the SPANISH YEARBOOK of INTERNATIONAL LAW

The relationship between legal systems

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1. I have decided to address the relationships between legal systems as the subject of my acceptance speech. Both the choice of subject and how I will approach it are conditioned by my professional background, which has essentially been shaped by three main factors: my status as an international law professor, my specific interest in European Community law, and my judicial activity over the last 15 years.

Needless to say, I do not intend to develop or even outline this topic as a thesis, but rather to lay out a few personal thoughts on it.

To this end, I will approach the subject successively from four different perspectives: the traditional perspective of the relationship between international law and domestic law, the specific perspective of the relationship between European Community law and the domestic law of the Member States, the perspective of the relationship between international law and European Community law, and, finally, the perspective of the growing interrelationship between different national and international legal systems.

Before I begin, I would like to underscore that a key premise of all my thoughts on these matters is the importance of legal pluralism or the pluralism of legal systems, which is an objective state of affairs. In my opinion, one important consequence of this legal pluralism is that there is not always a single legally correct solution to the conflicts that arise as a result of the interactions between the different legal systems. Instead there is a plurality of solutions, in keeping with the pluralism of the legal systems, whose harmonization or convergence cannot always be achieved through legal logic alone. This is something I always stress when referring to the relationship between European Community law and the constitutional law of the Member States, a passionately contested topic in the literature and one I will return to shortly.

2. With regard to the classical issue of the relationship between international law and domestic law, the traditional perspective, based on the divide in the literature between monism and dualism, has given way to a more empirical analysis of the legal reality. This new approach makes it possible to regard today as something non-controversial the fact that international rules are generally received and implemented in accordance with each state's legal system, that the various legal systems provide for diverse solutions in this regard based

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on monist or dualist conceptions, and that the problems encountered within each legal system often depend on the type of international rule being received and, in particular, whether it arises from customary international law, treaty-based law or regulations established by an international organization.

Setting aside, for a moment, the matter of European Community law, we can see that the progressive development of international law has afforded domestic judges an increasingly important role in its implementation whilst reinforcing the unavailable nature of certain principles. The most important innovations in this area are, in my view, those resulting from the recognition of the existence of imperative norms of international law *jus cogens* norms and of international norms establishing individual rights and obligations, particularly human rights norms and the norms categorizing international crimes and determining individual criminal responsibility.

However, notwithstanding the growing overlap between international law and domestic law in the areas governed by such international norms, the imperative nature of those norms, or the fact that they are intended to confer individual rights and create individual obligations, this process obliges states to adopt monist solutions for the reception and implementation of these norms in their respective domestic legal systems.

In this regard, beginning with a 1976 judgment, the European Court of Human Rights has acknowledged that the European Convention on Human Rights does not dictate for the Contracting States any given manner of ensuring the effective implementation of any of the Convention's provisions within their internal law, even though the Court itself has recalled that incorporating them into domestic law is the most effective way to do so. Furthermore, it is widely recognized that domestic rules are crucial for the criminal sanctioning of international crimes, in terms of the classification and criminalization of punishable behaviours and the very existence of universal criminal jurisdiction, as well as the possibility of extradition to a state whose criminal jurisdiction lacks a territorial basis. The various judgments delivered in Spain and the United Kingdom in the well-known *Pinochet* case are extremely illustrative in this regard.

Additionally, with a few notable exceptions, such as the 1949 Geneva Conventions on international humanitarian law (and, according to a controversial interpretation, the Convention on Torture), international treaties recognizing universal criminal jurisdiction for the prosecution of certain conducts do not usually establish the compulsory nature of that prosecution, but rather simply acknowledge the legitimacy of pursuing it. Thus, the progressive development of international law has not yet crystallized in the sense sought by the International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind, Article 8 of which provides that all States Party shall take the necessary measures to establish their jurisdiction over the crime of genocide, crimes against humanity and war crimes, regardless of where or by whom they were committed, and Article 9 of which provides that the State Party in whose territory an individual alleged to have committed a crime is found shall extradite or prosecute that individual.

3. Let us now look at the relationship between European Community law and domestic law. I will begin with a few preliminary observations to clarify my conceptual and methodological

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assumptions.

With regard to the controversial issue of the legal nature of European Community law, my personal position, which I have had the opportunity to express on several occasions, can be summarized as follows. The appropriate legal classification of European Community law is that of a specific international law system; however, the essential traits of this legal system are not determined by this classification, but by the content of the treaties constituting the primary law, as well as the subsequent evolution of the European Community legal phenomenon, which cannot be separated from its theoretical understanding.

As for the content of the primary law, the system's most salient aspects are, first, the ambitious integration agenda set forth in the treaties and enriched by their successive modifications, and, second, the institutional dimension of the European Communities, one of whose essential elements is the existence of a Court of Justice responsible for enforcing the law in the interpretation and application of the treaties and endowed with the necessary powers to fulfil this mission effectively. Accordingly, the Court of Justice has played a key role in the evolution of European Community law as a core element for coordinating the process of dialectical interaction between legal theory and application of the law.

The case law of the Court of Justice has thus shaped the elements today considered characteristic of European Community law, namely, first, the fundamental principles of direct effect, primacy and state responsibility for damage caused to individuals on account of non-compliance with European Community law, and, second, the progressive constitutionalization of the system in the sense that the treaties are conceived of and applied as a Constitution of the European Community.

This is not the place for an extended discussion of these well-known principles. What I wish to underline now is that the principles of direct effect and primacy have led to the establishment, as a major specificity of European Community law, of a monist solution for the relationship between the European Community legal order and the domestic law of each Member State. In short, unlike most international norms, the aforementioned principles of European Community law determine for themselves how the norms of this legal order are to be incorporated into the internal order, thereby precluding any sort of dualist solution.

The dramatic incompatibility of dualist techniques with European Community law was on display in the ingenious solution that the United Kingdom found, at the time of its accession, to overcome the seemingly insurmountable stumbling block of the principle of parliamentary sovereignty. The European Communities Act relativized that principle, stating that parliamentary acts could not prevail over European Community law, thereby ensuring the latter's primacy over both previous and subsequent acts of the British Parliament.

Certainly, this law can be interpreted in a dualist light if one considers that the relativization of parliamentary sovereignty that it brings about is valid only so long as Parliament does not expressly decide to question the pre-eminence of European Community law. I will not go into greater detail on this issue of British "constitutional" law. Allow me simply to cite the opinion of Professor MacCormick, who, in 1993, said that such an exception to the primacy of European Community law over acts of Parliament is dubious and subject to possible customary evolution, adding that whilst it would probably have been almost

 DOI: 10.17103/sybil.23.1

unanimously endorsed in 1972, and might even have continued to be so at the time he was writing (i.e. in 1993), it was quite likely that at some point in the next century (i.e. the 21st century) it would come to be regarded as antediluvian heresy.

The exclusion of dualist solutions in the relations between European Community law and domestic law, however, is not absolute, for the effectiveness of the principles of direct effect and primacy proclaimed by the Court of Justice, and, in short, of all European Community law, in each state's internal order is critically conditioned by the attitudes of national jurisdictional bodies, which are responsible, in their areas of territorial and functional jurisdiction, for enforcing European Community norms.

In this regard, it is worth noting, in general, that national constitutional and supreme courts have welcomed and accepted the basic principles of organization between European Community law and the domestic systems and have contributed to their general acceptance in the national legal systems. Today, both the direct effect and the primacy of European Community law over infra-constitutional domestic law seem to be generally accepted, although, to reach this point, it was first necessary to overcome various dualist obstacles in some states arising, in particular, from national conceptions of the supremacy of the legislative branch or of the position of administrative or ordinary judges in relation to the law.

However, dualist elements remain in the approaches of some constitutional courts or supreme courts with constitutional jurisdiction to the relationship between European Community law and the respective country's constitutional law.

In short, the recognition of the primacy of European Community law over domestic law does not include the absolute and unconditional nature with which the Court of Justice seems to have conceived of that primacy in its case law. In fact, unlike some supreme courts, such as the Belgian Council of State, no constitutional court has expressly endorsed the Court of Justice's conception of this primacy.

In contrast, some constitutional courts have identified constitutional limits to the Court of Justice's doctrine, originating in fundamental principles of their respective constitutional system, especially in matters of fundamental rights and powers.

However, by and large, the constitutional and supreme courts of the various Member States have managed to satisfactorily resolve the new problems of coordination between legal systems posed by the intensity of the integration of European Community law into domestic law. In most cases, they have reached solutions consistent with those established by the Court of Justice, although with different reasonings, in which, naturally, reasons grounded in the respective constitutional law are decisive.

In my opinion, in the current stage of European integration, characterized, in the legal arena, by the relative reciprocal autonomy of the national and European Community legal systems, despite their multiple overlaps, and by the separation of their jurisdictional bodies, which are not organized in a single hierarchical relationship, the dramatic conflict between the demands of the European Community system and those of each Member State's constitution does not lend itself to a logically satisfactory solution, as both European Community law and national constitutional law assert their own primacy.

However, this dramatic conflict is actually purely hypothetical, since the fundamental

 DOI: 10.17103/sybil.23.1

values of the national constitutions are shared and integrated into European Community law as general principles common to the Member States' legal systems.

As I noted at the start, legal logic is therefore not enough to avoid these types of conflicts. It is also necessary to use common sense, which, in my view, is an essential element of both legal theory and the practice of law.

4. I will now turn to the perspective of the relationship between international law and European Community law, i.e. to how non-European Community international rules that are binding on the European Communities are inserted and implemented in the European Community legal system. I am referring, of course, not so much to international rules regulating internal aspects of the Community's functioning, but to international sources arising from the external relations that result from the European Communities' participation, as an actor, in the universal international community, which is premised, at the legal level, on their status as a subject of international law.

The problems posed in this type of relationship are basically the ones posed by the relationship between international law and the domestic law of each state: criteria for the reception of international norms, hierarchical position of the international norms received, and the power of the various domestic bodies to apply and interpret international law. It is thus also necessary to seek the solution within the framework of European Community law itself, which, for these purposes, can be regarded as a "domestic order".

Article 300 of the Treaty establishing the European Community regulates with considerable detail the procedure for the conclusion of international agreements between the Community and third states or international organizations. However, when it comes to the internal effects of the rules set out in those agreements, it merely states, in paragraph 7, that "Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States."

We must thus turn to the Court of Justice's case law, which, admittedly, is not as clear in this area as in that of the relationship between European Community law and domestic law.

With regard to general international law, there is a clear monist trend. The Court has recalled on several occasions that the European Community's powers must be exercised in accordance with international law. In the *Poulsen* judgment, from 1992, the Court interpreted the rules relating to European Community jurisdiction in matters of fisheries in light of the texts codifying the rules recognized by international custom. The Court has likewise referred multiple times to the Vienna Convention on the Law of Treaties. The most remarkable example of this case law is the *Racke* judgment, from 1998, in which the Court of Justice states that the customary international law rules concerning the termination and suspension of treaty relations as a result of a fundamental change of circumstances are binding upon the Community institutions and are part of the Community legal order. It further recognized the power of justiciable parties to invoke those rules to contest the validity of a European Community regulation.

