and characterize a community as a people, it will be necessary to consider the political factors influencing the existence of every community. As an echo of this influence, the positions of the General Assembly in each case have been considered almost determinant. Regarding this qualification and the evaluation of the different elements at stake, professor Ruiloba understood that, in addition to the collective will of the community, it is necessary a certain measure of material or objective differentiation. He considered that, in practice, it is the historical and, above all, the political circumstances, which moved the organized

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[13] J.A. Pastor Ridruejo, 'Le Droit international à la veille du vingt et unième siècle: normes, faits et valeurs', 274 *Collected Courses of the Hague Academy of International Law*, 1998, at 21-305.

[14] See Ruiloba, *supra* n.11, at 2-3.

[15] Pastor comments on these doctrinal discrepancies in: Pastor, *supra* n. 12, at 141.

[16] Own translation (emphasis added). Ruiloba, *supra* n.11, 315-316

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international community (or its members individually considered) to appreciate if a certain community is "sufficiently differentiated to be considered as a people entitled to self-determination".[17] In a similar sense, Pastor also coincides in highlighting the importance of political circumstances in the process of awarding the "people category".[18]

By aligning ourselves with the thesis of both authors, we reaffirm that the will of the population is a necessary element to constitute a community as such. But this popular will is not enough by itself since it needs the concurrence of other objective elements. The set of these objective elements, such as language, religion, history, territory, culture and other domestic elements will be assessed from the international arena to determine the degree of legitimacy of the people to claim their right of self-determination.[19] These elements must be understood with an interdependent and complementary approach to determine (through their simultaneous concurrence) the identity of the people in question. Conversely, if we analyse them separately, we will find a lot of gaps and incongruences. As an example, the language is not a determining factor to assert the existence of a people.[20] In the same way, the territory has an eminently functional character[21] and the history is always subject to a complex and contextual interpretation.[22] None of the elements, considered in isolation, has an essential or imperative significance to attribute the category of people to a certain human community.

### (C) A POLYSOMIC CONCEPT

The lack of uniform and universal criteria regarding the concept of people requires assessing the circumstances in a case-by-case basis. This compels to take into consideration the set of objective and subjective elements of every community that seeks to become a people for the International Law. Likewise, in the evaluation of the singular elements of every people, the political issues and the international relevance of the entity (state or international

[17] Own translation. Ruiloba, *supra* n.11at 315.

[18] See Pastor, *supra* n.12, at 141.

[19] See Summers, *supra* n.1, at 46.

[20] *Ibid.*, at 63: "Different nations can speak the same language, as with Spanish in Latin American countries, or English in the case of the United States and Canada. Alternatively, the one nation could speak different languages. English and Gaelic are used in both Scotland and Ireland without been seen as a national difference. Different nations can also speak very similar languages [...] Indeed such differences can blur to the point of insignificance."

[21] *Ibid.*, at 71: "Territory can have an important functional role in defining nations, providing a population with its resources and shaping their lifestyle and culture. However, its role in uniting and dividing people is more difficult. Geographical features do not necessarily form barriers between people."

[22] *Ibid.*, at 81: "[...] Historical ties, then play a complex role. They are important for adding depth to national ideas and weight to legal principles. However, this very importance may mean that they are interpreted according to the needs of a self-determination claim, rather than their actual functional role in shaping nations."

organization) that make the assessment are crucial to the success of the process.[23] In this field, the international legal doctrine and the jurisprudence regarding the recognition of states can be useful when there are similarities or analogies.[24] Indeed, despite the differences, many of the classic parameters of International Law around the principle of effectiveness are also applicable in the field of peoples. In practice, the General Assembly assumed, with respect to the peoples, part of the work done in the past by the states regarding recognition.[25]

At this point, it is worth to underline that, despite the ambiguity of the concept, through the acceptance of the objective and subjective elements, the identity of many peoples from all continents have been recognized and they have become right-holders under the particular "rights of the peoples" regime.[26] However, although progress has been made in determining those characteristic elements of the peoples, this does not imply that the international legal order has forged neither a univocal meaning of the term nor a set of common characteristics inherent to any people. On the contrary, we can affirm that the progressive expansion of the original concept (basically applicable to peoples subject to colonial domination) has led to the gradual recognition of new rights that go beyond self-determination, like the rights recognized to other communities sharing other characteristics different from the original ones of the colonies.

Faced to this ambiguity, authors such as Wright encouraged the political bodies of the United Nations to qualify every sovereignty request.[27] Others, like Abi-Saab affirmed that the notion of the people would depend on the context in which it arises. He suggests a "contextual" and "dynamic" interpretation that implies that the rights recognized to those peoples may vary according to the context or depending on the scope and the particular content.[28] Thus, it would be different to refer to the right of the peoples to their own existence —which entails

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[23] See Q. Wright, 'The strengthening of international law', 98 *Collected Courses of the Hague Academy of International Law*, 1959, at 185: "The General Assembly has, however, taken the position that it is 'competent' to decide 'what territories come under Article 73'. Can this position be justified? I think it can, on the theory that a resolution of the General Assembly may constitute 'collective recognition' of a status.".

[24] See, among others, H. Blix, 'Contemporary Aspects of Recognition', 130 *Collected Courses of the Hague Academy of International Law*, 1970, at 587-704: L. García Arias, 'La desaparición de la doctrina Betancourt sobre no reconocimiento de gobiernos *de facto*', 22(1) *Revista Española de Derecho Internacional*, (1969), at 104-106; J. Crawford, *The creation of States in International Law* (Oxford University Press, Nueva York, 1979); J. Dugard, *Recognition and the United Nations* (Cambridge University Press, Cambridge, 1987); H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, Cambridge, 2012); and J. A. Carillo Salcedo, *Soberanía de los Estados y Derechos Humanos en Derecho Internacional* (Tecnos, Madrid, 2001).

[25] Wright discussed deeply this topic in Chapter X (Self-determination and recognition) of his Hague Academy Course. See Wright, *supra* n.171, and Q. Wright, 'Some thoughts about recognition', 44(3) *The American Journal of International Law* (1950), at 548-559 [doi: 10.2307/2194030].

[26] See Ruiloba, *supra* n.11, at 335.

[27] See Wright, *supra* n.22, at 490.

[28] See Abi-Saab, *supra* n.8, at 404.

the prohibition of being subjected to genocide— than to the right of self-determination. Likewise, Crawford goes a step further and links the concept of people with the rights-holders, affirming that the rights of the people conform a category, not a definition.[29]

We consider that it is feasible to affirm that the notion people does not have a univocal meaning in International Law; thus, its meaning can vary according to the type of community to which we are referring and their rights will also differ according to the legal field.[30] Ruiloba, studying the concepts of people and nation, stressed the need to interpret the term "according to the context".[31] This multi-layered conception of the notion people must be considered as a valid categorization to emphasize the difficulty of finding a univocal meaning of the concept. Brownlie insists on the difficulty of defining the term, although he affirms that the concept has a "core of reasonable certainty" which stems from the right of the communities to have its particular characters reflected in the governmental institution of the community.[32]

In this context, we must underline that peoples, as understood, are different entities of what we recognize as minorities,[33] which are recipients of Article 27 of the International Covenant on Civil and Political Rights.[34] It is evident that both concepts are very similar and they both contributed to the enlargement of the right of self-determination. But this type of intrastate communities are holders of other rights recognized by the international legal order and are addressees of many other studies by the doctrine.[35] Summers rightly emphasizes that,

[29] See Crawford (ed), *supra* n.10, at 169-170.

[30] Many authors have been favourable to this diversity. See, among others, Crawford (ed), *supra* n.10 at 170 and Michalska, *supra* n. 7 at 74.

[31] See Ruiloba, *supra* n.11, at 311.

[32] In this sense, Brownlie continues his argument by unravelling the elements that have traditionally shaped the different character of each people and links it to the principle of self-determination. See Brownlie, I, 'Rights of Peoples in International Law', in Crawford (ed), *supra* n.10, at 5.

[33] See F. Mariño Menéndez, 'Naciones Unidas y el derecho de autodeterminación', in F. Mariño Menéndez (coord.), *Balance y perspectivas de Naciones Unidas en el cincuentenario de su creación* (Boletín Oficial del Estado, Madrid, 1996) at 89.

[34] See International Covenant on Civil and Political Rights, *supra* n.10, Art. 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[35] With regard to minorities, specialized bibliography can be can consulted: Y. Ben Achour, 'Souveraineté étatique et protection internationale de minorities', 245 *Collected Courses of the Hague Academy of International Law*, 1994, at 361-462; C. Brölmann, R. Lefeber and M. Zieck (eds), *Peoples and Minorities in International Law*, (Martinus Nijhoff, London, 1993); P. Thornberry, *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991); T. D. Musgrave, *Self Determination and national minorities* (Oxford University Press, Oxford, 2000); W. Kymlicka, *The Rights of Minority Cultures* (Oxford University Press, Oxford, 1995); J. M. Contreras Mazarío, *Las Naciones Unidas y la protección de las minorías religiosas* (Tirant, Valencia, 2004) and T. Makkonen, *Identity, Difference and Otherness. The Concepts of 'People', 'Indigenous People' and 'Minority' in International Law* (The Eric Castrén Institute of International Law and Human Rights, Helsinki, 2000).

although there is no clear differentiation between minorities and peoples, the most decisive nuance is that they are not holders of the right of self-determination understood in its entirety but of other rights such as those related to their language, their religion or their own culture.[36] In this field, one of the most notorious cases took place on the occasion of the peace conference convened after the dismemberment of the former Yugoslavia, which agreed to the creation of an arbitration committee known as the Badinter Committee.[37] The Final Opinions of the Committee affirm, among other arguments, the existing compatibility between the rights of intrastate minorities and the maintenance of the territorial limits of the new states that emerged after the war.[38] The set of these opinions confirms the implementation force of the *uti possidetis iuris* principle,[39] without undermining the rights of those groups living within the state and the possibility of neighbouring states to modify their territorial limits as long as do it by agreement.[40] Likewise, the category of indigenous peoples is currently the

[36] See Summers, *supra* n.1, at 4: "While it is not clear whether minorities could also be peoples, they do not, in themselves, have a right of self-determination in international law. Instead, persons belonging to such minorities (note the focus on individual members rather than a group) are considered to have certain minority rights, such as the right to use their own language, practice their own religion or enjoy their own culture."

[37] The name of the Committee corresponded to its president, Robert Badinter, former president of the French Constitutional Council.

[38] See *Opinions of the Arbitration Committee*, Opinion Nº2: "[...] 1. The Committee considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise [...] The principle of the right to self-determination serves to safeguard human rights. By virtue of that right every individual may choose to belong to whatever ethnic, religious or language community he or she wishes." The text of the Final Opinions of the Committee can be found as an annexed document in: A. Pellet, "The Opinions of the Badinter Arbitration Comité. A Second Breath for the Self-Determination of Peoples", 3(1) *European Journal of International Law* (1992), at 182-185 [doi: 10.1093/oxfordjournals.ejil.a035802]

[39] See L. I. Sánchez Rodríguez, 'Uti possidetis: la reactualización jurisprudencial de un viejo principio', 40(2) *Revista Española de Derecho Internacional* (1988), at 121-152.

[40] Pellet, *supra* n.37, at.180: "The Arbitration Committee laid great emphasis upon the fundamental importance which it attached to the principle of respect for frontiers existing at the moment of independence (*uti possidetis juris*)."

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recipient of a large list of legal norms[41] to the point that they could constitute a particular branch of the International Law of Human Rights.[42]

### (D) A LEGAL CONCEPT

One of the most relevant elements in the legal recognition of the identity of every people is the subjective element of the freely expressed will of the people.[43] The common and necessary element in the syllogism *people – self-determination – political participation of the citizens* is the genuine expression of the popular will. Indeed, that expression of the will of the people must be a free and genuine expression of the will common to the group of inhabitants of the community. It has been a crucial (although not the only) element that must concur during the process of self-determination, either in the external and in the internal dimension.[44] Moreover, in order to grant some right of political participation to the members of that community, it will be necessary to offer them the possibility of expressing their political preferences in a system of political pluralism (respectful with the constitutional norms in the case of the internal dimension).

In brief, the concept of the people refers to a human community endowed with some form of political organization whose understanding and assessment is characterized by being dynamic and contextual (characters that are also inherent to the self-determination right). Despite the conceptual ambiguity of the notion people, it is shrouded with a certain international subjectivity and with the set of rights that each people can exercise. It must be determined in a case-by-case basis and it must bear in mind the political-legal circumstances

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[41] See F. Mariño Menéndez, 'Naciones Unidas y el derecho de autodeterminación', in F. Mariño Menéndez (coord), *Balance y perspectivas de Naciones Unidas en el cincuentenario de su creación* (Boletín Oficial del Estado, Madrid, 1996) at 94. With regard to indigenous peoples, specialized bibliography can be consulted in: F. Mariño Menéndez and J. D. Oliva Martínez (coords.), *Avances en la protección de los derechos de los pueblos indígenas* (Dykinson, Madrid, 2004); S. Pritchard (ed.), *Indigenous Peoples, the United Nations and Human Rights* (Zed Books, London, 1998); S. Torrecuadra García-Lozano, *Los pueblos indígenas en el orden internacional* (Dykinson, Madrid, 2001); M. P. Andrés Sáenz de Santa María, 'El estatuto internacional de los poderes indígenas locales', en M. Pérez González *et al.*, *Hacia un Nuevo Orden Internacional y Europeo: estudios Homenaje al Profesor Don Manuel Díez de Velasco* (Tecnos, Madrid, 1993) at 67-78 and C. P. Cohen, *The Human Rights of Indigenous Peoples* (Ardsley, Nueva York, 1998); and

[42] See Commission on Human Rights, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, Conclusions and recommendations of the expert seminar on indigenous peoples and the administration of justice, E/CN.4/2004/80/Add.4, 27 January 2004.

[43] See Summers, *supra* n.1, at 40: "The essential conceit in self-determination is that a 'self', a nation or people actually determines something. The right suggest that the will of a nation or a people is self-evident and is simply there to be acted upon [...] It assumes not only that the basic unit for political life is a nation or people, but that the individuals primarily identify with the nation, and that the will of the people will be based on national rather than individual concerns."

[44] *Ibid.*, at 40: "[...] In practical terms the will of the people in self-determination is not self-evident."

of each community. In this sense, Ruiloba distinguished very adequately between the legal capacity and the right (or capacity) to act of the people, assimilating the different legal capabilities of the individuals with the different actions that can be carried out by the peoples in the international arena.[45] This dynamic approach to the concept of people has provided solutions to the claims of colonial peoples through the exercise of the external dimension of the right of self-determination. Similarly, in the internal dimension, the concept itself is flexible enough as to allow a full degree of self-determination inside the states and to assuage the identity claims of the intra-state entities respectfully with the territorial integrity and with the sovereignty of the states.

[45] See Ruiloba, *supra* n.11, at 335-336.

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*Secession of States and Self-determination in contemporary International Law*

# The Absence of Any Right to 'Remedial Secession' in International Law

Juan Francisco ESCUDERO ESPINOSA*

*Abstract*: The theory of remedial secession puts forward the idea of an *opinio* that considers it licit to exercise external self-determination in contexts of oppression and grave violations of human rights. This view would be supported by just a few cases in international practice. For the most part, the international community has been reluctant to recognize it, even though only Bangladesh and Kosovo came to secede in accordance with its precepts. Indeed, even the Kosovo case raises doubts about whether it should be seen as a remedial secession. In view of these facts, it becomes necessary to note the deep-rooted and unquestionable existence of just such an *opinio juris*. This requires the argumentation advanced by new entities in justifying secession to fall in line with the theory, rather than that the result achieved should match a claimed emerging right to remedial secession. In neither of the two instances did the new entities allude to exercising a right to remedial secession. International practice would appear to show that States are not convinced that such a right should be recognized.

Keywords: Remedial Secession – Secession – Self-Determination

## (A) INTRODUCTION

The concept of secession lacks any precise boundaries in international law, which remains neutral on the matter, neither recognizing a right nor setting any prohibition, although unanimously considering it illicit when it is brought into play in violation of peremptory norms of international law.[1] In other words, secession is not recognized by international law, but likewise international law does not prohibit secession.[2] This is a 'deliberate silence' that

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[1] Cf. T.M. Franck, 'Report by Thomas M. Franck: 'Opinion Directed at Question 2 of the Reference', in A.F. Bayefsky (ed.) *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague: Kluwer Law International, 2000), 75-84, at 83. S.F. Van den Driest, 'From Kosovo to Crimea and Beyond: On Territorial Integrity, Unilateral Secession and Legal Neutrality in International Law', 22:4 *IJGR* (2015), 467-485, at 481-482.

[2] Cf. G. Abi-Saab, 'Conclusion', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge; New York: Cambridge University Press, 2006), 470-476, at 474 [doi: 10.1017/CBO9780511494215.017]. T. Christakis, T., 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?, 24:1 *LJIL* (2011), 73-86, at 83. J. Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: Clarendon Press, 2007), 870, at 390. P. Hilpold, 'Die Sezession – zum Versuch der Verrechtlichung eines faktischen Phänomens', 63:1 *ZaöRV/HJIL* (2008), 117-141, at 117. G. Lauwers and S. Smis, 'New Dimensions of the Right to Self-determination: A Study of the International Response to the Kosovo Crisis', 6:2 *N & EP* (2000), 43-70, at 64. R. Muharremi, 'A Note on the ICJ Advisory Opinion on Kosovo', 11:7

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Judge Bruno Simma felt, when making a declaration on the occasion of the *Kosovo Advisory Opinion*, must imply that certain actions were not illegal, but also that they were not necessarily legal.[3]

Apart from this, reasons have been mooted contrary to the acceptance of a right to secession. They point to the difficulties of determining who holds such a right, in the risks for States arising from recognition of multiple minorities, and the danger of excessive and indefinite fragmentation of the international community if it were to be formed by numerous unviable micro-states.[4]

Likewise, arguments are put forward in favor of a right to secession. They are based on satisfying the will of an extensive majority of the population of a given area;[5] on rectification of situations of 'past injustice', when a geographical unit was created into which the entity desirous of secession was unjustly incorporated;[6] on the idea that it should exist in itself, without any solid justification, but demonstrated by the positive results attained in specific instances;[7] or on the protection of members of a group subjected to serious violations of human rights by State authorities.[8]

In these latter contexts of particular gravity, strong support has been given to the legitimization of secession as a 'remedy' for a group suffering grave persecution at the hands of State authorities.[9] In these circumstances, international law might admit a 'qualified' right

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*German LJ* (2010), 867-880, at 875. S. Oeter, 'Secession, Territorial Integrity and the Role of the Security Council', in P. Hilpold (ed.), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010* (Leiden; Boston: M. Nijhoff Publishers, 2012), 109-138, at 114. S.F. Van den Driest, 'Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law', 62:3 *NILR* (2015), 329-363, at 354. J. Vidmar, 'Conceptualizing Declarations of Independence in International Law', 32:1 *Oxford JLS* (2012), 153-177, at 164.

3 Cf. 'Declaration of Judge Simma', *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), 403-626, at 480, para. 9.

4 Cf. L.C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978), 288, at 14. R. Higgins, 'Postmodern Tribalism and the Right to Secession', in C. Brolmann, R. Lefeber and M. Zieck (eds.), *Peoples and Minorities in International Law* (Dordrecht: Martinus Nijhoff, 1993), 29-35, at 35.

5 Cf. A. Buchanan, *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Boulder: Westview Press, 1991), 162, at 29-32.

6 Cf. Id., at 29-32.

7 Cf. G. Wilson, 'Self-Determination, Recognition and the Problem of Kosovo', 56:3 *NILR* (2009), 455-481, at 474.

8 Cf. A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 365, at 327-333.

9 Cf. K. Del Mar, 'The Myth of Remedial Secession', in D. French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge; New York: Cambridge University Press, 2013), 79-108, at 79. Oeter, *supra* n. 2, at 119.

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to 'remedial secession' aimed at putting an end to a situation of genocidal characteristics.[10] Backing for this view would be drawn from the events occurring in the case of Kosovo, which were seen by a major sector of legal opinion as completely fulfilling the postulates for 'remedial secession', even after the establishment of UNMIK.[11] Nevertheless, it is far from clear that Kosovo can be admitted as a precedent when it was considered a 'unique case'.[12]

### (B) THE PRINCIPLES OF THE THEORY OF 'REMEDIAL SECESSION'

The basis for the theory of 'remedial secession' was established by authors such as Allan Buchanan, Professor of the Philosophy of International Law, who grouped views about any right to secede around recognition either of a 'remedial right only' or a 'primary right' to secession.[13] In his formulation, the theory of 'remedial secession' advocates transformation of the internal right to self-determination into a right to independent statehood for a part of a State when all attempts to achieve it have been frustrated by the authorities through a lack of representation and violation of human rights.[14] Exercise of self-determination would constitute an exceptional 'remedy' for situations in themselves extraordinary, in which carrying out legitimate humanitarian intervention might prove a difficult task.[15]

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[10] Cf. D. Raič, *Statehood and the Law of Self-Determination* (The Hague: Martinus Nijhoff Publishers, 2002), 495, at 324. J. Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice', 6:1 *St. Antony's International Review* (2010), 37-56, at 40.

[11] Among others, on the previous situation and the course of the UNMIK administration: T. Baggett, 'Human Rights Abuses in Yugoslavia: To Bring an End to Political Oppression, the International Community Should Assist in Establishing and Independent Kosovo', 27:2 *Ga.J. Int'l & Comp. L.* (1999), 457-476, at 472. J.I. Charney, 'Self-Determination: Chechnya, Kosovo, and East Timor', 34:2 *Vand. J. Transnat'l L.* (2001), 455-468. T.D. Grant, 'Extending Decolonization: How the United Nations Might Have Addressed Kosovo', 28:2 *Ga.J. Int'l & Comp. L.* (2000), 9-54, at 53. G. Seidel, 'A New Dimension of the Right of Self-Determination in Kosovo?', in C. Tomuschat (ed.), *Kosovo and the International Community. A Legal Assessment* (The Hague: Kluwer, 2001), 203-215.

Holding that this right also applied at the moment of the declaration of independence: K.W. Watson, 'When in the Course of Human Events: Kosovo's Independence and the Law of Secession', 17:1 *Tul. J. Int'l & Comp. L.* (2008), 267-293, at 281.

[12] Cf. C. Tomuschat, 'Secession and Self-Determination', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge; New York: Cambridge University Press, 2006), 23-45, at 38.

[13] Cf. A. Buchanan, 'Theories of Secession', 26:1 *Philosophy & Public Affairs* (1997), 31-61, at 34. A. Catala, 'Remedial Theories of Secession and Territorial Justification', 44:1 *Journal of Social Philosophy* (2013), 74-94, at 74 [doi: 10.1111/josp.12011].

[14] Cf. Buchanan, *supra* n. 13, at 35. By the same author, *Justice, Legitimacy and Self-Determination. Moral Foundations for International Law* (Oxford; New York: Oxford University Press, 2004), 507, at 335. Catala, *supra* n. 13, at 77. T. Jaber, 'A Case for Kosovo? Self-determination and Secession in the 21st Century', 15:6 *IJHR* (2011), 926-947, at 935. Raič, *supra* n. 10, at 368-372.

[15] Cf. W.W. Burke-White, 'Crimea and the International Legal Order', 56:4 *Survival* (2014), 65-80, at 77. J. Summers, 'Relativizing Sovereignty: Remedial Secession and Humanitarian Intervention in International Law', 6:1 *St. Anthony's International Review* (2010), 16-36, at 30.

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Although these were present in early formulations,[16] development of the theory over the course of the post-colonial period led to the explicit enumeration of a list of requirements that must be fulfilled in order to legitimize a remedial right to secede. On the basis of descriptions of circumstances, authors like Cedric Ryngaert and Simone Van den Driest have summed up the requisites generally demanded by academics as four features:[17]

(1) Claims must be made by a people constituting a majority in a given territory;[18]
(2) There must be a state of affairs involving serious, massive, systematic violations of fundamental human rights;[19]
(3) There must be persistent denial of political participation in government leading to a situation of domination, subjugation or exploitation outside a colonial context;[20] and
(4) There is a need for any process of external self-determination to be undertaken as a last resort after the failure of negotiations.[21]

### (c) Remedial Secession as a Doubtful Norm in Customary International Law

#### (1) Uncertain Conviction of the Lawfulness of Remedial Secession

Some authors have mentioned the matter of the Åland Islands in 1921 as a precedent for the theory of remedial secession. Although considered unique at the time, this still today constitutes a benchmark.[22] The Committee of Rapporteurs of the League of Nations that examined the case held that there was no absolute right to unilateral secession but recognized

[16] Cf. Buchanan, *supra* n. 13, at 37.

[17] Cf. C. Ryngaert and C. Griffioen, 'The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers', 8:3 *Chinese JIL* (2009), 573-587, at 575-576. S.F. Van den Driest, S. *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?* (Cambridge: Intersentia, 2013), 383, at 351.

[18] Cf. B. Arp, 'The ICJ Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* and the International Protection of Minorities', 11:7 *German LJ* (2010), 847-866, at 853, note 15. N.A. Ioannidis, 'Constitutional Prohibition of Secession under the Prism of International Law: The Cases of Kosovo, Crimea and Cyprus', 2:4 *Edinburgh Student Law Review* (2015), 169-180, at 178. T.D. Musgrave, *Self-Determination and National Minorities* (Oxford: Oxford University Press, 2000), 290, at 154. Oeter, *supra* n 2, at 115. Ryngaert and Griffioen, *supra* n. 17, at 575.

[19] Cf. Ioannidis, *supra* n. 18, at 178. Jaber, *supra* n. 14, at 935. Ryngaert and Griffioen, *supra* n. 17, at 576. Van den Driest, *supra* n. 17, at 351.

[20] Cf. Ioannidis, *supra* n. 18, at 178. Jaber, *supra* n. 14, at 935. Raič, *supra* n. 10, at 368-372. Ryngaert and Griffioen, *supra* n. 17, at 576. Tomuschat, *supra* n. 12, at 41. Van den Driest, *supra* n. 17, at 351.

[21] Cf. Buchanan, *supra* n. 14, at 335. Ioannidis, *supra* n. 18, at 178. Jaber, *supra* n. 14, at 935 and 942. Lauwers and Smis, *supra* n. 2, at 64. Oeter, *supra* n 2, at 119. Ryngaert and Griffioen, *supra* n. 17, at 576. Tomuschat, *supra* n. 12, at 41.

[22] Cf. T. Fleiner, 'The Unilateral Secession of Kosovo as a Precedent in International Law', in U. Fastenrath (ed.) *From Bilateralism to Community Interests: Essays in Honour of Judge Bruno Simma* (Oxford: Oxford University Press, 2011), 877-894, at 882.

this option as a 'last resort'.[23] However, in their conclusions they stated that this possibility did not apply to the inhabitants of the archipelago because 'Aalanders have neither been persecuted nor oppressed by Finland', and neither was any evidence of a 'policy of oppression' found.[24]

The international community reflected a certain recognition of the exception in the so-called 'safeguard clause' envisaged by the Declaration on Principles of International Law of 1970 under which the territorial integrity principle was tied to the representative nature of a government.[25] Hence, the theory of remedial secession sought its basis in an interpretation running counter to the integrity principle.[26] If a State lacked a government representing the totality of the people belonging to a territory, without distinction of race, creed or color, it could not invoke territorial integrity to limit to an internal sphere the exercise of a people's right of self-determination.[27] Apart from any controversy about determination of the units for which the territorial integrity principle was intended, it must be objected that this principle of integrity of territory constituted a core principle of international law for which no exceptions were admitted, and the drafters likewise did not accept any chance of a contrary interpretation.[28]

Over the following decades, the theory was corroborated through its incorporation into the decisions of a number of national and international legal bodies, as also those of international organizations.[29] Among the first instances of this would be the Concurring

[23] Cf. 'Report Presented to the Council of the League of Nations by the Commission of Rapporteurs', 16 April 1921 (Geneva: League of Nations, 1921), 53, at 27, League of Nations Council Doc. B7/21/68/106 (1921).

[24] Id., at 28. V. P. Nanda, 'Self-Determination under International Law: Validity of Claims to Secede', 13:2 *Case W.R.J. Int'l L.* (1981), 257-280, at 266.

[25] Cf. A. Kapustin, 'Crimea's Self-Determination in the Light of Contemporary International Law', 75:1 *ZaöRV/HJIL* (2015), 101-118, at 107. A. Tancredi, 'Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia', 18 *Italian YIL* (2008), 37-62, at 40, note 11. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV), of 24 October 1970, at Annex, 'The Principle of Equal Rights and Self-Determination of Peoples', para. 7.

[26] Cf. T. Christakis, 'Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international (The Conflicts of Secession in Crimea and Eastern Ukraine and International Law)', 141:3 *JDI* (2014), 733-764, at 742. Del Mar, *supra* n. 9, at 94.

[27] Cf. Ryngaert and Griffioen, *supra* n. 17, at 581. J. Soroeta Liceras, 'La opinión consultiva de la Corte Internacional de Justicia sobre Kosovo de 22 de julio de 2010: una interpretation judicial *sui generis* para un caso que no lo es. Aplicabilidad de la cláusula de salvaguardia de la resolution 2625 (XXV) o de la 'secesión como remedio"', 25 *REEI* (2013), 29, at 28. Tancredi, *supra* n. 25, at 39. Del mismo autor, 'A Normative 'Due Process' in the Creation of States Through Secession', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge; New York: Cambridge University Press, 2006), 171-207, at 176.

[28] Cf. M.N. Shaw, 'Peoples, Territorialism and Boundaries', 8:3 *EJIL* (1997), 478-507, at 483. Intervention of Mr. Riphagen (The Netherlands), UN Doc. A/AC.125/SR.114, at 52, cited in Tancredi, *supra* n. 25, at 40, note 11.

[29] Cf. Jaber, *supra* n. 14, at 935-936. Van den Driest, *supra* n. 17, at 129-131.

Opinion issued by Judges Luzius Willhaber and Rolv Ryssdal in respect of the *Loizidou v. Turkey* case before the European Court of Human Rights in 1996.[30] To this can also be added the decisions of the African Commission on Human and Peoples' Rights relating to the matters of Katanga in 1996, and Southern Cameroon in 2009, based on the 'safeguard clause'.[31]

One particularly crucial contribution was the basis for the decision by the Supreme Court of Canada in its *Reference re Secession of Quebec* in 1998 when examining the recognition of a claimed right to secession. The Supreme Court took a step forward in accepting the existence of a right to external secession exclusively on the assumption that "a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development".[32]

The statements listed do not, however, seem sufficient to assert that there is a general conviction about the theory of remedial secession. This has led to striking divisions in the international community, as was highlighted by the case presented by *Kosovo* before the International Court of Justice (ICJ).[33] It might have been expected that the ICJ would deliver an opinion, but it toed the same line as legal and political bodies, whether internal or international, and avoided making any pronouncement on the existence of a right to remedial secession. It did no more than provide an answer strictly limited to the points raised by the General Assembly.[34] This attitude was criticized both by Judges Abdulqawi A. Yusuf and

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[30] Cf. 'Concurring Opinion of Judge Wildhaber, Joined by Judge Ryssdal', ECHR (Chamber), *Loizidou v. Turkey*, Application No. 15318/89, Judgment (Merits), 28 July 1998, 42, at 24, para. 1-2.

[31] Cf. *Katangese Peoples' Congress v. Zaire*, Merits, Communication No. 75/92, 8th Annual Activity Report, at para. 6. *Kevin Mgwanga Gunme et al./Cameroon*, Communication No. 266/2003, of 13-27 May 2009, at 36, para. 190-194.

Apart from the authors quoted previously, on these matters see: M. Vashakmadze and M. Lippold, "Nothing but a road towards secession'? The International Court of Justice's Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo", 2:2 *GoJIL* (2010), 619-647, at 635.

[32] Cf. Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217. 115 *International Law Reports* (1999), 536, at 287, para. 138. 37:6 *ILM* (1998), 1342-1377. S.E. Meller, 'The Kosovo Case: An Argument for a Remedial Declaration of Independence', 40:3 *Ga.J. Int'l & Comp. L.* (2012), 833-866, at 848.

[33] Among States expressing their support for remedial secession were Albania, Estonia, Germany, Finland, Ireland, Jordan, Lithuania, Maldives, the Netherlands, Poland, the Russian Federation, Slovenia, Switzerland, and Kosovo. Opposed to the theory were: Argentina, Azerbaijan, Belarus, Bolivia, Brazil, Burundi, China, Cyprus, Iran, Romania, Serbia, Slovakia, Spain, Venezuela, and Vietnam. Cf. G. Bolton, 'International Responses to the Secession Attempts of Kosovo, Abkhazia and South Ossetia 1989-2009', in D. French (ed.) *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge: Cambridge University Press, 2013), 109-138, at 109. Christakis, *supra* n. 26, at 742. Del Mar, *supra* n. 9, at 80-83. See also Vashakmadze and Lippold, *supra* n. 31, at 636, note 86.

[34] Cf. *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), 403-626, at 438, para. 82-83. Del Mar, *supra* n. 9, at 84. Kapustin, *supra* n. 25 , at 107.

Bruno Simma and by an extensive group of commentators.[35]

### (2) The Lack of International Practice on Remedial Secession

Some writers on the topic have referred to practice among the international community confirming the emergence of a right to secession when there is oppression and gross human rights violations.[36] These authors point to the cases of Bangladesh, Eritrea, Croatia and Slovenia, the Baltic Republics, South Sudan and Kosovo, unanimously highlighting the instance of Bangladesh as the clearest example.[37] Alongside these cases, account has also been taken of the instances of Southern Rhodesia, Katanga, Chechnya, South Ossetia and Abkhazia. However, these have been discounted because the international community opposed their recognition and in the end the secession failed.[38]

The outcome of the analysis performed by legal doctrine is the conclusion that only the instances of Bangladesh and Kosovo can be considered the result of a process of unilateral secession. Consequently, they alone can be taken into account as a manifestation of international practice relative to remedial secession.[39] To this should be added the fact that the Kosovo secession has not been universally accepted as a clear example. Among other reasons cited, this is because the abuses involved lay at some distance in time and did not justify remedial secession.[40]

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[35] Cf. 'Separate Opinion of Judge Yusuf', *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), 618-626, at 620, para. 5-6. 'Declaration of Judge Simma', *Accordance with the International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010), 478-481, at 480, para. 7.

Cf. Arp, *supra* n. 18, at 853. H. Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused?', 24:1 *LJIL* (2011), 155-161, at 156]. A. Orakhelashvili, 'The International Court's Advisory Opinion on the UDI in Respect of Kosovo: Washing Away the 'Foam on the Tide of Time"', 15:1 *Max Planck YUNL* (2011), 65-104, at 86. C. Ryngaert, 'The ICJ's Advisory Opinion on Kosovo's Declaration of Independence: A Mixed Opportunity?: International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 201', 57:3 *NILR* (2010), 481-494, at 492.

[36] Cf. Vidmar, *supra* n. 10, at 42-50.

[37] Cf. Dugard and D. Raič, 'The Role of Recognition in the Law and Practice of Secession', in M. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge; New York: Cambridge University Press, 2006), 94-137, at 120-130. Tancredi, *supra* n. 25, at 40-41. Van den Driest, *supra* n. 17, at 276, 279-289. Vidmar, *supra* n. 10, at 42-48.

[38] Cf. Ryngaert and Griffioen, *supra* n. 17, at 578. Tancredi, *supra* n. 25, at 53,

[39] Cf. Van den Driest, *supra* n. 17, at 289. Van den Driest, *supra* n. 2, at 345.

[40] Cf. M. Goodwin, 'From Province to Protectorate to State? Speculation on the Impact of Kosovo's Genesis upon the Doctrines of International Law', 8:1 *German LJ* (2007), 1-20, at 6. Jaber, *supra* n. 14, at 941-942. R. Kolb, 'Autodétermination et 'sécession-remède' en droit international public', in *The Global Community Yearbook of International Law and Jurisprudence: Global Trends: Law, Policy & Justice. Essays in Honour of Professor Giuliana Ziccardi Capaldo* (Oxford: Oxford University Press, 2013), 57-77, at 63. Van den Driest, *supra* n. 17, at 273. Vashakmadze and Lippold, *supra* n. 31, at 636, and note 86. Vidmar, *supra* n. 10, at 49. Wilson,

In accordance with the arguments taken on board by a broad sector of legal doctrine, it can be deduced that it is not possible to see any general and uniform international practice reflecting clear support for a right to remedial secession.[41]

## (D) CONCLUSION

In the absence of a rule in treaty law envisaging a right to remedial secession, it may be asked whether the concept of remedial secession can constitute a norm of international customary law. In the light of what has been stated above, it would appear difficult to point to the existence of general practice embodying any recognition of a right to remedial secession.[42] The presence of a strong *opinio juris* confirming an obligatory nature for remedial secession might provide a foundation for the emergence of a right to remedial secession as a norm of customary international law.[43] For this, it would be necessary to show that the behavior of States provides "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[44]

The two instances accepted would have to evince particular coherence from which the acceptance of remedial secession could be deduced.[45] Consequently, the presence of an *opinio juris* could be inferred from statements serving as a basis for recognition by States.[46] However, only in relation to Bangladesh did States allude to the infringement of human rights, to deprivation of access to internal self-determination, and to the impossibility of resolving the situation when justifying their recognition.