The case law also enshrines a monist solution with regard to the reception of treaty-based international law. As the Court indicated in the *Haegeman* judgment from 1974, the agreements concluded by the Community form an integral part of Community law from the date they

 DOI: 10.17103/sybil.23.1

come into force. It used this circumstance to justify its own jurisdiction to interpret such agreements and, in particular, to give preliminary rulings.

The case law concerning the determination of the internal effects of international conventions that are binding upon the Community is more complex.

Not only does the Court attribute an interpretive value to treaty-based international law rules in the sense that they should be taken into account for the purposes of interpreting the related secondary European Community law rules. Under certain conditions, it moreover recognizes that they have a direct effect — in the sense that they create rights that individuals can invoke before a judge — and accepts the potential invalidity of European Community acts that are incompatible with such treaty-based rules.

In this regard, I would like to specify that, although the distinction is far from clear in the case law, in my view, the ability of international rules to be invoked as a parameter of European Community legality is not based on a direct effect in the sense that I just explained.

I will not stop here to examine the criteria developed by the case law for recognizing such effects. What interests me is that these criteria involve analysing both the specific provision in question and the agreement as a whole. Thus, the direct effect or ability of an act to be grounds for invalidity has been rejected not only because the provision essentially served "to set out a programme" (*Demirel* judgment) or was "indicative" (*Compassion in World Farming* judgment), but also because, even if they were clear and precise, certain features of the agreement containing the rules prevented such a judicial application.

The more recent case law on the World Trade Organization is the best-known example of this latter type of situation. The impossibility for WTO rules to grant rights to individuals or be used as rules of control in disputes over European Community acts is due to considerations related to the agreement system in question: its "flexibility", which allows for negotiated solutions to be sought in case of non-compliance; its striking differences with bilateral agreements on "special relations of integration" or agreements intended precisely to deliver development aid through asymmetrical obligations; and, finally, the imbalance that would arise if the Community were to allow the acts of European Community institutions to be subject to control by the WTO agreements, when its main trade partners do not allow for any such possibility. All these considerations must be understood in the light of the logically preliminary finding that international law does not require the parties to such agreements to apply them directly as a source of objective rights or as a parameter of internal legality.

The case law only allows for the validity of a European Community act to be subject to control by WTO rules in two cases: if the Community intended to comply with a specific obligation undertaken in that framework (*Nakajima* judgment) or when the Community act expressly refers to specific provisions of the agreement in question (*Fediol* judgment). In such cases, the possibility for the judge to use those international rules crucially depends on a certain willingness of the institutions to submit to them, as expressed in an act of secondary law.

The dualist basis for this case law is clear, as is that of the case law enshrining the possibility of *a posteriori* control of the legality of the conclusion of international agreements by the Community.

 DOI: 10.17103/sybil.23.1

Used on several occasions in the 1990s, this *a posteriori* control is formally exercised over the act of approval of the international agreement, but nullification of the act of approval undeniably leads to a situation in which an international rule that is in force and is binding on the European Community in international law ceases to apply in the European Community legal order once the instrument of conclusion has been nullified.

These dualist elements found in the Court of Justice's case law on the relationship between treaty-based international law and European Community law stand in contrast with the radical monism of its case law on the relationship between European Community law and the domestic law of the Member States.

However, this contrast makes sense when one considers that, in the latter relationship, the monism arising from the basic principles of European Community law is not only the result of the application of certain legal techniques concerning the relationships between legal orders, but also a corollary of the conception of the European Community as a community not just of states, but also of peoples and citizens, a conception which, unfortunately, certainly cannot be expanded to include contemporary international society in general or the WTO in particular.

5. Finally, I would like to compare the relationship between the essentially regulatory phenomena of the relationships between internal and international legal systems to which I have just referred and a different kind of phenomenon, namely, that of the growing interrelationship between the different legal systems, both national and international. It is a universal phenomenon that, however, manifests with particular intensity in the European sphere, to which I will restrict these considerations, which I already discussed in a talk I gave on the formation of European law at the *Deutschen Juristentag* in 1998.

Beyond the legal unification resulting from European Community law and the European Economic Area, there has been a "Europeanization" of legal theory and growing convergence between the different legal orders. HÄBERLE, in particular, has studied this phenomenon in the area of constitutional law, referring to it as the "common European constitutional law", which he describes as "a growing set of constitutional principles common to the different national constitutional principles". In his view, such concordant principles are, in part, found in the national constitutional texts and unwritten constitutional law of the various European states and, in part, spread throughout Europe via European law, that is, European Community law, the European Convention on Human Rights, the rules of the European Council and even, from a trans-Atlantic perspective, the rules of the Organisation for Security and Co-operation in Europe.

For HÄBERLE, these common European constitutional principles are more than mere coincidental and explicit parallelisms or similar regulatory conceptions. They entail the existence in the different constitutional states of something common, concordant and assumed at the deepest level of their legal culture, something that goes beyond mere positive law. This convergence, which leads to the proliferation of common regulatory elements, has been extensively documented by research in the field of not only constitutional law, but also administrative law and private law.

To the extent that this Europeanization goes beyond the sphere of European Community

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law or the European Economic Area, it is more of a cultural phenomenon than a positive legal one. However, it has vital consequences for the content of positive law.

In conclusion, I would like to underscore that the reciprocal influence between legal systems, the reorganization of public power in Europe and the defence of certain shared political and social values give rise to a complementarity between the legal systems that calls for a new approach: it is increasingly difficult to understand legal systems as isolated legal phenomena.

This evolution, which goes beyond the European sphere, poses a challenge for legal science and the teaching of law. Despite the extremely considerable contribution that legal science has made and continues to make to the Europeanization of law and to the formation of a European law, and despite the proliferation of exchange programmes for teaching staff and students, I am convinced that these trends must yet be considerably intensified.

With regard to the teaching of law, curricula must be opened much more both to international and European legal phenomena and to other national legal systems.

Furthermore, the linking of legal science and the teaching of law to a given national legal system must be thoroughly reviewed.

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When are there substantial reasons to believe that an investigation of *core crimes* would not serve the interests of justice?

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Abstract: The Pre-Trial Chamber II has denied the Prosecutor the request for authorization of an investigation related to alleged war crimes and crimes against humanity committed in Afghanistan. The reason given has been that this investigation would not serve the interests of justice. This paper analyses the practice of the Prosecutor and Pre-Trial Chamber related to this procedure and how they have understood and applied the wording *interest of justice*, and the changes that this decision has effected. Furthermore, the article includes an evaluation of the decision with reference to some additional question which it raises. These doubts are related to its *ultra vires* character, its lack of sensitivity to restorative justice, the powers of the Pre-Trial Chamber under Articles 15 and 53 of the Rome Statute, and the use of extra-legal factors in the determination that an investigation does not serve the interests of justice.

Keywords: International Criminal Court. Investigation. Authorization to the Prosecutor. Interests of justice.

(A) INTRODUCTION

On 12 April 2019 the Pre-Trial Chamber II of the ICC rejected the request of the Prosecutor to open an investigation related to Afghanistan[1]. The principal reason that the Pre-Trial Chamber found to refuse the Prosecutor's request was that this investigation did not serve the interests of justice referred to in Article 53 1.c) of the Rome Statute.

This is the first time that the Pre-Trial Chamber has refused a request for authorization which may explain why it took so long for the Chamber to announce it[2]. In the situation in other places such as Kenya, Côte d'Ivoire, Georgia, and Burundi, the Pre-Trial Chamber always authorized the Prosecutor to investigate, and these decisions did not take more than five months to be announced[3].

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1 Public redacted version of "Request for authorization of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, 12 April, 2019.

2 On 20 November 2017, the Prosecutor requested authorization and the decision, as we know, was adopted on 12 April 2019.

3 In the situation of Kenya, the Prosecutor request authorization on 26 November 2009, and the Pre-Trial Chamber authorized it on 31 March 2010; In relation to the situation in Côte d'Ivoire, on 23 June 2011, the Prosecutor filed his request for authorization of an investigation and the Pre- Trial Chamber III gave it on 3 October 2011. In the situation in Georgia, on 13 October 2015, the Chamber received the Prosecutor's request for authorization of an investigation and its decision was adopted by the Pre-Trial Chamber I on 27 January 2016. In the situation of Burundi, on 5 September 2017, the Prosecutor submitted her request for authorization of an investigation and the Pre-Trial Chamber III decision was adopted on 25 October 2017.

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The decision is related to the *proprio motu* powers of the Prosecutor to initiate an investigation and to the criteria that he or she has to take into account when deciding whether there is a reasonable basis to investigate or not,

In this article, I will analyse the Prosecutor's practice on *proprio motu* investigations, and the criteria that he or she uses to determine the existence of a reasonable basis to investigate. In this context, I will focus on the use, meaning, and scope that the Prosecutor and the Pre-Trial Chamber have adopted with regard to "the interests of justice" expression, and how the doctrine has interpreted the dispositions of the Rome Statute. I note that until April 2019, the Office of the Prosecutor and the Pre-Trial Chamber shared a common idea of the meaning and consideration of the interests of justice and I argue that this consensus has now been broken. I wish to bring to attention the ramifications this disagreement.

(B) BACKGROUND ON *PROPRIO MOTU* INVESTIGATION ACTIVITIES OF THE PROSECUTOR

In addition to the referral of a situation by a State or the Security Council, the Prosecutor can receive information from other sources related to the commission of crimes within the jurisdiction of the Court such as organs of the United Nations, governmental and nongovernmental organizations or individuals[4].

Article 15 of the Rome Statute, which has polemical incorporation in the Preparatory Committee and the Rome Conference[5], sets out the rules applicable to the exercise on the prosecutor's initiative (*proprio motu*) of triggering the jurisdiction of the Court. The Prosecutor shall analyse the information (called the *preliminary examination*), and if he or she concludes that there is a *reasonable basis to proceed* with an investigation, the Prosecutor will submit to the Pre-Trial Chamber a request for authorization of an investigation[6]. If the conclusion is not to proceed, the Prosecutor shall promptly inform those who provided the information[7]. This regulation is complemented by Rules 46 to 50 of the Rules of Procedure and Evidence (RPE)[8].

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4 See regulation 25 of the Regulations of the OTP.

5 About the elaboration of Article 15 RS see for example S.A. Fernandez de Gurmendi, "The Role of the International Prosecutor", in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), pp. 175 188; R. Goldstone, N. Fritz, "In the interest of justice and the independent referral: The ICC prosecutor unprecedented power", 13 *Leiden Journal of International Law* (2000), 655-667, at. 657, and W.A. Schabas, *The International Criminal Court. A Commentary on the Rome Statute* Second Edition (Oxford, 2016), at. 394-397.