Furthermore, it should be plain that practice is an outcome of declarations by States as to why they are behaving in ways in conformity with any supposed new right to remedial secession, and not a question of seeing a posteriori that the result achieved corresponds to the premises for such secession. In the case both of Bangladesh and of Kosovo, the authorities did not invoke any claimed right to remedial secession, but rather put forward all sorts of justifications outside international law.

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*supra* n. 7, at 477. S. Yee, 'Notes on the International Court of Justice (Part 4): The Kosovo Advisory Opinion', 9:4 *Chinese JIL* (2010), 763-782, at 780.

41 Cf. S. Oeter, 'The Role of Recognition and Non-Recognition with Regard to Secession', in C. Walter *et al.*, *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014), 45-67, at 58. Ryngaert and Griffioen, *supra* n. 17, at 584. Van den Driest, *supra* n. 17, at 290.

42 Cf. Kolb, *supra* n. 40, at 63.

43 Cf. *North Sea Continental Shelf, Judgment*, ICJ Reports (1969), 3-57, at 44, para. 77. *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports (1986), 12-150, at 98-100, para. 186-188.

44 Cf. *North Sea Continental Shelf, Judgment*, ICJ Reports (1969), 3-57, at 44, para. 77.

45 Cfr. *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment*, ICJ Reports (1984), 244-352, at 299, para 111.

46 Cf. Jaber, *supra* n. 14, at 941.

It may be deduced that no acceptance can be assumed on the part of States of the emergence of any asserted right to secede under the circumstances characteristic of remedial secession in current international law.[47] Indeed, it may be affirmed that there are more instances in which negative practice may be observed, in the sense that attempts to secede are rejected. This is the consequence of an *opinio non juris*, in other words, the conviction that no such right exists.[48]

The ICJ avoided any pronouncement on the question in the *Kosovo* case, although it made itself clear about the precarious nature of any right to remedial secession linked to exercise of the right to self-determination.[49] The fact that eleven States expressly declared that remedial secession is recognized by international law and that two ICJ justices supported remedial secession implies a major development. However, even with this backing, it is far from constituting a general customary international law.[50] It should be added that Kosovo has been recognized as a new State by a far from negligible group of States, but this fact does not provide grounds for admitting the existence of a right to remedial secession, integrated into customary international law, as the basis for creating new States.[51] This conclusion is given considerable support by the declarations made by many other States, unequivocally opposing acceptance of Kosovo's right to secede.[52]

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[47] Cf. P. Hilpold, 'The Kosovo Case and International Law: Looking for Applicable Theories', 8:1 *Chinese JIL* (2002), 47-61, at 56, para. 15. Jaber, *supra* n. 14, at 941. D.H. Meester, 'Remedial Secession: A Positive or Negative Force for the Prevention and Reduction of Armed Conflict?', 18:2 *Canadian Foreign Policy Journal* (2012), 151-163, at 152. R.A. Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia', 8:1 *Chinese JIL* (2009), 2-25, at 19. Yee, *supra* n. 40, at 780.

[48] Cf. Del Mar, *supra* n. 9, at 107. Ryngaert and Griffioen, *supra* n. 17, at 584. Tancredi, *supra* n. 25, at 48.

[49] Cf. Del Mar, *supra* n. 9, at 84. Orakhelashvili, *supra* n. 35, at 86. V. Röben, 'The ICJ Advisory Opinion on the Unilateral Declaration of Independence in Respect of Kosovo: Rules or Principles?', 2:3 *GoJIL* (2010), 1063-1086, at 1075. A. Tancredi, 'Secession and the Use of Force', in C. Walter *et al.*, *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014), 68-94, at 81.

[50] In the matter of Kosovo, 36 States presented country submissions to the ICJ. In these submissions, eleven States (Albania, Estonia, Finland, Germany, Ireland, the Netherlands, Norway, Poland, Russia, Slovenia, and Switzerland) held remedial secession to be recognized in international law; six States felt that Kosovo constituted a unique or *sui generis* case, with varying stances on remedial secession in international law; five States remained neutral or expressed views on remedial secession that were ambiguous; and fourteen States (Argentina, Azerbaijan, Bolivia, Brazil, China, Cyprus, Egypt, Iran, Libya, Romania, Serbia, Slovakia, Spain, and Venezuela) were against recognition of remedial secession in international law. Cf. Meester, *supra* n. 47, at 153. By the same author, 'The International Court of Justice's *Kosovo* Case: Assessing the Current State of International Legal Opinion on Remedial Secession', 48 *Canadian Yearbook of International Law* (2010), 215-254, at 223-243.

[51] Cf. Tancredi, *supra* n. 25, at 49. Van den Driest, *supra* n. 17, at 351.

[52] Cf. J. Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence', 42:3 *Vand. J. Transnat'l L.* (2009), 779-851, at 835. Among the members of the United Nations opposing this were Algeria, Angola, Argentina, Armenia, Azerbaijan, Bahamas, Belarus, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Cambodia, Cameroon, Cape Verde, Chile, China, Democratic Republic of the Congo, Cuba, Cyprus,

Ecuador, Equatorial Guinea, Eritrea, Ethiopia, Georgia, Greece, Guatemala, India, Indonesia, Iran, Iraq, Israel, Jamaica, Kazakhstan, Kenya, North Korea, Kyrgyzstan, Laos, Lebanon, Libya, Mali, Mauritius, Mexico, Moldova, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Nigeria, Paraguay, Philippines, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, Sao Tomé and Principe, Serbia, Seychelles, Slovakia, South Africa, South Sudan, Spain, Sri Lanka, Sudan, Syria, Tajikistan, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, Ukraine, Uruguay, Uzbekistan, Venezuela, Vietnam, Zambia, and Zimbabwe.

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*Secession of States and Self-determination in contemporary International Law*

# The dissolution of the Soviet Union and complex state construction processes. Two differentiated secession models in the Republic of Moldova: Gagauzia and Transnistria

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*Abstract*: The purpose of this article is to analyse an unknown case of two different secessionist processes in the Republic of Moldova-Gagauzia and Transnistria-started in the framework of the decomposition of the Soviet Union. Both of them emerged as a virulent reaction to the irruption of a pro-Romanian Moldovan nationalism with a radical irredentist character.

Keywords: Russia-Moldova-Gagauzia-Transnistria relationships – Frozen Conflicts – Secession – Self-determination – Succession of States

## (A) INTRODUCTION

Post-Soviet space has created —and continues to do so— a lot of examples of unsolved complex states' succession. There are additional difficulties in order to explain a political event caused after the former Soviet Union's dissolution from an international and internal legal perspective.

Taking into account the international and the soviet internal law perspective we cannot consider a general framework without an essential political analysis that is impacting—from my point of view—relevant aspects of this case study. First of all, the Russian Federation's recognition of the legitimate successor role in the international community after the dissolution of the former Soviet Union should be noted. It was confirmed by direct succession, without the need to ask—*ex* novo—the recognition as a new member in United Nations, including the permanence in the privileged Security Council. But also by the development of new trends in foreign policy unfolded by the new Russian state since the independence and new configuration: we are talking about a new role and tool used by Moscow. Interventionism policy has been the most frequent reaction from the Kremlin

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versus the different secessionist processes. The relationship between Russia and the rest of the new independent republics has been substantially modified: the near abroad is being object of a progressive territorial fragmentation. Nevertheless, this worrying process is building an unstable geopolitics area in the shared neighbourhood with the European Union. So far, Western reaction according to international law has been non-recognition policy for the whole of new puppet states. The current situation on these conflicts is not moving in the way to consolidate *de iure* what has been building *de facto* in the former Soviet Union territory since the last twenty-six years.

The creation of new states has been the main consequence of the former Soviet dissolution. This historical event transformed one federal republic in fifteen new states overnight after Belavezha Treaty. Complex national construction processes started in all cases when they were facing the challenge to keep territorial integrity due to the different internal secessionist movements. The origin of these processes started during the final Soviet Union years, in the separatist context of the different federal republics, although it also shook several political administrative entities: the autonomous republics and regions. The most virulent political disintegration faced by an empire during the twentieth century was qualified by Putin as the biggest geopolitical catastrophe. The legal consequence was clear according to the former soviet internal legal orders: in the last Soviet Constitution of 1977, the voluntary character of the association of federated republics can activate Article 70 as well as Article 72 —right to separate freely from the federation. What was the hardest thing to do in this decomposition context? First of all, the last desperate attempt was approved by Supreme Soviet on April 7 1990: Secession Law tried to regulate the conditions to proceed in the legal republic secessions. Moscow wanted to get enough time for stopping the cascade of the independence declarations. Nevertheless, this new internal legal provision provoked what it wanted to avoid: Baltic Republics' declarations of sovereignty opened Pandora's box and the rest of the republics followed the marked path to independence. All these Soviet domestic legal orders had a single territorial entity as a beneficiary: only the fifteen federated republics could exercise the right of secession. The right to self-determination was not reserved for other territorial entities with different status in the former Soviet Union: neither the autonomous republics—Chechnya, for instance— nor autonomous regions, could use internal or international legal order to get independence from the federal state. In the same way, all the new republics had to build their respective path to independence in which the different national building processes should define the new status for these territorial units. Different domestic solutions were adopted according to the new states and each Constitution.

The whole of frozen conflicts—also protracted or without a definitive solution— that we can analyse in the former soviet space are developing their own dynamics. European Union

shared neighbourhood is marked by a diversity of territorial secessionist entities who share the same interventionist model: external Russian patronage linked to their geopolitical and geostrategic interests in the entire region.

The Moldavian case has been suffering a double secessionist process in the Gagauzia and Transnistria regions. Both of them have been managed similarly from Chisinau but with significative different results mainly due to Moscow's decision to maintain pressure on Moldova and its support to the authorities of Tiraspol through a complete package of tools. Especially the presence of the Russian armed forces since the beginning of their path as an independent state.

During the first stage of the conflicts in both regions, ideological component was the most important element in the confrontation. Nevertheless the first approach represented them in terms of clashes among the different ethnic groups living in the republic. In opposition to nationalist movements led by Popular Fronts, Gagauzia and Transnistria leaders wanted to stay within the Soviet Union. This means that, at the beginning, regional secessionism was an answer to Moldovan republican secessionism. It is important to remember that the two entities did not have a special status within the former Soviet Socialist Moldavia Republic.[1] Therefore, the subsequent evolution of the two processes after the Soviet Union collapse deserves a thorough analysis.




After the sovereignty declaration in the republic —during 1990— the evolution in both entities was quite different. Not only initiating their own secessionist movements but also starting statehood through the construction of independent institutions —executive, legislative, judicial, education, currency, security system— Transnistria's model represents *de facto* statehood consolidation existing for over 25 years. This "puppet state" has survived due to Russian intervention regardless of the continuous International Law's violations. Otherwise, the survival of Transnistria separated from Moldova would have been impossible. This support from Moscow has not been present in Gagauzia. This important nuance can explain the path to the Gagauz Yeri Autonomy within the Moldova framework. That internal

[1] Moldova is the current official name recognized in the Constitution (1994) of the Republic of Moldova and in the United Nations. The main purpose was trying to differentiate the Soviet period and the new independent republic.

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self-determination according to the Moldova's Constitution has been a satisfactory solution avoiding secessionist alternatives.

Historical context is really relevant to understand the origin of both separatist phenomes but it is impossible to address in this article and it is very well researched in several works. Nevertheless, nationalism and identity were the main reasons used to explain —especially at the beginning— the confrontations between the different ethnic minorities or between the centre and the periphery.[2]

### (B) SECESSIONISM IN GAGAUZIA

As the secessionist case developed in Transnistria, the southern districts of the republic led a similar movement within Gagauze minority.The main reason adopted as a protest flag was the ghost of Moldovan reunification with Romania. That is why the clashes between an irredentist Moldovan nationalism and the rest of the ethnic minorities started from the moment in which the main goal was considered to break with the Soviet Union for joining, after that, with the motherland Romania. This pendular movement tried to recover the old status within Romania. That is to say to return to the interwar period. This ethnic minority of Turkish origin professes the orthodox religion and it was concentrated in five southern districts. They are around 150.000 people—3.5% of the total population in the republic—. They declared their independence in august 1990, one year after the adoption of the linguistic laws. That was the key point considered by the Gagauzes, but also by the Slavic minorities living in Transnistria, as the breaking off with the Soviet Union. Moldovan identity was history. Official language was the Romanian because of the identification between Moldovan and Romanian language. Chisinau was under Moldovan Popular Front control but the secessionist claims were to remain within the Soviet Union, even though the Republic of Moldova was a unitary state-according to the Constitution of 1994 —Article 110 included the possibility of establishing special statutes of autonomy. This was especially designed for Transnistria and Gagauzia. In the future, this possibility can be reached through different organic laws. In a precise way, the concept of autonomy designed for the public administration within the administrative-territorial units "shall be based on the principles of local autonomy, decentralisation of public services, eligibility of the local public administration authorities and consultation of citizens on local problems of special interests" (Article 109(1)) But "the enforcement of the aforesaid principles may not alter the unitary character of the State" (Article 109(3)). In fact, Article 110(2) recognized that "places on the

[2] See, for instance, N. Cojocaru, 'Nationalism and Identity in Transnistria', 19 *Innovation: The European journal of Social Science Research* (2006), 261-272.

left bank of the Dniester River may be assigned special forms and conditions of autonomy, according to the special statutory provisions adopted by organic law". This organic law that is regulating the special statute of the autonomous territorial units—only in the case of Gagauzia for the moment— may be amended with the vote of three fifths of the elected members of Parliament. Moldovan case in terms of path to solve secessionist movements has been really original in comparison with other examples in the community of independent states.[3]

We need to remember the procedure by which Moldovan Constitution was approved and after that was celebrated the independence referendum and the Gagauz Yeri—Gagauzia autonomy— was established. The republican referendum celebrated on March 6, 1994 had the goal to consult the population about the independence of the republic. That is to put an end to doubts about an eventual reunification with Romania. Despite not meeting the deadlines established by the Moldovan law of 1992 on the holding of referendums, that consultation was called and celebrated a week after the parliamentary elections. Final results approved by 97, 9%, the independence of Moldova as a state and ending the debates on reunification with Romania. In this situation, the main argument had disappeared for Transnistria and Gagauzia secessionist movements. The approval of the Constitution on August 27 1994 allowed a few months later the approval in the Moldovan Parliament of the Autonomous Territorial-Unit of Gagauzia on December 23, 1994. That was incorporated as new Article 111 in the Constitution.[4]

This special statute of autonomy can be considered an exercise of internal self-determination because any kind of external self-determination is contrary to the Constitution and territorial integrity of the republic. This special consideration with the Gagauze people could be understood as an interesting model for a definitive solution in Transnistria. At the same time, this type of solution allowed to Chisinau authorities to avoid the different projects of asymmetric federalism in which Transnistria and Gagauzia could have the ability to block central institutions. [5] Nevertheless, there were a lot of projects and diplomatic solutions recovered during the following years trying to unlock the situation in Transnistria. For instance, the 1997 Moscow Memorandum —also named as the Primakov Memorandum—

[3] Among others: Th. Burri, 'Secession in the CIS: Causes, Consequences, and Emerging Principles', in Ch. Walter, A. V. Ungern-Sternberg and K. Abushov (eds.), *Self-determination and Secession in International Law* (Oxford University Press, Oxford, 2014) 138-156.

[4] Constitution of Moldova, entered into force August 27, 1994, available in the web of the Presidency, Constitution of the Republic of Moldova-Presidency of the Republic of Moldova, accessed June 20 2018.Art. 110 amended by the Law nº 344-XV of 25 July 2003, MO nr 170-172/08 August 2003, art. 721

[5] See on the different projects S. Roper 'Regionalism in Moldova: The Case of Transnistria and Gagauzia', 11 *Regional and Federal Studies* (2001), 101-122.

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and the 2003 Kozak Memorandum. [6]Both of them were offered by the Kremlin and the main purpose was to offer unacceptable alternatives to Chisinau in order to maintain the current *status quo*. The flagrant violations of basic rules of international law were going to be maintained. At the same time Transnistrian secessionism was going to become a real Trojan horse within the Republic of Moldova. Due to the veto power granted to Transnistria, the federalist model became a permanent nightmare to guarantee governability and territorial integrity. Bosnia-Herzegovina and its complex constitutional and territorial system represent the best example in this sense.[7]

The main constitutional provisions contained in Article 111 amended by the mentioned Law nº 344-XV of July 25 2003. Gagauzia is considered in 111(1) "an autonomous territorial-unit having a special statute and representing a form of self-determination of the Gagauzian people, shall constitute an integrant and inalienable part of the republic of Moldova and shall independently solve, within the limits of its competence, pursuant to the provisions of the Republic of Moldova Constitution, in the interest of the whole of society, the political, economic and cultural issues".[8] The following points collected in the article establish the guarantee on all the rights and liberties foreseen by the Constitution: representative and executive bodies independent from Chisinau, own budget, natural resources control, and other specific rights according to the special statute of Gagauzia. Nevertheless, "the control over the observance of the Republic of Moldova legislation within the autonomous territorial-unit of Gagauzia shall be performed by the Government under the terms of the law" (111(6)).

This type of autonomic model has become an interesting way of reconversion of a secessionist movement in an exercise of internal self-determination for ethnic minorities within the territory of a new independent state. Also respecting the rights of the rest of national minorities and the integrity territorial principle this solution has allowed to accommodate the basic rules of internal law within the internal legal order of the new Moldovan State.

The most important destabilizing factor has come as a result of events in Ukraine in the beginning of 2014. The named Euromaidan, the Russian annexation of Crimea previous referendum of independence and the military conflict in Eastern districts of Ukraine-

[6] See as a good example the web of Ministry of Foreign Affairs of Pridnestrovian Moldavian Republic in which is available full text of these Memorandums, accessed June 262018.

[7] The full text of The Moscow Memorandum on the bases of the normalization of relations between the Republic of Moldova and Transdniestria, signed on May 8, 1997, accessed June 22 2018. The full text of Kozak Memorandum signed on November 172003.

[8] Emended articles of this law in The Constitution of the Republic of Moldova with changes made by the Law nº 344-XV of 25 July 2003, accessed June 282018.

Donetsk and Lugansk mainly have been important in terms of agitation for all the secessionist movements of the former space. In this complex situation Moldova and also Ukraine and Georgia signed their Association Agreement with the European Union. The immediate reaction of Gagauzia's leaders was the celebration of a referendum in the autonomous territory in February 2014. The population was called for a triple consultation: 98.4% was favourable to establish closer ties with the Euroasiatic Economic Union—this is the economic integration project managed by Russia— 97.2% rejected a future integration within the European Union; by last, 98.9% of total voters supported Gagauzia's right to declare its independence if Moldova ceased to be independent. This possibility was not new. In fact several proposals made by the CSCE—not OSCE until 1995— from the first reports issued by the Mission established in Chisinau in 1993 collected this possibility including also Transnistria's secessionist movement.[9] If Moldova tried to join Romania, the CSCE Mission proposed that Transnistria could exercise the right of external self-determination. Nevertheless, it was a strong recommendation to Moldova in order to proceed to a broad territorial decentralization. This possibility could make the territorial integrity of Moldova compatible with a broad autonomy for Transnistria and Gagauzia. These special regions, according to the denomination collected in the Constitution of Moldova, could enjoy their own local institutions—executive, legislative, judicial—as integral parts of the republic with some shared competences. As we can see, Gagauze people chose this option. The absence of the Russian support was definitive to finish the Independence path and instead of that continue with the autonomist path.

The experience during two decades and a half in the development of the Gagauze people, with a direct election of their own government, has been successful. Ethnic and cultural identity has been protected in the general framework of the Republic of Moldova. In fact, this model is considered one of the most advanced examples in Eastern Europe and in the post-Soviet space.[10]

### (C) SECESSIONISM IN TRANSNISTRIA

This territory has been a complex scenario due to a turbulent historical evolution. During the period of *Perestroika* Transnistria was probably the first example of ideological political confrontation at the beginning of 1989. The supporters of the Soviet Union and the

[9] See this complete work on CSCE/OSCE contribution to establish different political and diplomatic solutions to the whole of post-Soviet conflicts, M. Raquel, *Conflict and Security in the Former Soviet Union: The Role of the OSCE* , specially 'Case-study: The OSCE in Moldova' (Routledge, New York, 2018)

[10] Confirmed by the reports of the OSCE Mission in Moldova, accessed June 29 2018.

communist structures were losing ground in front of the increasingly numerous supports of the republican independence and the construction of the new independent state. The main argument held by the separatists was the same than in Gagauzia: exploiting the fear of an eventual reunification between Moldova and Romania in case of rupture with the Soviet Union. Russian and Ukrainian minorities living in the region shared this feeling at the beginning of 1989 and especially when the Language Law was approved. But, the unilateral independence declaration made by Transnistria on September 3 1990 was previous to the independence of Moldova on August 27 1991. Thus, the Pridnestrovian Moldavian Soviet Socialist Republic was proclaimed as a Soviet republic. The reaction from Moscow was ambiguous and lacking in support for the territorial integrity of the republic. The secessionist leaders were violating international and soviet internal legality. The second one allowed the right of secession only in the case of the federated republics of the Soviet Union. This constitutional provision was not recognised for other territorial entities as the autonomous republics within federal republics. It is necessary to remember that neither Transnistria nor Gagauzia enjoyed a differentiated status within the Soviet Socialist Moldavia Republic.

When the Belavezha Treaty on December 8 1991 confirmed the dissolution of the Soviet Union and Moldova was recognized as an independent state, the reunification with Romania was not present in the different political projects. Moldova Popular Front was losing their strong presence in the Parliament and the construction of the new statehood was the main priority. The recognition of the rights of ethnic minorities and their protection in accordance with international standards became the main objective. Also the possibility of exercising the internal self-determination through special autonomy status collected in the Constitution of 1994 was definitive for the absence of all kinds of arguments in the position of Transnistria. There was no legitimacy or legality—neither internal nor international— to endorse Transnistrian separatism.

The war between March and July in 1992 ended with the confirmation of Transnistria as an independent territorial entity. This *de* facto independence was impossible without the Russian support during and after the war. Territorial integrity was questioned shortly after international recognition of Moldova. On July 21 1992 a peace agreement was reached in between Moldova and Russia. Since the short war between Moldova and the secessionists in Transnistria it lasted four months there had not been new military clashes after the cease fire agreement of July 1992. The parties were committed to establish political negotiations between the Moldovan and Transnistrian authorities. The main goal was to reach a definitive territorial status for Transnistria within Moldova. This question remains pending since that moment transforming this separatist entity into a frozen conflict. During those twenty-five years there were many diplomatic solution projects presented by the main international

actors. In addition, different political and legal projects have been analysed in the OSCE framework and other bilateral meetings.[11]

Meanwhile, the different negotiation and diplomatic mediation processes have been led by Moscow being judge and party with strong interests. In this context, all the attempts have failed.[12] This situation has lasted until today and *de facto* independence is the best scenario for the strategic interests of the state patron Russia and for this puppet state. The XIV Soviet Army installed in Transnistria from the Soviet period became an interposition force after the war and obviously the main Russian tool in the area.[13]

It is remarkable the celebration of a double referendum of independence celebrated on September 172006 violating the internal and international legality. The results were the following: 3.39% renounced the independence of the territorial enclave and supported an eventual reintegration in Moldova; on the other hand, 96.61% of total voters opposed both possibilities. Also 98.07% supported the independence and a future integration in Russia. The total participation was 77.55%. These results were not considered by Chisinau due to the illegality of the referendum. However, the separatist authorities claimed for that after the referendum celebrated in Crimea on March 16 2014. At that moment, they asked the United Nations to recognize their independence. This request was also transferred to OSCE and Russia appealing to the right of self-determination of people.

### (D) TRANSNISTRIA VS GAGAUZIA

The presence and importance of Russian patronage has been the determining factor in the evolution, freezing or eventual resolution of secessionism in Moldova, as it happened in the whole of secessionist movements in the former Soviet space. Both shared their origins as a reaction to the independence of the republic and its eventual reunification with Romania. However, despite relying on purely political-ideological criteria both broke international and soviet legality. The main political argument was the maintenance within the Soviet Union. But during this period, from 1989 to August 27 1991—declaration of independence in Moldova— it did not respond to the real situation. In that convulsive reformist period, neither Transnistria nor Gagauzia could exercise any form of internal or external self-determination in the legal soviet framework, since the right of secession was only reserved to the fifteen federated republics. The subsequent evolution in the construction of independent

[11] See, for example, S. Wolff, 'A resolvable frozen conflict? Designing a settlement for Transnistria', 39(6) *Nationalities Papers* (2011) 863-870.

[12] A brief synthesis of proposed solutions and bilateral developments: N. Belitser, 'The Transnistrian conflict', A. Bebler (ed.) *"Frozen conflicts" in Europe*, (Barbara Budrich Publishers, Berlin, 2015) 44-55.

[13] W. Alejandro Sánchez, 'The "Frozen" Southeast: How the Moldova-Transnistria Question has Become a European Geo-Security issue', 22(2) *The Journal of Slavic Military Studies* (2009) 153-176.

statehood—with the Constitution of 1994— allowed the creation of different special status for Gagauzia and Transnistria as explained above. These constitutional provisions could be considered as a way of internal self-determination, especially for two territorial entities without any prior special status. This possibility has only been used by Gagauzia and sometimes by Transnistria due to the Russian political, economic and military support.

There are some theories on state building process starting from *de facto* structures due to the time factor. In this case, Transnistria would have many options to transform temporary institutions into permanent as long as Russia maintains its economic, political and military support.[14]

The effectiveness principle has been specified both in Transnistria and Gagauzia. They maintain territorial control by breaking the territorial integrity of Moldova.In addition, it shows even clearly in the case of Transnistria, due to the support of the Russian Army. The effective and stable government has been a more relevant element in Transnistria with a rapid construction of independent institutional structures. The attribution of legal consequences has been once more supported by Moscow. Russia paid attention since 1992 to all the separatist political movements building a set of puppet governments on the periphery of the former Soviet Union. Nevertheless, effectiveness is strongly dependent on the Russian patronage support. This country controls the processes of political leadership exploiting economic dependence and energy captivity. In addition, the permanent presence of the Russian Army in terms of security is essential. Last and not least, this is connected with an extreme institutional fragility, much closer to post-totalitarianism than pre-democracy.

International recognition is absent in both cases: Gagauzia never requested it; Transnistria has been recognized by the rest of secessionist entities in the post-Soviet region (Nagorno-Karabaj, South Ossetia and Abkhazia) and Russia opened a consular office in Tiraspol. Unlike Gagauzia, where the autonomist way seems to triumph since 1994, the secessionism seems to have won the battle to the parent state (Moldova). The illegality of the declaration of independence has not prevented the consolidation of a *de facto* State. Time is really important although is not an irreversible process. In fact, Chisinau authorities have persisted in a not acquiescent attitude byclaiming the territorial integrity.

Respect for international legality as a necessary condition for the acquisition of an independent state has not been a characteristic feature in both processes. Therefore, as it happened with the rest of the frozen conflicts, the international community has sanctioned these secessionist movements with the practice of international non-recognition. The

[14] This theory is developed in H. Blakkisrud and P. Kolsto, 'From Secessionist Conflict toward a Functioning State: Processes of State-and Nation- Building in Transnistria', 27(2)*Post-Soviet Affairs* (2011), 178-210.

violation of the structural principles contained in the United Nations Charter —especially the use of armed force and territorial integrity of the states—makes illegal the access of these territorial entities to independence, even in those cases of succession of states. If we understand as secession the effective separation of a territory from the parent State without its acquiescence, we would need the concurrence of other situations that confer legality to the new status-submission by force, racist government or colonial power by foreign powers. It has not been the case neither in Transnistria nor in Gagauzia. On the other hand, the illegality of unilateral declarations of independence —at least until the controversial ruling of the International Court of Justice— has been persistent in the case of Transnistria.[15]

International regulations on human rights and especially in the protection of the rights of peoples and ethnic minorities—since United Nations General Assembly Resolution 2625 (XXV) of October 24, 1970 and the complete legal instruments of Council of Europe and OSCE— have been taken over by the Republic of Moldova. This evolution invalidates by unnecessary and unjustified the legal assumption considering secession as a remedy. In both cases (Transnistria and Gagauzia) there was not any massive violation of human rights or humanitarian reasons. Moreover, in Transnistria the violations—especially in terms of linguistic rights— have been suffered by the Moldovan-Romanian population.

Moldovan language is not considered as official language in this territory not even as a language in teaching due to the presence of Russian language.[16]

Considered as an imperfect secession because of a strong dependence of Russia, both movements took advantage of political circumstances of the dissolution of a federal state and multi-ethnic character. This messy process of succession of States was used by several political elites in different republics in order to build an independent statehood. The Russophile base in Transnistria was very identified with the Soviet system. Unlike what happened in Abkhazia or South Ossetia—even in Kosovo—, both cases analysed did not suffer any loss of previous territorial status-autonomy, autonomous region or autonomous republic. In fact, the application of the constitutional provision for Transnistria is still pending. However, as we have verified through the investigation it has been impossible to solve it due to the Russian intervention in the process both from the diplomatic sphere and in the internal interference in Moldova. Path to autonomy is not on the agenda of Moscow. As long as Transnistria will be a useful tool for the geostrategic interests of Russia in its near

[15] See on Kosovo ICJ the monographic volume dedicated to the advisory opinion, 63(1) *Revista Española de Derecho Internacional* (2011)

[16] See J.A. López, 'Transnistria: evolución de un modelo de secesionismo en el seno de la República de Moldova (1995-2000)', in M.D. Algora y C. Flores (ed.) *Estudios sobre la Europa Oriental* (Universitat de València, Valencia, 2002) 307-329.

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abroad, this territorial entity will be used in terms of foreign affairs policy. Otherwise,Transnistria will never be really an independent statehood, not only from Moldova but from Russia as well.[17]

Finally, with regards to the so named political doctrines of the recognition of states—not contemplated by Contemporary International Law— we can note that it is impossible to consider this possibility in both secessionist processes within Moldova. Neither Gagauzia, until the creation of the special autonomy, nor Transnistria had any historical situation that needed to be repaired, as for instance in the case of Crimea. Neither did the majority pro-independence will of a people exist, since the majority national minorities (Moldovan, Ukrainian and Russian) had already their own parent state. Rather it was about keeping a political and economic model by regional elites in the context of the dissolution of a system and a State. Therefore, the identification of nations, peoples and independent States has very specific profiles in the Transnistria's model.

From the International Law perspective, the different unilateral declaration of independence in the separatist territories involves the obligation of non-recognition. This is the answer of the international community —States and international organizations, mainly United Nations—as a sanction against the violation of structural principles and *ius cogens* imperative rules: general prohibition of the use of threat and/or force, territorial integrity and sovereignty, and no internal interference in the States. All of which has been forced by Russia in these conflicts.

As a conclusion, we can point out two different considerations: the secessionism in Gagauzia has been redirected endowing it with a special status within the Moldovan territory and giving an internal dimension to the exercise of self-determination. This option has not been explored in Transnistria due to different reasons: absence of political will of the secessionist leaders supported by the Russian external patronage. Moscow has a very marked and differentiated interest in foreign affairs on the two territories. Therefore, while Russia needs the presence of a puppet state *sine die*—the model of Transnistria— in the case of Gagauzia does not have any particular interest. In addition, Tiraspol sees Gagauzia as "an antimodel".[18]Therefore, the final solution in this entity was possible within Moldova and according to the international and internal law. This also explains how the various

[17] This is the thesis followed by A. Devyatkov, 'Russian Policy toward Transnistria. Between Multilateralism and Marginalization', 59(3) *Problems of Post-Communism*(2012) 53-62.

[18] S. Wöber, 'Making or Breaking the Republic of Moldova? The Autonomy of Gagauzia', EDAP (European Diversity Autonomy Papers) (Eurac Research, Bolzano, 2013) 1-52.

negotiating formats tried on Transnistria, mainly through the OSCE, have failed and in all likelihood, the conflict will be kept in the freezing phase.[19]

[19] E. Fouere, 'OSCE's efforts to resolve the conflict', in A. Bebler (ed.), *"Frozen Conflicts" in Europe* (Barbara Budrich Publishers, Berlín, 2015) 57-68.

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*Secession of States and Self-determination in contemporary International Law*

# The crisis at Guerguerat and the escalation of the Western Sahara Conflict

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*Abstract*: This paper analyses two crises which occurred in the town of Guerguerat, and their effect on the development of the conflict in Western Sahara. Guerguerat is situated in the south-west of Western Sahara, beyond the territory occupied by Morocco, in what Saharawi nationalism considers as "Liberated Territories". It is thus understood that, in the summer of 2016, the Polisario Front considered as a provocation the deployment of some troops of the Moroccan Gendarmerie, together with workers who were going to asphalt the stretch of track which runs between Guerterat and Mauritania. The second crisis, in 2017, was motivated by the announcement of the passage of a rally through Western Sahara. This work analyses the most relevant facts of both crises, the determining factors in the short, medium and long term, the reactions of the United Nations and other relevant actors, as well as the possible future scenarios that were opened due to the crisis.

*Keywords*: International crisis - Western Sahara Conflict - United Nations crisis management policy – MINURSO - Third party mediation - Self-determination of peoples - European Union External Action - Spanish Foreign Policy

## (A) INTRODUCTION

The Western Sahara Conflict is, in essence, a case of decolonization in which the people's right to self-determination must be applied. However, this decolonization has not yet occurred. The colony itself is, *de jure*, Spanish but the Spanish authorities withdrew from it in 1976. The result was a war that lasted until 1991. From that point forwards, attempts were made to resolve the conflict peacefully, but they were unsuccessful. As such, over forty years later, the conflict is still active and it seems as though there is no short- or medium-term solution in sight, unless there is an unexpected turn of events.[1]

The conflict is between two parties: Morocco and the Polisario Front. The former maintains that the land forms part of its territorial integrity. The latter defends its self-determination and the independence of the Sahrawi people, and proclaimed the Sahrawi Arab Democratic Republic in 1976, which has been recognized by eighty States, mostly Africans, Latin Americans

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[1] For an overview of the Western Sahara conflict, see: J. Soroeta, *El conflicto del Sahara Occidental, reflejo de las contradicciones y carencias del derecho internacional* (Universidad del País Vasco, Bilbao, 2001); J. Ferrer Lloret, *La aplicación del principio de autodeterminación de los pueblos. Sahara Occidental y Timor Oriental* (Universidad de Alicante, San Vicente del Raspeig, 2002); J. Soroeta, 'The Conflict in Western Sahara after Forty Years of Occupation: International Law versus *Realpolitik*', 59 *German Yearbook of International Law* (2016), 187-221.

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and Asians.[2] But there is also a Maghrebi aspect, seeing as the conflict is one of the key points in the conflictive dynamic of the region, particularly that occurring between Algeria and Morocco. It is also relevant to Spain and the European Union. Spain's interest stems from it still being, *de jure*, the colonial power and because Spanish civil society feels particularly responsible for it. For the European Union, it is because although Spain is a Member State, it maintains relations with Morocco. Said relations are controversial because they could be contrary to the values of the Union and because there are a series of bilateral agreements which are applied in Western Sahara.

For years, the conflict has been at a stalemate. However, certain recent events are making us view the situation in a new light. In this work, we will analyse two such events which took place near the village of Guerguerat. The events comprise two crises, one of which began in August 2016, and the other towards the end of 2017. On both occasions, the fragile and precarious state of the Western Sahara Conflict was made evident. This was so much so that, in our opinion, we are no longer facing a stalemate situation but rather an escalation of the conflict.

We therefore believe it is in our interest to begin by analysing the unfolding of the events in both crises. But it is also worth analysing the causes and assessing whether there will be possible consequences in the future development of the conflict.

In short, the aim is to analyse certain occurrences which may have had a great repercussion on the evolution of a conflict which directly affects and interests Spain, the European Union and even the entire international community.

## (B) THE CRISIS

### (1) The 2016 crisis in Guerguerat

The trigger of the crisis occurred on 14 August 2016, when troops from the Moroccan Royal Gendarmerie and Moroccan civil servants crossed the buffer strip near Guerguerat.[3] Said village is located to the southwest of Western Sahara, near the coast, about five kilometres from the country's southern border with Mauritania. But the most relevant aspect is that it is alongside the buffer strip, outside of Moroccan occupied territory, in what the Sahrawi supporters of independence consider as "Liberated Territories."

[2] Although in most of the instances addressed in this work, such as the United Nations or the Court of Justice of the European Union, they refer to Polisario Front. And that is why we have chosen to make references to the Polisario Front.

[3] Cf. *Report of the UN Secretary-General on the situation concerning Western Sahara*, S/2017/307, 10 April 2017. par. 2-15.

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According to the explanation offered to the United Nations by the Moroccan authorities, the deployment took place in order to clear the area of potential undetonated mines and explosive artefacts, and to asphalt the section of road running from the wall to Mauritania. The Moroccan authorities could have studied the possibility of turning to MINURSO for the cleaning labours, as they have done on previous occasions.[4] However, the truth is that the relationships between Morocco and MINURSO were not at their best at that time, as we shall see in a later section.