6 See Art. 15.3 RS

7 See Art. 15.6 RS and 49.1 RPE that foresees: "Where a decision under article 15, paragraph 6, is taken, the Prosecutor shall promptly ensure that notice is provided, including reasons for his or her decision, in a manner that prevents any danger to the safety, well-being and privacy of those who provided information to him or her under article 15, paragraphs 1 and 2, or the integrity of investigations or proceedings.

8 Related to the prosecutor's initiative, see H. Olásolo, *Corte Penal Internacional: ¿dónde Investigar?Especial referencia a la Fiscalíaen el proceso de activación*, Tirant lo Blanch, Valencia, 2003; A.

 DOI: 10.17103/sybil.23.2

The recognition of the Prosecutor's trigger capacity would permit work on protecting the interests of the international community but with three essential safeguards. These three conditions are firstly, the submission to the Pre-Trial Chamber of a request for authorization of an investigation; secondly, its authorization; and thirdly, the duty to inform those who provided the information if he or she has concluded that the information provided does *not* constitute a *reasonable basis* for an investigation.

The Prosecutor decision considering that there is a reasonable basis to investigate is necessary for every situation, both those referred by States or the Security Council and the *proprio motu* initiative. However, its relevance is essential when the Prosecutor request for the authorization of the Pre-Trial Chamber and when his or her decision notes that there is not a reasonable basis to investigate.

If one had thought that the *propio motu* prosecutor's initiative of triggering the jurisdiction of the Court would be one of the first to start it off, they would have been mistaken. It had to wait seven years from the entry into force of the Rome Statute to receive the first request for authorization and the first affirmative answer of the Pre-Trial Chamber. To date, the Office of the Prosecutor has presented five requests to the Pre-Trial Chamber for authorization of an investigation, and it has considered that there was not a reasonable basis to investigate on other five occasions.

On 26 November 2009, the Prosecutor Moreno-Ocampo filed a request related to the situation in Kenya[9] based on information sent by governmental and nongovernmental organizations, United Nations Funds and Rapporteurs, individuals and groups. In the context of national elections held on 27 December 2007, this country had suffered an escalation of violence within which crimes against humanity could have been committed, and relevant national judicial enquires had not been undertaken. The Court authorized the Office of the Prosecutor to investigate the alleged crimes committed after 1 June 2005, when the Rome Statute came into force in this country[10].

Two years later, on 23 June 2011, the Prosecutor applied for authorization to investigate the alleged crimes against humanity committed during the 2010/2011 post-electoral violence in Côte d'Ivoire[11]. Although this country did not formally ratify the Statute until 15 February 2013, it had accepted the jurisdiction of the ICC by a declaration on 18 April 2003. This statement was confirmed by its President on14 December 2010 and 3 May 2011. It was the first investigation authorized[12] and opened while a State was not yet a State Party

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Tiemessen, "The International Criminal Court and the Politics of Prosecutions". *The International Journal of Human Rights*, 18 (4-5), 2014, pp. 444-61; J.N. Foster, "A situational approach to prosecutorial strategy at the International Criminal Court", *Georgetown Journal of International Law*, 47 (2), 2016, pp. 439-473;

9 ICC-01/09, 26 November 2009, *Public Document Request for authorisation of an investigation pursuant to Article 15.*

10 ICC-01/09-9 *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010.

11 ICC-02/11, 23 June 2011, *Public Document Request for authorisation of an investigation pursuant to article 15.*

12 ICC-02/11-14 *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire*, 3 October 2011

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in the Statute but had only accepted the jurisdiction by a declaration provided in Article 12 (3) RS.

The first authorization[13] and investigation that did not only relate to situations in Africa was initiated on 17 November 2015. The Prosecutor requested authorization to open an investigation on alleged crimes against humanity and war crimes committed in the context of an international armed conflict between 1 July and 10 October 2008 in and around South Ossetia[14].

Finally, on 15 November 2017, there was a request for authorization related to Burundi[15], who deposited its instrument of ratification on 21 September 2004[16]. However, this country withdrew its ratification on 26 October 2016, and this decision took effect one year after (Article 127 (1) RS). The Pre- Trial Chamber authorized the Office of the Prosecutor to investigate the alleged crimes within the jurisdiction of the Court committed up to April 2015.

In relation to the preliminary examinations which have been closed, three of those are related to an act of *propio motu* of the Prosecutor[17], and the two remaining are situations referred by a State party[18]. The Prosecutor has never closed any of these examinations claiming the investigation does not serve the interests of justice. The most common reason to consider that there is not a reasonable basis to investigate is the non-existence of crimes within the jurisdiction of the Court[19]. The reason given for closure at the preliminary examination related to the situation of the registered vessels of the Union of Comoros, the Hellenic Republic, and the Kingdom of Cambodia was a consequence of the lack of gravity of the crimes committed. This decision has been the only one which has generated a particular controversy between the Prosecutor and the Pre-Trial Chamber, but this has not been related to the interests of justice.

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[13] ICC-01/15-12 *Decision on the Prosecutor's request for authorization of an investigation*, 27 January 2016.

[14] ICC-01/15-4 Corr. 2, 17 November 2015, Public Document with Confidential, *EX PARTE*, Annexes A, B, C, D.2, E.3, E.7, E.9, F, H and Public Annexes 1, D.1, E.1, E.2, E.4, E.5, E.6, E.8, G, I, J Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 16 October 2015, ICC-01/15-4-Corr.

[15] ICC-01/17-5 Red, 15 November 2017 *Public with Public redacted Annexes 1 and 8 and Under Seal, EX PARTE, only available to the Prosecution Annexes 2-7 Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 6 September 2017, ICC-01/17-5-US-Exp.*

[16] The particular entry into force was on 1st October 2004.

[17] These are the preliminary examinations related to the first time that the Prosecutor received information on Venezuela, Honduras and Korea.

[18] These preliminary examinations are related to Gabon and the registred vessels of the Comoros, Greece and Cambodia.

[19] See, Situation in the Republik of Korea, Article 5 Report, June 2014; Situación en Honduras Informe con arreglo al artículo 5 del Estatuto, Octubre 2015, and Situation en République gabonaise Rapport établi au titre de l'article 5 du Statut, 21 September 2018.

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(C) THE CRITERIA TO DETERMINE THE EXISTENCE OF A REASONABLE BASIS TO INVESTIGATE

In this section, I argue that until April 2019, the practice of the Prosecutor and the Pre-Trial Chamber in the application of Article 15 of the Rome Statute has been in only one direction and the interpretation of the wording "interests of justice" has appeared, except to political and legal theorists, quite uniform. This practice has had an influence on the content of the request the Prosecutor presents to the Pre-Trial Chamber.

(1) The position of the Office of the Prosecutor

How does the Prosecutor determine that there is a *reasonable basis* to proceed with an investigation? Is it a discretionary decision, or should he or she use specific criteria?

The analysis of the information received, as with every action of the Prosecutor, is conducted according to the general principles of *independence*[20], *impartiality*[21], and *objectivity*[22]. These fundamental tenets are common to all international criminal tribunals and their organs.

It is expected that the Prosecutor's decision shall be arrived at after taking into account some additional factors. Rule 48 of the Rules of Procedure and Evidence (RPE) makes a connection between Article 15 and the factors that the Prosecutor shall consider in the decision under Article 53.1 of the Rome Statute[23]. This Article refers to some criteria to be taken into consideration in deciding whether there is a *reasonable basis* to investigate: the crime is within the jurisdiction of the Court; it is admissible, and it is necessary to notes the gravity of the crime and how will this affect the interests of victims. The controversial wording follows the last two criteria because of paragraph (c) avers that "there are nonetheless substantial reasons to believe that the investigation would not serve the *interests of justice*".

The debate centres on the controversial wording in this paragraph (c) of the Article 53.1

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[20] In this context, the independence is understood in the sense of Article 42 of the Rome Statute. The Prosecutor shall act independently of instructions from any external sources. As the Prosecutor notes "(i)ndependence goes beyond not seeking or acting on instructions: it means that decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation." (*Policy Paper on Preliminary Examinations 2013*, at 7). The Prosecutor is not constrained by the information sent, and he or she may seek information from any reliable sources. On the independence of the Prosecutor, see G. Turrone, Ch. 29.1 "Powers and Duties of the Prosecutor, in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court*, Vol II (Oxford, 2002), 1137-1180, at 1139-1143.

[21] The *impartiality* involves that no adverse distinction drawn on grounds prohibited under the Statute: gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status (art. 21 (3) could be done.

[22] The Statute refers to the *objectivity* in Article 54 (1) when it regulates the investigation, but this principle and its consequences should apply to the preliminary examinations. This principle is related to establish the true (*Policy Paper on Preliminary…., supra* n. 20, at 8).

[23] The Rule 48 notes: "In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c). The link between art. 15 and art. 53 was showed at the Rome Conference had been noted by the Pre-Trial Chamber II, see ICC-01/09-19, paragraphs 22 and 23.

 DOI: 10.17103/sybil.23.2

because it uses an undefined legal concept the *interests of justice*- and this lack of definition[24] is the origin of important disagreements as to its meaning and thus the scope of the discretionary powers of the Prosecutor. Whilst all discussants accept the criteria listed in Article 53, the doctrinal position is polarized. Some authors consider it possible to give a broad sense to this expression, including a variety of considerations other than those strictly related to the criminal proceedings themselves. Others, including the Office of the Prosecutor, defend a narrow meaning and only consider procedural aspects[25].

In 2007 the Office of the Prosecutor published a *Policy Paper on the Interests of Justice* to point out that the Afghanistan experience demonstrates that each situation is different, and it is not desirable to establish a fixed relation of factors or circumstances that we should consider in consideration of the interests of the justice issue[26].

In this paper, the Prosecutor clarifies three interesting aspects. First, there is the presumption in favour of the investigation; second, the object and purpose of the Statute are as a guide to determine the interests of justice in each case; and third, there is a distinction to be made between the interests of justice and the interests of peace[27]. Nonetheless, a decision to not investigate should be considered very exceptional. As the Prosecutor has noted:

> "Bearing in mind the objectives of the Court to put an end to impunity and to ensure that the most serious crimes do not go unpunished, a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort. Various other options, besides deciding not to open an investigation or to stop proceedings, may be available".[28]

There is a strong presumption in favour[29]. The prosecutor is not obliged to explain that

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[24] This expression appears in several places in the ICC Stature and Rules of Procedure and Evidence, but it is never defined.

[25] To know this position, see T. de Souza Dias, "Interest of justice: Defining the scope of Prosecutorial discretion in Article 53 (1) (c) and (2) (c) of the Rome Statute of the Internacional Criminal Court, *Leiden Journal of International Law*, (2017), 30, 731-751 at.732 and the references to the diferent comentators. She and Dapo Akande are supporter sof the broad meaning, see D. Akande and T. de Souza Dias, "The ICC Pre-Triasl Chamber Decision on the Situation in Afganistan: A Few Thoughts on the Interests of Justice", ejiltalk, Apil 18 2019 In the same direction, see C. Cárdenas Aravena, "Revisión del criterio "interés de la justicia" como razón para no abrir una investigación o no iniciar un enjuiciamiento ante la Corte Penal Internacional", *Revista de Derecho Universidad Católica del Norte*, (2011, 1), 21-47, at 34-38. The narrow meaning is also defended by G. Turrone, *supra* n. 20, at 1154, and by Human Rights Watch, *Policy Paper: The meaning of "the interests of justice" in article 53 of the Rome Statute* June 2005, pp. 20-21. A broad interpretation but from a human rights perspective is the one defended by *Amicus Curiae*, see ICC- 02/17- 57, 11 July 2019, *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan, pp. 12-16.

[26] See *Policy Paper on the Interest of Justice*, September 2007, p.1. The position of the Office of the Prosecutor has been the same until now. See, *Policy Paper on Preliminary Examinations*, November 2013, at. 16 and Office of the Prosecutor Policy *Paper on Case Selection and Prioritisation*, 15 September 2016, at. 12.

[27] See *Policy Paper on the Interest of Justice, supra* n. 26, paragraph 67-71.

[28] *Ibid.*, at. 9. The same idea at., *Policy Paper on Preliminary Examinations*, *supra* n. 20, at. 16, paragraph 69 and Office of the Prosecutor Policy Paper on Case Selection and Prioritisation, 15 September 2016, at. 12, paragraph 32

[29] *Policy Paper on the Interest of Justice, supra* n. 26, p. 3. In the same sense see, ICC- 02/17- 57, 11 July 2019, *Amicus Curiae* Submissions on Behalf of Human Rights Organizations in Afghanistan, p. 5.; C. Cárdenas Aravena, *supra* n. 25, at 24-28; J. Dugard "Posible conflicts of Jurisdiction with Truth Commission", in A

 DOI: 10.17103/sybil.23.2

the required investigation is in the interests of justice. He or she should only furnish an explanation if the investigation would not serve the interests of justice. This affirmation is generally accepted[30], and it has been the position of the Pre-Trial Chamber. In 2017, the Pre-Trial Chamber III said:

> "Finally, in accordance with article 53(1)(c) of the Statute […], Contrary to sub-paragraphs (a) and (b), which require a positive finding, sub-paragraph (c) does not require the Prosecutor to demonstrate that initiating an investigation *is* in the interests of justice. Since the Prosecutor has not determined that initiating an investigation in the Burundi situation "would not serve the interests of justice" and, importantly, taking into account the views of the victims which overwhelmingly speak in favour of commencing an investigation, the Chamber considers that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice"[31].

The Prosecutor should take into account the specific factors of Article 53 (1) (c), first the gravity of the crime and the interests of victims, to decide that the investigation would not serve the interests of justice. In respect to the *gravity,* the Office of the Prosecutor has considered that "(i)n determining whether the situation is of sufficient gravity, the Office considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact"[32].

The second factor to consider is the *interests of the victims*. It is remarkable that at this point in time the Statute makes a reference to the victims. How does the Prosecutor know the interests of the victims if at this point in time there are no *official victims*? We can imagine that the Prosecutor intends this to refer to taking into account the people and communities named in the preliminary examination.

In general terms, it is likely that the interests of these alleged victims will generally weigh in favour of the prosecution. Nevertheless, in the decision, the meaning of this expression should be related to the position of the victims determined under International Criminal Law, the ICC and the restorative function of the Court. In this sense, the Prosecutor notes that "the central goal of respecting victims through the possibilities of participation in the proceedings also implies a duty to be respectful of possibly divergent views. The Office will give due consideration to the different views of victims, their communities and the broader societies in which it may be required to act". The Office of the Prosecutor also advises that the "interests of victims" include the interest to be

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Casesse Comentary, *supra* n. 9, at 70; W.A., Schabas, *supra*, n. 5, at 660-661, and T. de Souza Dias, *supra*, n. 25, at 735.

[30] See C. Cárdenas Aravena, *supra* n. 25, at 24 and 26; J. Dugard, *supra* n. 29, at 70 and W.A. Schabas, *supra*, n. 5, at. 661.

[31] ICC-01/17-X *Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp,* 25 October 2017, at paragraph 190. See also, ICC-01/09 *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, 31 March 2010, paragraph. 63; ICC-02/11 *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire*, 3 October 2011, paragraph 207, and ICC-01/15 *Decision on the Prosecutor's request for authorization of an investigation*, 27 January 2017, paragraph 58.

[32] See *Policy Paper on the Interest of Justice,* September 2007, at 5

 DOI: 10.17103/sybil.23.2

protected[33].

These relatively uncontentious aspects do not appear to be the only circumstances taken into account. To identify what else needs to be considered as relevant it is necessary, as the Procurator notes, to interpret the expression *interests of justice* "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"[34]. The Preamble of the Rome Statute offers a definition of the purpose of the establishment of the International Criminal Court. His reading reveals that the principal purposes are 1) to avoid impunity for the most serious crimes of concern to the international community as a whole[35]; 2) to put an end to impunity for the perpetrators of these crimes and to contribute to its prevention[36], and 3) to guarantee lasting respect for the enforcement of international justice[37]; in a nutshell, retributive justice which is one of the interests of victims.

Under the umbrella term the *interests of justice*, the Prosecutor assumes that it is necessary to integrate other strategies or mechanisms to combat the impunity of perpetrators[38]. It is in the context of these interests where some authors pay attention to peace processes, truth commissions, amnesties and their contribution to the interests of justice[39], and who expand the idea to embrace embryonic democratic process[40] or future peace and security considerations as well[41].

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[33] *Ibid.* at 5-6.

[34] Art. 31 (1) Viena Convention on the Law of Treaties (1969). T. de Souza Dias, *supra*, n. 25 analyses widely this question, at 735-751.

[35] Paragraph four.

[36] Paragraph five.

[37] Last paragraph.

[38] The Prosecutor notes the possible valuation of this factors but as others potential considerations, see *Policy Paper on the Interest of Justice*, September 2007, at. 7-8.

[39] M. Arsanjani, "Reflections on the jurisdiction and trigger mechanism of the International Criminal Court", in Von Hebel, Hermann / Lammers, Johan/ Schukking, Jolien, *Reflections on the International Criminal Court*, T.M.C. As-ser Press, The Hague,1999, 57, at 75; F. Bensouda, "Challenges related to investigation and prosecution at the International Criminal Court", in Belleli, Roberto (ed.), *International Criminal Justice*. Surrey: Ashgate, (2010), 131, at 141; M. Brubacher, "Prosecutorial discretion within the International Criminal Court". *Journal of International Criminal Justice*, Nº 2, 2004, pp. 71, at 81; D. Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", 59 *Law & Contempo□ rary Problems* (1996) 191, at 213; J. Dugard, "South Africa's Truth and Reconciliation Process and International Humanitarian Law", *Yearbook of International Humanitarian Law*, 2 (1999), 254-263, at 262-263; P. Hayner, "International Guidelines for the Creation and Operation of Truth Commissions: A Prelíminary Propasal", 59 *Law & Contemporary Problems* (1996) 168, at 173; S. Landsman, "Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions", 59 *Law & Contemporary Problems* 75, (1996), at 84; F. Razensberger, *The International Criminal Court*, Peter Lang, Francfort, 2006, at. 176; M. Scharf, "The amnesty exception o he jurisdiction of the International Criminal Court". *Cornell International Law Journal*, Nº 32, 1999, pp. 509, at 524; C. Stahn, "Complementarity, Amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court", *Journal of International Criminal Justice*, Nº 3, 2005, 695, at 719.

[40] See R.J. Goldstone and N. Fritz, *supra*, n. 5, at 662-663.

[41] See ad ex. T. de Sousa Dias, " 'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53 (1) (c) and (2) (c) of the Rome Statute of the International Criminal Court", *Leiden Journal of International Law*, vol 30, 2017, pp. 731-751, at 745-747.

 DOI: 10.17103/sybil.23.2

About truth commissions, Goldstone and Fritz note that such an elaboration of the interests of justice could suggest accepting that it would be better that prosecution was not undertaken. These criteria are mostly related to restorative justice[42], and so it is joined with the interest of victims. However, it is difficult to understand when the intention is to embrace all issues related to peace and security[43]. As the Prosecutor has noted:

> "…The Office will consider issues of crime prevention and security under the interests of justice, and there may be some overlap in these considerations and in considering matters in accordance with the duty to protect victims and witnesses under Article 68. As indicated above, however, the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."[44]

As Article 24 (1) of the Charter of the United Nations makes clear, the Security Council has the primary responsibility for the maintenance for peace and security, and the Rome Statute permit to the Security Council to avoid or suspend for a period of twelve months an investigation or prosecution if it is necessary for the international peace and security. Neither the Prosecutor nor the ICC have responsibilities for the maintenance of peace and security unless the interests of victims enforce it.

If the Prosecutor, acting *in proprio motu*, considers the beginning of the investigation is necessary, he or she will request authorization of an investigation under Article 15 of the Rome Statute to the Pre-Trial Chamber.

In the requests, the Prosecutor has always identified the relevant information, cited its sources[45] and explained the factors being taken into account to establish a reasonable basis for the investigation, including the jurisdiction and the alleged crimes[46], the admissibility where the gravity of this criminal conduct is usually noted[47], and the interests of justice (not elaborated on), confining the analysis to the interests of victims[48].

The prosecutor also has noted the importance of understanding the situation as a whole and that, at this moment, identification and apportioning of individual criminal responsibility may not be possible. The request takes into account the lower standard used to render his decision, and the Prosecutor argues that there is a reasonable basis to proceed. In his opinion, if the Chamber considers that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court, "it *shall authorize the commencement of the investigation* (emphasis added)"[49].

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[42] See R.J. Goldstone and N. Fritz, *supra*, n. 5, at. 663-665.

[43] See *Policy Paper on the Interest of Justice*, September 2007, at. 8.

[44] *Ibid*, at 8-9.

[45] ICC-01/09, paragraphs 24-44; ICC-02/11, paragraphs 23-34; ICC-01/15 paragraphs 44-51, and ICC-01/17 paragraphs 32-141.

[46] ICC-01/09, paragraph 45-50 and 62-101; ICC-02/11, paragraphs 35-43 and 52-253; ICC-01/15 paragraphs 44-51, and ICC-01/17 paragraphs 26-31.

[47] ICC-01/09, paragraphs 51-61; ICC-02/11, paragraphs 44-58; ICC-01/15 paragraphs 274-337, and ICC-01/17 paragraphs 142-195.

[48] ICC-01/09, paragraphs 60-61; ICC-02/11, paragraphs 59-60; ICC-01/15 paragraphs 338-344, and ICC-01/17 paragraphs 196-199.

[49] See ad ex ICC-01/09, paragraphs 102-103 and 106-107, and ICC-02/11, paragraphs 35-39.

 DOI: 10.17103/sybil.23.2

(2) The Pre-Trial Chamber authorization to investigate

The prosecutor should behave with complete independence, but he or she is not, in fact, independent because the investigation and prosecution are surrounded by legal obstacles which may paralyze his or her actions. At the outset, there is the need for specific authorization to investigate[50].