We have yet to see whether this movement of troops in the buffer strip could constitute a violation of the Ceasefire Agreements. In principle, as the troops were not strictly military, the deployment does not necessarily constitute a ceasefire violation, unless it is understood that the construction of the road could serve a dual purpose, and unless we consider the Moroccan gendarmes to be military troops, seeing as the Royal Gendarmerie is a police force with military status.[5] Another aspect is the opportunism and whether the deployment could suppose a provocation. In any event, it is not rare for Moroccan forces to pass through the area without this giving rise to any incidents.[6] However, on this occasion, something changed and the day after the Moroccan deployment, 15 August 2016, the Polisario Front responded by taking positions around Guerguerat, a little more than 100 metres from the where the Moroccans were based. The argument of the Polisario was that they were acting in order to impede a violation of the Ceasefire Agreements.

In the following months, the crisis intensified. In December 2016, the Polisario reinforced its positions in Guerguerat and even made incursions into the Cabo Blanco peninsula to the southwest, an area which until that point had been a sort of "no man's land." And in February 2017, it started to set up roadblocks on the road joining Guerguerat with Mauritania, stopping the passage of vehicles, mostly trucks, which were travelling with maps on which Western Sahara was shown as part of Morocco.

Despite all this, the point of no return was not reached. On 26 February 2017, Morocco announced that it would withdraw its troops on the condition that the Polisario did the same. This manoeuvre by the recently appointed UN Secretary General, Antonio Guterres, bore fruit

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[4] There is, occasionally, cooperation on the destruction of mines and explosive remnants of war between MINURSO and Morocco. The most recent was in April 2013: *Report of the UN Secretary-General on the situation concerning Western Sahara*, 8 April 2013 S/2013/220, par. 43. On other occasions, Moroccan army had simply notified to MINURSO about this kind of activities: *Report of the UN Secretary-General on the situation concerning Western Sahara*, 10 April 2014, S/2014/258, par. 4.

[5] The point 3.1 of the *Military Agreement No 1*, states that in *buffer strip*, "The entry of RMA [Royal Moroccan Army] and FPMF [Front Polisario Military Forces] personnel of equipment, by ground of air, and the firing of weapons in or over this area, is prohibited at all times and it is a violation".

[6] Mora Tebas, 'Control de fronteras en el espacio sahelo-sahariano: el caso de Mauritania', *Instituto Español de Estudios Estratégicos*, Documento Marco No 15/2015, 34 p. 7.

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and on 29 April 2017 – the day before the UN would debate the renewal of the mandate of MINURSO – the crisis was concluded with the withdrawal of the Polisario troops.

However, this crisis resolution did not put an end to the deterioration of the situation in Western Sahara. By the end of 2017, a new crisis had begun, also in Guerguerat, and it has not been resolved at the time of writing these pages.

### (2) The 2018 crisis in Guerguerat

As regards the second crisis in Guerguerat, which began at the end of December 2017, the trigger was the announcement of a new Polisario deployment of supposedly unarmed elements, who had the objective of stopping the passage of a rally which would pass through Western Sahara. This deployment took place on 4 January 2018, with the establishment of an "observation point." In response, Morocco deployed military forces (troops, armoured vehicles, combat vehicles and artillery) and its air force patrolled the skies in the area with orders to respond to any provocation.

With some difficulties, the rally was able to follow its planned course but the situation did not improve. The Polisario did not withdraw from the area and the deployment and reinforcement of Moroccan forces across the buffer strip did not only take place in the area of Guerguerat, but there were also news of a deployment taking place towards the northeast of Western Sahara.[7] On 22 April 2018, Polisario Front forces retired 16 kilometers southeast to Guergerat, but the tension still continues.[8]

The tension has remained high and the more or less habitual episodes in a tense environment have been taking place: incidents in which MINURSO was involved[9], news about the buying

[7] United Nations offers little information about this second crisis (S/2018/277 cit. par. 3-16 and 34-39). So we had to check press media in order to collect further data. E.g.: A. Amslal, 'Sahara: feu vert pour des frappes aériennes contre Le Polisario', *Le 360*, 11.04.2018; Magreb Arabe Press, 'Sahara: le Maroc 'prêt à tout' pour contrer le Polisario au delà du berm de défense', *Le Desk*, 02.04.2018. J. Maíz Sanz, 'Marruecos despliega al sur de su territorio sus potentes lanzacohetes chinos Norinco PHL 03', *Defensa.com*, 19.04.2018.

[8] Report of the Secretary General on the Situation Concerning Western Sahara, S/2018/889, 3 October 2018, par. 2, 4.

[9] On 16 March 2018, Polisario stopped MINURSO patrol, by shooting into the air, with no futher consecuences: *Point de presse quotidien du Bureau du Porte-parole du Secrétaire général de l'ONU: 19 avril 2018*, 19 April 2018.

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of weapons[10], military manoeuvres[11] and mutual accusations[12]. However, for the time being, the point of no return has not been reached.

## (c) The short- and long-term causes. The future scenarios that might come to pass

In this section, we will start by analysing the factors which, in the short and long term, have contributed to the breakout of the crisis. As previously indicated, the trigger or immediate cause of the 2016-2017 crisis was the deployment of Moroccan troops beyond the wall, in the buffer strip which the Polisario considers to be liberated territory. And, in terms of the 2018 crisis, it was the passage of a rally through Western Sahara. However, we wish to delve further into the analysis of these causes. Therefore, in the first subsection we will analyse the short term causes and in the second section we will address the long term causes. In some cases, we need to indicate various contexts and factors: some causes are immediate, but others are circumstantial whilst still being structural to the conflict. As a general conclusion, in contrast to what is usually said, the Western Sahara Conflict is not at a standstill or in a stalemate; rather it is in a state of gradual deterioration.

Next, in the third subsection, we will look at the possible future scenarios which may come to pass. We will close this section by commenting on the lack of a reaction from the International Community.

### (1) Short-term causes

We can highlight four short term causes: MINURSO was not at full operational capacity when the crisis broke out; the ruling of the Court of Justice of the European Union on the Agriculture Agreement between the EU and Morocco; the declarations of the Moroccan authorities about the Cabo Blanco peninsula; and the change in the management of the Polisario Front.

The operational problems of the MINURSO are long-standing. Its Peace Operation, titled the "Misión de Naciones Unidas para el Referéndum en el Sáhara Occidental" (United Nations

[10] The news about arms purchasing may be true, rumors or fake news, but nevertheless they contribute to tension: J. Maíz Sanz, 'Marruecos negocia adquirir una docena de F-16 de última generación', *Defensa.com*, 31 de mayo de 2018; "Iran denies Morocco accusation of Polisario arms delivery", *Daily Mail*, 2 May 2018.

[11] "Ejército marroquí hizo maniobras cerca de Argelia simulando agresión exterior", *El Confidencial*, 23 May 2018.

[12] An e. g. of Moroccan complaints: 'Marruecos se queja ante la ONU contra recientes 'acciones' del Polisario', en *La Vanguardia*, 20 May 2018. The Polisario Front answered by an official statement: "Frente POLISARIO condemns Moroccan false, shameless allegations", in *Sahara Press Service*, 16 May 2018.

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Mission for the Referendum in Western Sahara), encountered obstacles from the moment it was launched in 1991. Its initial objectives consisted of supervising the ceasefire between Morocco and the Polisario, creating a census of voters and organising a self-determination referendum in which the Western Saharan people could decide between independence or integration into Morocco.[13] As the initially planned referendum could not be held, given that the census was already created, and as there was no plan to resolve the conflict, the work of MINURSO was reduced to supervising the ceasefire. And it encountered numerous obstacles even in this task.

The most relevant aspect of the 2016-2017 Guerguerat crisis, an aspect which led to the almost complete lack of operativity of MINURSO at that specific time, occurred after UN Secretary General Ban Ki-Moon travelled to the area in March 2016. During his visit to the Tindouf camps, he made statements in which he said that Morocco was an occupying force in Western Sahara. In response, Morocco forced the majority of MINURSO's civil servants to leave. Given that the work of the civil servants had to be covered by the Military Unit, the latter stopped being able to efficiently carry out its task as a deterrent in the supervision of the ceasefire. MINURSO would not recover operativity until April 2017.[14]

Another immediate factor, in our opinion, was the change in management of the Polisario Front. May 2016 saw the death of Mohamed Abdelaziz, who had been the Front's General Secretary since 1976. On 9 July 2016, his successor was named: Brahim Ghali, who was previously the ambassador in Algeria and the Front's representative in Spain. His management style was different to that of his predecessor. We can only speculate about how Abdelaziz would have reacted to the Moroccan deployment in the summer of 2016. Conversely, we can compare the way Ghali acted in the face of the passage of the 2018 rally to how Abdelaziz reacted to the Paris-Dakar Rally passing through Western Sahara in 2001. On that occasion, the Polisario practically limited itself to verbal protests.[15]

Another potentially relevant aspect was the rulings of the General Court (December 2015)[16] and the Court of Justice of the European Union (December 2016)[17], after an appeal presented

[13] The objectives of MINURSO were established in two UN Secretary General Reports to the Security Council, in 18 June 1990 (S/21360) and in 19 April 1991 (S/224464). See also J. Soroeta Liceras, *El conflicto del Sahara Occidental... cit.*, 258-328.

[14] Doc. S/2017/307, cit, par. 14.

[15] Report of the Secretary-General on the situation concerning Western Sahara, S/2001/148, 20 February 2009, par. 3-7.

[16] Judgement of 10 December 2015, Frente Polisario v Consejo, T-512/12, EU:T:2015:953. For an analysis of this judgement, see R. Gosalbo Bono, 'El Frente Polisario, las normas del derecho internacional y el derecho de la Unión Europea. Apuntes en torno a la sentencia del Tribunal General, de 10 de diciembre 2015, T-512/12, Frente Polisario/Consejo', 53 *Revista de Derecho Comunitario Europeo* (2016), 21-77.

[17] Judgement of 21 December 2016, Consejo v Frente Polisario, C-104/16 P, EU:C:2016:973.

by the Polisario Front for the annulment of the Agriculture Agreement. The main result of these proceedings was that the agreements could not be applied to Western Sahara. In terms of consequences, the main one was the opening of a new dimension in the conflict, because it gave a new, legal "weapon" to the Polisario Front, for whom both courts recognised active legitimacy. This is now being used in courts of the European Union Member States as well as in non-member countries – e.g. the Republic of South Africa – seeing as the CJEU rulings are becoming a legal reference point. Furthermore, another of the rulings' consequences on the conflict was the creation of worry and nervousness among Moroccan authorities, who needed to do something to counteract them.

### (2) Long-term causes

In addition to analysing the trigger and some of the factors which, in a more immediate way, may have contributed to the outbreak of the crisis in Guerguerat, we believe that our study must be completed with an analysis of the deeper causes.

The main one of these causes is the lack of a solution to the conflict. Since 2003, the UN has not proposed any solutions. In said year, it put forward the Baker Plan: five years of self-rule for Western Sahara in Morocco and a referendum with the voters from a broader census.[18] The official positions of the involved parties as regards the plan have been the same since 2007: Morocco suggests the concession of a five-year period of an autonomous regime, after which there will be a confirmation referendum. Meanwhile, the Polisario suggests a formula inspired by Baker II Plan.[19]

This has produced a change in the United Nations' role in the Western Sahara Conflict. Up until 2003, it had played the part of mediator. Since then, it has been limited to offering good offices and it is no longer as concerned with the conflict.

[18] In its Resolution 1495 (2003), 14 July, UN Security Council expressed a commitment for Baker Plan as a solution for the conflict, but it did no enforced upon the parties. As a result, the refusal of Morocco forestalled the implementation of Baker Plan. See J. Ferrer Lloret, 'El conflicto del Sahara Occidental durante 2003: la Resolución 1495 (2003) del Consejo de Seguridad de las Naciones Unidas', 55(2) *Revista Española de Derecho Internacional* (2003), 1083-1089; J. Soroeta Liceras, 'El Plan de Paz del Sahara Occidental, ¿viaje a ninguna parte?', 10 *Revista Electrónica de Estudios Internacionales* (2005), 8-14.

[19] Both proposals were submitted to UN Secretary General: Letter dated 11 April 2007 from the Permanent Representative of Morocco to the United Nations addressed to the President of the Security Council, UN Doc. S/2007/206. The proposal of the F. Polisario was submitted by the Permanent Representative of South Africa to the UN: Letter dated 16 April 2007 from the Permanent Representative of South Africa to the United Nations addressed to the President of the Security Council, UN Doc. S/2007/210.

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Another aspect of the deterioration of the situation in the area is found in the camps and is caused by a reduction in humanitarian aid as well as by the unsatisfied aspirations of the new generations of Saharan refugees in the face of the lack of a conflict resolution.[20]

Furthermore, we must take into consideration that the personal situation of a large proportion of the Sahrawi people has been deteriorating as well: both that of the refugees and that of those who live in the part of Western Sahara that is occupied by Morocco. Thusly, the refugees in the Tindouf camps have seen a reduction in the humanitarian aid they receive. This is due, in part, to the revision of the concession criteria and the calculation of the number of refugees supported by UNHCR, the WFP and other donators, such as the European Union. It is also, in part, a consequence of the accusations of the diversion of aid, and the economic crisis of 2007 has had an influence as well.

For the Sahrawi who live in Western Sahara under Moroccan occupation and who are opposed to it, the situation has also worsened. Violations of human rights and fundamental liberties have been taking place since the start of the conflict, but they have become more prominent since the decade which began in the year 2000. It is true as well that there are allegations of human rights violations in the refugee camps but this has no point of comparison. We even have indications that the situation may worsen for those Sahrawi who have accepted and even supported the occupation, or who have been able to remain indifferent. This is a result of the reduction in subsidies, the lack of job opportunities and the alteration of the demographic equilibrium in Western Sahara.[21]

The factor related to the situation of the population may have various consequences. The human rights violations may, for example, contribute to the escalation of the conflict. A case in point, is that certain events, such as the dismantling of the Gdeim Iziq protest camp, coincided with the holding of rounds of negotiations and they were therefore used as weapons

[20] The unsatisfied aspirations of the new generations of Saharan refugees are one of the issues addressed in the Reports of the UN Secretary Generals to the Security Council. As an example, the Report of March 2018, doc. S/2018/277 cit, par. 20. See also H. Armstrong, 'The Youth Movement in Sahrawi Refugee Camps', *Commentary*, in *International Crisis Group*, 25/04/2018.

[21] For an overview of Human Rights violations in Western Sahara, see: J. Soroeta Liceras, 'La violación de los derechos humanos en los territorios ocupados del Sáhara Occidental. Especial referencia a los mecanismos de control que ofrece el Derecho Internacional para su control', 4 *El Vuelo de Ícaro* (2003), 9-25; J. A. González Vega, 'El respeto de los derechos humanos en el Sahara Occidental: cuestiones de Derecho Internacional', in F. Palacios Romeo (coord.), *El derecho a la libre determinación del pueblo del Sahara Occidental. Del ius cogens al ius abutendi* (Thomson Reuters/Aranzadi, Pamplona, 2013), 79-109; J.M. Martín Morillo/ G. E. Arbesú Sancho, 'Observación judicial. Procesos contra defensores de derechos humanos saharauis. Vulneración de la tutela judicial efectiva', in F. Palacios Romeo (coord.), *op. cit.*, 231-254; M. Ollé Sesé, 'Violación de los derechos humanos en el Sahara Occidental y jurisdicción universal', in F. Palacios Romeo (coord.), *op. cit.*, 337-376; C. Faleh Pérez/ C. Villán Durán, 'La situación de los derechos humanos en el Sáhara Occidental ocupado', in Vv. Aa., *Sahara Occidental. Cuarenta años construyendo Resistencia* (Pregunta, Zaragoza, 2016), 147-234.

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to provoke the other party. The deterioration of the situation for the Sahrawi people may have yet another consequence: a sense of weariness towards their leaders, as has been reflected in the various reports by the UN Secretary General. In fact, the late Secretary General of the Polisario Front, Mohamed Abdelaziz, indicated on numerous occasions that the young Sahrawi people in the camps were increasingly in favour of resuming the hostilities.

Lastly, we must make a brief reference to the regional context, that of the Maghreb –not forgetting the neighbouring Sahel– as marked by the Arab Springs, the changes in political regimes and the rise of groups who use Islamism as their flag, to cite just the most relevant aspects of the last decade. The Western Sahara Conflict is not a regional one, but the dynamic in the zone has had a very negative impact on said conflict and has contributed to the impossibility of finding a solution. Traditionally, it has been the conflictive dynamic in the Maghreb, particularly the enmity between Algeria and Morocco, which has affected the Western Sahara Conflict in a negative manner. That said, we should not obviate other regional level factors such as the potential consequences of the "Arab Springs," which the Gdeim Iziq protest camp regarded as the first relevant mobilisation; the expansion of the aforementioned regional framework; and the situation of Sahel, which may also have an influence on the development of the conflict.

### (3) What future scenarios might come to pass?

International crises can have various results. The patently obvious result is that there will be an increase and escalation in the tension, leading to armed conflict. This occurred, to cite a classic example, in the Sarajevo Crisis or the July Crisis of 1914 after the assassination of Archduke Franz Ferdinand of Habsburg, a crisis which led to the outbreak of the First World War. But they can also cause the parties in the conflict to pause and reflect, thus leading to a *détente*, as occurred with the 1962 Cuban Missile Crisis. In the case of the Western Sahara Crisis we are analysing in this work, we should distinguish between the 2016-2017 crisis and that of 2017-2018.

As regards the 2016-1017 crisis, we could deem it to be concluded after the withdrawal of the Polisario from the area in April 2017. The main effect of this was its contribution to the production of an escalation and it was therefore another step towards the gradual conflict deterioration which we addressed in the previous section.

As regards the crisis which started in December 2017, it is still ongoing and there is an entire range of possibilities, given that some of the short- and long-term factors are still present. Among the short-term factors, in addition to the new leadership of the Polisario Front, we should highlight the ruling of the Court of Justice of the European Union on the Fisheries Agreement between the EU and Morocco, alongside its rulings on the Agriculture Agreement.

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The ruling on the Fisheries Agreement was in response to a preliminary question of validity of the 2006 Fisheries Agreement and the 2013 Protocol, as presented by a court of the United Kingdom. In essence, the Court said that the agreements could not be applied to Western Sahara because that territory is not of Moroccan sovereignty.[22] However, the ruling left various fronts open. The Court did not adopt a stance on the fact that fishing was taking place in Western Sahara with licences granted within the framework of the Fisheries Agreement[23], nor did it mention which control mechanisms should be established to stop illegal fishing. Furthermore, a new fishery agreement is on the horizon and it will apply to Western Sahara[24], following the so-called Corell doctrine, according to which the exploitation of the area's natural resources will be legitimate if it benefits and has approval from the Western Sahara people. The Polisario rejected this possibility and announced that, if the agreements were adopted, they would request their annulment before the Court of Justice of the EU.[25]

The long-term factors are also persistent. A solution to the conflict still has not been put forward and it seems as though there is no reaction from the international community, which must become more involved in the conflict by helping to diffuse the tension and by attempting to find a solution. At least the UN Security Council has been seen to react to the 2017 crisis, given that it asked the parties to sit down for negotiations and it reduced the deadline for the renewal of the MINURSO mandate from one year to six months.[26] In turn, the European Union seems to be more a part of the problem than the solution, and the Commission and Council seem to be more preoccupied with finding a formula for safeguarding the agreements for the exploitation of natural resources than with looking for a solution to the conflict. The sale of arms to the contenders does not contribute to easing the tension either. In any case, it seems that the African Union is going to become more actively involved in helping to find a solution. During the 31st Summit of the Heads of State and Government of the African Union, held in Nuakchott from 25 June to 2 July 2018, a mechanism was approved to help resolve the

[22] Judgment of the Court (Grand Chamber) of 27 February 2018, Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs, case C-266/16.

[23] I. González García, 'Los acuerdos comunitarios de pesca con Marruecos y el problema de las aguas del Sáhara Occidental, 36 *Revista Española de Derecho Europeo* (2010) 521-564.

[24] Recommendation for a Council Decision to authorise the Commission to open negotiations on behalf of the European Union for the amendment of the Fisheries Partnership Agreement and conclusion of a Protocol with the Kingdom of Morocco, COM (2018) 151 final. ANNEX to the Recommendation for a Council decision to authorise the Commission to open negotiations on behalf of the European Union for the amendment of the Fisheries Partnership Agreement and the conclusion of a Protocol with the Kingdom of Morocco, (2018) 151 final ANNEX.

[25] "EU-Morocco agreement including Sahrawi territories: Polisario Front firmly condemns, lodges appeal to CJEU", *Sahara Press Service*, 16/07/2018.

[26] UNSC Res 2414 (2018), 27 April 2018.

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Western Sahara Conflict. In contrast, there are no short-term changes in sight in the Maghrebi regional context.

We therefore think that all scenarios are possible. The possibility that the hostilities will restart is ever closer. Even though the months tick by and the point of no return is not reached, the tension is high in the area and any incident could provoke the worst of all the scenarios.

However, as the months pass and hostilities are not reopened, we believe it is equally (or more) possible that this crisis will not lead to an armed confrontation, even if another step is taken in the escalation and deterioration of the situation and the presence of the Polisario around Guerguerat turns into the new state of normality.

We must not overlook other scenarios, either: the crisis may lead to a *détente* or, in an ideal world, it might even lead to a reflection process which brings about a solution to the conflict. These two possibilities have been shown in the UN Secretary General's Reports of March 2018, in which he appears to be relatively optimistic regarding the future and in which he has confirmed the parties' desire for dialogue.[27] Recent events may confirm this optimism: on August 2018, the UN Secretary General's Special Envoy (Hans Köehler) proposed the parties and neighbour states a "preliminary round of talks". Morocco and Polisario Front accepted the proposal, and the first "round table meeting" will be held in Geneva in December 2018.[28]

## (D) CONCLUDING REMARKS

Having put forth our analysis, we have reached the following conclusions:

(1) The immediate cause of the 2016-2017 crisis was the deployment of Moroccan forces (Royal Gendarmerie and civil servants) beyond the buffer strip, thus entering what the Polisario call the "Liberated Territories." The 2017-2018 crisis, which is still not over, was directly caused by the passage of a rally through Western Sahara.

(2) In our opinion, these events show that the Western Sahara Conflict is currently in a dynamic of deterioration and escalation. The 2016-2017 crisis, which is now over, contributed to increasing the tension in Western Sahara. The crisis which started in December 2017 is still ongoing and there is an entire range of possibilities. The tension is high and any incident could lead to the reopening of hostilities, but it is also possible that time will pass and nothing will happen. There is even a window of hope for a detente, perhaps even a reopening of the negotiation process.

(3) This crisis has both short- and long-term causes. Highlights from among the short-term causes are MINURSO's lack of operativity in the middle of the 2016-2017 crisis; the change

[27] S/2018/277, par.30.

[28] S/2018/889, par. 27.

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in leadership of the Polisario Front, which brought about a different management of some aspects of the Western Sahara Conflict; and the ruling of the Courts of the European Union concerning the Agricultural Agreement between Morocco and the EU, due to the concerns that it generated among the Moroccan authorities. And in terms of the long-term causes, we should highlight the lack of a solution to the conflict and the United Nations' avoidance of said conflict. We must also point out the worsening situation of the Sahrawi people, both in Western Sahara and in the Tindouf refugee camps, and the delicate situation in the Maghreb as well as in the neighbouring Sahel.

(4) In our opinion, the international community is not acting as it should. The UN has started to react but we believe its actions are insufficient, for the time being. The European Union is not contributing to improving the situation either. Nor are other relevant international stakeholders. The only party that appears to be doing something is the African Union, but it is not clear what result their initiative might have.

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*Secession of States and Self-determination in contemporary International Law*

# European Union policy towards secessionism in neighbouring countries

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*Abstract*: The aim of this article is to analyse EU's behaviour in the pro-secession attempts that have taken place in neighbouring third-countries. The article considers whether there was an agreement with the parent state or, on the contrary, the secessionist attempt was unilateral. It also reviews whether a legal procedure was followed. It is shown that the EU has always rejected those independence movements carried out unilaterally, except in the case of Kosovo, where gross human rights violations were committed. Furthermore, recently the EU has also demanded a respect for the Rule of Law in the pro-independence process (e.g. Montenegro's independence).

*Keywords*: Neighbouring countries – Pro-secession attempts – Consensual and lawful secession – Non-consensual and unlawful secession

## (A) INTRODUCTION

Secession is a live issue in today's Western Europe. In the last years, we have witnessed the failure of two pro-independence attempts in Scotland and Catalonia. In the near future, we might see the rise of other pro-secession movements in other European regions and the re-emergence of the former. The debate of the legal response that the European Union should offer (and, consequently, the position of the new sovereign entity within the EU) has been one of the multiples issues widely discussed among scholars and politicians. There is no legal provision (either EU primary law or secondary law) facing the issue, nor any clear precedent,[1] although one can derive some lessons from the 2017 Catalan case. Given this legal uncertainty, scholars have offered very different interpretations of EU law. Some believe that because of teleological reasons the EU should oppose any type of secession.[2] Others sustain that following

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1 A. Boyle et al., 'Annex A Opinion: Referendum on the Independence of Scotland - International Law Aspects', published on 10 December 2012, at para. 143, accessed 14 June 2018.

2 Among others, J. H. H. Weiler, 'Catalonian Independence and the European Union', *EJIL: Talk!*, accessed 14 June 2018.

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the democratic principle, the EU should welcome and recognize any democratic secession.[3] There are also scholars who, sustaining a more nuanced position, believe that the EU should distinguish between on the one hand legal and agreed pro-secession attempts and on the other hand unlawful and unilateral pro-independence processes.[4] However, scholars have not paid so much attention to what one could call the historical or practical argument, i.e., how has the EU reacted, which have been the reasons invoked, in pro-independence attempts in neighbouring countries? This is precisely the object of this article: to analyse EU's behaviour in the pro-secession attempts that have taken place in neighbouring third-countries. This analysis aims to enrich the debate about which should be the legal position of the EU in pro-independence attempts within EU Member states. However, although we should ask for a certain degree of coherence and consistence between EU internal and external policies, we should also be aware that the categories *Member state* and *third country* are not merely interchangeable.

First, this article will review the case of the Turkish Republic of Northern Cyprus and the EU attitude towards it since its declaration of independence. Next, we will examine the experiences of the countries borne right after or immediately before the crumbling of the Soviet Union (Baltic States, dissolution of Czechoslovakia and Yugoslavia). These are examples of national fragmentation in the post-communist world and cannot be considered genuine secessionist challenges comparable to the ones posed in constitutional and liberal democracies. However, some of the lessons drawn from these experiences might tell us something relevant about EU and secessionism. This will be followed by analysis of EU policies towards more recent secessionist attempts in neighbouring countries such as Serbia with the two key cases of Montenegro and Kosovo. Finally, the cases of Transnistria (Moldova), South Ossetia and Abkhazia (Georgia), Nagorno-Karabaj (Azerbaijan) and Crimea (Ukraine) will be analysed. What has been the position of the EU regarding the proclaimed entities? Has the EU recognized them? Is there any *rationale*, any constant and coherent trend?

In the analysis of all the conflicts mentioned above, we will consider the following features: was there an agreement with the Mother state or was the secessionist attempt unilateral? Did it follow a legal procedure? It will be shown that the EU has rejected those independence movements achieved unilaterally and that recently the EU has also demanded a respect for the Rule of Law.

## (B) THE NORTHERN TURKISH REPUBLIC OF CYPRUS

[3] J. Matas et al., 'The Internal Enlargement of the European Union', Centre Maurits Coppieters, 2011, accessed 14 June 2018.

[4] Among others, C. Closa, 'Secession from a Member State and EU Membership: the View from the Union' 12(2) *European Constitutional Law Review* (2016) 240-264 [doi:10.1017/S1574019616000146].

In 1974, the Greek Military government organized a *coup d'état* in Cyprus and extended the Greek dictatorship to the island, which provoked the Turkish invasion through the North. Greece joined the European Community (EC) in 1981. In November 1983, the Turkish-Cypriots declared unilaterally the Turkish Republic of Northern Cyprus (TRNC). The European Commission and the then 10 Member states issued statements declaring that they profoundly regretted and rejected the unilateral declaration of independence.[5] The international community as a whole also condemned the act of secession.[6]

In 2002 Cyprus was invited to join the EU. The process was launched by the Greek Cypriots and the Turkish Cypriots were excluded from the process.[7] The understanding within EU institutions was that a settlement was a precondition of accession.[8] Such conditionality gave the EU strong bargaining power in the conflict. EU accession could make both communities reconsider its opposition to reunification, which was the preferred optimistic solution.[9] Surprisingly this conditionality position was abandoned.[10] The main reason was Greece, the only Member state with strong and clear interests in Cyprus. It made its consent to strengthen ties with Turkey conditional on the progressive lifting of conditionality on the Greek Cypriots.[11] It also threatened to veto EU enlargement to the north and to the east.[12] When in 2004 a divided Cyprus joined the EU, Turkish-Cypriots were left outside the EU.[13]As one

[5] Bull. EC 11-1983, point 2.2.34 and Bull. EC 11-1983, points 2.4.1 - 2.4.2.

[6] N. Tocci, *The EU and Conflict Resolution. Promoting peace in the backyard* (Routledge, Abingdon, 2007), at 33 [doi: 10.1111/j.1468-5965.2008.00797_17].

[7] Ibid., at 41.

[8] European Commission, 'Opinion on the Application by the Republics of Cyprus for Membership' doc/93/5 June 30, 1993.

[9] G. Christou, 'Cyprus and the EU: Two years later: The European Union: What role in the Cyprus conflict?' 41(2) *The International Spectator* (2006)19-31, at 19 [doi: 10.1080/03932720608459413]

[10] Ibid., at 23.

[11] In effect, "Cyprus has been closely intertwined with Greece and Turkey and has had a strong impact on the Greek-Turkish relationship." E. Tannam, 'The European Union and Conflict Resolution: Northern Ireland, Cyprus and Bilateral Cooperation', 47(1) *Government and opposition* (2012) 49-73, at 52 [doi: 10.1111/j.1477-7053.2011.01354]. It is worth mentioning that the Greek position towards Turkey met the tacit consent (if not encouragement) of other EU Member States also reluctant to strengthen ties with Turkey. Thus, Greek interests were not at odds with the position of other EU Member States.

[12] Tocci, *supra* n. 6, at 52.

[13] G. Kyris, 'Europeanization and the Turkish-Cypriot Political Parties: How Europe Matters' 13(3) *Turkish Studies* (2012) 471-487, at 478 [doi: 10.1080/14683849.2012.717446]. Does it mean that the EU has no contact at all with TRNC? The Union has been very cautious in dealing with Turkish Cypriots authorities, since it could constitute or be interpreted as an act of recognition. Tocci, *supra* n. 6, at 49. Despite the absence of diplomatic recognition, the EU is trying to help the Turkish Cypriots out of their isolation. Christou, *supra* n. 9, at 23. Partially this EU approach was triggered by the results of the Annan Plan referendum, which altered the Commission's perceptions of 'fault' and 'blame' for the situation in Cyprus, giving Turkey and the Turkish Cypriots the 'moral' high ground in efforts to find a solution. Ibid, at 24. The European Commission has two

expert points out, "[t]he Cyprus conflict was the clearest case in which the strong national interest of one Member state played a pivotal role in determining the conduct of contractual relations with Cyprus and Turkey."[14] The national interest of an EU Member state can play a key role in changing the whole European approach, particularly when there is no conflict with the interests of the other EU Member states.

### (c) New European States after the Dissolution of the Soviet Union: Baltic States, Yugoslavia and Czechoslovakia

#### (1) Baltic States

At the end of the 1980s, the case for the independence of the Baltic States was clear.[15] Their forced incorporation in the Soviet Union in 1940 was a violation of international law.[16] However, the EC and its Member states did not support enthusiastically the 1990 Baltic Spring. They were particularly reluctant to accept any movement that could endanger the cordial German-Soviet relations.[17] The disintegration of the Soviet Empire in the 1991 summer and the consolidation of President Yeltsin, who did not oppose Baltic secessions, enabled the EC and its Member states to welcome the restoration of the sovereignty of the Baltic States.[18] Democratic legitimacy and historical reasons were not enough to support Baltic independences given the threats that the Soviet Union represented. A typical case of realpolitik.

#### (2) Yugoslavia

In Yugoslavia, after Milosevic's ascension to power in 1987, ethnic tensions turned the country into a minefield.[19] At first and given the risk of instability the EC and its Member states reacted asking for a democratic and united Yugoslavia.[20] But shortly after the first declarations of

main instruments to interact with the TRNC: (i) the aid programme 'to help the Turkish Cypriots prepare for reunification' (in place since 2006) and (ii) the Green Line Regulation (in place since 2004), aimed at regulate and facilitate trade between the divided island. In order to avoid direct contact with the TRNC authorities, the European Commission works closely with the TRNC Chamber of Commerce. Kyris, *supra* n. 13, at 479.

[14] Tocci, *supra* n. 6, at 171.

[15] J.A. Trapans, 'The West and the recognition of the Baltic states: 1919 and 1991. A study of the politics of the major powers' 25(2) *Journal of Baltic Studies* (1994) 153-173, at 163 [doi: 10.1080/01629779400000071].

[16] M. Malksoo, 'The Memory Politics of Becoming European: The East European Subalterns and the Collective Memory of Europe' 15(4) *European Journal of International Relations* (2009) 653-680, at 669 [doi: 10.1177/1354066109345049].

[17] A. M. Klein *et al.*, 'Die Beziehungen Deutschlands zu den Baltischen Ländern seit der Wiedervereinigung', KAS Auslandsinformationen, published in October 2010, accessed 15 June 2018.

[18] Bull. EC 7/8-1991, point 1.4.23. In the same sense, 6th September Declaration. EC 9-1991, point 1.4.3.

[19] R. M. Hayden, 'Yugoslavia's Collapse: National Suicide with Foreign Assistance' 27(27) *Economic and Political Weekly* (1992) 1377-1382, at 1380.

[20] EPC Joint Statement dated 8 May. Bull. EC 5-1991, point 1.4.3 (emphasis added).

independence, the EC seemed more inclined to accept Yugoslav disintegration due to the following reasons: excessive use of force by Serbia;[21] lack of Soviet reaction due to its own collapse;[22] the opinions of the Badinter Commission admitting the irreversible breakup of the country;[23] Germany's insistence in the recognition of Slovenia and Croatia[24] and French interest in keeping a unified European policy.[25] Finally, France and Germany reached an agreement to recognize the new republics under certain conditions.[26] Thus, the EC institutional framework had facilitated an agreement among its members despite their initial divergent positions.

The Yugoslav case had many particularities. Like in the case of Czechoslovakia (and unlike the Baltic independence movements), there was no Soviet threat. But whereas the Czechs and the Slovaks were able to reach an agreement, the different Yugoslav nations engaged in wars. The lack of a peaceful settlement did not enable a quick EC recognition. However, the irreversible dissolution of the Mother state, i.e. Yugoslavia, (as the Badinter Commission acknowledged), together with the German impulse allowed for a conditional EC recognition policy once it was evident that the pre-war situation could not be restored.

### (3) Czechoslovakia

Slovak disappointment within Czechoslovakia was a constant throughout the 20th century,[27] but Czechs and Slovaks protested united after the East Germany regime collapsed in November 1989. Nobody then expected the dissolution of the country.[28] But diverging policy views in the two enclaves exacerbated the debate over the breakup of the country. The 1992 elections accentuated the political division among the two Republics. The huge economic disparity did

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[21] R. Caplan, *Europe and the Recognition of New States in Yugoslavia* (Cambridge University Press, Cambridge, 2005), at 22.

[22] Ibid., at 23.

[23] In its Opinion nº1, dated 29 November 1991, the Badinter Commission noted "that the Socialist Federal Republic of Yugoslavia [FRY] is in the process of dissolution." A. Pellet, 'The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples', 3 *European Journal of International Law* (1993) 178-185, at 183 [doi: 10.1093/oxfordjournals.ejil.a035802]

[24] Caplan, *supra* n. 21, at 18.

[25] Ibid., at 43-46. "Germany was among the first to realize that Serbian policies made the demise of the former Yugoslavia inevitable, and that this development had to be accepted in order to direct the process of dissolution into orderly channels and to limit its destructive effects." M. Libal, *Limits of persuasion: Germany and the Yugoslav Crisis, 1991-1992* (Praeger, Westport and London,1997), at 161.

[26] S. Lucarelli, *Europe and the breakup of Yugoslavia: a political failure in search of a scholarly explanation* (Kluwer Law International, The Hague and Boston, 2000) at 154-157.

[27] H. A. Osterland, 'National self-determination and secession: the Slovak model', 25 *Case Western Reserve Journal of International Law* (1993) 655-702, at 685.

[28] J. Batt, 'Making a success of Montenegrin independence – lessons from Slovakia', *ISS*, published on 1 June 2006, accessed 15 June 2018.

not help to mitigate the tense situation.[29] The political paralysis, some degrees of indifference on the Czech side and resentment on the Slovak side led the leaders of both Republics, Vaclav Klaus and Vladimir Meciar, to negotiate the end of the federation through the 1968 constitutional amendment process.[30] The process, though, was full of legal and democratic flaws, public opinion polls showed that a majority of Czechoslovaks favoured unity[31] and no referendum was held to ratify the decision, despite demands for it. The breakup occurred against friendly (and unofficial) advice from members of the EC.[32] However, due to the peaceful and negotiated path of the dissolution, the EC did not oppose it.

These three cases show that for the EC the 'agreement' factor has been key in determining its policy. As for the Baltic States, only after the Soviet Union opposition vanished, did the EC Member states accept their independence. In Czechoslovakia, despite a contested procedure (no popular referendum), EC Member states did not oppose the dissolution of the country since there was a peaceful agreement. And in the Yugoslav case, it was precisely the lack of such agreement (namely Serbia's opposition) that prevented a quick EC common policy. EC Member states accepted the emergence of new states in the former Yugoslavia only after violence made clear that its dissolution was an irreversible fact.

### (D) SECESSION AFTER THE DISSOLUTION OF YUGOSLAVIA: MONTENEGRO AND KOSOVO

#### (1) Montenegro

In 1992 Montenegro joined together with Serbia in the Federal Republic of Yugoslavia. Despite Montenegro has no history of conflict with Serbia, political trends began to turn within Montenegro.[33] In 2000 Montenegro's President Djukanovic[34] favoured independence, despite

[29] S. Massa, 'Secession by mutual assent: a comparative analysis of the dissolution of Czechoslovakia and the separatist movement in Canada' 14 *Wisconsin International Law Review* (1995) 183-222, at 190.

[30] S. Engelberg, 'Czechoslovakia Breaks in Two, to Wide Regret', *New York Times*, published on 1 January 1993, accessed 18 June 2018.

[31] Osterland, *supra* n. 27, at 692. See also Massa, *supra* n. 29, at 192 and E. Macek-Macková, 'Challenges in conflict management in multi-ethnic states – the dissolution of Czechoslovakia and Serbia and Montenegro' 39(4) *Nationalist Papers: The Journal of Nationalism and Ethnicity* (2011) 615-633, at 619 [doi: 10.1080/00905992.2011.579952].

[32] On 22 June 1992, the then EC spokesman said that dissolution was an "internal decision". He also revealed his disappointment "because the aim should be integration rather than disintegration". J. Rupnik, 'The International Context', in J. Musil (ed), *The End of Czechoslovakia* (Central European University Press, Budapest, 1995) 271, at 276.

[33] As Tocci says, "Serbia's legacy of war in the Balkans and its policies towards Kosovo sparked Montenegro's desire to secede." Tocci, *supra* n. 6, at 156.

[34] Macek-Macková, *supra* n. 31, at 619.

the division among the population.[35] The EU repeatedly argued against further secessionism in the Western Balkans region.[36] In the 2001 elections, pro-independence parties took the lead. Given the EU Member states opposition to a new split in the Balkans, Javier Solana stepped in and mediated the Belgrade Agreement, which gave birth to the State Union of Serbia and Montenegro (the Union). The text established a loose federal level of government and allowed for a referendum on secession in either one or in both republics after three years of its establishment. For Serbia and Montenegro the motivation behind it was not the Union itself (no one wanted it), but the prospect of EU integration, since the EU had made the Union a condition of Serbia and Montenegro's admission.[37] Despite international efforts, the regime was highly dysfunctional[38] and it failed to gain domestic support and legitimacy.[39] By 2005 trends inexorably pointed towards a referendum in Montenegro. The Serbs had resigned themselves when faced with the political stalemate.[40] Since the situation seemed irreversible, the EU decided to cooperate and make sure that the process went as smoothly as possible. The Constitutional Charter was revised in 2005 to ensure that an eventual referendum would comply with the guidelines of the Council of Europe's Venice Commission.[41] The EU stepped in[42] and imposed that there would have to be a required turnout of 50 per cent + 1 voter and a 55 per cent majority in favour of independence. The EU supervised the formation of the Montenegrin Referendum Commission, as well.[43] The referendum took place on the 21 May 2006 with an 86,5% voter turnout and a sufficient (albeit extremely narrow) 55,5 per cent majority in favour of independence. It was considered a major success for EU's soft power.[44] The EU recognized rapidly its outcome and stressed both the legal conformity of the process and the agreement and consent of Serbia.[45]

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[35] "Support for independence dropped after the ouster of Milosevic, and stayed below 50 per cent in most opinion polls thereafter." Batt, *supra* n. 28.

[36] Stockholm European Council Presidency Conclusions, published on 23- 24 March 2001, accessed 18 June 2018.

[37] Macek-Macková, *supra* n. 31, at 627.

[38] Tocci, *supra* n. 6, at 86.

[39] *Ibid.*, at 87.

[40] Macek-Macková, *supra* n. 31, at 628.

[41] See European Commission for Democracy Through Law (Venice Commission), 'Opinion on the compatibility of the existing legislation in Montenegro concerning the organisation of referendums with applicable international standards' adopted at its 65th Plenary Session, 16-17 December 2005, CDL-AD(2005)041, accessed 18 June 2018.

[42] Macek-Macková, *supra* n. 31, at 625.

[43] Tocci, *supra* n. 6, at 88.

[44] J. Batt, 'Montenegro and Serbia after the referendum', *ISS*, published on 1 May 2006, accessed 18 June 2018.

[45] 2737th Council Meeting General Affairs and External Relations, published on 12 June 2006, accessed 18 June 2018.

### (2) Kosovo

Although the EU was committed to the maintenance of the territorial integrity of Serbia, dramatic events in the following years made the international community change its mind. Serbia virtually abolished Kosovo's autonomy and a period of repression and (at least) attempt of ethnic cleansing followed. After the NATO intervention in 1999, and the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK),[46] various rounds of negotiations between Kosovo and Serbia were held to discuss a settlement proposal. One of the guiding principles of the negotiations was that unilaterality was unacceptable.[47] But the parties were unable to make any progress and in 2007 the UN Special Envoy concluded that "the only viable option for Kosovo is independence".[48] In February 2008 the new elected Assembly of Kosovo adopted the declaration of independence.[49] The International Court of Justice (ICJ) assessed the compatibility of the declaration with international law and concluded that the declaration of independence did not violate any applicable rule of international law.[50]

West European states hoped to present the case of Kosovo as a unique one. In its Conclusions on Kosovo, adopted immediately after the declaration of independence, the Council of the European Union noted that "Member States will decide, in accordance with national practice and international law, on their relations with Kosovo."[51] This pragmatic approach avoided a split within the Union, which would not have been able to agree a common stance on this issue.[52] After reaffirming the EU commitment to the stabilization of the area, the Council added that Kosovo constitutes a *sui generis* case. Almost all EU Member states did recognize Kosovo's independence immediately. Only five EU Member states (Spain, Greece, Slovakia, Romania and Cyprus) did not out of domestic concerns.[53]

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[46] United Nations doc. S/RES/1244, published on 10 June 1999, accessed 18 June 2018.

[47] 'Guiding principles of the Contact Group for a settlement of the status of Kosovo' United Nations doc. S/2005/709, published on 10 November 2005, accessed 18 June 2018.

[48] 'Report of the Special Envoy of the Secretary-General on Kosovo's future status' United Nations doc. S/2007/ 168, published on 26 March 2007, accessed 18 June 2018.

[49] Kosovo Declaration of Independence, published on 17 February 2008, accessed 18 June 2018.

[50] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports (2010) 403, para. 122.

[51] 2851th General Affairs and External Relations Council of the European Union, published on 18 February 2008, accessed 18 June 2018.

[52] M. Weller, 'Negotiating the Final Status for Kosovo', *Chaillot Paper*, published on 31 December 2008, accessed 18 June 2018.

[53] In order to honour the different positions of EU member states concerning Kosovo, when referring to her, many EU documents include an asterisk clarifying that "[t]his designation is without prejudice to position on status, and is in line with UN Security Council Resolution 1244/99 and the International Court of Justice Opinion on the Kosovo declaration of independence."

## (E) Secession within Former Soviet Republics

### (1) Transnistria (Moldova)

Transnistria declared its independence from Moldavia (a Soviet Republic) in September 1990, while the Moldovan Parliament seceded from the Soviet Union in August 1991. A short war from March 1992 to July 1992 between the secessionist entity and the Mother state was ended by Russian military intervention, which used the entity to maintain influence and military presence in the region. No European state has recognized the *sui generis* independence of Transnistria (in fact, the entity could not survive without Russian aid).[54]

At first the EU was not interested in contributing to conflict settlement in Transnistria.[55] However, by the second half of 2002, the EU was actively looking for ways to play a bigger role in resolving a conflict that would border the EU in just a few years.[56] EU engagement, though, is limited to technical and low-politics instruments, in order to avoid direct confrontation with Russia. Besides, the EU official position supporting the territorial integrity and sovereignty of Moldova has been constant.[57] However, it has not been translated into a commitment to restore such integrity, a good example of the clash between EU's interests and Russia's assertion of her sphere of influence. This case highlights the attachment of the EU to the traditional principles of territorial integrity and non-recognition without a negotiated settlement between the secessionist entity and the Mother state.

### (2) Abkhazia and South Ossetia (Georgia)

Abkhazia and South Ossetia (former autonomous republics within Soviet Georgia) fought secession wars against Georgia in the 90s. Russia is deeply engaged in these two conflicts,[58] particularly since Georgia expressed its desire to join NATO. Moscow policies have consolidated their *de facto* independence, but also their integration into Russia.[59] After the peaceful 2003 Rose Revolution in Georgia, the EU was committed to supporting Georgia's reform process as technical assistance, but not willing to challenge Russia by assuming a too high profile in the secessionist conflicts.[60] Virtually all EU declarations on these two conflicts (before and after the 2008 war) have emphasized the non-negotiable principle of Georgia's

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54 N. Popescu, 'The EU in Moldova-Settling conflicts in the neighbourhood', *ISS Occasional Paper*, published on 1 October 2005, accessed 18 June 2018.

55 N. Popescu, *EU Foreign Policy and post-soviet conflicts. Stealth Intervention* (Routledge, London, 2011), at 42.

56 *Ibid.*, at 44 and 45.

57 See the Conclusions of the 2996th Foreign Affairs Council meeting, published on 22 February 2010, accessed 18 June 2018.

58 Popescu, *EU Foreign Policy...*, *supra* n. 55, at 68.

59 Tocci, *supra* n. 6, at 134.

60 Popescu, *EU Foreign Policy...*, *supra* n. 55, at 82.

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sovereignty and territorial integrity.[61] Besides, the EU has used extreme caution in avoiding official contact with secessionist authorities.[62] Like in the case of Transnitria, the EU seems inflexible in its non-recognition policy.

(3) Nagorno-Karabakh (Azerbaijan)

Nagorno-Karabakh (predominantly ethnic Armenians and Christians) was an autonomous region of the Soviet Azerbaijan, where Azeris, Muslims, are the predominant ethnic group. A full-scale war between Armenia and Azerbaijan took place between 1992 and 1994 and ended with a military victory of Armenia.[63] Azerbaijanis claim that Nagorno was unlawfully occupied by Armenia, violating international law. In 2006, the EU negotiated with both Azerbaijan and Armenia their European Neighbourhood Policy Action Plans.[64] The EU tried to keep the negotiations as technical and depoliticized as possible.[65] However, the EU-Azerbaijan Action Plan admits the respect of and support for the sovereignty, territorial integrity and inviolability of internationally recognised borders.[66] EU engagement is almost non-existent. Although there is no direct confrontation with Russia, it lies in the high politics domain, where EU involvement is always more problematic.[67] Besides, Nagorno is located in an area geographically far from the EU and it is a conflict between two (already) recognized states, Armenia and Azerbaijan, each having its own partnership with the EU. Again, we find EU opposition to the independence of the secessionist entity despite the irreversibility of the situation due to the lack of consent of the Mother state.

(4) Crimea (Ukraine)

Crimea has a long history of independence, but since the 18th century it belonged to the Russian Empire. It remained part of Russia until 1954, when it was ceded to Ukraine.[68] After the fall of the Soviet Empire, it remained under Ukrainian jurisdiction, with episodes of growing

[61] 'Declaration by the Presidency on behalf of the EU concerning the recent 'parliamentary elections' in Abkhazia, Georgia', published on 12 March 2002, accessed 18 June 2018; 'Declaration by the Presidency on behalf of the European Union on Russian President Medvedev's visit to the Georgian region of South Ossetia', published on 16 July 2009, accessed 18 June 2018.

[62] Tocci, *supra* n. 6, at 142-147.

[63] Popescu, *EU Foreign Policy... supra* n. 55, at 97.

[64] B. Dimitrovova, 'Imperial re-bordering of Europe: the case of the European Neighbourhood Policy', 25(2) *Cambridge Review of International Affairs* (2012) 249-267, at 250 [doi:10.1080/09557571.2012.678298].

[65] Popescu, *EU Foreign Policy..., supra* n. 55, at 102.

[66] See EU-Azerbaijan Action, published on 7 October 2016, accessed 18 June 2018.

[67] Popescu, *EU Foreign Policy..., supra* n. 55, at 101.

[68] A. Remiro Brotons, 'Derecho y poder en el destino de Crimea', 34 *Anuario Español de Derecho Internacional* (2018) 231- 244, at 232. [doi: 10.15581/010.34.231-243].

separatism.[69] During the 2014 Ukrainian crisis, Russian troops emerged in Crimea and the city of Sebastopol. Immediately, the Crimean regional parliament voted to hold a referendum ten days later on the region's secession from Ukraine and possible reunification with Russia (inconsistent with the Ukrainian Constitution).[70]According to the data released, the turnout was high (around 82%) and almost 96% voted in favour of reuniting with Russia. On March 17 Russia recognized Crimea as an independent state, despite strong opposition from Ukraine. On March 18 Russia and the Republic of Crimea signed an accession agreement. Crimea is now *de facto* part of Russia. This process received immediate condemnation from the EU (and the US). In March 2014 the European Union released a Joint statement on Crimea declaring that the referendum is illegal and illegitimate and its outcome will not be recognised.[71] The European Union position has not varied since then.[72]

## (F) CONCLUSIONS

Some general lessons can be drawn both from those conflicts where EU engagement has been key (e.g. Montenegro's independence), and from those where EU presence has been barely perceived (e.g. Transnistria, Nagorno-Karabakh):

(1) With the exception of the unique case of Kosovo (that included gross human rights violations) the EU has always opposed unilateral independence (e.g. Turkish Republic of Northern Cyprus, Transnistria, South Ossetia, Abkhazia, Nagorno-Karabakh, Crimea).

(2) The EU's main criteria for recognizing a secessionist entity has been the approval of the nation state from which an entity is seceding. The cases of the Baltic States and Montenegro are paradigmatic. Czechoslovakia, although not a secessionist process, also confirms this approach to the extent that EC Member states did not oppose the split, given that there was an agreement between the two Republics.

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[69] S. Stewart, 'Autonomy as a mechanism for Conflict Regulation? The Case of Crimea' 7(4) *Nationalism and Ethnic Politics* (2001) 113-141, at 118 [doi: 10.1080/13537110108428647].

[70] See European Commission for Democracy Through Law (Venice Commission), 'Opinion on whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory of the Russian Federation or restoring Crimea's 1992 constitution is compatible with constitutional principles' adopted at its 98th Plenary Session, 21-22 March 2014, CDL-AD(2014)002, accessed 18 June 2018.

[71] Joint statement on Crimea by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Durao Barroso, published on 16 March 2014, accessed 18 June 2018.

[72] Declaration by the High Representative on behalf of the EU on Crimea, published on 16 March 2015, accessed 18 June 2018.

(3) Another important lesson of the cases reviewed is that the EU position has proved to be highly vulnerable to the national interests or priorities of EU Member states when dealing with secessionist issues. Note the case of Greece and Cyprus, where the EU accepted a radical change in her policy towards the conflict. Or the pressure exerted by Germany when the declarations of independence of Croatia and Slovenia.

(4) As a final note, let us underline the relevance of the secession of Montenegro: it was the first time that the EU got so deeply involved in a secessionist conflict. What should be highlighted (apart from what has been said about Serbia's acquiescence) is that the EU required respect for the Rule of Law and for the democratic principle (imposing certain rules for the celebration of a referendum on independence).

These conclusions apply only with caution to cases of secession within current EU Member states since these conflicts occurred beyond EU frontiers, not within. However, considering this warning, the conclusion goes as follows. One can assume a fierce opposition towards pro-independence movements that breach the legal constitutional order of EU Member states and that are conducted without the agreement of the EU Member state affected. However, it would not be so obvious the position of the EU in a consensual and lawful pro-independence movement.

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# The Judgment of the Supreme Court sentencing Spain for failing to duly comply with the Council Decisions (EU) 2015/1523 and 2015/1601 on international protection for the benefit of Italy and Greece (STS 2546/2018, 9 July 2018)

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*Abstract*: This note analyses the Judgment of the Supreme Court of 9 July 2018 sentencing Spain for failing to duly comply with the Council Decisions (European Union, hereinafter EU) establishing provisional measures in the area of international protection for the benefit of Italy and Greece, in other words, the Council Decisions 2015/1523 of 14 September 2015, OJ 2015 L 239/146, and 2015/1601 of 22 September 2015, OJ 2015 L 248/48, establishing the legal regime to relocate in other EU Member States the thousands of asylum seekers who massively arrived in Italy and Greece since 2014. In this sense, the association *Associació de support a stop mare mortum* appealed the rejection by administrative silence of a request of 21 April 2017 and sought the Spanish Government to immediately accomplish its obligations of relocating applicants of international protection, at least, in the measure of the quotas established for Spain by the aforesaid Decisions. Despite the lack of due cooperation between the European Union Member States, even Italy and Greece, the Supreme Court decided, in accordance with the two Decisions and the *acquis communautaire*, that Spain has partly breached its administrative obligations provided by the EU Decisions and, consequently, it shall continue processing the applications of international protection according to the Decisions and future agreements that the European Institutions may adopt.

*Keywords*: relocation, asylum seekers, Supreme Court's Judgment, Council Decision (EU) 2015/1523, Council Decision (EU) 2015/1601, principle of solidarity.

## (A) INTRODUCTION

On 9 July 2018 the Supreme Court, concretely the Fifth Section of its Contentious-Administrative Chamber, delivered the Judgment 2546/2018[1] in answer to the appeal made, on behalf of the *Associació de support a stop mare mortum*, against the rejection by administrative silence of a request of 21 April 2017 for the Spanish Government to immediately fulfil its obligations of relocating applicants of international protection. Those obligations were established by the Council Decision (EU) 2015/1523 of 14 September 2015, OJ 2015 L 239/146, and the Council Decision (EU) 2015/1601 of 22 September 2015, OJ 2015 L 248/48,[2] which were

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1 STS 2546/2018, 9 July 2018.

2 Both *Decisions* 2015/1523 and 2015/1601, establishing provisional measures in the area of international protection for the benefit of Italy and Greece, are no longer in force. Their dates of end of validity were 17 September 2017 and 26 September 2017, respectively.

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the response to "the critical need to show solidarity towards Italy and Greece and to complement the actions taken so far to support them with provisional measures in the area of asylum and migration."[3] For this purpose, the Decisions created a procedure for the relocation by 26 September 2017 of 120.000 asylum seekers arrived in Italy and Greece to other Member States in the manner established in the Annex of the *Decision 2015/1601*.[4] Concretely, in accordance with the system established by both Decisions, Spain was obliged to relocate 19.449 asylum seekers (13.086 applicants for international protection coming from Greece and 6.363 among those who came from Italy), of which, on 4 March 2018, the Spanish State has just offered 2.500 places for the resettlement of the refugees and effectively relocated 235 people from Italy and 1.124 from Greece.[5] Nevertheless, as the Supreme Court points out, the insufficient cooperation between all EU Member States on the relocation of the refugees as well as the lack of response by Italy and Greece to the Spanish requests should be considered, too.[6]

## (B) THE JUDGMENT

### (1) Facts and Parties' arguments

By means of an appeal to the Supreme Court, the *Associació de support a stop mare mortum* sought Spain to immediately comply with its obligations of relocating the asylum seekers in accordance with the *Council Decisions (EU) 2015/1523* and *2015/1601*. Besides, the appellant asked the adoption of provisional measures in that regard. However, the Supreme Court denied that last possibility throughout the Writ of 17 October 2017.[7]

On the one hand, the claiming association argued that, according to the legal system established by the Decisions, Spain has two obligations. Firstly, a final obligation to take the total quota of asylum seekers in. Secondly, a regular obligation consisting of offering relocation places, approving the lists of refugees and accepting the relocated people within some particular periods.[8] Both obligations shall be fully, progressively, immediately and urgently met since the Decisions ordered the relocations to be forthwith carried out,[9] being that an order completely enforceable before a court due to the general principles of, among others, loyal cooperation

3 *Council Decision (EU) 2015/1523*, whereas (*considerando*) paragraph 13.
4 *Council Decision (EU) 2015/1601*, article four.
5 STS 2546/2018, *supra* n. 1, 16th legal basis (*fundamento de Derecho*).
6 *Ibid.*
7 Writ TS, 17 October 2017.
8 STS 2546/2018, *supra* n. 1, second fact (*antecedente de hecho*).
9 Concretely, the appellant argued that "...el mandato [debe] llevar a cabo la reubicación asignada 'lo antes posible' o 'lo más rápidamente posible'", *ibid.*

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between the Member States and the European Union, and solidarity in the fields of immigration and asylum.

The principle of solidarity is a well-established principle of the European Union Law, being the EU's Common European Asylum System (hereinafter, CEAS) even described as a 'common area of protection and solidarity' and foreseen, for the policies on border checks, asylum and immigration, in article 80 of the Treaty on the Functioning of the European Union (hereinafter, TFEU).[10] As professor Abrisketa Uriarte pointed out, in the Judgment of the Court of Justice of the European Union of 6 September 2017 (addressed below) the interpretation of the principle of solidarity was reduced to 'merely a symbolic status', probably because of lack of preciseness of the principle in its regulation of article 80 TFEU and as such the Court avoided to make a very detailed interpretation of the scope of this principle.[11] Interestingly, the principle of solidarity is not included in article 2 of the Treaty of the European Union within the list of values on which the Union is founded, such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, but however that article refers solidarity to prevail between women and men in the society of the EU Member States. Doubtlessly, solidarity is a founding principle of the EU legal order as well as a structural element of the European integration project despite the lack of a single notion of the solidarity principle applicable to the EU asylum policy.

Nonetheless, Spain would not have complied with those obligations, having offered only the 12.85% of the relocation places and having effectively relocated just the 6.46% of the asylum seekers. On the basis of the aforementioned reasons, the appellant requested the Supreme Court to adjudge and declare illegal the rejection by administrative silence of the previous request, in addition to the breach by the Spanish Government of its obligations under the *Council Decisions (EU) 2015/1523* and *2015/1601* and, finally, to order the Government of Spain to immediately and urgently comply with the aforesaid obligations.[12]

On the other hand, the State Administration argued basically the lack of the appellant association of a collective legitimate interest to appear before the court because the association,

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[10] E.L. Tsourdi, 'Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System', 24 Issue 5 *Maastricht Journal of European and Comparative Law* (2017) 667-686. Concretely, article 80 reads as follows 'the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.'

[11] J. Abrisketa Uriarte, 'La reubicación de los refugiados: un déficit de solidaridad y una brecha en la Unión Europea. Comentario a la Sentencia del Tribunal de Justicia de 6 de septiembre de 2017, asuntos C-643/15 y C-647/15 Hungría y Eslovaquia contra el Consejo', 44 *Revista General de Derecho Europeo* (2018) 125-154, at 126, 138 and 153.

[12] STS 2546/2018, *supra* n. 1, second fact.

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allegedly, did not mention any reference regarding that legitimacy. According to the State Attorney, who appeared on behalf of the Government of Spain, the relocation aimed by the association was generical and impersonal based on an alleged breach of the Constitution without any concrete reference in relation to that legitimacy.[13] Therefore, the State Attorney sought the appeal dismissed because the appeal lacked any legal foundation. In view of the State Attorney, Spain was carrying out all the necessary proceedings to ask and relocate the asylum seekers allocated to Spain in spite of the complexity of the procedure as a result of the need for Spain to verify which people of the quota fulfil the requirements laid down to be considered as refugees.[14] Finally, the State Attorney, taking into account the absence of precedents in the domestic and European jurisprudence, pointed out the alternative for the Court to seek a preliminary ruling before the Court of Justice of the European Union in order to set the way to address this legal issue in the future.[15] Nevertheless, it is worth reminding the existence of the already mentioned 6 September 2018 Judgment given by the Court of Justice of the European Union, which would indeed reject the argument of the State Attorney based on the absence of any precedent in the European jurisprudence.

### (2) Merits

The Chamber of the Supreme Court starts addressing the case refusing the arguments employed by the State Attorney suggesting the Court to seek a preliminary ruling in addition to the argument of the European Commission as the competent to initiate infringement proceedings in its condition of guardian of the Treaties.[16] In this sense, the Chamber considered itself as competent to control the activity of the national Administration in the compliance and execution of the European Union's obligations.[17] Notwithstanding the European Commission's task to supervise the observance of the European Union Law, the Commission has a significant discretionary power to bring infringement proceedings before the Court of Justice of the European Union.[18]

#### (a) *The relocation*

Regarding the binding nature of the Decisions adopted in order to relocate the asylum seekers arrived in Italy and Greece, the Supreme Court affirms their mandatory nature in addition to their direct effect.[19] Accordingly, the Supreme Court is of the understanding that the domestic

[13] STS 2546/2018, *supra* n. 1, third fact.
[14] *Ibid.*
[15] STS 2546/2018, *supra* n. 1, third legal basis.
[16] STS 2546/2018, *supra* n. 1, fourth legal basis.
[17] STS 2546/2018, *supra* n. 1, fifth legal basis.
[18] *Ibid.*
[19] STS 2546/2018, *supra* n. 1, sixth legal basis.

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courts are able to control the enforceability of the Decisions without contradicting the powers and competences of the European Commission to seek an infringement proceeding against a Member State.[20] In this case, that proceeding has not been triggered against Spain and hence the Supreme Court can examine and consider the requests and claims of the appellant. Otherwise, whether an infringement proceeding would be pending, to trigger the national jurisdiction would be acceptable since it is the only way for individuals to assert their rights, even though the national jurisdictions should wait the Court of Justice's judgment in order to solve the case in accordance with this last one's decision.[21] Consequently, the Supreme Court refuses to submit a question for a preliminary ruling to the Court of Justice in considering that possibility as an optional power belonging to the national judge.[22]

Along the two following legal basis of the judgment (eighth and ninth FD), the Supreme Court reproduces some relevant provisions of the two *Decisions* (EU) 2015/1523 and 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece. Firstly, the Supreme Court mentions article 5 of the *Decision* (EU) 2015/1523, which establishes the relocation procedure, being relevant for this task to hand its paragraph seven, containing that provision the possibility for Member States to "refuse to relocate an applicant only where there are reasonable grounds for regarding him or her as a danger to their national security or public order or where there are serious reasons for applying the exclusion provisions set out in Articles 12 and 17 of Directive 2011/95/EU."[23] Secondly, the *Decision* (EU) 2015/1601 is thoroughly explained by the Supreme Court reproducing its 13 provisions. For this paper's purposes, articles four and six are particularly interesting. The first paragraph of the article 4, intitled "Relocation of 120 000 applicants to Member States", establishes that "120 000 applicants shall be relocated to the other Member States as follows: (a) 15 600 applicants shall be relocated from Italy to the territory of the other Member States in accordance with the table set out in Annex I; (b) 50 400 applicants shall be relocated from Greece to the territory of the other Member States in accordance with the table set out in Annex II; (c) 54 000 applicants shall be relocated to the territory of the other Member States, proportionally to the figures laid down in Annexes I and II, either in accordance with paragraph 2 of this Article or through an amendment of this Decision [...]."[24] From this provision, the compulsory and mandatory nature of the obligation is remarkable.

### (b) *The rights of the applicants for international protection*

[20] STS 2546/2018, *supra* n. 1, seventh legal basis.
[21] *Ibid.*
[22] *Ibid.*
[23] STS 2546/2018, *supra* n. 1, eighth legal basis.
[24] Article 4, paragraph 1, *Council Decision* (EU) 2015/1601.

On the other hand, the article six of the *Decision 2015/1601*, intitled "Rights and obligations of applicants for international protection covered by this Decision", reads as follows:

> "1. The best interests of the child shall be a primary consideration for Member States when implementing this Decision; 2. Member States shall ensure that family members who fall within the scope of this Decision are relocated to the territory of the same Member State; 3. Prior to the decision to relocate an applicant, Italy and Greece shall inform the applicant in a language which the applicant understands or is reasonably supposed to understand of the relocation procedure as set out in this Decision; 4. When the decision to relocate an applicant has been taken and before the actual relocation, Italy and Greece shall notify the person concerned of the decision to relocate him in writing. That decision shall specify the Member State of relocation; 5. An applicant or beneficiary of international protection who enters the territory of a Member State other than the Member State of relocation without fulfilling the conditions for stay in that other Member State shall be required to return immediately. The Member State of relocation shall take back the person without delay."

This article is the sole in both Decisions dealing with the rights of the asylum seekers.[25] It seems a kind of summary of the right of asylum regulation that is mostly, as it is well-known, customary international law. From this provision, the prior interest of the child clearly stands out. Besides, the relocation of families in the same Member State is the second element to consider in order to carry out the relocations. Finally, the need to ensure the fulfilling of the conditions by the applicants of international protection can be pointed out, too. Apart from being the sole provision of the Decisions addressing in somehow the international law of protection, this legal basis constitutes,[26] surprisingly, the only reference made by the Supreme Court through the entire judgment to this important field of international law, specially taking into consideration the fundamental matter of the decision, namely: the obligation to receive and relocate the refugees arrived in Italy and Greece. Therefore, to clarify the legal distinction between the regime of refugees and economic migrants could have been convenient since not all the applicants for international protection ought to have the same treatment. Nevertheless, it can also be argued that explanation is not necessary in this judgment because the obligation that Spain have to comply with is just in relation to the asylum seekers arrived in Italy and Greece, whom the Decisions' system assume that already fulfil the conditions to benefit of international protection.

### (c) *The nature of provisional measures*

In addition, along the tenth legal basis of the judgment, the Supreme Court brings up the Judgment given by the Court of Justice of the European Union on 6 September 2017 addressing

[25] In this regard, see S. Peers, 'Relocation of Asylum-Seekers in the EU: Law and Policy', *EU Law Analysis*, published on 24 September 2015.

[26] STS 2546/2018, *supra* n. 1, ninth legal basis.

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the content of the *Decision 2015/1601* in response to its contestation by some EU Member States.[27] The interpretation of the Decision's content given by the Court of Justice, logically, is prominently considered by the Supreme Court. In its reasoning, the Supreme Court repeats some of the most relevant legal arguments of the Court of Justice's Judgment about the context, history, and content of the contested Decision.[28]

Moreover, the Supreme Court broaches several findings of the Judgment of the Court of Justice.[29] Regarding the "[t]he first part of the Slovak Republic's fifth plea and Hungary's second plea, alleging that the contested decision is not provisional and that its period of application is excessive",[30] the Court of Justice clarified that "choice of a period of application of 24 months is justified in view of the fact that the relocation of a large number of persons, such as that provided for in the contested decision, is an unprecedented and complex operation which requires a certain amount of preparation and implementation time, in particular as regards coordination between the authorities of the Member States, before it has any tangible effects."[31]

Concerning "[t]he second part of the Slovak Republic's fifth plea, alleging that the contested decision does not satisfy the conditions for the application of Article 78(3) TFEU [Treaty on the Functioning of the European Union]", namely "that the Member State benefiting from the provisional measures must be confronted by 'an emergency situation characterised by a sudden inflow of nationals of third countries",[32] the Court of Justice declared that "[i]t is apparent from recitals 12, 13 and 26 of the contested decision and from the statistical data mentioned in those recitals that a sufficiently close link has been established between the emergency situation in Greece and Italy, namely the significant pressure on the asylum systems of those Member States, and the inflow of migrants throughout 2015, in particular in July and August of that year."[33]

Finally, the last finding of the Court of Justice's judgment brought up by the Spanish Supreme Court is related to the "Slovak Republic's sixth plea, in so far as it alleges that the contested decision is not appropriate for attaining the objective which it pursues."[34] In that regard, the Court of Justice declared that, since "[...]the legality of an EU act cannot depend

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[27] Judgment of the Court (Grand Chamber) of 6 September 2017, Slovakia v Council and Hungary v Council, C-643/15 and C-647/15, EU:C:2017:631.

[28] STS 2546/2018, *supra* n. 1, tenth legal basis.

[29] STS 2546/2018, *supra* n. 1, 11th legal basis.

[30] Italic emphasis in the original.

[31] Judgment of the Court (Grand Chamber) of 6 September 2017, Slovakia v Council and Hungary v Council, *supra* n. 27, para. 97.

[32] *Ibid*, para. 107.

[33] *Ibid*, para. 126.

[34] Italic emphasis in the original.

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on retrospective assessments of its efficacy"[35] and "[...] when the Council adopted the mechanism for the relocation of a large number of applicants for international protection, it carried out, on the basis of a detailed examination of the statistical data available at the time, a prospective analysis of the effects of the measure on the emergency situation in question,"[36] the "[...] analysis does not appear manifestly incorrect."[37] Regardless, the Court of Justice importantly suggests that "[...] the small number of relocations so far carried out pursuant to the contested decision can be explained by a series of factors that the Council could not foresee at the time when the decision was adopted, including, in particular, the lack of cooperation on the part of certain Member States."[38]

In view of the foregoing, the Supreme Court begins to decide on the merits of the case. For this purpose, the Supreme Court upholds that the Decisions contain "provisional measures" in the sense of article 78 (3) of the TFEU because the *Decision (EU) 2015/1601* has a period of validity of 24 months according to article 13 thereof.[39] Although that "provisional measure" nature of the Decision should, in view of the State Attorney, make the Court to reject as unfounded the appeal, the Supreme Court declares, referring the words of the European Commission in a communication of 12 April 2017,[40] that "[...]more efforts are needed from all Member States to ensure that all people eligible are relocated over the coming months [...]" and as such "[...]*if Member States do not increase their relocations soon, the Commission will not hesitate to make use of its powers under the Treaties for those which have not complied with the Council decisions, noting that the legal obligation to relocate those eligible will not cease after September* [...]."[41]

### (d) *The relocation quotas*

Consideration is given by the Supreme Court to the relocation quotas assigned to Spain within a period of 24 months -since 25 September 2015 until 26 September 2017- by virtue of Annexes I and II of the *Decision 2015/1601*, which allocated to Spain a quota of 12,15% of the total of relocations.[42] As a consequence of article 4 of the *Decision 2015/1601*, Spain shall offer places

[35] Judgment of the Court (Grand Chamber) of 6 September 2017, Slovakia v Council, *supra* n. 27, para. 221.

[36] *Ibid*, para. 222.

[37] *Ibid*.

[38] *Ibid*, para. 223.

[39] STS 2546/2018, *supra* n. 1, 12th legal basis. The article 78(3) TFEU establishes that "[i]n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."

[40] European Commission, 'Eleventh report on relocation and resettlement', COM(2017) 212 final, published 12 April 2017.

[41] STS 2546/2018, *supra* n. 1, 13th legal basis. Italic and bond emphasis in the original text of the Judgment.

[42] STS 2546/2018, *supra* n. 1, 16th legal basis.

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and relocate 8.023 asylum seekers (1.896 from Italy and 6.127 from Greece) and, according to its paragraphs 1 (c) and 2, other 6.564 people should have been relocated in Spain between 26 September 2016 and 25 September 2017 (1.551 from Italy and 5.013 from Greece). In addition, 2.917 asylum seekers from Italy and 1.945 from Greece ought to be relocated in Spain in accordance with article 4 (a) (b) of the *Decision 2015/1523*.[43] It follows that Spain should have effectively offered places and relocated 13.086 asylum seekers from Greece and 6.363 from Italy. In that regard, the Supreme Court remarks that Spain could have reduced the 30% of its quota, following the article 4.5 of the *Decision 2015/1601*, but the Spanish State decided not to take that possibility.[44]

In this sense, the fact that the relocation mechanism was already finished up (it came to its end on 26 September 2017) by the time the Supreme Court gave this Judgment (9 July 2018) ought to be taken into consideration. In general, the mechanism was not very successful since instead of 160.000 asylum seekers foreseen by both Decisions of 2015, just 33.846 asylum seekers had been effectively relocated in the European Union as a whole.[45] Nevertheless, the failure of that mechanism to relocate the asylum seekers is not only due to the 'lack of interest' performed by Spain or even more the strong resistance to its implementation conspicuously shown by countries like Hungary, the Czech Republic, Slovakia and Poland, but also the consequence of several factors,[46] namely: 1. The lack of the preceptive request made by many asylum seekers in order to avoid the country of destination preestablished by the mechanism in trying to move to countries of their own choice; 2. The EU-Turkey agreement of 2016, whose implementation brought a significant reduction in the number of asylum seekers in Greece;[47] and, 3. The relocations were effectively carried out exclusively when the asylum seekers consented to their transfer to another EU country.