This requirement was the solution adopted by the Diplomatic Conference to get a consensus between states that were defending a *propio motu* capacity for the Prosecutor and those who considered it was absolutely inappropriate to give the Prosecutor this power, thinking about the real risks of abuse of power and the necessity to prevent arbitrary decisions[51].

It has been said that the Conference created a Prosecutor "under guardianship"[52] and the reasons for this control are more political than legal. The Prosecutor's office is not a political organ. It has no a political liability. It is a judicial organ. However, his or her activity could have a meaningful political impact when he or she brings to trial people who have political relevance, and where such decisions might have political consequences.

The Pre-Trial Chamber shall examine the request and the supporting material to consider whether there is, or not, a reasonable basis to proceed with an investigation, and according to the case, he or she shall decide to authorize or refuse. The examination that the Pre-Trial Chamber conducts is of a limited nature, namely to ensure the accuracy of the statement of facts and legal reasons which are at that time presented by the Prosecutor[53]. This function exists essentially to curb any abuse of power, or as the Pre-Trial Chamber notes "to prevent unwarranted, frivolous, or politically motivated investigations"[54].

The exercise of this kind of control raises some critical question. How does the Pre Trial Chamber adopt its resolution? Is it necessary to use the same criteria that the Prosecutor has used? How deep is the examination of the Chamber? What is the standard of evidence that the Chamber demands? Is a detailed explanation of the decision required?

Article 15 (3) and (4) of the Rome Statute uses the same expression "reasonable basis" to refer to the result of the examination of the Prosecutor and the outcome of the Pre-Trial Chamber, and it is also the expression included in article 53 (1).

The exercise of a supervisory function must be made using the same criteria that the Prosecutor has used to determine the existence of a reasonable basis to proceed. In its decisions, the Chamber warns that to supervise the *proprio motu* initiative it must apply

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[50] The others are related to the Security Council art. 16 RS or States (national investigations, prosecutions or activities included in the proportionality principle art. 17 RS.

[51] About this question see W.A. Schabas, *supra*, n. 5, at 394-397 and G. Turrone, *supra*, n. 20, at 1159-1160. A reference to the elaboration of the Article 15 was included by the Pre-Trial Chamber II ICC-01/09-19, paragraph 17 and 18.

[52] See G Turrone 19, *supra* n. 20, at 1142.

[53] See S. Fernandez de Gurmendi separate and partially disenting opinion, paragraph 28.

[54] See ICC-01/09-19-Corr, paragraph 32; ICC-02/11-14, paragraph 21, y ICC-02/17-33, paragraph 31.

 DOI: 10.17103/sybil.23.2

the same test, or as it stated "the exact standard", that the Prosecutor used[55], and analyses every criteria taken into account to render a decision about the existence of a reasonable basis to proceed with an investigation. In the decision related to the situation in Kenya, the Chamber has cleared up many questions related to the adoption of the decisions *ex Article 15* of the Rome Statute. It defines the "reasonable basis to believe" standard, considering that the request must have relevant available information to suggest that crimes within the jurisdiction have been committed, the admissibility of the cases, the gravity of the crimes, and also the interests of victims. Taking into account these elements, it should then decide whether the investigation would serve the interests of justice or not. In all the previously mentioned situations the Chamber considered that the existence of the four elements had been shown and noted that the investigation will serve the interests of justice. On every occasion, the Prosecutor and the Pre-Trial Chamber have been in agreement that there is a presumption in favour of an investigation.

We need to consider that the information that the Prosecutor has given to the Chamber is the result of a preliminary examination, recalling that it is not conclusive and that it needs only to establish a "reasonable basis to believe".

The use of the words "reasonable basis" suggests that the evidentiary standard will be lower than the three standards established at the Rome Statute[56]. This standard does not, for example, require that the conclusion reached on the facts to be the only possible or reasonable one[57]. As the Pre-Trial Chamber II notes, "the Chamber must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court "has been or is being committed". A finding on whether there is a sensible justification should be made bearing in mind the specific purpose underlying this procedure."[58] Moreover, Article 15 (4) of the Rome Statute notes that the decision of the Pre-Trial Chamber authorizing to proceed an investigation is adopted "without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of the case." This precautionary clause advises that at this stage only a preliminary and provisional assessment could be possible on jurisdiction and admissibility because at this time there is no investigation and so there is no case to answer.

If the opinion of the Chamber were not conclusive, and it could only establish that there existed a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed, the Pre-Trial Chamber would grant the authorization. Furthermore, its examination of the material and explanation of its decision would not extend beyond a certain time limit. It is necessary to respect the

[55] ICC-01/09-19, paragraph 24; ICC-01/15-12, paragraph 4, and ICC-01/17-9, paragraph 28.

[56] As the Pre-Trial Chamber II said: "(t)he expression "reasonable basis" in Article 15 indicates that a decision to authorize the commencement of an investigation shall be made pursuant to a lower standard than the one required for the issuance of a warrant of arrest or summons to appear." ICC-01/09-19paragraph 102-103.

[57] *Ibid.* paragraph 33 where the Pre-Trial Chamber makes mention to the Appeals Chamber.

[58] *Ibid.*, paragraph 35; ICC 02/11-14, paragraph 24; ICC-01/15-12, paragraph 25;

 DOI: 10.17103/sybil.23.2

correct relationship between prosecutorial and judicial functions[59].

As I noted before, there exists a presumption in favour of an investigation that does not necessitate a depth analysis by the Pre Trial Chamber of the information presented. As the Prosecutor has said:

> "Accordingly, Article 15(4) requires the Pre-Trial Chamber to conduct "an examination of the request and the supporting material". Absent anything to suggest the contrary, the Chamber should conclude that "the case appears to fall within the jurisdiction of the Court".[60]

This interpretation and application of Article 53.1 of the Rome Statute have two important consequences. First, the Prosecutor only has to explain if he or she believes that an investigation would *not* serve the interests of justice, and by doing so, this decision triggers the review power of the Chamber[61]. Second, a decision of the Chamber finding that there is not a reasonable basis because the investigation does not serve the interests of justice should be exceptional and should be based on the evaluations that it has made with the criteria of Article 53 (1). This decision cannot be founded upon political criteria because these do not belong to the Court[62].

(D) THE CHANGE OF THE WAY INTERPRETING THE INTERESTS OF JUSTICE

As can be seen, the practice of the Prosecutor and the Pre-Trial Chamber in the application of Article 15 of the Rome Statute has been uniform until April 2019. We now come to the exception which proves the rule. The decision of the Pre-Trial Chamber related to the request for authorization of an investigation related to the situation in the Islamic Republic of Afghanistan has changed the factors which the Court must consider when it decided that the investigation would serve, or not, the interests of justice.

(1) What happened on 12 April 2019?

The Office of the Prosecutor began to receive information relating to the situation in Afghanistan on 1st June 2006 and it made the preliminary examination public in 2007[63]. This country had been involved in armed conflict since 1978 when the People's Democratic Party of Afghanistan (PDPA) took power. The pertinent circumstances and acts are those committed in this territory after the first of May 2003 which was when the Rome Statute came into force in Afghanistan[64].

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[59] See G. Turrone, *supra*, n. 20, at. 1161. It is the reason of the partially disidentin opinion of the S. Fernandez de Gurmendi judge, situation in the Republic of Côte d'Ivoire, ICC-01/11-15, Corr, paragraphs 35-45.

[60] See ICC-01/09, 26 November 2009, *Public Document Request for authorisation of an investigation pursuant to Article 15*, at 39-40, paragraph 110.

[61] In this sense, ICC-01-09-19, paragraph 63.

[62] See G Turrone, *supra*, n. 20, at 1161.

[63] See, ad ex, Office of the Prosecutor, *Report on Preliminary Activities*, 13 December 2011, paragraph 20. For more information https://www.icc-cpi.int/afghanistan.

[64] Afghanistan made its accession on 10 February 2003, and Article 126 (2) RS notes that for each State

 DOI: 10.17103/sybil.23.2

Although information started to accumulate with the OTP in 2006, it was not enough to make analysis until the end of 2013[65]. The sources of the information, as the Prosecutor noted, have been evaluated following a consistent methodology based on criteria such as relevance, reliability, credibility, and completeness[66].

On 20 November 2017, the Prosecutor submitted a request for authorization of an investigation in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes which relate to the armed conflict in Afghanistan committed on the territory of other States since 1 July of 2002[67]. In her text, Fatou Bensouda uses the same methodology and structure as before. She explains the historical context, the activities made by the OTP, the examination of the information, the crimes which fell within the jurisdiction of the ICC, the admissibility of the case, and last but not least, the question related to the interest of justice. On this point, the Prosecutor explains the gravity of the alleged crimes previously identified and described. She also explains the interests of victims, and she concludes, as she did on previous occasions that: "(i)n the light of the mandate of the Prosecutor and the object and purpose of the Statute, and based on the information available, the Prosecution has identified *no substantial reasons to believe that the opening of an investigation into the situation would not serve the interests of justice* (emphasis added)"[68].

On 12 April 2019, the Pre-Trial Chamber II adopted a decision pursuant to Article (15) related to the request of the Prosecutor for an investigation into the situation of the Islamic Republic of Afghanistan[69].

In this case there are potentially war crimes committed on all sides. There may be war crimes allegedly committed by members of the Afghan National Security Forces (ANSF), together with members of the USA forces and members of the CIA. On the other side there are crimes against humanity and war crimes allegedly committed by members of the Taliban and affiliated armed groups. In all cases their gravity, admissibility, and the interests of victims in seeing justice done would appear to sanction authorization to the investigation. Nevertheless, the Pre-Trial Chamber II decided "that an investigation into the situation in Afghanistan at this stage would not serve the interests of justice and,

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acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession (it is the case of Afghanistan), the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of accession.

[65] ICC-02/17-7 *PUBLIC with confidential, EX PARTE, Anexes 1, 2A, 2B, 2C, 3A, 3B, 3C, 4A, 4B, 4C, 6 public Annexes 4,5 and 7, and public redacted version of Annex 1-Conf-Exp. Public redacted version of "Request for authorization of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp*, paragraph 3.

[66] *Ibid*, paragraph 29.

[67] ICC-02/17-33, *Public Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the situation in the Islamic Republic of Afghanistan*, 12 April 2019, paragraph 5.

[68] *Ibid.* paragraph 372.

[69] ICC-02/17-33 12-04-2019, PTC II, *Public Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan*

 DOI: 10.17103/sybil.23.2

accordingly, rejects the request"[70]. What are the reasons that led the Chamber to decline the Prosecutor's request? The answer to this question obliges to analyse the reasoning behind the decision of the Pre-Trial Chamber. This examination throws up some divergencies in the thinking around the Chamber's previous decisions.