### (e) *The breach of the obligations to offer places and to carry out the relocation*

Thus, the Supreme Court concludes that Spain has breached its obligations to offer places and to effectively carry out the relocations to which it was obliged to. As such, six months later

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43 *Ibid.*

44 *Ibid.*

45 B. De Witte and E.L. Tsourdi, 'Confrontation on relocation-The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: *Slovak Republic and Hungary v. Council*', 55 Issue 5 *Common Market Law Review* (2018) 1457-1494, at 1492-1494.

46 *Ibid.*

47 As professors De Witte and Tsourdi rightly highlight "19 March 2016 (the day after the EU-Turkey statement) was *de facto* considered as a cut-off date for relocation, despite this interpretation going against the text of the emergency relocation decisions" and "hence, all asylum seekers that arrived on the Greek islands still during the application period of the schemes, but after 19 March 2016, were not considered eligible for relocation, regardless of their nationality, and even if they did file asylum claims", *ibid.*

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than the deadline, the report of the Asylum and Refugee Office (*Oficina de Asilo y Refugio*) recognizes a compliance percentage less than 13%, likewise, according to that report, on 4 March 2018 Spain had just offered 2.500 places, i.e. a 12,85% of its total mandatory quota.[48] Notwithstanding that assertion, the Supreme Court also acknowledges the fact that both Greece and Italy have received requests from Spain to relocate asylum seekers without the compulsory response from those States. Therefore, as mentioned above, that scenario highlights a prominent failure in the fulfilment of the coordination tasks essential for the succeeding of the Decisions.[49]

Indeed, the Spanish State has not fully complied with the European Decisions despite their binding and compulsory legal nature.[50] The serious administrative difficulties to fulfil those obligations, as the State Attorney emphasised, can under no circumstance mean their exemption since the measures aimed to make flexible the relocation objectives of the Decision have not been neither invoked nor used by the Spanish Government.[51] Moreover, the Supreme Court highlights that a general lack of compliance of the aforementioned Decisions does not justify the omissive conduct protested in this appeal.[52]

Finally, the Supreme Court concludes the legal reasoning of the judgment declaring that "the complexity of the relocation process, the need to cooperate of Greece and Italy and the measures to be adopted by the European Institutions oblige, in the Chamber's view, that the declaration of partial breach of the regular obligations of the Decisions results in the sentence for the Spanish State to continue the processing in accordance with the Decisions and with the agreements that in the future the European Institutions may adopt."[53]

### (3) The Decision

In light of the above, the Fifth Section of the Contentious-Administrative Chamber of the Supreme Court: 1) partially upholds the appeal and declares unlawful the rejection by administrative silence of a request of 21 April 2017; 2) partially upholds the request; 3) declares the partial breach by the Spanish State of the administrative obligations established in the Decisions (EU); and, 4) consequently, the Spanish State shall continue the processing [of the applications of international protection from asylum seekers arrived in Italy and Greece] in

[48] This author has not been able to find the report of the *Oficina de Asilo y Refugio* mentioned by the Supreme Court in its Judgment.

[49] STS 2546/2018, *supra* n. 1, 16th legal basis.

[50] STS 2546/2018, *supra* n. 1, 17th legal basis.

[51] *Ibid.*

[52] *Ibid.*

[53] STS 2546/2018, *supra* n. 1, 18th legal basis.

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accordance with the Decisions and with the agreements that in the future the European Institutions may adopt. The Court did not assign any Party in the proceeding to pay the costs.[54]

## (C) CONCLUSION

The judgment of the Supreme Court analysed along this note concludes succinctly that Spain has failed to duly comply with the *Decisions EU 2015/1523* and *2015/1601*, establishing provisional measures in the area of international protection for the benefit of Greece and Italy, since the Spanish State has just offered less than the 13% of its relocation quota allocated by those Decisions. Consequently, and in spite of the general lack of cooperation between the EU Member States (including Greece and Italy), Spain shall continue the processing of the applications of international protection made by asylum seekers arrived in Italy and Greece in accordance with the Decisions and with the agreements that in the future the European Institutions may adopt.

This judgment means the first decision given by a domestic court of an EU Member State dealing with the two Council Decisions entered into force in 2015 in order to solve, through relocations of the asylum seekers, the refugee crisis that took place in Italy and Greece due to the massive arrival of refugees to those countries. Besides, this judgment of the Spanish Supreme Court implies an interpretation and, more specifically, application of the Judgment given by the Court of Justice of the European Union answering to the appeal made by the Slovak Republic and Hungary, by means of which the Court of Justice declared the conformity of the *Decision 2015/1601* with the rules and principles of the European Union Law.

Nevertheless, this judgment could be rather presumptuous taking into account the difficulties of the interpretation of the legal system established by those EU Decisions. Even though their legal binding nature is doubtless, the manner to enforce the obligations therein may not be as easy as the Supreme Court understands. In this sense, it seems a complicated task to identify the refugees who arrived within 2015 in Italy and Greece and to obtain the cooperation of their governments to effectively relocate in Spain the pending number of them to fulfil the mandatory quota. Accordingly, as the State Attorney pointed out, the possibility of the Supreme Court to seek preliminary ruling before the Court of Justice could have been convenient in order to clarify the way to comply with the Decisions and to remind the EU Member States their obligation to cooperate and to relocate their quota of asylum seekers. On the other hand, it can also put into question the intervention of the European Commission, or rather, the lack of its intervention, since regarding such an important issue the Commission should have initiated infringement proceedings before the Court of Justice against those States

[54] STS 2546/2018, *supra* n. 1, decision (*fallo*).

(including Spain) for their failure to fulfil their obligations in accordance with the *Decisions EU 2015/1523* and *2015/1601*.

Indeed, the Spanish Supreme Court could have been quite naive trying Spain to solve the huge and severe issue of the refugee's crisis in complying with a legal regimen that has clearly become insufficient and inefficient because of the lack of cooperation between the EU Member States. Nonetheless, it is worth putting into context that any system, even one without structural weaknesses in terms of its capacity, would more likely have been seriously affected and disrupted by the unprecedent influx of arriving migrants which took place in Italy and Greece during 2015. In this sense, the reform of the EU's CEAS has been proposed, whose need was highlighted by that migration crisis. Among the weaknesses of the CEAS, the need of uniform treatment for asylum seekers across the EU is remarkable since the asylum seekers can travel along Europe, in a common space without internal borders, and as such apply for international protection in the country where a higher level of international protection is expected. Consequently, the Council of the European Union is working on seven legislative proposals,[55] made by the European Commission to improve EU asylum rules and system, aimed mainly to "make the system more efficient and more resistant to migratory pressure", "eliminate pull factors as well as secondary movements" and finally "fight abuse and better support the most affected member states".[56]

Importantly, this judgment highlights the Spanish commitment, stated by means of its highest judicial institution, to the Rule of Law and to the European Union legislation and values. Moreover, the current political situation in some countries of the EU with governments clearly against the reception of migrants and refugees, concretely Italy, shows a complicated scenario for the cooperation between Member States and for the complete enforcement of the Decisions' system as well as the forthcoming regulations to collectively address the relocation of the asylum seekers arrived in the European Union.

Finally, the present judgment may bring a hoped judicial development to achieve the effective relocation of the asylum seekers according to the Decisions (and, in general, to the International Law), even though it seems doubtful the judgment could be enforced by the

[55] The seven legislative proposals presented by the Commission aim to: "1. Reform the *Dublin system* to better allocate asylum applications among member states and to guarantee the timely processing of applications; 2. Reinforce the *Eurodac* [European Dactyloscopy] *regulation* to improve the EU fingerprint database for asylum seekers; 3. Establish a fully fledged EU *asylum agency*; 4. Replace the *asylum procedure directive* with a regulation to harmonise EU procedures and reduce differences in recognition rates among member states; 5. Replace the *qualification directive* with a regulation to harmonise protection standards and rights for asylum seekers; 6. Reform the *reception conditions directive* to ensure that asylum seekers benefit from harmonised and dignified reception standards; and, 7. Create a permanent EU *resettlement framework*", in Council of the European Union, *Reform of EU asylum rules*. Original bold emphasis turned into italic emphasis.

[56] *Ibid*. Bold emphasis omitted.

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Spanish Government and it could create a judicial precedent along other EU Member States. Otherwise, it will be the turn for the European Commission, in its condition of guardian of the Treaties, to initiate the diverse proceedings, mainly the infringement ones, to ensure the enforcement of the European Union Law in this field of international protection.

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# Spain and the Monetary Gold Doctrine in the M/V "*Norstar*" Case

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Abstract: The dispute between Panama and Italy regarding the seizure and detention of the M/V "*Norstar*" has led to the first preliminary objections proceeding brought before the ITLOS as well as to the invocation of the *Monetary Gold* doctrine, namely in relation to Spain. Besides the emphasis on the application of this doctrine with regard to Spain before international courts and tribunals, the study will touch on several other issues raised by the M/V "*Norstar*" case that are in close relation with the subject-matter of the dispute over the detention of the M/V *Louisa* and more prominent ITLOS's statements in the M/V "*Louisa*" (*San Vincent and the Granadines v, Kingdom of Spain*) case.

Keywords: International Tribunal for the Law of the Sea - Detention of vessels – Preliminary Objections- Indispensable party

## (A) INTRODUCTION

Spain has been part in contentious and advisory proceedings before the International Tribunal for the Law of the Sea (ITLOS). It was a party to the contentious case concerning the detention of the M/V "*Louisa*", where the Tribunal concluded that no dispute concerning the interpretation or application of the United Nations Convention on the Law of the Sea (LOSC) existed between the parties and that, therefore, it has no jurisdiction *ratione materiae* to entertain the case before it[1]. Thereafter, Spain presented written and oral statements in the course of the proceedings that resulted in the Advisory Opinion on flag State responsibility for illegal fishing in the Exclusive Economic Zone rendered by ITLOS in response to the request submitted by the Sub-Regional Fisheries Commission (SRFC)[2].

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[1] *M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain), Judgment,* ITLOS Reports (2013) 4. All the documents relating to the case are available at the ITLOS Web site. See R. Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2013", 30 *IJMCL* (2015) 1-35; C. Escobar, "España y el Tribunal Internacional de Derecho del Mar: especial referencia al caso M/V "Louisa", in J. Martín y Pérez de Nanclares (Dir.), *España y la práctica del Derecho Internacional, LXXV Aniversario de la Asesoria Jurídica Internacional del MEC* (Colección Escuela Diplomática 20, Madrid 2013) 179; P. Gautier, "The International Tribunal for the Law of the Sea: Activities in 2010", 10 *Chinese JIL* (2011) 865-881; R. Ojinaga, "The M/V "Louisa" Case: Spain and the International Tribunal for the Law of the Sea", 18 *SYbIL* (2013-2014) 199 -222; N. Peiris, "M/V Louisa: in search of a Jurisdictional basis in the Law of the Sea Convention", 29 *IJMCL* (2014) 149-157: E. Sessa, "Giurisprudenza Internazionale, International Tribunal for the Law of the Sea", 113 (3) *Il Diritto Marittimo,* (2011) 814-827; Y. Tanaka, "The M/V Louisa case (Saint Vincent and the Grenadines v. the Kingdom of Spain, 23 December 2010), Request for Provisional Measures", 26 *IJMCL* (2011) 481-490; Y. Tanaka, "A Note on the M/V "Louisa" Case", 45 *Ocean Development & International Law* (2014) 205-220.

[2] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC),* Advisory Opinion of 2 April 2015. See R. Ojinaga, "Spain and the Advisory Jurisdiction of the International Tribunal for

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More recently, Spain has been involved in the first preliminary objections proceeding brought before ITLOS since its creation in 1996. It was in relation to the dispute between Panama and Italy concerning the arrest and detention of the M/V "*Norstar*" as the result of judicial cooperation between Italy and Spain on the basis of the European Convention on Muttual Assistance in Criminal Matters on 20 April 1959. Having filed Panama its application with the ITLOS against Italy, this State contested the jurisdiction *ratione personae* of the Tribunal by considering it was not the proper respondent and that, in any event, Panama's claim would inevitably involve the ascertainment of the rights and obligations of a third State (Spain) in its absence from the proceedings and without its consent[3]. Both these arguments were rejected by ITLOS in its preliminary objections Judgment on 4 November 2016[4]. Between 10 and 13 September, 2018, the ITLOS held public-hearings on the merits of the case and heard the concluding arguments of the parties. The Tribunal plans to deliver the Judgment in spring 2019.

Besides the emphasis on the invocation of the *Monetary Gold* doctrine[5] with regard to Spain

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the Law of the Sea", 20 *SYbIL* (2016), 279-304.

[3] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Written Preliminary Objections under Article 294, paragraph 3, of the United Nations Convention on the Law of the Sea, 10 March 2016, at. 1.

[4] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 41. All the documents relating to the case are available at the ITLOS Web site, www.itlos.org/.

[5] C. Jiménez, "Fundamento, concepto y naturaleza jurídica de la doctrina del oro amonedado (tercero indispensable) en la jurisprudencia internacional", in M. Vargas and A. Salinas (cords), *Soberanía del Estado y Derecho Internacional*, homenaje al profesor Juan Antonio Carrillo Salcedo (Universidad de Córdoba, Servicio de Publicaciones: Universidad de Sevilla, Secretariado de Publicaciones: Universidad de Málaga (UMA), 2005) 733-755. On this matter, C. Chinkin, *Third Parties in International Law*, (Clarendon Press, Oxford 1993); "The East Timor Case before the International Court of Justice", 4 *EJIL* (1993) 206-222; B. Delcourt, "Un seul État vous marque ... La application de la jurisprudence de l'Or monétaire à l'affaire du Timor oriental", XXIX *RBDI* (1996), 191-215;; "Efectos explícitos e implícitos de la doctrina del oro amonedado: la retricción de la competencia de la CIJ en litigios de límites con presencia de trifinios", in *Pacis Artes*, Obra Homenaje al profesor Julio González Campos (Edifer, Madrid 2005) 291-325; F. Jouanner, "Le príncipe de l'or monétaire à propos de l'arrêt de la Cour du 39 juin 1885 dans l'affáire du Timor Oriental (Portugal c. Australie)", 100 *RGDIP* (1996), 673-713; N.S. Klein, "Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case", 21 *Yale Journal of International Law* (1996) 305-347; S. Torres, "The New Theory of "Indispensable Parties" under the Statute of the Internacional Court of Justice", in Wellens (ed.), *International Law: Theory and Practice* (Kluwer Law International, Dordrecht 1998) 737-750; "L'intervention dans la proèdure de la Cour internationale de Justice", *R. des C.*, t. 256 (Martinus Nijhoff, The Hague 1995) 197-457; A. Orakhelashvili, "The Competence of the International Court of Justice and the Doctine of the Indispensable Party: from Monetary Gold to East Timor and Beyond", 2 (2) *Journal of International Dispute Settlement* (2011) 373-392; S. Rosenne, "Article 59 of the Statute of the International Court of Justice Revisited", in *El Derecho Internacional en un mundo en transofrmación*, Liber Amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga, Vol. II (Fundación de Cultura Universitaria, Montevideo 1994) 1129-1158; M.A. Ruiz, "El "tercero indispensable" en el Asunto de Timor Oriental: una noción a medida de la Corte Internacional de Justicia para la determinación de su propia competencia", XLVIII *REDI* (1996) 99-124; T. Thiennel, "Third States and Jurisdiction of the Internacional Court of Justice: The *Monetary*

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in contentious proceedings before international courts and tribunals, it is also worth noting that main issues raised by the M/V "*Norstar*" case are in close relation with the subject-matter of the dispute over the detention of the M/V *Louisa* and more prominent ITLOS's statements in the M/V "*Louisa*" case. Accordingly, this note is structured into five sections. Firstly, a summary is given on the factual and procedural background of *the* M/V "*Norstar*" case. This is followed by an examination of the basis and scope of the jurisdiction of ITLOS to entertain the dispute by virtue of the unilateral declarations made by Panama and Italy under Article 287 LOSC. The following section is about jurisdiction and admissibility issues under discussion at the stage of the proceedings on preliminary objections; in particular, we will look at the arguments posed by Italy with regard to the interpretation of rules on international responsibility of States and the doctrine of indispensable parties which are of particular relevance to Spain. Last section provides conclusions on issues that may acquire a more relevant role in the development of the ITLOS's case law.

## (B)THE DISPUTE CONCERNING THE ARREST AND DETENTION OF THE M/V "NORSTAR"

On 17 December 2015, Panama filed an application with ITLOS instituting proceedings against Italy in a dispute concerning the arrest and detention of the M/V "*Norstar*", an oil tanker registered under the flag of Panama. From 1994 until 1998, the ship was allegedly engaged in supplying gasoil to mega yachts in an area described by Panama as "international waters beyond the Territorial Sea of Italy, France and Spain" and by Italy as "off the coasts of France, Italy and Spain"[6]. On 11 August 1998, the Public Prosecutor at the Court of Savona issued a Decree of Seizure against the M/V "*Norstar*", as *corpus delicti*, in the context of criminal proceedings against four Italian nationals and four foreign citizens for the alleged offences of criminal association aimed at smuggling mineral oils and tax fraud. As a result, the M/V "*Norstar*" was seized by Spanish authorities at the request of Italy when anchored at the bay of Palma de Mallorca on 24 September 1998[7].

With the Judgment of 13 March 2003, the Court of Savona acquitted all accused of all charges

*Gold* Principle", 57 *German Yearbook of International Law* (2014) 321-352; N. Zamir, "The applicability of the Monetary Gold principle in international arbitration", 33 *Arbitration International* (2017) 523-538.

6 *Ibid*., para. 41.

7 A request for judicial assistance was submitted by the Prosecutor at the Court of Savona pursuant to article 15 of the European Convention on Mutual Assistance in Criminal Matters, 72 UNTS 185 (adopted 20 April 1959, entered into force 12 June 1962) —amended by I y II Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters— and article 53 of the Schengen Agreement (Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. Schengen, OJ L 239, 22.9.2000, p 13; adopted 14 June 1985, entered in force provisionally on 15 June 1985 and definitively on 2 March 1986).

and ordered that the seizure of motor vessel *Norstar* be revoked and the vessel returned to the owner. The Public Prosecutor appealed the Judgment of 13 March 2003 but the appeal was limited to the sentencing of the individuals and was not made in relation to the vessel. On 25 October 2005, the Court of Appeal of Genoa upheld the judgment delivered by the Court of Savona. According to Italy, on 18 March 2003 the Court of Savona transmitted a copy of its judgment of 13 March 2003 to the Court of Palma de Mallorca, requesting the latter to execute the order for release of the M/V "*Norstar*". By letter dated 17 April 2003, the Spanish judicial authorities instructed the Provincial Maritime Service to lift the detention of the M/V "*Norstar*". On 21 July 2003, the detention was consequently lifted by the Provincial Maritime Service, with Order No. 84/03. The following day, the Captain of the Provincial Maritime Service informed the competent Spanish judicial authorities that the detention of the M/V "*Norstar*" had been lifted, and attached the relevant documentation as evidence[8]. On 6 September 2006, the Port Authority of the Balearic Islands, requested through the Court of Savona authorization to demolish the M/V "*Norstar*". On 31 October 2006, the Court of Appeal of Genoa issued an order stating that the judgment of the Court of Savona of 13 March 2003 has to be enforced and that there was no decision to be taken given that the destiny of the vessel, after having been given back to the party entitled, does not fall within the competence of that Court. On 13 November 2006, the Court of Appeal of Genoa transmitted a copy of its order of 31 October 2006 to the Port Authority of the Balearic Islands.

The dispute was submitted to the ITLOS pursuant to the declarations made by Panama and Italy under article 287 of the United Nations Convention on the Law of the Sea (LOSC)[9]. In its application, Panama claims compensation from Italy for damage caused by the illegal arrest of the M/V "*Norstar*". In support of its request, Panama contends that Italy violated articles 33, 73 (3) and (4), 87, 111, 226 and 300 LOSC; in particular, it rests upon the right of freedom of navigation provided in article 87.

In its Application, Panama requested that the dispute be referred to the Chamber of Summary Procedure pursuant to article 15, paragraph 3, of the Statute of the ITLOS, but Italy expressed its preference for the case to be heard before the Tribunal *in plenum*. Since the Tribunal did not include upon the bench a member of the nationality of either of the Parties to the dispute, both parties have availed themselves of the possibility to choose a judge *ad hoc*, pursuant to article 17 (3) of the Statute. Mr Tullio Treves was chosen by Italy and Mr Gudmundur Eiriksson was chosen by Panama.

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8 Italy included these documents as Annexes to its Counter-Memorial but as confidential documents.

9 United Nations Convention on the Law of the Sea, 1833 UNTS 3 (adopted 10 December 1982, entered into force 16 November 1994).

On 11 March 2016, Italy filed preliminary objections to the jurisdiction of ITLOS and the admissibility of Panama's claim under article 294 (3) LOSC and the proceedings on the merits were suspended[10]. On 4 November 2016, ITLOS delivered its Judgment on the preliminary objections. The Tribunal finds that it has jurisdiction to adjudicate the dispute and decides that Panama's application is admissible.

Notwithstanding the differences between the two cases, the *M/V "Norstar"* is a matter of interest in connection with the *M/V "Louisa"* case. Both cases deal with the exercise of the sovereign right of States to adjudicated suspected crimes, including measures relative to the detention of ships as *corpus delicti*. Notwithstanding, in the dispute on the *M/V "Louisa"*, the exercise of that right —regarding crimes committed in the Spanish territorial sea— was in conformity with LOSC and was considered by the ITLOS when criminal proceedings in Spain was still on-going. By the contrary, the dispute between Panama and Italy arises the question of the exercise of criminal jurisdiction by Italy regarding activities that could be were undermined, at least in part, in high seas and could be considered by the Tribunal as a wrongful act in the light of article 87 LOSC, and also extends to the question of the reparation of damages incurred by the *M/V "Norstar"*. Even if domestic legislation provides means for obtaining such reparation, the question arises about the conditions permitting that the reclamation may be claimed under international law, both as the consequence of the commission of an internationally wrongful act or even, more controversially, in absence of it[11].

### (C)ARTICLE 287 LOSC AS THE LEGAL BASIS FOR JURISDICTION OF ITLOS IN THE SPECIFIC DISPUTE

In its application, Panama invoked as the basis for the jurisdiction of the ITLOS, the declarations made by the Parties in accordance with article 287 LOSC. The "choice of procedure" clause referred in article 287 (1) establishes that, upon ratification of LOSC or at any time thereafter, States parties may file a declaration selecting one or more of the following jurisdictions: International Tribunal for the Law of the Sea, International Court of Justice, arbitration under Annex VII or special arbitration under Annex VII. If the parties to a dispute have chosen the same forum, the dispute will be submitted only to that forum, unless the parties

[10] *The M/V "Norstar" (Panama v. Italy)*, Order 2016/12, 15 March 2016.

[11] In the opinion of Judge *ad hoc* Treves, there is one clear example of a provision, article 110 (3) LOSC, prescribing the compensation of damage caused by acts that are not wrongful, but not in situations as that of the *M/V "Norstar" (The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, Dissenting Opinion of Judge *ad hoc* Treves, para. 15. A close examination on issues regarding the action for damages as exhaustion of local remedies, estoppel, acquiescence and extensive prescription (time bar) is addressed in the Separate Opinion of Judge Lucky.

agree otherwise (Article 288 (4)). If the parties have not selected the same forum, the dispute will be submitted to arbitration under Annex VII, unless the parties agree otherwise (Article 288 (5)).

Italy ratified LOSC on 13 January 1995 and made a declaration under the article 287 on 26 February 1997. Then, Italy chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other. In accordance with article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the ITLOS or the ICJ. The declaration states:

> "In implementation of article 287 of the United Nations Convention on the Law of the Sea, the Government of Italy has the honour to declare that, for the settlement of disputes concerning the application or interpretation of the Convention and of the Agreement adopted on 28 July 1994 relating to the Implementation of Part XI, it chooses the International Tribunal for the Law of the Sea and the International Court of Justice, without specifying that one has precedence over the other.
>
> In making this declaration under article 287 of the Convention on the Law of the Sea, the Government of Italy is reaffirming its confidence in the existing international judicial organs. In accordance with article 287, paragraph 4, Italy considers that it has chosen "the same procedure" as any other State Party that has chosen the International Tribunal for the Law of the Sea or the International Court of Justice".

Panama ratified the Convention on 1 July 1996 and made a more limited declaration under article 287 of the Convention on 29 April 2015, restricted to the specific case. The declaration states:

> "In accordance with paragraph 1 of article 287 of the United Nations Convention on the Law of the Sea of December 10th, 1982, the Government of the Republic of Panama declares that it accepts the competence and jurisdiction of the International Tribunal of the Law of the Sea for the settlement of the dispute between the Government of the Republic of Panama and the Government of the Italian Republic concerning the interpretation or application of LOSC that arose from the detention of the Motor Tanker NORSTAR, flying the Panamanian flag".

Even if the Parties did not raise the issue of the scope of their declarations, the Tribunal considered it appropriate to restate its jurisprudence by stating that LOSC does not preclude a declaration limited to a particular dispute[12]. Therefore,

> "[...] in cases where States Parties have made declarations of differing scope under article 287 of the Convention, its jurisdiction exists only to the extent to which the substance of the declarations of the two parties to a dispute coincides"[13].

[12] Judgment, para. 58. See M/V "Louisa" (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Judgment, ITLOS Reports (2013) 4, at 30, para. 79.

[13] *Ibid.* See M/V "Louisa" (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Judgment, ITLOS Reports

On this point the Tribunal is relaying in its previous decision in the *M/V Louisa* case and the *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* case, considered as the initiation of a new practice regarding the implementation of Article 287 and consisting in the selection of a forum for a particular category of disputes or a specific dispute. The view that a declaration under article 287 confined to the particular case is compatible with that disposition is debatable, as posed by judge *ad hoc* Treves who decided not entry into this discussion with the Tribunal[14].

Certainly, the tendency to the inclusion of limitations *ratione materiae* to the jurisdiction of ITLOS in the framework of unilateral declarations made by States under Article 287 must be examined on the basis of a systematic interpretation of Part XV of LOSC. The differences between the ICJ's facultative jurisdiction for States making declarations under Article 36 of the Statute and the compulsory jurisdiction system established in Section 2, Part XV, of LOSC are remarkable. The only exceptions and limitations to applicability of compulsory procedures are those provided in articles 297 and 298, and article 309 prohibits reservations to LOSC [15]. In addition, the limitation of the declaration of acceptance of the ITLOS's jurisdiction to one particular case "is hardly reconcilable with the principle of equality of arms"[16]. In any event, the Judgment on preliminary objections in the *M/V "Norstar"* "touches upon the scope of the Tribunal's jurisdiction in paragraph 58 but not as to whether such a practice of limited declarations is legitimate under the Convention"[17].

(2013) 4, at p. 30, paras. 81. In this regard, the ITLOS made recourse to the ICJ's jurisprudence on Article 36(2) of its Statute (*Certain Norwegian Loans*, Judgment, I.C.J. Reports (1957) 9, at 23; see also *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports (2006) 6, at 39, para. 88).

[14] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, Dissenting Opinon of Judge *ad hoc* Treves, para 4.

[15] Moreover, as posed in previous commentary on the *M/V Louisa* case, a reasonable interpretation of the admissibility of limitations to the competence of the Tribunal, or other particular forum chosen by States under Article 287 of LOSC, leads to the conclusion that matters excluded by virtue of that unilateral declarations fall, at last, into the residual jurisdiction of the arbitral tribunal. In any case, the inclusion of "reservations" in unilateral declarations under Article 287 increase the risk of fragmentation of the object of the controversies and could raise new problems of coordination among international tribunals acting both inside and outside the framework of the LOSC's settlement of disputes regime. In the past, consideration by the Tribunal of the concurrence of jurisdictions issues, both in the *Southern Bluefin Tuna* case and the *MOX Plant* case, were drew to great criticism (Ojinaga *supra* n. 1, at 204-205).

[16] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, Separate Opinion of Judges Wolfrumg and Attard, para 10.

[17] *Ibid.*, para. 10.

## (D) OBJECTIONS TO JURISDICTION OF THE ITLOS AND THE ADMISSIBILITY OF THE APPLICATION

On 11 March 2016, Italy filed preliminary objections to the jurisdiction of ITLOS and the admissibility of Panama's application under article 294 (3) LOSC. It was the first preliminary objections case in the twenty-year history of the Tribunal. So, some judges considered that "the Judgment could have dealt with the new matter of procedural objections and established a legal regime in that regard before dealing with jurisdiction and admissibility of the application. Furthermore, the operative part of the Judgment should have been more conventional"[18]. In this regard, there has been a deal of criticism which focuses on the fact that operative provisions should have contained a formal disposition of each of the preliminary objections, so that each objection would have been voted on separately in order to ensure great advantage and transparency[19].

Italy contested the jurisdiction of the ITLOS on the grounds that (i) there was not dispute between Panama and Italy; (ii) Italy was not the proper respondent and, in any event, Panama's claim would inevitably involve the ascertainment of the rights and obligations of a third State in its absence from the proceedings and without its consent; (iii) Panama has failed to appropriately pursue the settlement of the dispute by negotiation of other peaceful means under article 283 LOSC.[20] All of these objections to jurisdiction were rejected by the Tribunal, but its decision has not been without criticism because a more rigorous test could be applied to the determination of the jurisdiction *ratione materiae* and, even, it would probably have been good reasons for declaring that some points regarding objections were not of an exclusive preliminary character on the basis of article 97 (1) of the Rules of the Tribunal[21]. Certainly, some statements need further explanation and deemed controversial.

Italy also raised various objections to the admissibility of the Panama's application that relates to the nature of the Panama claim as an exercise of diplomatic protection, the nationality of the reclamation and the application of the rule of exhaustion of local remedies as required by article 295 LOSC. Consistent with its previous jurisprudence[22], even if open to criticism, the ITLOS rejected these objections by restating that "the exercise of diplomatic protection by a

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[18] Separate Opinion of Judge Ndiaye, at 1.

[19] Declaration of Judge Heidar, para. 10 and 15-16; Dissenting Opinion of Judge ad hoc Treves, para. 2.

[20] M. Aznar, "The obligation to exchange views before the International Tribunal for the Law of the Sea: a critical appraisal", 17/1 *RBDI* (2014) 237-254.

[21] Separate Opinion of Judges Wolfrumg adn Attard, para. 3. Similarly, Dissenting Opinion of Judge *ad hoc* Treves, para. 18.

[22] *The M/V 'Saiga' (No 2), (Saint Vincent and the Grenadines v Guinea)*, Merits, Judgment, ITLOS Reports (1988) 2, at 62-63; *M/V "Virginia G" Case (Panama / Guinea.Bissau)*, Judgment, ITLOS, Reports (2014), at 48.

State in respect of its nationals is to be distinguished from claims made by a flag State for damage in respect of natural and juridical persons involved in the operation of the ship who are not nationals of that State"[23].

## (1) Jurisdiction *Ratione Materiae*: The Existence of a Dispute Concerning Articles 87 and 300 LOSC

The existence of a dispute is the primary condition for a court or tribunal to exercise its judicial functions. In its Order of 27 August 1999, in *the Southern Bluefin Tuna* cases[24] the Tribunal stated that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests"[25] and '[i]t must be shown that the claim of one party is positively opposed by the other"[26]. This jurisprudence of the ICJ has been reaffirmed further in the case of *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. [27]

In its advisory Opinion of 30 March 1950 on the Interpretation of *Peace Treaties Case*, the ICJ stated: "[w]hether there exists an international dispute is a matter for objective determination"[28]. Notwithstanding, it is also necessary that the Applicant established that the scope of the dispute is covered by the jurisdiction of the Tribunal in general and -regarding the ITLOS- by declarations made under article 287 LOSC by the parties. In line with its Judgment in the *M/V "Louisa"* case[29] —where the Tribunal made recourse to the *Oil Platforms* case[30]—, the ITLOS stated again in the preliminary objections Judgment on *M/V "Norstar"*

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[23] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 229.

[24] *The Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, ITLOS Reports (1999), at 293, para 44.

[25] Citing *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, 11.

[26] Citing *South West Africa*, Preliminary Objections, Judgment, I.C.J. Reports (1962) 238.

[27] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, 5 October 2016, paras 27 et seq.

[28] *Interpretation of Peace Treaties with Bulgaria, Hungary and Rumania, First Phase*, (1950) ICJ Report 65, at 70: Second Phase, ICJ Report (1950) 221. The dictum was applied again in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary Objections)*, (1996) ICJ Report 595, at. 614

[29] "[...] To enable the Tribunal to determine whether it has jurisdiction, it must establish a link between the facts advanced by Saint Vincent and the Grenadines and the provisions of the Convention referred to by it and show that such provisions can sustain the claim or claims submitted by Saint Vincent and the Grenadines."*M/V "Louisa" (Saint Vincent and the Grenadines* v. *Kingdom of Spain)*, Judgment, ITLOS Reports (2013) 4, at p. 32, para. 99.

[30] "[T]he Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has

that:

> "[...] in order for the Tribunal to determine whether a dispute between the two Parties in the present case concerns the interpretation or application of the Convention, the Tribunal must establish a link between the facts advanced by Panama and the provisions of the Convention referred to by it and show that such provisions can sustain the claims submitted by Panama"[31]

As previously note, in support of its request Panama contends that Italy violated articles 33, 73 (3) and (4), 87, 111, 226 and 300 LOSC. However, in the course of oral proceedings, Panama conceded that articles 58, 73 and 226 were not applicable[32]. Additionally, the ITLOS stated that Italy had not claimed to be acting under Article 33 and Article 111 and it therefore considered that those provisions had not relevance to the case[33]. That left Articles 87 and 300 LOSC as the rules applicable to the circumstances to the case. On Article 87 the ITLOS concluded that:

> "The Decree of Seizure by the Public Prosecutor at the Court of Savona against the M/V "*Norstar*" with regard to activities conducted by that vessel on the high seas and the request for its execution by the Prosecutor at the Court of Savona may be viewed as an infringement of the rights of Panama under article 87 as the flag State of the vessel. Consequently, the Tribunal concludes that article 87 is relevant to the present case"[34].

It might seem difficult to reconcile this ruling of the ITLOS with is finding in the M/V "*Louisa*" case, when the Tribunal found that article 87 cannot be interpreted in such a way as to grant a ship detained in port a right to leave the port and gain access to the high seas notwithstanding its detention in the context of legal proceedings against it. From this standpoint, it is difficult to see how a request for the Spanish authorities to detain the M/V "*Norstar*" could, in itself, interfere with Panama's freedom of navigation on the high seas[35]. Nevertheless, it seems to be assumed by the ITLOS that Panama had invoked a possible violation of article 87 LOSC arguing on the basis of the fact that the Decree Seizure of the Public Prosecutor of Savona concerned crimes derived from bunkering activities conducted on the high seas[36]. As a consequence, the violation of Article 87 could result from enforcement action for the sole reason that it was decided in relation to activities carried out by the vessel when it was on the high

jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2." (*Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment*, I.C.J. Reports 1996, 803, at 810, para. 16).

[31] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 110.

[32] *Ibid.*, para. 116, 118 y 127.

[33] *Ibid.*, para. 125. However, Judge Lucky is of the opinion that the Italian authorities incorrectly applied the provisions of article 33, paragrapah 1 (a) LOSC (para. 48).

[34] *Ibid.*, para. 122.

[35] R. Churchill, "Dispute Settlement in the Law of the Sea: Survey for 2015, Part II and 2016", 32 *The International Journal of Marine and Coastal Law* (2017) pp 379-426, at 383.

[36] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, Dissenting Opinion of Judge *ad hoc* Treves, para. 12.

seas. This broad interpretation of article 87 has been rejected by Judges Wolfrum and Attard which emphasized that the *M/V "Norstar"* case differs sharply from the *Arctic Sunrise* case[37] because, in the latter case, enforcement measures were taken against the vessel when it was on the high seas and the Arbitral Tribunal considered this a violation of article 87 LOSC[38].

Nonetheless, further to the Judgment on preliminary objections, Italy noted that during the incidental proceedings parties did not discuss in detail the scope of the application of the Decree of Seizure and asserted that, contrary to the assumption of the Tribunal, it didn't target the activities conducted by *M/V "Norstar"* on the high seas but contemplates the detention and arrest of the vessel because it was allegedly part of a unitary criminal plan concerning the commission of the crimes of tax evasion and smuggling in the Italian territory[39]. In addition, Italy argued that at the time when the Decree of Seizure was enforced, the vessel was in Spanish internal waters and, therefore, it did not enjoy the right to freedom of navigation under Article 87 (1)[40], then relying on the ITLOS's statement regarding the interpretation of Article 87 in the *M/V Louisa Case* and remaining then fully opposed to a broader interpretation of Article 87.

In view of the above, the judgment on preliminary objections would have indeed required to submit the claim of the existence of jurisdiction *ratione materiae* to a more rigorous test[41];

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[37] PCA Case No. 2014-02, In the Matter of the Arctic Sunrise Arbitration before an Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Kingdom of the Netherlands and The Russian Federation, Award of 14 August 2015, paras 226 et seq.

[38] Separate Opinion of Judges Wolfrum and Attard, at 12-13, paras 35-39 and 42.

[39] *The M/V "Norstar" (Panama v. Italy)*, Counter-Memorial of Italy, Vol. I, Counter-Memorial, 11 October 2017, para. 129 and 151. This view of the facts has been already adopted by Judges Wolfrum and Attard in its Joint Separate Opinion to the Judgment on preliminary objections (at 13, para. 40). More specifically, Judge Lucky exposed that "[t]he essence of the conduct under scrutiny by the Italian prosecuting authority consisted in the purchase of oil products as ship's stores in non-European Union countries, in Italy and in other European Union ports under a customs-free regime. These oil products were then to be used to refuel yachts and mega yachts, including many registered in Italy. These yachts and mega yachts subsequently introduced the fuel into the Italian territorial sea without making a declaration for customs purposes. The *M/V "Norstar"* loaded marine gas oil on four occasions in the ports of Gibraltar, Livorno, Barcelona and Livorno again" (Separate Opinion of Judge Lucky, at 5, para. 19).

[40] *Ibid.*, para. 75.

[41] As posed by Judges Wolfrum and Attard, "[t]he decision on preliminary objections is rendered in the form of a judgment which decides on the objections raised with binding effect on the parties concerned (res judicata). This means, in principle, that there is no possibility to reintroduce an objection against jurisdiction and admissibility decided upon by a judgment on preliminary objections or to reopen an issue which was dealt with in this context in the merits phase. In this respect, the procedure of preliminary objections differs significantly from a decision on jurisdiction in the course of proceedings on provisional measures. In the latter case, the decision on jurisdiction and admissibility is taken prima facie without prejudice to the merits; in a procedure on preliminary objections such a decision is, as already indicated, final. This necessarily has consequences concerning the assessment of facts, the interpretation and application of the provisions on jurisdictional limitations, and on limitations concerning admissibility. The standards to be applied by the Tribunal have to reflect that the decision

in particular, it has been evidenced the necessary difference with the test which could be utilized in provisional measures proceedings in order to support the view that jurisdiction exists *prima facie*[42]. The mere acceptation that article 87 is relevant for the case "is a surprisingly tentative statement, given that the ITLOS was making a definitive ruling about jurisdiction"[43]. In the same vein, Judge *ad hoc* Treves expressed the view that the Tribunal "while finding that a dispute exists between Panama and Italy, studiosly avoids specifying what its object is"[44].

Regarding Article 300 LOSC, the principle of good faith and the prohibition of the abuse of rights in the area of the Law of the Sea, the ITLOS repeated its case law as established in the M/V *Louisa* case[45], noting that "it is apparent from the language of article 300 of the Convention cannot be invoked on its own"[46]. Then, "a claim pursuant to Article 300 is

is a final one; consequently, we feel the prima facie standard establishing jurisdiction concerning provisional measures is not sufficient in proceedings on preliminary objections" (Separate Opinion, para. 4). The same argument has been made by Judge *ad hoc* Treves, (Dissenting Opinion, para. 13).

[42] *Ibid*., para. 13. The distinction between jurisdiction *prima facie* in proceedings on provisional measures and jurisdiction on the merits was established by the ITLOS in the M/V "*Saiga*" (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), Provisional Measures, Order of 11 March 1998, ITLOS Reports (1998) 24, at 37, para. 29. *The* M/V "*Louisa*" (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Provisional Measures, Order, 23 December 2010. para. 69. The case law of the ITLOS confirms it has adopted a low threshold on *prima facie* jurisdiction as that assumed by the ICJ (Case *Anglo-Iranian Oil Co. (United Kingdom v. Iran) (Interim Measures)*, Order, I.C.J., Reports (1951) 89, at 93. Criticism had been expressed regarding ITLOS's approach to *prima facie* jurisdiction, especially when the Tribunal is called upon to decide *prima facie* on its own jurisdiction under Article 290 (1), as in the *Southern Bluefin Tuna Case and MOX Plant Case* (Y. Kerbrat, "Le différend relative à l'usine Mox de Sellafield (Irlande/Royaume—Uni): connexité des procedures et droit d'accès à l'informationen matière environnementale", *AFDI* (2004) 607-623; R. Rayfuse, "The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention", 36 *VUWRL* (2005), 683; B. Kwiatkowska, "The Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) Cases"15 *Int'l J Marine and Coastal*, (2000) 1. Criticism has also been expressed in other situations as in the M/V *Louisa* (*Saint Vincent and the Grenadines v. Kingdom of Spain*), Provisional Measures, Order, 23 December 2010, Dissenting Opinion of Judge Wolfrum, para.7).

[43] Churchill, *supra* n. 35, at 383. In this regard, judges Wolfrum and Attard expressed criticism with the statement in paragraph 122 of the Judgment that the Decree of the Seizure against the M/V "*Norstar*" "may be viewed" as an infringement of the rights of Panama under article 87 as the flag State of the vessel which they consider as a repetitiion of the statement made by Panama but lacking any legal reasoning. In this respect, they considers that "the standart of appreciation applied by the Judgment does not even meet the *prima facie* standart of appreciation in provisional measures proceedings" (Separate Opinion, para. 5).

[44] Dissenting Opinion of Judge *ad hoc* Treves, para. 6.

[45] M/V "*Louisa*" (*Saint Vincent and the Grenadines* v. *Kingdom of Spain*), Judgment, ITLOS Reports (2013) 4, at p. 41, para. 137. Similarly, M/V "*Virginia G*" (*Panama/Guinea-Bissau*), Judgment, ITLOS Reports (2014) 4, para. 398-399.

[46] *The* M/V "*Norstar*" (*Panama v. Italy*), Preliminary Objections, Judgment of 4 November 2016, para. 131. Regarding the applicability of article 300, Spain contended that a systematic interpretation of the LOSC in line with the Vienna Convention on the Law of Treaties leads to the conclusion that the principle of good faith and the prohibition of the abuse of rights embodied in Article 300 LOSC is applicable *in connection to the exercise of the rights, jurisdiction and freedoms recognized in the Convention* (Presentation by Professor Escobar Hernández, Agent, Counsel and Advocate of Spain, Verbatin Record, 10 October 2012, ITLOS/PV.12/C18/11, 10; Ojinaga,

necessarily linked to the alleged violation of another provision of the Convention"[47]. Accordingly:

> "The Tribunal concluded in paragraph 122 that article 87 of the Convention concerning the freedom of the high seas is relevant to the present case. The Tribunal considers that the question arises as to whether Italy has fulfilled in good faith the obligations assumed by it under article 87 of the Convention. Therefore, the Tribunal is of the view that article 300 of the Convention is relevant to the present case"[48].

In the light of the foregoing, the ITLOS rejected the objection raised by Italy based on non-existence of a dispute concerning the interpretation or application of LOSC[49].

Further the preliminary objections Judgment, Panama had asserted that by ordering the arrest of the M/V "*Norstar*" in the exercise of its criminal and tax jurisdiction for bunkering activities performed by Panama on the high seas, Italy also breached articles 92, 97(1) and 97(3)[50]. Italy has opposed by considering that Panama is precluded from enlarging the dispute before the Tribunal. So, in its Judgment of the merits, the ITLOS will have to state if Panama is bringing a new claim or an additional claim. In its previous statement in the M/V *Louisa* case, the ITLOS explained that "the dispute brought before the Tribunal by an application cannot be transformed into another dispute which is different in character"[51]. This would be contrary to Articles 24 (1) and 54 of the Rules, which are considered as essential from the point of view of legal security and the good administration of justice[52]. In order for a new claim to be admitted "it [...] must arise directly out of the application or be implicit in it"[53].

Even more controversial could be Panama new or additional claims concerning human rights[54]. While LOSC is not a human rights instrument, it must be admitted that human rights

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*supra* n. 1, at 216).

[47] *Chagos Marine Protected Area Arbitration* (*Mauritius v. United Kingdom*), PCA Case No. 2011-03, Award, 18 March 2015, para. 303.

[48] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 132.

[49] *Ibid.*, para. 133.

[50] *The M/V "Norstar" (Panama v. Italy)*, Memorial of the Republic of Panama, 11 April 2017, para. 92.

[51] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports (2013) 4, para. 143.

[52] *Ibid.*, para. 148. Citing *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*), Preliminary Objections, Judgment I.C.J., Reports (1992) 240, para. 67-69. Quoting its own case law, the ICJ held that it is not sufficient that there should be links between the original claim and the additional one of a general nature. Additional claims, must have been implicit in the application (*Temple of Preah Vihear*, Merits, I.C.J. Reports (1962) 36) or must arise 'directly out of the question which is the subject-matter of that Application' (Fisheries Jurisdiction (*Federal Republic of Germany v. Iceland*), *Merits*, I.C.J. Reports (1974) 203, para. 72).

[53] *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports (2013) 4, para. 142.

[54] It claims that: "[b]y applying its customs laws and ordering and requesting the arrest of the M/V "*Norstar*", Italy breached its international obligations concerning the human rights, fundamental freedoms, and the

should be taken into consideration in the process of applying the Convention. However, the ITLOS has never ruled *in abstracto* on violations of due process and human rights. This is merely a consequence of its specific jurisdiction as the International Tribunal for the Law of the Sea[55]. More explicitly, the Arbitral Tribunal constituted under Annex VII in the *Artic Sunrise* case stated that:

> "The Tribunal considers that, if necessary, it may have regard to general international law in relation to human rights in order to determine whether law enforcement action such as the boarding, seizure, and detention of the Arctic Sunrise and the arrest and detention of those on board was reasonable and proportionate. This would be to interpret the relevant Convention provisions by reference to relevant context. This is not, however, the same as, nor does it require, a determination of whether there has been a breach of Articles 9 and 12(2) of the ICCPR as such. That treaty has its own enforcement regime and it is not for this Tribunal to act as a substitute for that regime. In determining the claims by the Netherlands in relation to the interpretation and application of the Convention, the Tribunal may, therefore, pursuant to Article 293, have regard to the extent necessary to rules of customary international law, including international human rights standards, not incompatible with the Convention, in order to assist in the interpretation and application of the Convention's provisions that authorise the arrest or detention of a vessel and persons. This Tribunal does not consider that it has jurisdiction to apply directly provisions such as Articles 9 and 12(2) of the ICCPR or to determine breaches of such provisions."[56]

### (2)Jurisdiction Ratione Personae: Italy is the Proper Respondent and Spain is not an Indispensable Party

Italy submitted that ITLOS lacks jurisdiction *ratione personae* in the case on the basis of three arguments, considering that each of these three grounds alone was sufficient to establish the lack of jurisdiction of the Tribunal. All of them have serious implications for Spain:

> "First, Italy argues that it is not the proper respondent in this case because the Decree of Seizure of the M/V "*Norstar*" issued by the Italian judicial authorities does not amount per se to an internationally wrongful conduct. Second, Italy argues that it is not the proper respondent

performance of the obligations of the persons involved or interested in the operations of the M/V "*Norstar*" and so did not conform to the due process of law" (*The M/V "Norstar" (Panama v. Italy)*, Memorial of the Republic of Panama, 11 April 2017, para. 133. Panama invoques a number of human rights provisions that Italy would have violated. These include Article 17 of the Universal Declaration of Human Rights; Articles 17 and 54 of the Charter of Fundamental Rights of the European Union; Articles 1 and 2 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms; Articles 4 of Protocol 2 to the Convention for the Protection of Human Rights and Fundamental Freedoms (*Ibid.*, paras 139-148).

[55] Ojinaga, *supra* n. 1, at. 216-217.

[56] *Arctic Sunrise*" (*Kingdom of the Netherlands v. Russian Federation*), PCA Case No. 2014-12, Award on the Merits, 14 August 2015, paras. 197–198.

> because the conduct of the authorities of Spain could not be attributable to Italy. Third, Italy argues that, in any event, the Tribunal may not exercise jurisdiction because such exercise over the merits of the case would imply adjudicating on rights and duties of a State absent from the present proceedings, without its consent"[57].

Regarding the first argument, Italy invoked the jurisprudence of the ICJ in the case concerning *the Gabčíkovo-Nagymaros Project*[58] in order to conclude that, asuming that the arrest of the M/V "*Norstar*" was to be considered as internationally unlawful, the Order for Seizure of the Italian judiciary could only be deemed as conduct 'preparatory' to an internationally wrongful act; namely, the material arrest and detention of the M/V "*Norstar*" executed not by Italian enforcement officials but by the Spanish authorities. By the contrary, Panama emphasized that the order of arrest was an internationally wrongful act because it was issued in contravention of several provisions of LOSC and Spain merely provided judicial assistance. Finally, the ITLOS considered that the facts and circumstances of the case indicate that, although the arrest took place as the result of judicial cooperation between Italy and Spain, "the Decree of Seizure and the request for its enforcement by Italy were central to the eventual arrest of the vessel. It is clear that without the Decree of Seizure, there would have been no arrest"[59]. Consequently, the Tribunal finds that the dispute before it concerns the rights and obligations of Italy and that its decision would affect the legal interests of Italy, so it is the proper respondent to the claim made by Panama in these proceedings[60]. Then,

> "The Tribunal does not consider relevant to the present case the reference made by Italy to the distinction between a State's conduct that completes a wrongful act and the State's conduct that precedes such conduct and does not qualify as a wrongful act, stated in the Gabčíkovo-Nagymaros Project case and the preparatory work of the ILC. The present case, which involves the action of more than one State, fits into a situation of aid or assistance of a State in the alleged commission of an internationally wrongful act by another State"[61].

The response of the ITLOS to the second ground of objection is in connection with the terms indicated above, so that

> "Having made the above findings, the Tribunal considers it unnecessary to determine the validity of Italy's second ground of objection, namely, that the conduct of Spain could not be attributable to Italy. The Tribunal recalls that Italy made this argument as "complementary submissions" to its first argument that the Decree of Seizure of the M/V

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57 *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 135.
58 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports (1997) 7, at p. 54, para. 79.
59 *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 165.
60 *Ibid.*, para 167-168.
61 *Ibid.*, para. 166

> "*Norstar*" does not per se amount to a breach of an international obligation. As the Tribunal has rejected the first argument of Italy and found that Italy is the proper respondent, the question whether the conduct of Spain is attributable to Italy is irrelevant for the purpose of determining the proper respondent"[62].

Although Italy posed the second ground of objection as subsidiary to the first one, the ITLOS has considered unnecessary to answer it just because the first ground had been rejected. In any case, ITLOS considers the case fits in abstract within the framework of article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission (ILC) and excludes the application of article 6 -conduct of organs placed at the disposal of a State by another State- as argued by Italy and contested by Panama.[63] The position of ITLOS regarding the nonapplication of this rule seems to be in conformity with the ILC's commentary when it states that "article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise"[64]. On the other hand, article 16 is characterised by the stringent conditions of complicity[65] that could provide legal basis for international responsibility of the State.[66] In

[62] *Ibid.*, para. 169.

[63] Panama considered applicable article 6 because the Spanish authorities were indeed put at the disposal of Italy and "did not act independently but rather under the exclusive direction and control of Italy as the receiving or beneficiary party" (*Ibid.*, para. 153). and contended that the *Xhavara* case is not comparable to the M/V "*Norstar*" (*Xhavara and Others v. Italy and Albania*, Decision of 11 January 2001, Appl. No. 39473/98, ECHJ). It posed that in the *Xhavara* case Italy action was not a mere execution of mutual assistance but in execution of its own decision on the basis of a bilateral agreement authorizing the Italian Navy to board and search Albanian boats. Thus, in the *Xhavara* case the sinking of the Albanian ship was directly caused by the Italian warship so it observed that if "Spain had used excessive force and had damaged the Norstar when putting its organ at the disposal of Italy, Panama would have considered Spain as the respondent for the wrongful act of the sending State" (*Ibid.*, para. 154).

[64] UN International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UN Doc. A/56/10, 2001, 44. In this regard, ILO cites the above mentioned *Xhavara Case* –where the conduct of Italy in policing illegal immigration at sea pursuant to an agreement with Albania was not attributable to Albania- and that of the conduct of Turkey taken in the context of the Turkey-European Communities customs union where the conduct was still attributable to Turkey (WTO, Report of the Panel, Turkey: Restrictions on Imports of Textile and Clothing Products (WT/DS34/R), 31 May 1999, paras. 9.33–9.44).

[65] H.P. Aust, *Complicity and the Law of State Responsibility*, (Cambridge University Press, 2013), 225 et seq; V. Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Oxford and Portland, Oregon 2016); G. Nolte & H. P. Aust, "Equivocal Helpers – Complicity States, Mixed Messages and International Law", 58 *ICLQ* (2009) 1-30.

[66] State practice has been mainly related to the use of force, but a State also may incur responsibility if it assists another State to circumvent sanctions imposed by the UN Security Council or provides material aid to a State that uses the aid to commit human rights violations (Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, cit., at 66). The ICJ made reference to article 16 and endorsed it as reflecting customary international law in the *Application of the Convention on the Prevention and Punishment*

particular, the double condition of both (actual) knowledge of the circumstances in which aid or assistance is intended to be used by the acting state[67] and the intention to facilitate the commission of the wrongful conduct[68], which must actually occur, is rather unlike to be met in judicial assistance cases as well as in extradition[69]. So, in this later field of law, "[t]he difficulty in relying on Article 16 of the ARSIWA to deal with most complicity scenarios in the context of extradition and related transfers has been remedied by resort to primary rules that can take precedence as *lex specialis* (as per Article 55 of the ARSIWA)"[70].

Another option has been the reliance on the concept of attribution, instead of the rules on derived responsibility under ARSIWA. In particular, the European Court of Human Rights (ECHR) has adopted this line of reasoning in the *Stephens v. Malta* case[71], latter reaffirmed in *Toniolo v. San Marino and Italy* case[72] and the admissibility decisions in *Wedler v. Poland*[73] and *Benioashvili v. Russia and Georgia*[74]. The main case is *Stephens v. Malta* in relation to the extradition of a UK national who was arrested and detained in Spain as the result of an extradition request by the Maltese authorities. Following an appeal by the applicant, the Maltese Civil Court ruled that the warrant was defective under Maltese law as the issuing court

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*of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 February 2007.

67 Attemps to also include constructive knowledge —that the complicit state should have known that it was asisting in the commission of an internationally wrongful act— in article 16 ARSIWA were rejected (J. Crawford, *State Responsibility, The General Part* (Cambridege University Press, 2013, at 406.

68 H. Moynean, "Aiding and Assiting: The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility", 67 *ICLQ* (2018), 455-471.

69 A. Constatinides, "The Practice of Shared Responsibility in relation to Extradition", SHARES Research Paper 77 (2016), at 18; B. Malkani, "The Obligation from Assisting the Use of the Death Penalty", 62 ICLQ (2013) 523-556; M. den Heijer, 'Shared Responsibility before the European Court of Human Rights' 60 *NILR* (2013).

70 The practice and case law of extradition provides a fertile ground for the development of rules of shared responsibility of the cooperating states. But when courts and treaty bodies have grounded the responsibility sending states for contributing to the harm inflicted on the individual by the receiving states none seem to have resorted to the rules of complicity under article 16 of the International Law Commission (ILC) on Responsibility of States for Internationally Wrongful Acts, "because the primary obligation of sending states have been broadened in the case law of the ECtHR and treaty bodies so as to substitute for any derived responsibility they could have incurred as a result of the transfer" (A. Constatinides, *supra* note 69, at 18).

Similarly, while empathizing the relevance of these rules in connection with many forms of cooperation in controlling migration, it has been questioned how these categories of derived responsibility embodied in articles 16, 17 and 18 of the ARSIWA "correspond to the doctrine of positive obligations under human rights law, which may also entail a duty to undertake preventive or protective action in respect of human rights violations committed by another state" (M. Heijer, *Europe and Extraterritorial Asylum* (Studies in International Law, Hart Publishing 2011), at 101).

71 *Stephens v. Malta* (No. 1), App. No. 11956/07 (ECHR, 21 April 2009).

72 *Toniolo v. San Marino and Italy*, App. No. 44853/10 (ECHR, 26 June 2012).

73 *Wedler v. Poland* (*Decision*), App. No. 44115/98 (ECHR, 27 May 2003).

74 *Benihasvili v. Russia and Georgia* (*Decision*), App. No. 39549/02 (ECHR, 13 March 2012).

had acted *ultra vires* and lacked jurisdiction over non-Maltese national accused of committing a crime outside Malta. The application before the ECHR was filed against both Spain and Malta but the Court decided to strike the applicant's complaints lodged against Spain out of its list of cases. The ECHR referred to its case law on extraterritorial jurisdiction, thus implying that through the arrest warrant Malta had exercised control over the applicant when he was arrested in Spain. It noted that 'the applicant's deprivation of liberty had its sole origin in the measures taken exclusively by the Maltese authorities pursuant to the arrangements agreed on by both Malta and Spain under the European Convention on Extradition"[75]. By setting in motion a request for the applicant's detention pending extradition, the responsibility had lain with Malta to ensure that the arrest warrant and extradition request were valid as a matter of both its substantive and procedural law. In addition, the ECHR stated that,

> "In the context of an extradition procedure, a requested State should be able to presume the validity of the legal documents issued by the requesting State and on the basis of which a deprivation of liberty is requested. It is to be noted that in the instant case the arrest warrant had been issued by a court which did not have the authority to do so, a technical irregularity which the Spanish court could not have been expected to notice when examining the request for the applicant's arrest and detention. Accordingly, the act complained of by Mr Stephens, having been instigated by Malta on the basis of its own domestic law and followed-up by Spain in response to its treaty obligations, must be attributed to Malta notwithstanding that the act was executed in Spain"[76].

Giving the underdeveloped character of the rules of shared responsibility in international law[77], main issues raised in the *M/V "Norstar"* case are about the determination of the regime of international responsibility inherent in the system of judicial cooperation. The more prominent ITLOS's statement on this regard is found in paragraph 167 in connection with paragraph 164 of the Judgment that led the Tribunal to the conclusion that Italy was the proper respondent to the claim made by Panama in these proceedings:

> "The Tribunal notes that the detention carried out by Spain was part of the criminal investigation and proceedings conducted by Italy against the *M/V "Norstar"*. It is Italy that adopted legal positions and pursued legal interests with respect to the detention of the *M/V "Norstar"* through the investigation and proceedings. Spain merely provided assistance in accordance with its

[75] *Stephens v. Malta* (No. 1), App. No. 11956/07 (ECHR, 21 April 2009), para 51.

[76] *Ibid.*, para. 52.

[77] A, Nolkaemper and D. Jacbos, "Shared Responsibility in International Law: A Conceptual Framework", 34 (2) *Michigan Journal of International Law* (2013) 359-438. Because of its very nature, cases of shared responsibility are in close relation to the indispensable parties principle. A. Nolkaemper, "Issues of Shared Responsibility before the International Court of Justice", SHARES Research Paper 01 (2011), ACIL 2011-01; M. Paparinskis, "Procedural Aspects of Shared Responsibility in the International Court of Justice", 4 *European Journal of International Law* (2013) 295-318.

> obligations under the 1959 Strasbourg Convention. It is also Italy that has held legal control over the *M/V "Norstar"* during its detention. This is clearly evidenced by the communication that took place between Italy and Spain subsequent to the seizure of the *M/V "Norstar"*, including Italy's letter of request dated 18 March 2003 for the release of the vessel and its return to the owner following the judgment of the Court of Savona and Spain's letter dated 6 September 2006 asking for Italy's authorization to demolish the vessel. Accordingly, the Tribunal finds that the dispute before it concerns the rights and obligations of Italy and that its decision would affect the legal interests of Italy"[78].

Since the ITLOS has not made use of a more explicit line of reasoning regarding the application of the rules of international responsibility in the specific circumstances of judicial cooperation, doubts has been expressed by some judges regarding the consideration of Spain as an indispensable party[79]. Nonetheless, these issues were more directly addressed by Judge Nyiage in its Separate Opinion:

> "The clauses in the Strasbourg Convention of 1959 which attribute prerogatives are clear. They present a requesting State and a requested State, which acts in the name and on behalf of the former, in conformity with the Convention. In truth, Spain itself had no interest in seizing the "Norstar". Its action simply follows the "international letter rogatory sent by the Court of Savona to the Spanish authorities, on 11 August 1998" and Italy's order constituted a request for international judicial cooperation sent by it to Spain. It is thus Italy which initiated the letter rogatory and, consequently, it is Italy which is responsible for the actions of the Spanish authorities, carried out in its name, since, with Spain being the requested State, they were hardly responsible for conducting an investigation into the validity of the seizure of the vessel, or the lack thereof, in the context of a request for cooperation. Spain was accountable only for the manner in which the seizure was carried out; that is for the protection of the integrity of the vessel and crew when seized. This definition of mutual responsibility is inherent in the system of judicial cooperation. The effect of this distinction between the responsibilities of the requesting State and of the requested State in the area of judicial cooperation is also that, if a criminal accusation is invalid, it is the requesting State which is liable for compensation, not the requested State; any other conclusion would result in the States' refusal to accept a request for judicial cooperation"[80]

Then, taken into consideration the respective functions performed by both States in the framework of the European Convention on Mutual Assistance in Criminal Matters on 20 April 1959, we could arrive to the conclusion that Italy is the proper respondent and Spain is not an indispensable party to the proceedings. While according to Italy, this instrument gives to the Spanish authorities "ample margin to refuse the Italian letter rogatory"[81], Panama was in the view that "Spain, as the State providing judicial assistance, was neither obligated nor expected

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78 *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 167.

79 Separate Opinion of Judges Wolfrumg and Attard, para. 44.

80 Separate Opinion of Judge Ndiaye, paras. 25-26.

81 *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 141

to investigate whether an offence existed or whether the seizure was justified". This latter assertion seems to be reinforced with the arguments raised by Italy itself when it further emphasized that the Order of Seizure indicated that the crimes were committed on the Italian territory and the Letter Rogatory of the Tribunal of Savona to the Spanish Authorities of 11 August 1998 explained that the main ground justifying the investigations by the Italian was that "many bunkering operations were specifically aimed at concomitantly and illegally re-introducing the product into the territory of the Community"[82]. Then, Spain was obliged to comply because the request was not contrary to the provisions of articles 2 and 5 of European Convention on Mutual Assistance in Criminal Matters on 20 April 1959 and should be considered as a "delegate operative", so that "the indispensable party principle" would not be applicable in this case[83]. Therefore, Panama assumed that if a criminal charge for which judicial assistance had been granted were not ratified "the State seeking judicial assistance would be liable for paying damages, not the State providing judicial assistance"[84], adding in the abstract that "Spain was merely responsible for the manner and methods of the seizure". At the public-hearings again:

> "Panama contends that Spain does not have any interest of a legal nature which would be affected by the decision of the Tribunal. The arrest of the *Norstar* was based on an order given by Italy, not by Spain, and thus this case involves only the actions of Italy and not those of a third State"[85]

A more specific concern has been expressed on the basis that ITLOS does not consider sufficiently the Order of the Court of Savona of 18 March 2003 to release the vessel. How Spanish authorities reacted vis-à-vis the owner has not been reported to the Tribunal, so the finding that Spain was not an indispensable third party has been referred as premature[86]. According to Italy, the M/V "*Norstar*" had been in a state of abandonment since 14 April 1998, even before the date of the seizure. From 2005 the ship's agent (Transcoma) cessed formally to act as such and brought legal actions against the owner (Inter Marine & Co) claiming the payment of pending invoices. As the result, the M/V "*Norstar*" was sold at public auction on August 2015[87].

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[82] *The M/V "Norstar" (Panama v. Italy)*, Counter-Memorial of Italy, Vol. I, Counter-Memorial, 11 October 2017, para. 130.

[83] Separate Opinion of Judge Lucky, para. 34.

[84] *The M/V "Norstar" (Panama v. Italy), Preliminary Objections, Judgment of 4 November 2016*, para. 150.

[85] ITLOS/PV.16/C25/3/Rev.1. Public sitting held on Wednesday, 21 September 2016, at 10 a.m., at the International Tribunal for the Law of the Sea, Hamburg, at. 4, Lin. 9-13

[86] Separate Opinion of Judges Wolfrum and Attard, para. 45; Separate Opinon of Judge Lucky, para. 94; Churchill, *supra* note, at 384.

[87] Italy cites and article attached to the Panama's Memorial (Annex 16), published in Diario de Mallorca on 8 August 2015 (disponible at *Memoria Sostenibilidad*, Ports de Balears, Autoritat Portuària de Balears, 2015, at 25).

Having adopted the above-mentioned line of reasoning, the ITLOS didn't accept the third argument of Italy that Spain was an indispensable party to the proceedings. On the contrary,

> "The Tribunal does not consider that Spain is an indispensable party in the present case. As noted in paragraph 167, the dispute before the Tribunal concerns the rights and obligations of Italy. The involvement of Spain in this dispute is limited to the execution of Italy's request for the seizure of the M/V "*Norstar*" in accordance with the 1959 Strasbourg Convention. Accordingly, it is the legal interests of Italy, not those of Spain, that form the subject matter of the decision to be rendered by the Tribunal on the merits of Panama's Application. The decision of the Tribunal on jurisdiction and admissibility does not require the prior determination of Spain's rights and obligations. Thus, it is not necessary, let alone indispensable, for Spain to be a party to the present proceedings for the Tribunal to determine whether Italy violated the provisions of the Convention"[88].

The ITLOS made recourse to the principle of the indispensable party but none explicit reference was made to the existing international case law in the matter. The principle of indispensable parties is also referred as the *Monetary Gold* doctrine[89] since it was formulated by the International Court of Justice in its judgment in the case of *the Monetary Gold removed from Rome in 1943*, when the ICJ declined to exert jurisdiction by considering that Albania's "legal interest would not only be affected by a decision, but would from the very subject-matter of the decision"[90]. It is a well-established principle of international law that an international court or tribunal can exercise jurisdiction over a State only with its consent. The doctrine of the third indispensable or the indispensable party precludes a court or tribunal from adjudicating the merits of a case involving the rights, duties and claims of states that not participate in the relevant proceedings, in order to strength the integrity of the judicial function and to ensure the proper administration of justice[91]. The *Monetary Gold* doctrine was

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[88] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 173.

[89] In fact, this would be a more appropriate terminology as explained by C. Jiménez, supra note 6, at. 732-735.

[90] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question). (Italy v. France, UK and USA)* I.C.J. Reports (1954) 32. The background of this doctrine is in the *Corfu Channel* case ( I.C.J. Report (1949) 4) and the *Rights of U.S. Nationals in Morocco case* (I.C.J. Report (1952) 215). See S. Forlati, *The International Court of Justice. An Arbitral Tribunal or a Judiciary Body?*, (Springer, Heidelberg 2014), at 44-46. On the application of the "very-subject matter" test and the "prerequisite determination" test used by the Court in further decisions, P. Tzeng, "Investments on Disputed Territory: Indispensable Parties and Indispensable Issues", 14 (2) *Revista de Direito Internacional, Brazilian Journal of International Law* (2017), at 124-125.

[91] The notion has been summarized in the following terms: "El fin de la doctrina del oro amonedado, también mal llamada del tercero indispensable, consiste en proteger los derechos, obligaciones o pretensiones de terceros Estados que puedan verse implicados en una controversia al formar parte del objeto o el núcleo de la misma, y sobre los que la Corte deba pronunciarse previamente o al mismo tiempo por imperativos de lógica jurídica para resolver el fondo del litigio al que, en principio, esos terceros son ajenos. La Corte atiende así a las exigencias de su Estatuto, que le impide ejercer su jurisdicción sin el consentimiento de las partes, en honor a la integridad de su función jurisdiccional y de una buena administración de la justicia internacional. Esta doctrina debe

subsequently applied by ICJ in the *East Timor* case —where it refused to adjudicate a case involving the validity of the 1989 East Timor Gap Treaty between Indonesia and Australia in the absence of Indonesia—[92] whereas, in other cases, it had exercised jurisdiction but limited its decision to those areas in which the claims of the principal parties were the only competing claims[93], even it had merely rejected the application of such doctrine in most instances[94]. The same principle was further invoked before other international courts and tribunals[95], as has recently been the case of the ITLOS in M/V "*Norstar*" and the arbitral tribunals deciding under Section 2, Part XV of LOSC in the *South China Sea Arbitration*[96]. In both these cases

distinguirse de las formas de intervención de los artículos 62 y 63 del Estatuto, que son procedimientos de autoprotección voluntarios de carácter incidental puestos a disposición de los terceros Estados para que éstos los activen si entienden que en un caso ante la Corte puede verse afectado algún interés jurídico real y propio" (C. Jiménez, *supra* note 6, at 754, 739-744). On the relation between the *Monetary Gold* doctrine and third-party intervention, see also C. Chinkin, *supra* note 6. Similarly, to articles 62 and 63 of the Statute of the ICJ, article 31 and 32 of the Statute of the ITLOS envisaged two types of intervention in the proceedings envisaged before it. According to Wolfrum the most remarkable difference between the two bodies concerning intervention is to be found in paragraph 3 of article 31 of the Statute of the ITLOS, as there is no corresponding provision in the Statute of the ICJ., This provision provides that the decision of the Tribunal shall be binding upon the intervening State as regards the matter for which it had intervened (R. Wolfrum, "Intervention in the Proceedings before the ICJ and ITLOS", in P. C. Rao, & R. Khan, *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International, The Hague/London, 2001) 161-172, at. 171; T. Treves, "The Rule of the International Tribunal for the Law of the Sea". in P. C. Rao, & R. Khan, *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International, The Hague/London, 2001) 135-159);

92 *East Timor (Portugal v Australia)*, Jurisdiction, Judgment, ICJ Report (1995) 90.

93 *Continental Shelf (Libya v Malta)*, Merits, Judgment, I.C.J. Report (1995) 13; As exemplified in this case, the ICJ make this limited use of its competence in relation to disputes over maritime areas when the rights and claims of third States might be affected (C., Jiménez, *supra* n. 6, at. 737). See C. Tomuschat, "Article 36", in A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, C. J. Tams, *The Statute of the International Court of Justice: A Commentary* (OUP Oxford 2012), at 650 et se.

94 These three options have been identified in the practice of the ICJ, depending on the level of impact granted by the Court to these doctrine in the exercise of its jurisdiction, by Jiménez, *supra* n. 6, at 736-737.

In most cases the ICJ rejected the application of the principle as in *Frontier Dispute, Burkina Faso v Mali*, Merits, Judgment, I.C.J. Report (1986) 554; *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, Merits, Judgment, I.C.J. Report (1986) 14; *Certain Phosphate Lands in Nauru, Nauru v Australia*, Preliminary Objections, Judgment, I.C.J. Report (1992) 240; *Certain Property, Liechtenstein v Germany*, Judgment, Preliminary Objections, I.C.J. Report (2005) 6; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports (2015) 118.

95 The *Monetary Gold* doctrine has been even invoked in relation to the *Al-Bashir* case before the International Criminal Court (ICC, *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Order inviting submissions, No. ICC-02/05-01/09 OA2, 25 May 2018. See, M. Vagías, "The problem: Discussing Sudan's immunities in the absence of Sudan", Opinio Iuris, 29 August 2018. On main legal issues raised in Al-Bassir case regarding the inmunity of Heads of State from criminal jurisdiction, J. Abrisketa, "Al-Bashir: ¿Excepción a la inmunidad del Jefe de Estado de Sudán y Cooperación con la Corte Penal Internacional", 68/1 *REDI* (2016) 19-47.

96 *The South China Sea Arbitration: Republic of Philippines v People's Republic of China*, Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Law of the Sea Convention, Case No. 2013-19, Award

the tribunal concluded that there was no indispensable third party precluding the tribunal exercise of jurisdiction.

In the light of the foregoing, the ITLOS rejected the objection raised by Italy based on lack of jurisdiction *ratione personae*[97]. Although the objection was submitted under this denomination, commentators generally consider the *Monetary Gold* doctrine as an objection to admissibility rather than jurisdiction[98], and the ICJ jurisprudence suggest the same[99] even though the Court often has not characterised it[100].

## (E) CONCLUSIONS

The dispute between Panama and Italy regarding the seizure and detention of the M/V "*Norstar*" has led to the first preliminary objections proceeding brought before the ITLOS as well as to the invocation of the *Monetary Gold* doctrine, namely in relation to Spain. The treatment of the third indispensable or the indispensable party principle by the ITLOS is overly concise and without references to the ICJ jurisprudence on the matter. In brief, the application of the doctrine to the circumstances of the M/V "*Norstar*" case seems to be correct if perfunctorily reasoned[101]. Some explanation can be found in the range of views among the judges and the voting method, that excluded the possibility that each objection would have been voted on separately. In addition, the specific constraints envisaged by the Tribunal on this matter should be considered.