In this decision, the Pre-Trial Chamber explains, as in the four previous situations, that the purpose of the procedure in Article 15 (4) is to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could hurt its credibility[71]. Remarkably, the text of the decision adds a new criterion namely, "to set boundaries to and restrain the discretion of the Prosecution acting *proprio motu*, in order to *avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundaments*" (emphasis added)[72]. It is this new function which permits the Court "to avoid *engaging in investigations which are likely to ultimately remain inconclusive*" (emphasis added)[73]. Thus, the Chamber, I contend, has removed the discretionary control of OTP to verify *a priori* the effectiveness of the investigation. Given such an impasse the Chamber believes that investigations would not serve "either the interests of justice or any of the universal values underlying the Statute"[74], and so there is not a reasonable basis to investigate. This new consideration of predictably inconclusive investigations has fundamental importance.
In their previous decisions, the Pre-Trial Chamber has never considered it necessary to explain that the investigation is in the interests of justice and it has accepted the Prosecutor's position when the victims also agreed with it. In the decision of the Pre-Trial Chamber III on 9 November 2017, it notes:

> "(s)ince the Prosecutor has not determined that initiating an investigation in the Burundi situation "would not serve the interests of justice" and, importantly, taking into account the views of the victims which overwhelmingly speak in favour of commencing an investigation, the Chamber considers that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice"[75].

By its decision on 12 April 2019, the Pre-Trial Chamber II appears to have made an 180-degree turn on the interpretation of the *interests of justice*. This decision notes that the investigation's consistency with the interests of justice is a statutory legal parameter the Chamber should assess. This control must be conducted with care because a partial or inaccurate assessment might have implications for the "objectives of the Statute and hence the overall credibility of the Court, as well as its *organizational and financial sustainability*" (emphasis added)[76].

It is surprising that if the Chamber has considered that the consistency of the

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[70] ICC-02/17-33, at 32.
[71] *Ibid.*, paragraph, 31.
[72] *Ibid.*, paragraph. 32.
[73] *Ibid.*, paragraph. 33.
[74] *Ibid.*, paragraph. 34.
[75] ICC-01/17-9-Red, paragraph 190. See also ICC-01/09-19, paragraph63; ICC-02/11-14, paragraph 208, and ICC-01/15-12, paragraph 58.
[76] ICC-02/17-33, paragraph 88.

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investigation with the interests of justice is a statutory legal parameter, it did not order to the Prosecutor to provide information about why she has considered that, in this case, there are no substantial reasons to believe that the investigation would not serve the interests of justice[77]. This information might offer some clarifications about the wording of *interests of justice*.

Related to this question, the decision notes that the determination of the existence of a reasonable basis to investigate must include a positive determination to the effect of that investigation would be in the interest of justice and the likelihood that investigation is feasible and meaningful under the relevant circumstances.[78] In the opinion of the Chamber, this is difficult in complex situations which have been under preliminary examinations for many years. The Chamber seems to overlook the fact that the accumulation of years of preliminary examinations is a consequence of multiple factors. As such the feasibility and meaning of an investigation is not necessarily dependent on the time expended at this stage. Indeed, the future political environment itself may change. The decision of the Chamber about the existence (or non-existence) of a reasonable basis to investigate is normally based on the information that the Prosecutor has included in his or her request. Never before had the Chamber commented on its quality. In the decision on 12 April 2019, the Chamber considers that it has "to verify whether the *notitia criminis* is credible and deserves to be assessed and examined further through investigations", and it derives a new criteria to evaluate its reasonableness. This is the "authoritativeness of its source"[79] . In the opinion of the Chamber, United Nations agencies, national organs, and parliamentary inquiry committees have such authority[80]. This appears to throw up a new test. Does it mean that there is no reasonable basis to investigate even if the information brought by the Prosecutor has all its inherent qualities: completeness, relevance, and consistency, but in the opinion of the Chamber the source lacks authority? In the context of the commission of *core crimes*, which are the most authoritative sources? Are there only credible sources if designated as such by the Chamber? Will the Prosecutor no longer be qualified to make this evaluation?

In the four previous decisions, the Pre-Trial Chamber authorized the investigation when it had determined the existence of a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed; when it had checked the admissibility under Article 17 of the Rome Statute, and when it had taken into account the gravity of the crime and the interests of victims in favour of the prosecution. In its opinion, "there are indeed no substantial reasons to believe that an investigation would not serve the

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77 This possibility exists in conformity as Rule 50 (4) of the RPE. In this procedure the Chamber ordered to the Prosecutor to provide additional information in two occasion, on 5 December 2017 and on 5 February 2018.

78 ICC-02/17-33, paragraph 35.

79 *Ibid.*, paragraph 37-38.

80 *Ibid.*, paragraph 46.

 DOI: 10.17103/sybil.23.2

interests of justice"[81].

The absence of a definition of *interests of justice* forces the Pre-Trial Chamber to take into account the relation of these interests with the objectives of the Statute. Thus, there is a new criteria: the requirement for an effective and timely investigation. The Chamber considers now that "an investigation would only be in the interests of justice if prospectively it appears likely to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame"[82].

In its opinion, three factors conclusively proved that an investigation of the crimes committed in Afghanistan would not serve the interests of justice, namely: "(i) the significant time elapsed between the alleged crimes and the Request; (ii) the scarce cooperation obtained by the Prosecutor throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage"[83].

Although the decision does not expressly note it, the Pre-Trial Chamber II uses this interpretation of the interests of justice to influence the selection of cases that has been, de facto, a function of the Office of the Prosecutor. Clarifying this limitation on its scope of action, the Chamber notes that the Court "is not meant -or equipped - to address any and all scenarios where the most serious international crimes might have been committed; therefore, focussing on those scenarios where the prospects for successful and meaningful investigations are serious and substantive is key to its ultimate success"[84].

The Chamber also wishes to opine on budgetary aspects and considers inappropriate a reallocation of financial and human resources probably to the detriment of other actions of the Court[85]. It must be admitted that it is not easy to find references to material and human resources in the academic analysis of the interests of justice, and when there is some reference, the authors aver that they should not be used as criteria to be taken into account[86].

Lastly, the Pre-Trial Chamber should consider the interests of victims, and to close the circle that it has drawn, it refers only to the interests of the victims in their participation in the proceedings. If the investigation does not finish, there are no cases before the court, and in the absence of any cases, the victims cannot participate in the proceedings. The Chamber seems to forget that the function of the Court is not retributive only.

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[81] See ICC-01/15-12, paragraph 58. In a similar way, ICC- 02/11-14, paragraphs 2017-208, and ICC-01/17-9, paragraph 190.

[82] *Ibid.*, paragraph 89.

[83] *Ibid.*, paragraph 91.

[84] *Ibid.*, paragraph 90.

[85] *Ibid.*, paragraph 95.

[86] See, Cárdenas Aravena, C, *supra* n. 25, at 33 with references to other authors as Webb, Behrens, H.J and Gómez Colomer, J.L.

 DOI: 10.17103/sybil.23.2

(2) Valuation of the decision

If the Court had wanted to be the centre of attention, it achieved this. After its decision was published, there was a storm of criticism. It is difficult to find positive, neutral or pragmatic opinions[87]; most of them are severe censures. This decision has been regarded as "a scathing response"[88], "unfortunate and unwise"[89] or "unacceptable and shameful"[90] decision. Related to the victims, someone has considered some expressions of the Chamber as "disingenuous" and "paternalistic"[91]. There are also opinions that note the incidence of political reasons in the judges of the Pre-Trial Chamber, and they consider that this decision "relies on a host of non legal factors to explain…" or has succumbed to pressure from the USA Administration[92]. In addition, they comment that this decision came on the heels of the USA revocation of the Prosecutor's visa[93]. Also, some comments focus on the utilitarianism of the position of the Chamber when it seeks to achieve both justice and efficacy[94], and who inquire if this signals the end of the ICC as we know it[95].

Whilst all these opinions have merited the opinions related to the legal factors have special importance for us, particularly those related to the interests of justice[96]. The decision of the Pre-Trial Chamber II on 12 April 2019 has been labelled as *ultra vires*. Jacobs was the first who considered that the Pre-Trial Chamber was not respecting the limits of its functions[97]. I disagree with the reasons he has used to support the power's extra limitation. I do not consider that, when the Chamber decides on authorization, it is limited

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[87] It could be possible consider as positive the opinion by D. Akande and T. de Souza Dias, "The ICC Pre-Trial Chamber Decision on the Situation in Afghanistan: A Few Thoughts on the Interests of Justice", *ejiltalk*, published on April 18, 2019. The web of the American Society of International Law notices only the decision and its support for the interests of justice, https://www.asil.org/ILIB/icc-pre-trial-chamber-rejects-opening-investigation-afghanistan-april-12-2019 (last visit July 16 2019). The opinion of Vasiliev considering the decision as the triumph of pragmatism over idealistic (Vasiliev II)

[88] See P. Labuda, "A Neo-Colonial Court for Weak States? Not Quite. Making Sense of the International Criminal Court's Afghanistan Decision", *ejiltalk*, Published on April 13, 2019.

[89] See M. Waraki, "Afghanistan and the "interests of justice"; an unwise exercise?", *ejiltalk*, Published on April 26, 2019.

[90] Worldwide Movement for Human Rights (FIDH), Press Release, published on April 12, 2019, https://www.fidh.org/en/issues/international-justice/international-criminal-court-icc/icc-refuses-to-investigate-crimes-in-afghanistan-including-us-torture (last visit July 16 2019).

[91] S. Vasiliev, "Non just another "crisis": Could the blocking of the Afghanistan investigation spell the end of the ICC? I", *ejiltalk*, Published on April 19, 2019.

[92] M. Labuda *supra,* n. 88.

[93] B. Walton and A. Farhadi, "The ICC and US Retaliatory Visa Measures: Can the UN Do More to Support the Privileges & Immunities of the Prosecutor?, *ejiltalk*, Published on April 23, 2019.

[94] Worldwide Movement for Human Rights (FIDH), *supra,* n. 90.

[95] S. Vasiliev, "Non just another "crisis": Could the blocking of the Afghanistan investigation spell the end of the ICC? I and II", *ejiltalk*, Published on April 19 and 20, 2019.

[96] Other reason suggested by some critical commentaries is related to the limitations that the Pre-Trial Chamber considers that it can enforce on the Prosecutor's investigation.

[97] D. Jacobs, "ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision", Post on April 12 2019. This post could be read in the web: https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/ (last visit October 31 2019).

 DOI: 10.17103/sybil.23.2

by the references on Article 15 (4) [98], and it is not possible to consider the interests of justice because the Chamber uses the same test or standard as the Prosecutor[99]. I consider the decision of the Chamber *ultra vires* for another reason. In my opinion, when the Chamber uses efficacy as a criterion to decide an authorization to investigate, it is exercising a right to select and prioritize cases, and also a right to exercise financial control of the budget of the Office of the Prosecutor, and these are not rights or functions of the Pre-Trial Chamber.

It is relevant that the criteria used by the Chamber are found in the *Policy Paper on Case Selection and Prioritisation*, published by Office of the Prosecutor on 15 September 2016. As operational criteria, the Office considers, for example, the quantity and quality of the incriminating and exonerating evidence already in the possession of the Office, as well as the availability of additional evidence and any risks to its degradation; international cooperation and judicial assistance to support the Office's activities; the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time, and the potential to secure the appearance of suspects before the Court, either by arrest and surrender or pursuant to a summons[100].