In fact, the ITLOS merely rejected this third ground of the preliminary objections raised by Italy on the basis of its previous determination that Italy was the proper respondent to the claim made by Panama in these proceedings. In doing so, the Tribunal held that the case, which involves the action of more than one State, fits into a situation of aid or assistance of a State

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of 12 July 2016. See S. Rao Pemmaraju, "The South China Sea Arbitration (The Philippines v. China): Assessment of the Award on Jurisdiction and Admissibility", 15 *Chinese Journal of International Law* (2016), 265-307; S. Talmon, "The South China Sea Arbitration: Observations on the Award of Jurisdiction and Admissibility", 15 *Chinese Journal of International Law* (2016) 309-391.

[97] *The M/V "Norstar" (Panama v. Italy)*, Preliminary Objections, Judgment of 4 November 2016, para. 175.

[98] C. Jiménez, *supra* n. 6, at. 749-754; Y. Shany, "Jurisdiction and Admissibility", in C. Romano and others (eds.), *The Oxford Handbook of International Adjudication* (OUP Oxford 2013, at 797-798; H. Thirdway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. 1, (OUP Oxford 2013), at 971.

[99] *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question). (Italy v. France, UK and* USA) I.C.J. Reports (1954), at 32; *Certain Phosphate Lands in Nauru, Nauru v Australia*, Preliminary Objections, Judgment, I.C.J. Report (1992) 240, para. 55; *East Timor (Portugal v Australia)*, Jurisdiction, Judgment, ICJ Report (1995) 90, para. 35;

[100] C. Jiménez, *supra* n. 6, at. 750.

[101] F. Fontanelli, "Reflections on the Indispensable Party Principle in the Wake of the Judgment on Preliminary Objections in the Norstar Case", 1 *Rivista di Diritto Internazionale* (2017) 112-132, at 131.

in the alleged commission of an internationally wrongful act by another State, placing then the case within the framework of article 16 of ARSIWA. However, as the international rules on shared responsibility are poorly developed, such assertion does not shed much light on the matter. Instead, as mentioned above, the ECHR case law provides with a more sophisticated line of reasoning in the field of international cooperation among States in extradition, which is built around the concept of attribution, instead on the rules on derived responsibility provided in the ARSIWA. Even if the ITLOS seems to implicitly adopt a similar line of reasoning in its preliminary objections Judgment, the scheme of international responsibility inherent to judicial assistance system needs major clarification. This is a matter of practical significance in an era characterized by coordinated and joint action, rather than independent action, of the States.

In addition, the *M/V "Norstar"* case has disclosed the extensive use of the jurisprudence in the *M/V Louisa* case in further practice before the Tribunal, mainly in relation to the interpretation and application of article 300 LOSC, that is often invoked by the parties in proceedings brought before the Tribunal. Other trends in the further development of the jurisprudence in the *M/V Louisa* are more open to criticism. Declarations under Article 287 LOSC consisting in the selection of a forum for a particular category of disputes or a specific dispute are unqualified accepted by the ITLOS as the legal basis for jurisdiction. One more, in the *M/V "Norstar"*, "the Judgment touches upon the scope of the Tribunal's jurisdiction in paragraph 58 but not as to whether such practice of limited declarations is legitimate under the Convention"[102]. Finally, the trend in the *M/V "Norstar"* case to embrace a new broader interpretation of article 87 LOSC —as far as the freedom of navigation is concerned— in connection with the exercise of the sovereign right of States to adjudicated crimes under its competence, deserves to be stressed while waiting for the Judgment on the merits that is still pending before the ITLOS.

[102] Separate Opinion of Judges Wolfrum and Attard, paa. 10.

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Enrique J. MARTÍNEZ PÉREZ, *La tutela ambiental en los sistemas regionales de protección de los derechos humanos* (Tirant lo Blanch, Valencia 2017), 157 pp. (includes e-book)

The relationship between fundamental rights and the protection of the environment is not a new issue, but a fundamental one that is reaching greater interest nowadays. Indeed, a healthy environment is essential for not jeopardizing the life and health of people, as well as it ensures the enjoyment and exercise of other less vital human rights. There is no point in protecting peoples' life or ensuring their political, civil or labour rights, if they cannot survive because they live in a degraded environment. In this sense, human and environmental interests are inseparable: there is no protection of the human being without the protection of the environment. Moreover, the preservation of the environment through the protection of human rights presents a reasonable path to provide sufficient legal protection of the natural world, since environmental regulations often lack of precise and binding nature and of an international court with mandatory jurisdiction to control its compliance. In this sense, there are at least two possibilities for protecting the environment through the safeguarding of human rights. The first is formally recognizing a human right that contains environmental imperatives. The second is to seek indirect protection, introducing environmental interests in other existing fundamental rights. The latter case is precisely what happens at the regional systems of protection of fundamental rights, and what is under consideration in this book.

The monograph by Professor Enrique Martínez Pérez encloses six chapters, which addresses thoroughly all the matters that one can think of about environmental protection in the most important regional systems of fundamental rights: the European, the Inter-American and African regime. The author focusses his thoughtful study on the first two since under the African one has not enough case law. The approach chosen is not to explain each regime separately, but to combine them in each chapter, offering a direct and immediate comparison among them. Precisely, this comparative element makes the book of greatest interest for academics and practitioners. A good and serious comparative study is not an easy task, but the author has accomplished this goal, especially brilliantly in the conclusions to the book. Most of the times one can ascertain which regime is referred to in spite of the multiple and interspersed considerations. Although, if a second edition of the book will take place, a possible confusion can be easily avoided by introducing a brief mention of the Court that dictates the jurisprudential pronouncements when quoting the case law in the footnotes.

The first chapter ("*La aplicación* rationae personae *y* ratione loci *de los diferentes instrumentos jurídicos regionales de derechos humanos*") is devoted to the conditions to stand before the international human rights tribunals such as determining who can have the condition of

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'victim', if popular actions are allowed or transboundary damage may be covered, among others issues. These competence requisites are of great importance to bring a case before the different human rights tribunals as the conditions may vary among each regime.

In the second chapter ("*De la ecologización de los Derechos humanos al reconocimiento de un Derecho autónomo al medio ambiente*") the author reviews the evolution in taking into consideration environmental issues in the human rights regimes (the "greening" of human rights) and the eventual recognition of an autonomous right to the environment in each regime. He focuses on the European system although the European Convention of Human Rights does not enclose a right to a suitable environment, as there has been no agreement to include it in the Convention or in its successive Protocols. This has not hindered the European Court of human rights (ECHR) to consider the violation of a fundamental right for environmental reasons. In fact, the ECHR has constructed a solid jurisprudence on this matter, considering the Convention as a living instrument that has to be interpreted in the light of the actual conditions.

The Inter-American system, on the other hand, does recognize an independent right to the environment in an additional Protocol to the Pact of San José (art. 11 of the Protocol of San Salvador of 1988). However, as pointed out by the author, its application is limited to the extent that it is only controlled through the periodic reports summited by States party. Now, the truth is that the Inter-American Court of human rights (IACHR) has been very ambitious in considering environmental concerns in its case law. As highlighted by the author, the IACHR has undertaken several achievements, such as the possibility of indigenous peoples to access to the system in defence of their individual and collective rights. Moreover, in the Advisory Opinion on the environment and human rights OC-23/17 of 15th November 2017, the IACHR has emphasized the close relationship between the protection of fundamental rights and the environment and the need to preserve the environment in order safeguard the livelihood of the enjoyment of others fundamental rights such as life or physical integrity. The IACHR Advisory opinion was issued after the appearance of the book; yet, it would be interesting to examine whether the protection of the environment through human rights will be easier now in the American regime.

The African Charter on Human and Peoples' Rights is also considered as it explicitly recognises in article 24 a "right to a general satisfactory environment favourable to their development". However, this recognition has been brought in just a single case before the African Commission on Human and Peoples' Rights: the issue of Social and Economic Rights Action Center (Nigeria) /Center for Economic and Social and Economic and Social Rights (USA) v. Nigeria from 2001 (Ogoniland case).

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From a substantive point of view, the third chapter ("*La dimensión ambiental de los derechos sustantivos: entre el derecho a la vida y el derecho a la vida privada y familiar*") is of great interest since it explores the environmental dimension of the right to life and the right to private and family life. It is also the most extensive chapter (26 pages) and where the author meticulously analyses the interpretation and application of the provisions enclosing the aforementioned fundamental rights. The study focuses, again, in the European system for a reason: its case law is more numerous. At European level, the vast majority of "environmental cases" deal with the "right to respect for his private and family life, his home and his correspondence", contained in article 8 of the European Convention. The ECHR has broadly interpreted this provision affirming that the respect for the home is not conceived only as a right to a physical space, but also as the right to enjoy this space in tranquillity. In this regard, attacks of the right to respect one's home are not only those of material character -as the entrance of an unauthorized person-, but also intangible or incorporeal attacks, such as noises, emissions or bad odours. If such environmental damage or risk is a serious one, it may affect the well-being of people and deprive them of the enjoyment of their home and impairment of his private or family life. In the American system, by contrast, are other fundamental rights considered, such as the right to life, the right to ownership of land and, in particular, the rights of indigenous peoples.

In the fourth chapter ("*Restricciones al derecho de propiedad privada por motivos mediambientales*"), the author studies another interesting manifestation of the relationship between human rights and the protection of the environment. On this occasion, however, with conflicting interests. Indeed, the protection of the environment may also constitute a limit to the enjoyment of other fundamental rights enshrined in these regional conventions, as in the case of the right to private property. However, the interference with the use and enjoyment of a property —often real estate and land property subject to conservation policies— is due to the fact of not having received just compensation by the State and not to the fact of protecting nature, which is considered a legitimate interest to limit this fundamental right. In this chapter, one can find an exhaustive review of the guarantees of the interference of the right to property, both in relation to the European system and the American system. In the latter case, also considering the rights of indigenous peoples when it comes to creation of natural reserves in their ancestral territories in order to preserve the environment.

The last two chapters ("*Las garantías procedimentales derivadas de los derechos sustantivos en situaciones de deterioro ambiental*" and "*El desarrollo de derechos procedimentales autónomos en materia ambiental*") are dedicated to the instrumental and procedural aspects of protecting the environment within the fundamental rights' regimes. Procedural duties and rights are reaching a greater importance in the case of environment preservation, even more than through substantive rights. They facilitate the prevention of environmental damage, as is the case with

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the obligation to carry out environmental impact assessments, the right to obtain information or to allow the participation of private individuals in the decision-making process. Moreover, they are also essential to obtain compensation for possible environmental damages, such as the right of access to justice or the obligations to investigate, punish and repair environmental damage.

In conclusion, the monograph by Professor Enrique J. Martínez Pérez is a very serious and rigorous study of all aspects accompanying the protection of the environment in the regional systems of human rights protection. The author presents a complete and remarkable jurisprudential and doctrinal research on the matter that makes its reading an imperative for anyone who wants to deepen the knowledge on the relationship between the environment and human rights.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

José Antonio de YTURRIAGA BARBERÁN, *Guinea Ecuatorial: Cincuenta años de independencia* (Madrid, Sial/Casa de África, 2018) pp.

On the occasion of the fiftieth anniversary of the independence of Equatorial Guinea, José Antonio de Yturriaga, career diplomat and PhD in law, has published this book with Sial. This publishing house has published several works on Equatorial Guinea, targeted at the small Spanish public interested in the country, mainly made up of former settlers and their descendants and the handful of academics who study it. As the author himself explains in the prologue, the first part of the book consists of his 1965 thesis for the *Escuela Diplomática* (Foreign Service School), which the Francoist authorities did not let him publish at the time. He reproduces it here with a few additions and contemporary comments. The second part deals with Equatorial Guinea's evolution in the final stage of the decolonization process and during the two successive Nguemist dictatorships, i.e. Macías's (1969-79) and Obiang's (since 1979). In the end, he concludes that "the colonization was mediocre and the decolonization almost exemplary". The first half of that statement is at odds with his 1965 account of the colony, especially during the Franco era, which offers a clearly positive view of the colonizing work carried out by the regime that emerged from the *Alzamiento Nacional* (National Uprising). If he thought the colonization was mediocre at the time, he offered no indication in his work. The exemplary nature of the decolonization process refers to the response given by the Spanish Foreign Ministry, then led by Javier María Castiella, to the insistent pressure from the United Nations to decolonize the territory via its unitary independence. However, the book does not conceal the efforts to oppose Castiella's policy made by Luis Carrero Blanco's Ministry of the Presidency (the Spanish Cabinet Office), which effectively controlled the territory at the time through the general governors and commissioners general. Nor does it refrain from criticizing its attempts to undermine the Foreign Ministry's policies. The decolonization was exemplary insofar as it was peaceful and ultimately guided by the democratic framework that the UN had called for. However, viewed in the light of Castiella's clear and documented aim of establishing a neocolonial regime akin to those established by France in many of its former colonies in the region, including neighbouring Cameroon and Gabon, it was a resounding failure. This failure began with the electoral victory of the candidate who had shown the greatest hostility towards Spanish colonialism and its plans for decolonization, Francisco Macías Nguema. In the September 1968 election campaign, Macías successfully harnessed the widespread resentment towards whites after decades of humiliations and discrimination (something the colonial apologists have never managed to explain).

The book ends with a 26-page bibliography divided into five sections, which includes many

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works not cited in the text and repeat entries in multiple sections, as well as errors in titles and authors' names. Nevertheless, the author properly cites the sources actually used in the notes.

The first part of the book, based on the 1965 thesis, offers an overview of the colony's geography, population, economy and history based on colonial sources (hence, the plainly colonialist perspective). With regard to the history, it places special emphasis on Spain's title to the territory under international law and the protracted conflict between Spain and France for control of the Rio Muni region in the 19th century. In contrast, it has little to say on the matter of colonial society and, in particular, the colonized population. The problem with this perspective is that we now know much more about these issues than we did in 1965, thanks to authors such as Sanz Casas, Sundiata, Nerín, Castro, Ndongo, Díaz Matarranz, García Cantús, Creus, Okenve, Martino or Sant Gisbert. What was surely a more novel contribution at the time was the study of the decolonizing pressure exerted by the UN and the Foreign Ministry's responses (Chapters 4 and 5). However, today we also have a much stronger grasp of this subject as a result of Alicia Campos's magnificent book on the decolonization, Rosa Pardo's studies of Castiella, and the estimable memoirs of Jaime de Piniés, then member of the Spanish delegation to the UN.

The summary offered in the extensive Chapter 6 of the fifty years of independent Guinea, subjugated to the two Nguemist dictatorships, is not new. However, it does offer a good introduction to the subject for those who are relatively unfamiliar with the country. Yturriaga focuses on its political and economic evolution and its relations with Spain and other global powers. His sources include the works of Max Liniger-Goumaz, Adolfo Obiang Biko, Donato Ndongo, Emiliano Buale Borikó and Fernando Abaga, as well as certain works produced at the *Escuela Diplomática*, such as those by Terencio Ngundi and Mansueto Nsi-Owono. In addition, he draws especially heavily on Paula García Ascanio's commendable undergraduate thesis at Universidad Complutense de Madrid and Djongele Bokokó's epilogue for one of Liniger-Goumaz's books. With regard to the end of the decolonization period, he falls victim to certain widespread misconceptions regarding, for example, Macías's candidacy in the 1968 election.

Yturriaga takes a very harsh stance in the book against the current dictatorship of Obiang Nguema. In the dedication, he wishes that the Equatorial Guinean people will achieve "a free and democratic country in the near future". In this regard, he does not seem to join the varied chorus of Spanish politicians calling for a policy of unabashed support for the Equatorial Guinean dictator, invoking Spain's interests, their shared Hispanicism and, even, the need not to judge Africans by the same standards as leaders from other parts of the world.

The book ends with an emphatic call for Spanish support for the positions of the Guinean democratic opposition: "The Spanish government must rid itself of its complexes and fear of being labelled neo-colonialist and help establish democracy in Equatorial Guinea." However,

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this eloquent willingness is somewhat blunted by the fact that it comes just pages after the author reproaches Spain's king and prime ministers for not visiting the (reviled) dictator Obiang to strengthen ties with his country, when they have no scruples meeting with dictators from other continents.

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*¿Hacia una nueva gobernanza económica de la Unión Europea? – Towards a new government of the economy in the European Union? – Para um novo governo da economia na União Europeia?*. By Francisco Jesús Carrera Hernández (dir.) (Thomson Reuters/Aranzadi, Cizur Menor, 2018) 315 pp. (includes e-book) [ISBN: 978-84-9177-284-2]

The global financial and economic crisis initiated in 2008 and the subsequent sovereign debt crisis suffered by several countries in the Eurozone (particularly, between 2010-2013) showed serious shortcomings in the initial design of the Economic and Monetary Union and required the adoption of new instruments, with diverse nature, to govern the economy of the European Union, trying to overcome the crisis and promoting a smart, sustainable and inclusive growth.

This collective book analyses, from an essentially institutional perspective, the recent developments in the economic governance of the European Union and delves into its future prospects. The origin of this book is a research project funded by the Ministry of Economy and Competitiveness of Spain (DER2015-63927-P), entitled "The reinforcement of the legitimacy of the economic policy of the European Union after the crisis: Proposals for a new economic governance of the European Union".

The main researcher of this project and director of this collective book is Francisco Jesús Carrera Hernández, Professor of Public International Law at the University of La Rioja (Spain) and author of other relevant publications on the architecture of the economic governance of the European Union. The book has authors from different countries and specialties, which allow a multidisciplinary approach to the subject. The transnational character of the book is evidenced, for example, in the use of different languages (Spanish, English and Portuguese) in the title and its nine chapters.

The book includes a prologue by Professor Rui Manuel Gens de Moura Ramos, who has been, among other prominent positions, Vice-President (2003-2007) and President (2007-2012) of the Constitutional Court of Portugal, which has developed a very relevant jurisprudence when, during the Portuguese debt crisis, had to decide on the constitutionality of certain public spending cuts. The prologue highlights the imperfections of the Economic and Monetary Union designed in the Maastricht Treaty and the multifaceted nature of the successive instruments adopted, with a certain improvisation, to deal with the financial and economic crisis in the European Union.

Chapter I (Francisco Jesús Carrera Hernández) notes that intergovernmental dynamics prevail in the economic arm of the Economic and Monetary Union, highlighting, in particular, the role of the Eurogroup and the Euro Summit and the operation of the European Stability Mechanism (ESM), created through an international agreement. The author analyses, especially, the functioning of the so-called European Semester, as a mechanism for the coordination and supervision of the national economic policies, and its incidence in the approval of the national budgets by each Member State. The author acknowledges that the role of the European Parliament and national parliaments within the framework of the European Semester is small. The author refers to proposals for increasing the participation of such parliamentary institutions, but he underlines that the increase of democratic legitimacy must be designed with prudence. The author emphasizes that not only the European

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Parliament and national parliaments have democratic legitimacy, but also intergovernmental bodies have an "indirect" democratic legitimacy (p. 53). Beyond possible short-term reforms, the author emphasizes that the strengthening of the legitimacy of the economic policy of the European Union must be placed within the framework, wider and ambitious, of a future redesign and deepening of all the European integration process.

Chapter II (Nicolas De Sadeleer, Jean Monnet Chair and Professor at Saint-Louis University) offers an illustrative analysis of the European Union fiscal and economic governance. The author emphasizes that the financial and economic crisis evidenced that the original design of the Economic and Monetary Union was deficient, since there was a great asymmetry between a strong monetary arm ("with a single currency falling under an exclusive competence with its own independent central bank") and a weak economic arm ("where national economic policies are not integrated but only set within limits") (p. 64). The author specifies the various initiatives and instruments that have been adopted in recent years to strengthen this economic arm, distinguishing three major approaches: establishing mechanisms for crisis management (such as the European Stability Mechanism Treaty); improving the coordination of economic and employment policies (such as the Europe 2020 Strategy); and reinforcing the preventive and corrective dimensions of the Stability and Growth Pact (SGP). This chapter is mainly focused on macro-economic and fiscal control measures and highlights the strengthening of the SGP by the Fiscal Compact. According to the author, the "new powers conferred to the Commission and the Council are likely to give real teeth to economic governance" in the European Union (p. 106). The author assumes that these new mechanisms are complex and imperfect, but he concludes that, globally, they have been remarkably effective, considering that the "monetary federation" has now been complemented, with the new budgetary surveillance, "by a budgetary federation" (pp. 108-109).

The following three chapters address the role of different institutions in the economic governance of the European Union, examining successively the role of institutions endowed with executive, parliamentary and judicial powers.

Chapter III (José María Porras Ramírez, Professor of Constitutional Law at the University of Granada) questions the dominant role of institutions endowed with executive powers in the economic and budgetary supervision of the Member States, reinforced for the states of the Eurozone and considered "intrusive" for the states of the Eurozone subjected to economic adjustment programs (p. 132). The author criticizes the intergovernmentalism and the technocracy that preside such supervisions and formulates reform proposals for a greater democratization, through a profound reform of the founding treaties of the European Union, including all the mechanisms of the economic union within the primary law.

Chapter IV (Ariadna Salazar Quiñonez, Researcher Professor at the National Institute of Criminal Sciences of Mexico) focuses on the mechanism of budgetary surveillance implemented through the indicated European Semester, and the role that national parliaments of the Member States can play in it. The author also refers, in particular, to the Inter-Parliamentary Conference on Stability, Economic Coordination and Governance in the European Union, which is a forum for debate and exchange of information and best practices, aimed at strengthening the cooperation among national parliaments and

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the European Parliament. The author defends a greater parliamentary participation in the monitoring and control of the national budgets, which are currently exercised mainly by the Commission and the Eurogroup.

Chapter V (Tamara Ćapeta, Professor of European Public Law at the University of Zagreb) studies the role of courts in economic governance in the European Union. The author identifies measures adopted during the crisis that have been examined by different courts (such as austerity measures that could be incompatible with fundamental social or labour rights) and defends that the "judicialization of economic governance" should be considered as "an ordinary feature of economic governance in Europe" (p. 189).

The remaining four chapters deal mostly with some European Union policies that, as the book's director stresses, go beyond the Economic and Monetary Union, but they have undoubted relevance in the economic governance of the European Union.

Chapter VI (Luis Pedro Cunha, Professor at the University of Coimbra) refers to the governance of foreign trade and, after making a theoretical framework of the various types of regional economic agreements, reviews the main trade agreements that the European Union has concluded or is currently negotiating with third countries, some as controversial as the Comprehensive Economic and Trade Agreement (CETA) with Canada, underlining that part of its provisions are applied provisionally from September 2017, but that it can only come into full force after its ratification by all the Member States of the European Union.

Chapter VII (Peter Van Elsuwege, Professor of European Union Law at the Ghent European Law Institute – GELI, and Jolien Timmermans, Academic Assistant at the GELI) examines the issue of the external representation of the euro area in the International Monetary Fund (IMF). The authors note the current fragmented European Union representation in the IMF and analyse the obstacles on the road towards a unified external representation of the euro area in the IMF, proposing, for example, the creation of a European Minister of Economy and Finance, taking into account the experience of the "double-hatted" function of the High Representative for Foreign Affairs and Security Policy (p. 242).

Chapter VIII (Isabel Cabrita, Professor at ISCSP-ULisboa) examines the European Union international investment policy. Since the entry into force of the Treaty of Lisbon, the Treaty on the Functioning of the European Union (TFEU) includes, within the Common Commercial Policy, the regulation of foreign direct investment (FDI), which enables the European Union to adopt autonomous regulations and to conclude international investment agreements (IIAs) with third countries. The author evaluates the European Union international investment policy approach in the complex framework of the current global investment policy environment, considering, particularly, the criticisms and reform proposals of the traditional investor-State dispute settlement (ISDS) systems and the new Investment Court System (ICS) promoted by the European Union.

Finally, Chapter IX (Ángel Sánchez Hernández, Professor of Civil Law at the University of La Rioja) analyses the rural development in the European Union regulations. After a diagnosis of the main problems in the rural world, the author studies Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European

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Agricultural Fund for Rural Development (EAFRD), which shall contribute to the Europe 2020 Strategy by promoting sustainable rural development throughout the European Union and complementing the other instruments of the Common Agricultural Policy (CAP), the cohesion policy and the common fisheries policy. The EAFRD shall contribute to the development of an agricultural sector more territorially and environmentally balanced. The author refers, particularly, to the strategic initiative LEADER (according to its initials in French: Liaison entre activités de développement de l'économie rurale), established in Articles 42-44 of the quoted Regulation to support rural development projects launched at a local level.

Taken together, this book offers valuable contributions on the complex economic governance of the European Union and its current challenges. The authors agree that the financial and economic crisis showed the need to strengthen the economic arm of the Economic and Monetary Union, which has materialized, among other measures, in new mechanisms of macro-economic and budgetary control. Various contributions observe that in these new mechanisms there is a primacy of intergovernmentalism and technocracy, raising the debate on their degree of democratic legitimacy. The authors tend to share a Europeanist vision and make thoughtful and constructive criticisms on the recent developments in the economic governance of the European Union. Some authors show the need to proceed with calm and prudence to profound reforms of the founding treaties, which could rationalize the complex architecture of the current European Union, linking the improvements in the economic governance to decisive advances in the political union.

Certainly, the current global context (with the unresolved Brexit, tensions and trade wars between great powers, the rise of populisms and exclusionary nationalisms or the fear of new economic crises) generates a lot of uncertainty about the future of the European Union, but it is precisely in turbulent times when holistic and rigorous studies, like this book, are most needed.

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Carlos Espósito, James Kraska, Harry N. Scheiber and Moon-Sang Kwon (eds.), *Ocean Law and Policy: 20 Years under UNCLOS* (Brill – Nijhoff, Leiden – Boston, 2017), 469 pp.

The volume in review contains the proceedings of an international conference held in 2014 in Madrid under the sponsorship of the Law of the Sea Institute. Most of the papers focus on the United Nations Convention on the Law of the Sea (Montego Bay, 1982; UNCLOS) and directly or indirectly address the thorny question whether this successful codification treaty, which mostly corresponds to customary international law, is appropriate to meet a number of factual or legal developments that have taken place after its adoption and were not foreseen or completely foreseen by the negotiators.

An obvious example of factual post-UNCLOS concern is sea-level rise. Davor Vidas ("International Law at the Convergence of Two Epochs: Sea-Level Rise and the Law of the Sea for the Anthropocene") moves from the word "anthropocene", as referred to the present epoch, in which humans have acquired the capacity to destabilize the natural Earth system. Sea-level rise is the consequence of global warming, which, in its turn, is the consequence of the increased consumption of fossil fuels by humans. This contains the potential for new types of tension in the relations between States, which cover also law of the sea. As the UNCLOS drafters did not foresee substantial variations in coastal geography, it is now difficult to handle a phenomenon that has the potential to alter the "stability" of maritime limits, be they the baseline of the territorial sea, as determined by low-water mark, or the maritime boundary between adjacent or opposite States, as determined by the equidistance line between relevant base-points. Kerrylee Rogers and Clive Schofield ("Responding to Changing Coasts: The Need for Fixed and Flexible Limits and Boundaries in the Face of Sea-Level Rise") point out how the effects of sea-level rise extend beyond environmental aspects to social and economic impacts. As it is not possible to assess with precision the scope, scale and pace of future sea-level rise, more dynamic and flexible legal and policy models are needed.

Linked to global warming is the question of ocean fertilization. Due to their colossal volume, the oceans have a great capability for the storage of $CO_2$, the main greenhouse gas. The intentional introduction of iron in the upper ocean (ocean fertilization) stimulates the growth of phytoplankton, which photosynthesizes $CO_2$ and retains carbon in its cells. In 2013 the Protocol to the Convention on the prevention of marine pollution by dumping of wastes and other matter (London, 1996) was amended to provide a regulatory mechanism for ocean iron fertilization and other marine geoengineering activities. However, as explained in the paper by Sherry P. Broder ("International Governance of Ocean Fertilization and Other Marine

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Geoengineering Activities"), there continue to be many serious unresolved questions that demand additional analysis and work.

The issue of marine biodiversity beyond national jurisdiction is addressed in the contribution by Yasuko Tsuru ("Institutional Interplay between Marine Biodiversity beyond National Jurisdiction – A New Agreement?"). Now the United Nations General Assembly has taken the decision to convene an intergovernmental conference to elaborate the text of an international legally binding instrument in this regard (Resolution 72/249 of 24 December 2017). However, after the first session of the conference, the situation is still very close to what is noticed in the paper: States and institutions "are not clear on how to address the biodiversity problem, especially the 'institutional deficit' regarding marine genetic resources". This could lead to devastating consequences for humankind.

New challenges for the international oceans order are likely to come also from the development of navigation routes in Arctic waters, given the different positions held by some Arctic coastal States, on the one hand, and some States more linked to navigational freedoms, on the other. Said Mahmoudi ("Arctic Navigation: Reflections on the Northern Sea Route") reaches the conclusion that, despite the formal position of the countries that continue to emphasize the international status of the Northern Sea Route waters, the Russian Federation has in fact consolidated in a definitive manner its legal claim on such waters.

The adoption in 2001, within the framework of UNESCO, of the Convention on the protection of the underwater cultural heritage is an example of legal development having taken place after the UNCLOS signature. In his contribution ("The Legal Protection of Underwater Cultural Heritage: Concerns and Proposals"), Mariano J. Aznar makes a commendable effort to explain why the 2001 UNESCO convention is consistent with the relevant UNCLOS provisions, as the former translates, perhaps with some "constructive ambiguities", the general principles embodied in the latter. Another paper ("Protection and Management Policy of Underwater Cultural Heritage in Korea" by Seoung Wook Park and Chang Soo Choe) suggests improvements in the Korean domestic legislation to strengthen the protection of underwater cultural heritage. The inclusion of these two papers in the part of the volume devoted to "managing ocean resources" may be criticized by those who are inclined to give priority to the cultural and non-economic character of this kind of "resources".

Security issues are largely addressed in the volume. Protest and civil disobedience on the high seas can be the source of conflicts between the need for good order and safety in maritime activities and the international right of free expression, which is central to participatory democracy. As shown by James Kraska ("The Laws of Civil Disobedience in the Maritime Domain"), the reconciliation of different bodies of law —law of the sea and human rights law— is not an easy task, also because incidents of marine protest fall in most cases under the

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jurisdiction of several States (it is sufficient to think of cases that have involved those who protest at sea against whaling or seabed drilling activities). The paper brings several elements in support of the balanced view that "the right to free expression is not absolute and may be impeded, but interference in the freedom of expression is not unlimited". Vasco Becker-Weinberg ("Flag States' Liability for Wrongful Acts by Private Military and Security Companies on Board Ships") rightly emphasizes that, while private military and security companies are private actors, flag States have the obligation to control and exercise due diligence with respect to services rendered by such companies on board ships flying their flag, particularly in cases where human rights abuses are likely. Nilufer Oral ("Black Sea Security under the 1936 Montreux Treaty") explains why substantial changes in the convention regulating passage of merchant and military ships through the Turkish Straits would risk unsettling a consolidated security framework.

Security issues are also discussed under a regional perspective in the contributions by Kamal-Deen Ali ("Anti-Piracy Responses in the Gulf of Guinea: Addressing the Legal Deficit"), Seokwoo Lee and Hee Eun Lee ("The Conceptualization and Construction of a Northeast Asian Maritime Security Architecture: Might Europe Serve as a Model?") and Bimal N. Patel ("Eight Dimensions of Maritime Security Law and Practice among Member States of the Indian Ocean Rim Association), where the author remarks that the States in question, like vast majority of developing countries, believe more in their exclusive interests than in the importance of a collective and inclusive approach.

Despite the promising title that seems to lead to general considerations on how best to move forward, the paper by Assunção Cristas ("One Cannot Change the Wind, but One Can Always Adjust the Sail: The Role of Legal Framework in Developing a Blue Economy") focuses on the special case of the Portuguese framework law on marine spatial planning and management (Law No. 17 of 10 April 2014). The law envisages two types of spatial planning instruments (situation plans and allocation plans). In any case, it is a very interesting enactment, considering that Portugal, also due to its Atlantic islands, is entitled to a quite large exclusive economic zone (about 1,700,000 km$^2$, corresponding to 18 times the land area of the country). Thought-provoking considerations on marine spatial planning can be found, *inter alia*, in the contribution by Clive Schofield on "Ever More Lines in the Sea: Advances in the Spatial Governance of Marine Space". The author moves from the present "dissatisfaction with traditional, generally sector-specific approaches to ocean governance, giving rise to sustained calls for more cross-cutting, coordinated and ideally integrated oceans management frameworks". In this regard, he points out that the objective of marine spatial planning is not necessarily to replace well established sector-oriented management approaches but rather to offer strategic planning with a view to improving decision-making, thereby delivering more

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rational and harmonised uses of marine space, ideally eliminating overlaps, clashes and conflicts and identifying co-development opportunities". This may lead to the conclusion that the present fragmentation of the sea in different jurisdictional zones (maritime internal waters, territorial sea, exclusive economic zone, high seas, seabed beyond the limits of national jurisdiction) is not totally incompatible with marine spatial planning at the international level.

A departure from the UNCLOS-oriented scope of the volume may be noticed in the inclusion of two contributions devoted to the European Union (EU) fisheries policy ("Stakeholder Participation in the European Common Fisheries Policy: Shifting the Legal Paradigm towards Rights and Responsibilities" by Ronán Long and "West Africa and the New European Common Fisheries Policy: Impacts and Implications" by Katherine Seto). As Long's paper remarks, within world fisheries, the EU common fisheries policy is a unique case, seeking to manage the stocks in an integrated manner, irrespective of the maritime boundaries of Member States, on the basis of the objective of maximum sustainable yield and more recent concepts, such as the ecosystem approach and the precautionary principle. However, fisheries in Europe have been in a constant cycle of decline and crises, being affected by lack of environmental, economic and social sustainability, complexity of legislative framework and poor public image. The reform process that resulted in EU Regulation 1380/2013 aimed at vesting stakeholders, in particular the fishing industry, with additional rights and responsibilities. The paper elaborates on what else could be done towards a more effective natural resource stewardship, for instance the adoption of a rights-based approach characterized by individual transferable quotas and fishermen property rights. As far as the external EU fisheries policy is concerned, fisheries along the coast of West African States are particularly significant, because of their proximity to Europe, former colonial ties and limited domestic demand for high-value fish products. Strong criticism to the EU external fisheries policy can be found in Seto's remark that it was designed to maximize employment from the European fishing sector and ensure supply of fish to the European market, while reducing fishing pressure in European waters. This has led to in the 1990s to unsustainable exploitation of West African waters, lack of monitoring, control and surveillance, impairment of developing economies, food insecurity and inconsistencies with the EU policies on environment and development. In other words, displacing the European fleets from European to West African waters has simply shifted declines from European to West African stocks. While the 2013 reform, based on maximum sustainable yield, encourages a shift towards conservation objectives, its effects on West African fisheries remain insufficient, due to the lack of the scientific information needed to set maximum sustainable yield and the lack of enforcement capacity by coastal States.

The paper ("Standard of Review in the Law of the Sea: Reflections from the Bench") by Jin-Hyun Paik, a judge and the present president of the International Tribunal for the Law of the

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Sea (ITLOS), touches upon the fundamental balance of power between States and international judicial institutions, asking how intensely should an international court review the decisions of national authorities. This is a question that typically occurs in cases where States are called to comply with flexible, open-ended or indeterminate international provisions, leaving a substantial room for discretion. The author's answer is that courts are entitled to a relatively high standard of review, in order to allow a uniform interpretation and application of the relevant law of the sea provisions and to avoid that the same obligation means different things to different States. "UNCLOS and Non-Party States before the International Court of Justice" is the subject addressed by Tullio Treves, a former ITLOS judge. The UNCLOS, which *per se* is not binding on non-parties, includes several provisions that correspond to customary international law and, as such, do create rights and obligations also for non-parties. The paper discusses the peculiarities of cases in which non-parties to the UNCLOS were involved, such as *Qatar v. Bahrain*, *Nicaragua v. Colombia* and *Peru v. Chile*.

The volume does not provide clear-cut answers to the question on whether the UNCLOS is fully equipped to address all the developments that have taken place after its adoption and, of course, it would have been impossible to do so (incidentally, a paper on the UNCLOS flexibility to changes and improvements in the light of the practice of "implementation agreements" would have been a useful addition to the collection). Nevertheless, the contributions included in volume offer to the readers many notable considerations that can help them to make their own documented opinions on many UNCLOS aspects and nuances.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

# AEPDIRI Journal's Review*

The Board of Editors of the *Spanish Yearbook of International Law* (SYbIL) has decided that, from this volume 22 onwards, the *SYbIL* will give notice to our readers of the studies and doctrinal articles published in each respective year (in this case, 2018) by the other two periodic journals edited —as our *Yearbook*— by the *Asociación Española de Profesores de Derecho internacional y Relaciones Internacionales* (AEPDIRI). This final section of the volume will therefore include the abstracts of the main contributions published by the *Revista Española de Derecho Internacional* (REDI) and the *Revista Electrónica de Estudios Internacionales* (REEI).

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*Revista Española de Derecho Internacional* (REDI), Vol. 70/1 (2018)

Teresa FAJARDO DEL CASTILLO, "El acuerdo de París sobre el cambio climático: sus aportaciones al desarrollo progresivo del Derecho internacional y las consecuencias de la retirada de los Estados Unidos", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.1.01]

*The Paris Agreement on Climate Change and its contributions to progressive development of international law and the consequences arising from the withdrawal of the United States*

This study examines the contribution of the Paris Agreement to the progressive development of international law. The Paris Agreement exemplifies the characteristic features of a sectoral regime and the triumph of flexibility in a legal sector of international law where States have to implement their international obligations to the domestic framework, for which they require flexibility to fulfil their commitments as well as their national circumstances to be taken into account. To this end, the Paris Agreement has distanced itself from the previous approaches that guided the normative development of the Framework Convention on Climate Change: the most rigid, envisaged in the Kyoto Protocol, and the softer, set forth by the Copenhagen Accord. The Paris Agreement develops the Framework Convention by establishing a set of provisions having a different normative intensity. These provisions are mandatory for both developed and developing countries through a mechanism of voluntary commitments (Intended Nationally Determined Contributions) that ultimately marks the identity of the Agreement. Finally, the study also assesses the impact that the United States' withdrawal may have on the Paris Agreement.

* This section has been compiled by Ms Hanan LAGHRICH GONZÁLEZ, Assistant to the Editor in Chief.

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Sergio SALINAS ALCEGA: "El acuerdo de París de diciembre de 2015: la sustitución del multilateralismo por la multipolaridad en la cooperación climática internacional", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.1.02]

*The Paris agreement of december 2015: the replacement of multilateralism by multipolarity in international climate cooperation*

The Paris Agreement breaks the perverse dynamic of international climate cooperation after the failed attempts in Copenhagen and Doha. This circumstance is the only one that justifies the enthusiasm with which it was received. However, the careful analysis of the text brings uncertainties regarding the magnitude of its contribution. Especially the analysis of its content allows to conclude that the new model of climate management does not fit as it should to what seems appropriate in the case of a global public good. The substitution of the top down for the bottom up approach does not bring the schema closer to a multilateral model but to a multipolar one, through the individualization of the mechanism for the attribution of emission reduction obligations. The consequence is that we are as subject as before, or even more, to the political will of the States. These should be those that, without a strong pressure on the issue in the new agreement, make commitments ambitious enough for the aggregate effort to think of an effective response to global warming. And this does not seem to be enough, given the pace of aggravation of a problem that threatens us all.

Mª J. CERVELL HORTAL: "Sobre la doctrina «unwilling or unable state» (¿podría el fin justificar los medios?)", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.1.03]

*About the «unwilling or unable doctrine» (could the end justify the means?)*

This article addresses the doctrine that defends the possibility that the States use the force within the territory of another which is unwilling or unable to face terrorist groups using that territory to attack others. In particular, it reflects on this doctrine's contents, legal basis and its application to the fight against ISIS in Syria. It also evaluates the existence of a growing tendency to accept it and defends alternatives which could help to face the terrorist threat.

Pilar JIMÉNEZ BLANCO: "La ejecución forzosa de las resoluciones judiciales en el marco de los reglamentos europeos", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.1.04]

*Enforcement of judgments in the framework of the European regulations*

Enforcement of judgments still depends on national laws of Member States, but it is subject to certain conditions resulting from European Regulations. From a comparative study of the different Regulations, a series of common guidelines have been obtained which constitute a European minimum in the field of the enforcement. The coexistence of exequatur and direct enforcement affects procedural issues, but the grounds for refusal available on national law are the same in both cases. There are different standards of defense of the executed debtor, in particular a special protection under the Recast

Brussels I Regulation. Finally, the implementation of the Regulations in Spanish law has some deficiencies that should be corrected.

Asier GARRIDO MUÑOZ: "Los requisitos procesales en serio: la existencia de una «controversia internacional» en la jurisprudencia de la Corte Internacional de Justicia", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.1.05]

*Taking procedural requirements seriously: the existence of an «International Dispute» in the case law of the International Court of Justice*

The notion of «international dispute» has become increasingly relevant in the determination of the ICJ's jurisdiction, but it has been in the judgments rendered in the cases Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India, Pakistan and United Kingdom) that the term has been most decisive. Following the allegations of «formalism» made against these decisions, this work aims first to put the notion into historical perspective by identifying two opposing tendencies in the Court's case law: one prioritising flexibility and another one prioritising rigorousness. Next, this work will try to explain the rationale of the most recent decisions on the matter through the prism of the protection of the judicial function of the Court.

Beatriz CAMPUZANO DÍAZ: "La derogatio fori en la Ley Orgánica del Poder Judicial", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.1.06]

*The derogatio fori in the Judiciary Organization Act*

This article deals with the regulation of the derogatio fori after the amendment of the Ley Orgánica del Poder Judicial (Judiciary Organization Act). The article focuses on the way our tribunals should act to verify that the parties have agreed to submit the dispute to a foreign tribunal and that such agreement is valid from a formal and substantive perspective, in order to stay the proceedings in our country.

María Jesús ELVIRA BENAYAS: "Transposición al ordenamiento español de la Directiva 2014/60/ue sobre restitución de bienes que hayan salido de forma ilegal de un Estado miembro mediante la Ley 1/2017", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.1.07]

*Transposition into Spanish Law of the 2014/60/EU Directive on the return of cultural objects unlawfully removed from the territory of a Member State by the 1/2017 Act*

The protection of cultural property in the European Union has been a constant concern since the beginning. However, the establishment of the single market prompted a specific regulation for its export as well as the setting of rules aimed at the restitution of cultural objects that had left illegally from one Member State and were located in another Member State. Those first standards had to be modified because they showed little practical application and, as result of that process, a new Directive was adopted in 2014. This norm has recently been incorporated into Spanish Law through the 1/2017 Act.

With this new norm some deficiencies that the 36/1994 Act showed were fixed but it shows, in turn, some gaps for its application.

Montserrat PINTADO LOBATO: "Hacia una teoría china de las relaciones internacionales. Evolución, proyectos teóricos y pertinencia práctica", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.1.08]

*Towards a Chinese theory of international relations. Evolution, theoretical projects and practical appropriateness*

Chinese International Relations production has become one of the main focus of non- Western peripheral academic production. The rise of China in the international system and its progressive accommodation on global forums stimulates the knowledge and theory production as tools to battle ethnocentrism and understand the new international reality. In this process, the three main theoretical projects (Tianxia, the Tsinghua School and Sinoconstructivism) could be used as windows to understand this native academic production and the project of international society that China aims to lead.

Antonio PASTOR PALOMAR: "La solución de controversias de doble imposición en España: una práctica convencional peculiar encaminada al arbitraje", 70(1) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.1.2018.3.01]

*Double taxation dispute settlement in Spain: a peculiar conventional practice aiming at arbitration*

The OECD-G20 Base Erosion and Profit Shifting (BEPS) Package refers to tax planning strategies that exploit gaps and mismatches in national and international tax rules. BEPS provides tools to governments so as to improve the functioning of international tax dispute settlement procedures, such as the mutual agreement procedures and arbitration. This paper deals with Spain's international practice on this subject matter and underlines the need to apply the national legislation as well as the new treaties effectively. A key part of it is the Law on treaties and other international agreements which should be taken into consideration to implement the procedures. Moreover, there is an analysis of the different double taxation arbitration systems that Spain is bound to follow from the entry into force of the national and international legislative reforms.

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*Revista Española de Derecho Internacional* (REDI), Vol. 70/2 (2018)

Sixto SÁNCHEZ LORENZO: "El principio de coherencia en el Derecho internacional privado europeo", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.1.01]

*The consistency principle in european private international law*

The present study contains a critical analysis of the scope of the principle of coherence or consistency principle in the field of European private international law. First, the author analyzes the areas in which the requirement of legal coherence between concepts, notions and legal solutions is required: vertical

(successive normative texts on the same subject), horizontal (normative texts on different subjects) and transversal (European and non European legal rules). The logic of integration can lead to a formal understanding of the principle of coherence as a mere parallelism between concepts and legal solutions in the systematic interpretation of European private international law. A casuistic analysis tries to demonstrate such a risk as well as the need for an axiological, relative and dialectical understanding of the coherence principle, which requires a comparison of legal objectives and values issue-by-issue, discarding any possibility to resort to an automatic parallelism of concepts or legal solutions.

Fulvio ATTINÀ: "Afrontando la ola de inmigración. La UE como causa y gerente de la crisis", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.1.02]

*Tackling the migrant wave: EU as a source and a manager of crisis*

The response of the EU and Member States to the current migration wave is an interesting case of building collective management for coping with a trans-boundary crisis. The present article analyses and assesses the EU response to the migration wave in a wide perspective that encompasses the existing knowledge about the drivers of increasing migration and about Europe's political and social approach towards regular and irregular migrants in the past decades; the analyses of the response of the European leaders to the demand of the citizens to close off the borders and prevent migrants from getting in; and the assessment of the EU management of the crisis. The closing section checks the EU response against the drivers of the on-going migration wave and draws a picture of the main weaknesses of the EU response.

Elisenda CALVET MARTÍNEZ y Xavier PONS RAFOLS: "El fortalecimiento de la independencia judicial en los procesos de justicia transicional como garantía de no repetición", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.1.03]

*Strengthening judicial independence in transitional justice as a guarantee of non-repetition*

The guarantees of non-repetition include all the measures that a State in transition must adopt to prevent the recurrence of serious violations of human rights that occurred in the past. The purpose of this study is to analyze, from an International Law perspective, to what extent institutional reforms aimed at strengthening judicial independence in transitional justice constitute guarantees of non-repetition. In this sense, International Law offers a set of rules and principles to guarantee judicial independence, both in its institutional and individual dimensions. On the other hand, the judiciary has often been accomplice in human rights violations committed in the past, therefore, transitional justice measures should serve a threefold purpose: removing justice operators from the judicial system identified with the previous regime, protect judges from possible arbitrariness or indiscriminate measures and, finally, ensure that judges form a homogeneous body, with proven integrity and impeccable conduct. Eventually, strengthening judicial independence in transitional justice not only contributes to prevent future human rights violations, but also increases citizens' trust in institutions and promotes the rule of law.

José Antonio SANAHÚJA: "Reflexividad, emancipación y universalismo: cartografías de la teoría de las Relaciones Internacionales", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.1.04]

*Reflexivity, emancipation and universalism: cartographies of the theory of international relations*

Since his post-positivist turn of the Eighties of the 20st Century, both the theory and discipline of International Relations has become more plural and diverse, and its cartography can be drawn from three axes or lines of tension: the first one, in the epistemological realm, has radical rationalism and reflectivism as extreme poles, with social constructivism, as moderate rationalism, and neo-Gramscian critical theory in the middle ground; the second axis, of praxeological-normative nature, is organized around the possibility and desirability of change; the third one address the definition of universality versus diversity, and the possibility or negation of a post-Western universalism. All of them also entail divergences between foundationalism and anti-foundationalism, both in the epistemological and normative realm.

Marta REQUEJO ISIDRO: "El tiempo en el Reglamento 650/2012. ilustraciones de la práctica española", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.1.05]

*Time in the regulation 650/2012. First illustrations of Spanish practice*

The first cases of application of the European Successions Regulation in Spain dealt with testamentary dispositions granted before August 17, 2015 by foreigners with habitual residence in Spain. The application of art. 83 (transitional provisions) raised doubts among the legal practitioners involved as to the applicable law, in particular regarding the identification of a choice of law. The paper focuses on art. 83 and its complexity; at a second stage it assesses the Spanish decisions in light of the proposed explanations to the rule.

Margarita ROBLES CARRILLO: "La reforma de la corporación para la asignación de nombres y números de internet (ICANN): un análisis en términos de legitimidad", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.1.06]

*The reform of the internet corporation for assigned names and numbers* (ICANN): *an analysis of its legitimacy*

ICANN is a corporation created in accordance with US law and aimed to ensure the stable and secure operation of the Internet's unique identifier systems. Since its creation, this corporation has been widely criticized for its lack of legitimacy. This problem justifies the need to reform it. Both political-institutional dissent and the appearance of neutrality of technological governance have led to a unilateral solution to this problem to the extent that the United States has controlled its development and results. This reform has been carried out following the multistakeholder model. The new Bylaws modifies the

ICANN institutional model and also the accountability system. But the first shows serious organic and functional problems, while the second has been built mainly through one procedure that does not really guarantee independent and external control. Despite the reform, ICANN's legitimacy crisis has not been yet resolved satisfactorily.

Carmen MONTESINOS PADILLA: "Los principios Ruggie y la Agenda 2030. Un futuro de recíprocas influencias por explorar", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.1.07]

*The ruggie principles and the 2030 Agenda. A future of reciprocal influences to be explored*

The Guiding Principles on Business and Human Rights are a valuable tool for the implementation of the 2030 Agenda. The adoption of National Action Plans in accordance with them and the consequent implementation of measures that, among other things, guarantee the recognition of the extraterritorial responsibility of the parent companies, impose mandatory due diligence procedures and remove obstacles in access to effective mechanisms of reparation, will contribute to the fulfilment of the sustainable development goals. The evaluation of the National Action Plans and the monitoring of compliance with the measures by which they are integrated are considered to be useful tools for diagnosing the level of achievement of the objectives around which the 2030 Agenda is articulated. The purpose of this paper is precisely to contribute to the preliminary assessment of compliance with the Ruggie Principles through the analysis of the content of the National Action Plans of the United Kingdom, the Netherlands, Denmark, Finland, Sweden, France, Norway, Italy, Switzerland and Spain, and in this way to establish guidelines to follow in future activities assessing the level of achievement of the sustainable development goals.

Concepción ESCOBAR HERNÁNDEZ: "La corte penal internacional en construcción: nuevos retos veinte años después de la Conferencia de Roma", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.2a.01]

*The International Criminal Court under construction: new challenges twenty years after the Conference*

Almost fifty years after the General Assembly of the United Nations adopted the Universal Declaration of Human Rights on 10 December 1948, a Diplomatic Conference of Plenipotentiaries convened under the auspices of the same Organization entered another important date in the history of international law: on 17 July 1998, the States meeting at the Rome Conference adopted the Statute of the International Criminal Court, through an unregistered vote whose result is worth noting: 120 votes in favor, seven against and 21 abstentions. The celebration in this year of the twentieth anniversary of the adoption of the Statute of Rome offers a good opportunity to reflect again on a legal instrument located in the heart of the collective imagination on the fight against impunity for the most serious international crimes.

Sara KENDALL: "*Restorative Justice at the International Criminal Court*", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.2a.02]

With the twentieth anniversary of the Rome Statute of the International Criminal Court (ICC) approaching in July of 2018, the ICC has announced its intention to «mark this milestone» throughout

the year, inviting visitors to its website to do the same. An accompanying film commemorating the anniversary opens with scenes of atrocity crimes throughout the world flashing in sequence. Interspersed throughout this account of the Court's establishment are images of victims of crimes that could possibly fall under the court's jurisdiction, whilst the film narrates the subject matter that the ICC is empowered to adjudicate: the use of child soldiers, destruction of cultural property, and sexual violence, among other forms of war crimes, crimes against humanity and genocide. Following a clip of testimony of a survivor of sexual violence crimes, the film introduces the Court's Trust Fund for Victims, which was established through the Rome Statute to provide «support to victims, survivors, their families and community». It closes with the claim that the pursuit of security «starts with justice for everyone». While a familiar genre of institutional self-representation, the film is remarkable for the way in which it foregrounds the figure of the victim of international crimes within a retributive legal field.

Ángeles JIMÉNEZ GARCÍA-CARRIAZO: "La plataforma continental de las islas Canarias: ampliación y cuestiones afines", 70(2) *Revista Española de Derecho Internacional* (2018) [DOI: http://dx.doi.org/10.17103/redi.70.2.2018.3.01]

*The continental shelf of the Canary Islands: extension and related issues*

The United Nations Convention on the Law of the Sea envisages the possibility for coastal States to extend their continental shelf beyond 200 nautical miles. This creates an additional marine space where States can explore and exploit extremely attractive mineral and energy resources.
The geo-strategic position of the Canary Islands provides an excellent example of state practice. The potential extension of the continental shelf leads to overlaps with Portugal and with Western Sahara and has reactivated two outstanding issues. On the one hand, the question of the Savage Islands, which is out of the sphere of the extended continental shelf. On the other hand, the status of the Western Sahara as a non-autonomous territory, which prevents the delimitation of the marine spaces between this territory and the Canary Islands.
It is the State's responsibility not to miss the opportunities offered by a treaty such as this one which exhaustively codifies the law of the sea. A good use of the tools that the Convention makes available to coastal States is a guarantee of power and access to resources under legitimate conditions.

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*Revista Electrónica de Estudios Internacionales* (REEI), No. 35 (2018)

Francisco JIMÉNEZ GARCÍA: "El Derecho internacional en mutación. El test «civilizatorio» del estado de derecho internacional (¿Soft-Law de baja o alta intensidad?) y el régimen de las fuerzas de estabilización de la paz", 35 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.02]

*International Law in mutation. The «civilizing» test of the international rule of law (soft law of high or low density?) and the regime of the peace stabilization forces*

In the turn of the millennium, different areas of the global society are deeply challenging the international Law. Indeed, today with new factors altering the spatial, structural and regulatory

dimension of state and humans relations, at the domestic and at the international levels, the international order remains in its crisis of identity. On the one hand, the predominance of liberal and non-formalistic systems increases the distance between power, law and justice, while on the other hand, multilevel action is encouraged and transparency and accountability are promoted. Within the framework of the United Nations, while the topic of the Rule of Law has been proposed to mark the course of these changes and to limit the new sovereign powers or action forums, there is no consensus either on its scope or on its legal status. Rather, it is conceived as a «civilizing test» under certain structural principles or values: certainty, predictability, transparency, accountability and respect for international humanitarian law and human rights. In order to test such a purpose, it is proposed as a field of study that stabilization operations –and their changing basic principles– should not only be in accordance with the principles of the Rule of Law, but also contribute to their implementation in the countries or regions where they operate.

Mercedes SOTO MOYA: "El Reglamento (UE) 2016/1104 sobre régimen patrimonial de las parejas registradas: algunas cuestiones controvertidas de su puesta en funcionamiento en el sistema español de Derecho internacional privado", 35 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.03]

*Council Regulation (EU) 2016/1104 in matters of the property consequences of registered partnerships: Some controversial issues from its implementation in the Spanish IPL system*

On July 8, 2016, was published the Council Regulation (EU) 2016/1104, implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships. This Regulation is a milestone in the construction of EU private international law, since never before the registered unions had been the protagonists of a EC Regulations. This paper analyzes some of the problems that its implementation in the Spanish system of Private International Law will arouse. In the first place, it will be complicated for the legal operator identifying the couples covered by the Regulation. Second, another of the controversial aspects that may result in the entry into force of this rule in the Spanish IPL system, is the relative to the applicable law when it corresponds to a State with more than one legal system, like Spain. We have a notion that the diversity of autonomic regulations can produce problems of internal conflicts of laws, as happens with other regulations, such as the one of successions, for example. It is studied if this diversity will constitute a real problem of application of the Regulation 2016/1104 and what the possible solutions would be.

Elena RODRÍGUEZ PINEAU: "La oposición al retorno del menor secuestrado: movimientos en Bruselas y La Haya", 35 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.04]

*Opposing the return of an abducted child: Brussels and The Hague on the move*

The adequacy of the solutions foreseen in the otherwise successful Hague Convention 1980 on child abduction has been increasingly questioned. This has been particularly so in relation to abductions linked to domestic violence. Criticisms have also been relevant in relation to the EU rules on child abduction. In this context, both The Hague Conference and the European Union have undertaken a revision of these rules. The former has put forward a Draft Guide to good practice on Article 13(1)(b)

on the assumption that there is no need to review the rule but to foster its proper application. The proposal for a Brussels II Regulation Recast EU, on the other hand, includes a thorough reform of the Regulation in relation to child abduction. Both texts aim at securing the return of the child by means of the adoption of protective measures. This article addresses the solutions proposed in both documents in the light of the aims they pursue in order to evaluate their significance and the reciprocal impact they may have.

José ABU-TARBUSH y Javier GRANADOS: "La política exterior de Rusia en Oriente Medio: su intervención en Siria", 35 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.05]

*Russian foreign policy in Middle East and its military intervention in Syria*

Russia's military intervention in Syria since september 2015 marks a turning point in its foreign policy after the fall of the Soviet Union in 1991. Russia has in Syria and in the whole region several interests, like the control of military bases, enegy projects and regional alliances. However, Moscow pursued also other objectives which are capital to its global strategy. Russian authorities aim to change the structure of the International System toward a multipolar order in which it wants to be considered as a great power and, at the same time, to decrease American power in the region. Moscow has seen USA's failure trying to change authoritarian regimes in Afganistan (2001), Irak (2003) or Libia (2011), as an opportunity to achieve those goals. This Russian strategy has introduced a new balance of power in the Middle East, although it has not change the traditional order of the region or revised the existing order. Moscow seeks to preserve the status quo and reinforce authoritarianism.

Pilar JIMÉNEZ BLANCO: "Movilidad transfronteriza de personas, vida familiar y Derecho internacional privado", 35 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.06]

*Cross-border mobility of persons, family life and private international law*

The cross-border mobility of persons requires adequate protection of their right to family life, which implies, therefore, the possibility of moving and residing with family members in another State. The mobility regime within the EU has certain peculiarities for EU citizens but also for third-country nationals. A minimum European family model can be identified. In addition, there is a trend towards the recognition of already established families, in particular, when they have established themselves as families in another EU State. In the field of immigration law, the way to accredit and make effective the family relationships does not coincide in all cases with the classical methods of private international law. Sometimes there are two different approaches, civil and administrative, on the same family relationship. Immigration law should be subject to the right to family life, in particular to the protection of the best interests of the children and their right of relationship with both parents as guiding principles of all decisions that affect them.

Borja FERNÁNDEZ BURGUEÑO: "Solicitudes de asilo patrocinadas presentadas en embajadas y consulados: un modelo basado en la experiencia española y en el programa canadiense de «private sponsorship»", 35 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.07]

*Sponsored asylum applications filed in embassies and consulates: A model grounded on the Spanish experience and on the Canadian program «private sponsorship»*

For 25 years Spain allowed to seek asylum at its embassies and consulates. This legal route was closed with the entry into force of Law 12/2009, October 30, Regulating the Right of Asylum and Subsidiary Protection. Eight years later, under the greatest refugee crisis in Europe since World War II, it is necessary to construe a proposal that re-enables a legal and safe way for refugees to seek protection in Europe preventing them from having to resort to mafias and smugglers to cross the Mediterranean Sea. In this paper, after analysing the legal basis and viability of lodging asylum applications in diplomatic missions, it will be proposed to accommodate the Canadian "Private Sponsorship of Refugees" programme to the Spanish legal framework to shape up a regime sponsored by the civil society which will allow refugees to seek asylum in Spain from abroad.

Andrea COCCHINI: "Tráfico ilícito de migrantes y operación Sophia: ¿podría aplicarse de nuevo la responsabilidad de proteger en Libia?", 35 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.08]

*Migrants smuggling and operation Sophia: Could the responsibility to protect return to Libya?*

Libyan internal conflict after Gaddafi's fall makes it impossible to control over its southern land borders and the coastal ones in the north of the country. This lack of control facilitates irregular migrations from sub-Saharan Africa to Libya and from there to the EU, through the southern central Mediterranean. In order to stop migrants smuggling, the EU Council adopted Decision (CFSP) 2015/778 which is developing the operation Sophia. This operation, however, is jammed in a phase that prevents it from achieving its objectives due to the absence of Libya's consent or UN Security Council resolution allowing its extension to the following phases. To unlock it, this paper suggests to restore the already forgotten principle of the responsibility to protect which, backed by the theory of UN Security Council retroactive authorizations, would allow the operation to continue within the international legal framework.

Elena PINEROS POLO: "Arbitraje del Mar del Sur de China. La estrategia procesal de la República Popular de China", 35 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.09]

*South China Sea arbitration. The procedural strategy of the People's Republic of China*

This paper summarizes the main procedural aspects of the arbitral resolution of the South China Sea Arbitration. Likewise, it analyses the default of appearance of China in the arbitral proceedings. The legal and practical consequences of the non-appearance of the respondent state in the arbitral proceedings are examined, specifically in this particular case, including the decision of the Tribunal regarding its jurisdiction. China adopted a certainly questionable procedural strategy, indeed it finally did not assure an absolute successful outcome.

José Ignacio PAREDES PÉREZ: "Medidas contra el bloqueo geográfico injustificado: el Reglamento (UE) 2018/302 y su incidencia sobre las normas europeas de Derecho internacional privado", 35 *Revista Electrónica de*

*Estudios Internacionales* (2018) [DOI: 10.17103/reei.35.10]

*Measures against unjustified geo-blocking: Regulation (EU) 2018/302 and its impact on European private international law rules*

The purpose of this study is to analyze the measures of Regulation 2018/320/EU against discriminatory practices based on nationality, place of residence or place of establishment in cross-border transactions within the internal market. In this particular context, the interaction of these measures with the European rules of private international law is addressed in order to delimit, on the one hand, the cases of contractual and non-contractual obligations in case of infringement of the prohibitions foreseen in the new Regulation, and, on the other hand, of the need to review the interpretation of the criteria that define the notion of activity addressed to the Member State of the domicile of the consumer in the meaning and purpose of the Regulation, which is to achieve the conciliation between the right of the customers not to be discriminated against for geographical reasons and the freedom of the traders to determine the geographical scope to which they direct their activities within the European Union.

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*Revista Electrónica de Estudios Internacionales* (REEI), No. 36 (2018)

Juan Domingo TORREJÓN RODRÍGUEZ: "El Parlamento Europeo y el conflicto del Sáhara Occidental (1956-2018)", *36 Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.02]

*The European Parliament and the Western Sahara conflict (1956-2018)*

Our main objective is to make an analysis of the attitude of the European Parliament about the Western Sahara conflict, from the origin of the conflict until 2018. In the early 80's, the Parliament supported the Moroccan thesis. But throughout the decade, this position changed towards a support of the self-determination of the Western Sahara people. In the 90's, after a crisis between Morocco and the EU, the European Parliament adopted a more moderate posture about the issue. In the 00's, the Parliament drew attention to human rights and exploitation of natural resources issues, supported the Baker Plan, the Corell Opinion about the exploitation of natural resources in Western Sahara, and requested for the inclusion of the human rights monitoring in MINURSO. In the 10's the European Chamber pays less attention to the Western Sahara conflict.

Cástor Miguel DÍAZ BARRADO: "El "principio democrático" al hilo del Acuerdo sobre diálogo político y cooperación entre la Unión Europea y Cuba", *36 Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.03]

*The "principle of democracy" in light of the political dialogue and cooperation agreement between the European Union and the Republic of Cuba*

International community is determined to embody the "principle of democracy" long ago as an essencial principle of the international order. However, it has not yet happened as this fact is demostrated by international practice. But, States' behaviour and international organizations' task, particularly it from european and american organizations, indicate a neat trend in this direction. Political dialogue and

cooperation agreement between the European Union and its Member States, and the Republic of Cuba is of particular interest in order to appreciate the evolution which is taking place in this matter. The "delicate balance" achieved with this Agreement is a notable expression of the path chosen by some States and international Organizations in accepting eventually the "principle of democracy" in the international community. Projecting a pragmatic approach of international relations, as it is done by the Agreement, is not incompatible with the will to form the "principle of democracy" in the international order.

Víctor Luis GUTIÉRREZ CASTILLO: "La aplicación extraterritorial del Derecho internacional de los derechos humanos en casos de ocupación beligerante", 36 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.04]

*The extraterritorial application of international human rights law in cases of belligerent occupation*

Over the last decade, one of the most controversial issues in international protection of human rights is the extraterritorial application in situations where a State occupies the territory of another State for belligerent reasons. The practice and the international case law -within the United Nations and the Council of Europe- have recognized the extraterritorial applicability of international texts on protection of human rights but with subtle differences. This article pays particular attention to the development of the case law of the European Court of Human Right (ECHR). As for the latter, when a State is exercising effective control over a foreign territory, its responsibility is compromised by the acts committed by its armed forces, as well as by the local authorities supported thereby.

Manuel de Jesús ROCHA PINO: "La asociación estratégica China-Unión Europea durante el periodo 2010-2018: interdependencia económica y tensiones normativas", 36 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.05]

*The China-European Union strategic partnership during the period 2010-2018: economic interdependence and normative tensions*

The research analyzes the development of the China-European Union (EU) strategic partnership during the period 2010-2018. Along this time, the China-EU relations have been characterized by two processes: on the one hand, in order to continue with their commercial relations, both actors have favored the deepening of their economic interdependence relations in a pragmatic way. On the other hand, the bilateral relations experience tensions and constant disagreements due to the political, economic and normative asymmetries existing between China and the EU. This paper uses a liberal institutional approach in order to analyze the priority issues of the bilateral agenda, and how the strategic partnership has become an institutional mechanism to negotiate disagreements and tensions, as well as the accommodation of their interests.

Carlos GONZÁLEZ VILLA: "La dimensión internacional de la desintegración de Yugoslavia: una fuerza impulsora de la violencia", 36 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.06]

*The international dimension of Yugoslav disintegration: a driving force of violence*

The study addresses the impact of the international dimension of the final crisis in Yugoslavia between 1990 and 1991. This period encompasses the failure of the reform led by the Yugoslav Federal Prime Minister, the road to the proclamation of independence by Slovenia and Croatia in June 1991, and the armed conflicts in those republics. International influence in those development is approached from a multidimensional perspective, taking into account the foreign policy of the United States, analysed through the constraint represented by the existence of the Soviet Union; the international support that allowed secessionist republics to rearm before the proclamation of their independence; and the diplomatic activity of European countries, some of which also participated in the rearming process. Through the analysis of primary sources and published material, the paper concludes that international factors are directly related to the fact that the dissolution of Yugoslavia resulted in a violent process.

Mª del Pilar DIAGO DIAGO: "La prueba de la nacionalidad española y de la vecindad civil: dificultades en la determinación del régimen económico matrimonial legal", *36 Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.07]

*The proof of the spanish nationality and the regional citizenship: difficulties in the determination of the legal matrimonial economic regime*

The Spanish Civil Registry does not provide any complete evidence of the nationality or of the, regional citizenship except in the specific cases that are dealt in this study. This reality generates a legal uncertainty that affects the determination of the law to apply on many occasions and especially, in the legal matrimonial property regime. This work analyzes the ways of the nationality and the regional citizenship, as well as the difficulties that arise in the determination of the legal matrimonial property regime. In addition, new solutions are proposed, according to the new regulation offered by the LRC.

Rocío CARO GÁNDARA: "La reserva de dominio como garantía funcional del comercio internacional: su eficacia en España", *36 Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.08]

*Retention of title clause as a functional security right in international trade: its effectiveness in Spain*

In time of crisis, as in time of economic stability, the availability of credit is a key element in financing business activity. But in the business world there is no credit without security. In this sense, the retention of tittle clause, understood as a clause inserted in a contract for the sale of movable property, wich suspends the transfer of propert until the full payment of the deferred price, is a cheap inter-party financing mechanism, a guarantee of compliance of the deferred payment, and, finally, and effective guarantee of satisfaction of the seller interest, in case of default of the buyer. However, when it is inserted in an international contract, its effectiveness is highly questioned, as a consecuence of the spatial discontinuity caused by the application of the lex rei sitae rule, as a criterion for determinig the law applicable to rights in rem in case on movables. This discontinuity of its effectiveness is caused, in turn, by the diversity of requirements that national legislators demand for their effectiveness against other creditors of the buyer and third parties. In this context, this paper analyzes the posible effectiveness in Spain of retention of title agreed upon abroad and proposes de lege lata and de lege ferenda solutions, taking into account legislative developments, in different territorial and material areas,

that offer different models of regulation, through the choice or combination of material and conflictual techniques.

Soledad TORRECUADRADA GARCÍA-LOZANO: "Los derechos humanos como límite a la gestión de los flujos migratorios mixtos", *36 Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.09]

*Human rights as limiting the management of mixed migration flows*

Even if it is true that the State is sovereign to decide who enters its territory, where and under which conditions, it is a competence that is limited because of the necessary human rights guarantees of the persons who form part of mixed migration flows. Thus, the principle of non refoulement finds its foundation in the guarantee of the right to life and not to be a victim of torture and other cruel, inhuman or degrading treatment or punishment and is applicable both to asylum-seekers or as migrants who find themselves in a situation of risk. At present, international tribunals and organs remind all states of their obligations to ensure respect for human rights of all persons, insisting on rationality and humanity in a social context which is dangerously turning towards populism and against those who are in a situation of special vulnerability.

María José CERVELL HORTAL: "Un caleidoscopio sobre el uso de la fuerza (el conflicto sirio)", *36 Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.10]

*A kaleidoscope on the use of force (the syrian conflict)*

This article analyzes, from the Syrian conflict perspective, some of the norms regulating the use of force, with special reference to non-intervention principle, self-defence against non-state actors and humanitarian intervention, in order to determine their implementation, effectiveness and limits.

Ángeles JIMÉNEZ GARCÍA-CARRIAZO: "El tratado de delimitación entre Timor Oriental y Australia fruto de la conciliación obligatoria", *36 Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.11]

*The delimitation agreement between Timor-Leste and Australia as a result of the compulsory conciliation*

On March 6, 2018, Timor Leste and Australia signed the maritime boundary treaty. This treaty comes true after nearly thirty years since the Timor Gap Treaty was signed between Australia and Indonesia. That agreement has marked relations between Australia and Timor Leste since the latter's independence. Australia's carve-out from the maritime boundary jurisdiction of international courts has forced Timor Leste to activate for the first time the compulsory conciliation mechanism within the framework of the United Nations Convention on the Law of the Sea. The outcome of this dispute settlement mechanism is embodied in an agreement that divides the continental shelf and the exclusive economic zone between both States, but whose lateral limits are subject to future adjustments upon certain events.

Valentina MILANO: "Human trafficking by regional human rights courts: An analysis in light of Hacienda Brasil Verde, the first Inter-American Court's ruling in this area", 36 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.12]

Hacienda Brasil Verde Workers v Brazil is the Inter-American Court of Human Rights' (IACHR) first ruling on human trafficking and slavery. In this landmark case, the Court provides important guidance on the scope of the exploitative conducts prohibited under Article 6 of the American Convention on Human Rights and of the positive obligations this prohibition entails. After referring to the circumstances that have hindered the adjudication of slavery and human trafficking cases internationally, this study provides an overview of the developing international case law on these forms of exploitation, focusing on the European Court of Human Rights (ECtHR). It then analyzes in detail the reasoning followed by the IACHR in Hacienda Brasil Verde, highlighting its main contributions but also some of its weaknesses. Finally, the study presents conclusions on the extent to which the IACHR's ruling addresses some of the gaps and weaknesses identified in the ECtHR's case law, in particular by providing greater clarity on the relationship between slavery and trafficking in international law as well as by putting more emphasis on States' positive obligation to prevent these practices.

Leandro BALTAR y Luciana Beatriz SCOTTI: "La aplicación del derecho extranjero, la cláusula de excepción y el reenvío en el Derecho Internacional Privado argentino: Un trinomio pragmático", 36 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.13]

*The application of foreign law, the clause of exception and the renvoi doctrine in the Argentine Private International Law: A pragmatic trinomy*

The incorporation into the Civil and Commercial Code of the Nation of a title dedicated to provisions of International Private Law implied a change for Argentina. Faced with an incomplete systematization of the rules that regulate these legal relationships, we are obliged to reinterpret today's solutions. Now, we have rules that regulate the general aspect by introducing new challenges and overcoming old problems. The reception of the renvoi doctrine opens up to us as a new path expected by many. This regulation must be interpreted together with the novel incorporation of the "exception clause" that proposes a flexibilization of the Argentine conflict system and that, together, become two "friends" that function in a peculiar way.

Nicolás CARRILLO SANTARELLI: "La decisión "humanizadora" de la Sala de Cuestiones Preliminares de la Corte Penal Internacional sobre competencia y jurisdicción frente a algunos crímenes cometidos de forma transnacional: el caso de los Rohingya expulsados hacia Bangladesh", 36 *Revista Electrónica de Estudios Internacionales* (2018) [DOI: 10.17103/reei.36.14]

*The "humanizing" decision of the Pre-Trial Chamber of the International Criminal Court on competence and jurisdiction regarding certain crimes perpetrated with transnational elements: the case of the Rohingya expelled to Bangladesh*

The decision on competence and jurisdiction of the Pre-Trial Chamber I of the International Criminal Court, in spite of its brevity and its seizing procedural aspects at first glance, is noteworthy for several reasons flowing from its interpretations, which enable the Court to address a serious humanitarian and

social crisis that cannot be left in impunity. Concerning this, besides highlighting the autonomous participation that victims may have, and even referring to rights of theirs in the institutional framework of the Court –that the latter must ensure, the Chamber's decision draws a distinction between the crimes of forcible transfer and deportation, and concludes that the Court can have competence even when only part of the pertinent criminal conduct takes place in the territory of States parties to its Statute, even if such conduct did not begin in their territories. This logic permits to strengthen the fight against the impunity of conducts with transnational elements, further eliminating gaps and control vacuums through the potential action of the Court, whose objective international legal personality and effects in relation to third parties in some events are also upheld in the decision.

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