Judge Mindua in his concurrent and separate opinion explains why they use these operational criteria[101], but not why they should consider them as elements of the interests of justice. The judge and the Chamber are confusing the evaluation of the interests of justice with the selection and prioritization of cases, and they are discrete decisions with distinct functions and operate at different stages of the process. When the Chamber decides on authorization to open an investigation, it should use the same standard as the Prosecutor and not different criteria[102].

The decision on 12 April 2019 has another aspect related to the restorative justice that should be criticised [103]. The Pre-Trial Chamber considers that the failure of the

[98] *Ibid.* In opinion of this author: "The only job of the PTC when the Prosecutor requests the opening of an investigation is to determine jurisdiction and admissibility. And the "interests of justice" fall under neither of these categories".

[99] Judge Mindua considers that the Pre-Trial Chamber has competence to analyse the question of the interests of justice. See, ICC-02/17-33 Anex, paragraph 17-23.

[100] See Office pof the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, paragraph 51.

[101] As the judge notes: "This idea of taking 'extra-legal' factors into account is also accepted by the ICC Prosecutor in her 'Policy Paper on Case Selection and Prioritisation', published on 15 September 2016. She said that she would consider factors such as the availability of international cooperation and judicial assistance to support her activities, her Office's capacity to effectively conduct the necessary investigations within a reasonable period of time, including the security situation in the area, and the potential to secure the appearance of suspects before the Court.... As such the feasibility of an investigation is not a separate factor under the Statute when determining whether to open an investigation." ICC-02/17-33 Anex., paragraph. 41.

[102] It is always the opinion of the Pre-Trial Chamber, see, ICC-01/09-19, paragraph 24; ICC-01/15-12, paragraph 4, and ICC-01/17-9, paragraph 28.

[103] On this issue *Amicus Curiae* Organizations and the Office of Public Counsel for Victims have insisted. See ICC-02/17-55, 25 June 2019, Request Seeking Leave to File *Amicus Curiae* Submissions on Behalf of

 DOI: 10.17103/sybil.23.2

investigation could create "frustration and possibly hostility vis-à-vis the Court" in the victims because they will not have the opportunity to participate in the relevant proceedings. Has the Chamber forgotten that the interests of victims are also vested in protection and reparation? We could be forgiven for thinking this if it were not for the opinion of judge Mindua[104]; thus, it is evident that the Chamber knew that opening an investigation is necessary to establish a situation, and this is required to identify victims. For example, the victims of crimes committed in Afghanistan cannot access the assistance of the Trust Fund for Victims because there is no situation. People who suffer torture and cruel treatment, victims of sexual violence, or children conscripted or enlisted under the age of 15 years and who have been used actively in hostilities do not have the assistance of a program to provide physical and psychosocial rehabilitation. Does not this outcome create frustration and hostility from victims vis-à-vis the Court? Does not it have a negative impact on the ability of the Court to pursue restorative justice?

It is surprising that a judge says that "(d)eciding these kinds of investigations without taking into account all relevant factors is irresponsible and would only result in undermining the Court's credibility in the long run, even though such authorisations may satisfy human rights activists and some victims at present."[105]. The judicial decision has at its root, to be just, and it should not need to satisfy any organization or government.

In addition to this assessment, it should be noted that the decision of the Pre-Trial Chamber has raised some questions, the answer to which will be decisive for the Court itself and for the future of the investigations that the Prosecutor deems appropriate to initiate *proprio motu*. Some of these issues relate to the competence and powers of the Chamber in the proceedings for authorization; others to the factors to be taken into account in the decision relating to the interests of justice; and finally, there are doubts relating to the scope of the authorization granted by the Chamber to the Prosecutor. For us and for this work, the first two are the ones that will be analysed[106].

The decision on 12 April has brought changes which give rise to doubts as to the powers of the Chamber under Articles 15 and 53 of the Rome Statute. Must the Pre-Trial Chamber make always a determination to the effect that investigation would serve the interests of justice? Must the Pre-Trial Chamber review the decision of the Prosecutor considering the

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Human Rights Organizations in Afghanistan and ICC-02/17-59, 12 July 2019, Submission in the general interest of the Victims on the Prosecutions Request for Leave to Appeal the "Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the situation in the Republic of Afghanistan (icc-02/17-34).

[104] The paragraph 56 of the opinión of judge Mindua notes that the Chamber was aware of the consequences for the victims.

[105] *Ibid.*, paragraph 49.

[106] The decision of the Pre-Trial Chamber II has raised some doubts about the scope of the authorization; for example, whether the Chamber may authorize the investigation only to incidents identified by the Office of Prosecutor or whether it may even restrict such incidents to those comprised within the authorisation's geographical, temporal, and contextual scope. On this subject see also ICC-02/17-33 Annex Concurring and separate opinion of judge Antoine Kesia-Mbe Mindua, on 31 May 2019, paragraph 4-15.

 DOI: 10.17103/sybil.23.2

investigation would be in the interests of justice? And in this case, has the Chamber the obligation to ask the Prosecutor about this question? The first two questions lend themselves to discussion, but it seems indisputable that if the Prosecutor did not explain that the investigation would serve the interests of justices[107] because of every single factor points in that direction, the Pre-Trial Chamber must give the Prosecutor the opportunity to be heard on the interests of justice. Likewise, I could extend this question to the victims. Must the Pre-Trial Chamber hear the victims before deciding not to authorise the Prosecutor investigation? Rule 50 (4) RPE provides for the possibility to consult victims and, although it does not oblige the Chamber to do so, it is certainly advisable to.

The Pre-Trial Chamber II has enlarged on factors under Article 53 about the interests of justice. It is necessary to clarify whether the Chamber has discretionary powers to select factors and if in this case, the choice was made correctly.

The use of extra-legal factors makes it possible to consider their consistency with the interpretation of wording *interests of justice*. Is the degree of the cooperation of the States a relevant factor in determining whether the investigation would serve the interests of justice? Is the scope of the information and evidence gathered so far essential to consider that the investigation would not serve the interests of justice? Is the belief that the investigation will be unfeasible or that the Prosecutor should allocate its resources to other activities, enough factors to deny the request of investigation? Could the factors be changed? And in this case, would be the Prosecutor obliged to explain new aspects *proprio motu*? How does the Court will ensure the legal security of the Prosecutor at the time of preparing the request for authorization of an investigation?

We are confronted by legal issues of constitutional importance[108] which necessarily require a nuanced answer. I have considered that extra-legal factors do not have a place under Article 53 (1) (c), but the Pre-Trial Chamber II has used it and it is logical that we have some doubts, and consequences which are currently unknown as well. Nonetheless, this decision will have repercussion in the reluctance of some States to cooperate with the International Criminal Court.

It is not surprising that appeal claims and other procedural reactions have appeared. On 7 June 2019, the Office of the Prosecutor made a request for leave to appeal this decision of the Pre-Trial Chamber II[109]; on 10 June 2019, the Victims filed a request for leave to appeal the Decision before Pre-Trial Chamber II[110], and a notice of appeal of the

[107] As it has so far been the case that the Prosecutor when he or she has considered that crimes within the jurisdiction of the Court were committed, the cases were admissible and the gravity of the crimes and the interests of victims has led him or her to the conclusion that the investigation would serve the interests of justice.

[108] This is the adjective used by the Prosecutor herself in relation to some of this doubts, see ICC-02/17-34, 7 June 2019, paragraph 18,

[109] ICC-02/17-34, 7 June 2019, Public Request for Leave to Appeal the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan"

[110] ICC-02/17-37, 10 June 2019, Public with Confidential Annex I, Victim's request for leave to appeal the

 DOI: 10.17103/sybil.23.2

Decision before Appeal Chamber[111]. In addition, legal representatives of other victims filed two separate notices of appeal before the Appeals Chamber[112]. On 17 September 2019, Pre-Trial Chamber II granted in part the request of the Prosecutor and victims for leave to appeal[113] . The Appeals Chamber could clarify the way in which the interests of justice are to be understood in the context of authorizing an investigation. The future of other preliminary examinations may depend on it.

(E) CONCLUSION

The interests of justice have been used by the Pre-Trial Chamber to deny the authorization requested by the Prosecutor with the intention to open an investigation related to the alleged crimes committed by members of the Afghan National Security Forces, members of the Taliban and affiliated armed groups, members of the USA forces and members of the CIA. This decision has been polemic because the Chamber has overturned the decision of the Prosecutor when the latter has noted that there are not substantial reasons to believe that an investigation would not serve the interests of justice, and when she has followed identical procedures and advanced identical arguments on previous successful occasions.

Likewise, criticisms have now arisen because of the apparently innovative criteria that the Chamber has used and their demonstrably extra-legal character, for example, the duration of the preliminary examination, the information and evidence the Prosecutor has got, the degree of cooperation of States at the Preliminary Examination, factors related with the organizational and financial sustainability of the Court, and simple beliefs or conjectures. These are not the only reasons to contest the decision. This decision of the Pre-Trial Chamber could be considered *ultra vires*. Furthermore, it is also a decision which does not take into account the restorative interest of the victims and has denied them the possibility to become a beneficiary of the assistance programs of the Trust Fund for

"Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan".

[111] ICC-02/17-36, 10 June 2019, Public with Confidential Annex I, Victim's Notice of Appeal of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan".

[112] ICC-02/17-38,10 June 2019, Legal Representatives of Victims, 'Victims' Notice of Appeal of the "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan"; ICC-02/07-36.10 June 2019, Legal Representatives of Victims, 'Victims' Notice of Appeal of the "Decision Pursuant Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,"; ICC-02/17-40-Corr.. 12 June 2019, Legal Representatives of Victims, 'Corrected version of the Notice of appeal against the "Decision Pursuant to Article 15 of the Rome Statue on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan" (ICC-02/17-33)'.

[113] ICC-02/17-62, 17 September 2019, Decision on the Prosecutor and Victims' Requests for Leave to Appeal the 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan'.

 DOI: 10.17103/sybil.23.2

Victims.

It is evident to most commentators that this was not a wise decision. The message which this decision sends to States is clear: Do not collaborate and the International Criminal Court will not investigate the *core crimes* committed in your territory or by your nationals. If the credibility of the Court was in doubt before it, and if the future of the Court was uncertain, now is possible that the Pre-Trial Chamber has facilitated its own demise.

For the sake of the Court, criminal justice, human rights, and, above all, victims, I hope the Appeals Chamber puts things in their place. Is that too much to ask?

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Some Reflections on Good Faith during Negotiations in Recent ICJ Cases

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Abstract: Whatever their legal basis or their objectives negotiations between states essentially consist of a process parties to which may hold divergent views on the qualification of the exchanges between them. The normative principle of good faith during negotiations is multifaceted and arguably also governs the pre-conditions for the start of the process: (un)conditional willingness to enter it, creation of a favourable climate and no use of intimidation. The well-established *acquis jurisprudentiel* has confirmed that parties must comply with procedural and substantive duties. In recent cases before the International Court of Justice Parties have abandoned their traditional reluctance to formulate allegations of lack of good faith rendering it more difficult for the Court to turn to its judicial presumption of good faith. This article looks at Parties' general approach towards good faith requirements during negotiations in order to identify areas were refinement and expansion —both *ratione temporis* and *ratione materiae*— of the *acquis jurisprudentiel* by the Court would be welcome.

Keywords: *good faith during negotiations – recent ICJ cases – room for refinement of the acquis jurisprudentiel*

(A) INTRODUCTION

Peaceful settlement of disputes is not only one of the main tasks of the international legal order, but it also entails a Charter-based and customary legal obligation for states. Although negotiations are still the method of preference for states, they "are free to resort to negotiations or put an end to them"[1] or not to negotiate at all although in the *North Sea Continental Shelf* and *Fisheries Jurisdiction* cases the International Court of Justice (ICJ) "came close to enunciating a general obligation to negotiate in good faith."[2]

States are the *domini negotii*, but within the limits imposed by international law; hence the process is governed by principles, rules and duties. The principle of good faith "does not oblige states to negotiate in the first place" [3] but it is the controlling principle for any diplomatic process of negotiations.

Analysis by negotiation scholars in the field of international relations has provided states with an "ethical" code of "dispute management"[4] minimum requirements for state

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[1] *Obligation to negotiate access to the Pacific Ocean (Bolivia v. Chile), Judgment of 1October 2018, para. 86.* The author has been consulted by the Government of Chile during the proceedings.

[2] M. Waibel, 'The Diplomatic Channel', in J. Crawford (Ed.), *The Law of International Responsibility* (OUP, Oxford, 2010), 1085 at 1093.

[3] R. Kolb, *Good Faith in International Law* (Hart Publishing, Oxford and Portland, Oregon, 2017), at 203.

[4] K. Oellers-Frahm, 'Nowhere to Go? The Obligation to Settle Disputes Peacefully in the Absence of Compulsory Jurisdiction ', in T. Giederich (Ed.), *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the Second Hague Peace Conference* (Berlin, 2009), 435 at 451.

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behaviour during negotiations. The functional interaction between negotiations and adjudication has given the ICJ and other courts and tribunals the opportunity to bring important parts of that basic code of conduct into the realm of law, giving rise to an *acquis jurisprudentiel* providing "a limited conduct guidance" while preserving "a significant 'zone of legality' within which States are free to operate"[5] and containing the benchmarks for any judicial good faith review.

This *acquis* jurisprudentiel has been built through the exercise of *jurisprudential authority* —as reflected in judicial reasoning— and to a far lesser extent of their *decisional authority* —i. e. the authority of the operative part of judgments[6]. Parties 'submissions only rarely do include allegations of lack of good faith and relevant cases do not always reach the metis stage.

Parties' narrative of the factual matrix underlying the dispute and their arguments will cover a wide range of conduct, behaviour and actions part of which may, in due course, be "replaced by flexibly and spontaneously emerging norms, a process which carries with it a certain degree of legal uncertainty"[7] while others are (still) based "on a spirit of understanding and cooperation."[8]

Litigation "is about the art of persuasion, understood as the effective advocating for a particular outcome under the applicable law."[9] The *acquis jurisprudential* "gives States guideposts that help [them] to assess the merits of their case and [to] shape their litigation strategy" and it is "argumentatively being used by the parties to persuade" the Court.[10]

(1) The Purpose of this Article

The purpose of this article is to have a closer look at the various heads of bad faith allegations and to find out whether and to what extent there is room or a need even for judicial expansion and refinement of this *acquis jurisprudentiel* (judicial law), in light of Parties' opinions and views in recent cases as to what it means to negotiate in good faith (justiciable law).

Aspects and facets of good faith during negotiations as perceived and put forward by Parties in their narrative of the historical trajectory of a process of negotiations and legal

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5 C. Ragni, 'Standard of Review and the Margin of Interpretation before the I.C.J.', in L. Gruszczynski and W. Werner (Eds.), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP, Oxford, 2014), 319 at 322.

6 A distinction made by O. Amman, 'The European Court of Human Rights and Swiss Politics: How does the Swiss Judge Fit in?', in M. Wind (Ed.), *International Courts and Domestic Politics* (CUP, Cambridge, 2018), 262 at 276 and 280.

7 R. Kolb, *supra* n. 3, at 81.

8 H. Thirlway, 'The Law and Procedure of the International Court of Justice 1969-1989 Part One', 60 *B.Y.I.L.* (1989), 4-157, at 24, note 60 [doi/org/10.1093/bybil/60.1.1].

9 S. Ugalda and J. Quintana, 'Managing Litigation before the International Court of Justice ', 9 *JIDS* (2018), 691-724, at 691 [doi:10.1093/jnlids/idy001].

10 WW. Alschner and D. Charlotin, 'The Growing Complexity of the International Court of Justice 's Self- Citation Network' 29 *EJIL* (2018) 83-112, at 100 and at 85 [doi/10.1093/ejil/chy002]

 DOI: 10.17103/sybil.23.3

arguments will be interwoven with corresponding parts of the *acquis jurisprudentiel*. Recent cases which did not reach the merits stage and even pending cases can show us the way forward in this continuous process of elaboration and refinement.

(2) The scope of this Article

In order to stay within editorial limits our reflections only deal with recent ICJ cases without however going into the merits of these cases; the focus will be on good faith during negotiations whatever their instrumental role in the proceedings.

Parties may disagree whether they are under an obligation to negotiate, what topics had (allegedly) (not) been discussed, whether the process had failed or whether there was still a chance to resume the process; these topics are outside the scope of this article as well as *procedural good faith sensu stricto* operating during adjudicatory proceedings.

(3) The Methodology used

We will approach the question on the basis of the Court's "judicial findings" and it "recording the positions" of the Parties[11] in the last five years and making extensive use of the oral pleadings by the Parties which "are of monumental importance" because it is "where the parties make their last stand, and, where, to a significant degree, a case may be lost or won."[12] Torres Bernárdez has rightly pointed to the role of the pleadings in the Court's assessment of negotiations.[13] This way we will look for those aspects and elements in Parties' arguments which could deserve a "jural imprimatur."[14]

(B) GOOD FAITH HAS MULTIPLE FUNCTIONS IN THE INTERNATIONAL LEGAL ORDER

The principle of good faith "touches every aspect of international law" and "every power in international law, and every right and privilege provided for a State in a treaty is to be executed in good faith"[15] hence the eagerness of Parties in their opening statements before the Court to stress their good faith in conducting their international relations in the shadow of international law.

Robert Kolb has masterfully identified three different "shades of good faith"[16] each of

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[11] H. Thirlway, ' The Law and Procedure of the International Court of Justice 1969-1989 Part Twelve ' 82 *BYIL* (2011) 37-181, at 75, note 139 [doi/org/10.1093/bybil/brs004].

[12] S. Ugalda and J. Quintana, *supra* n. 9, at 716 and 717.

[13] S. Torres Bernardez, 'Are Prior Negotiations a General Condition for Judicial Settlement by the International Court of Justice?', in C. Barea et al. (Eds), *Liber Amicorum 'In Memoriam' of Judge José Maria Ruda* (The Hague, 2000), 507, at 507, para. 2.

[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment*, ICJ Reports (1986) 14, Dissenting Opinion of Judge Schwebel,259 at 286.

[15] R. Jennings and A. Watts (Eds.), *Oppenheim's International Law*, Vol. 1, (9th Ed. Longman, London, 1992), at 38 and *Application of the CERD (Qatar v; UAE), Request UAE provisional measures*, CR. 2019/5 (UAE), at 30, para. 8.

[16] R. Kolb, *supra* n. 3, at 15-29.

 DOI: 10.17103/sybil.23.3

them potentially or actually giving rise to reviewable rules and good practices in a process of negotiations.

– *As a subjective legal fact,* good faith "designates a state of mind consisting in an erroneous representation of legally relevant facts."[17] The rebuttable character of the judicial presumption of good faith entails indeed that "there is nothing non-justiciable in the notion of bad faith."[18] "Good faith is treated as a question of fact" and international courts and tribunals "apply *de novo* review and once a court decides to examine evidence of bad faith, the State is afforded no deference."[19]

One should keep in mind that "les entorses à la bonne foi sont rarement si grossières. Le combat se déroule à fleurets mouchetés et les diplomaties répugnent à y dégainer un sabre."[20] Moreover, "will the International Court, the expert in law, now also be required to become adept in psychology, so that it can probe the heart and mind not of an individual, but of a State, the respondent ?"[21]

Given the unwillingness of international jurisprudence in general "[de] pénétrer dans les intentions des Etats"[22] the question arises whether the Court is equipped to fully evaluate parties' conduct beyond a touch and feel approach. A summary of negotiations referring to the numerous political difficulties that had caused a delay in the process of negotiations would seem to have been for long the most far-reaching judicial approach while staying well within the limit just referred to.[23]

As "a *vague standard for evaluating the reasonableness or the normality of behaviour*"[24] good faith operates an objectivising legal standard.[25] Reasonableness of behaviour appears to be the dominant notion in this regard[26] as reflected in both procedural and substantive duties of good faith.

The "main normative content" of good faith *as a general principle of the law*" is the protection of legitimate expectations freely created in another subject by some deliberate course of conduct[27] and nourishing e. g. "some pre-contractual obligations" on "which another subject could and should have relied."[28]

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[17] *Ibid*, at 15.

[18] *Ibid*, at 21.

[19] A. Marmolea, 'Good Faith Review' in *Deference in International Courts and Tribunals, supra* n. 5, 74, at 75.

[20] J.P. Cot, ' La bonne foi et la conclusion des traités ' 4 *RBDI* (1968) 140-159, at 143.

[21] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 833, Dissenting Opinion of Judge *Ad Hoc* Bedjaoui, 1108 at 1117, para. 31.

[22] L.Marion, 'La notion de "Pactum de Contrahendo" dans la jurisprudence internationale' (1974) 78 *RGDIP*, 351-398, at 398 and 392.

[23] L. Marion, *supra* n. 22, at 390, note 100.

[24] R. Kolb, *supra* n. 3, at 15 (emphasis added).

[25] *Ibid*, at 22.

[26] *Ibid.*

[27] *Ibid*, at 15.

[28] *Ibid*, at 23.

 DOI: 10.17103/sybil.23.3

(C) THE DEFINITION OF NEGOTIATIONS

Before entering further into the heart of the *acquis jurisprudentiel* it is appropriate to briefly attempt to delineate its potential reach *ratione materiae.* A process of diplomatic interaction may consist of "a protean amalgam of elements of negotiations, good offices, mediation and possibly conciliation, the appropriate weight of each element varying from phase to phase"[29] and a dispute settlement clause may carefully y climb "from *dialogue* in which each State's concerns are voiced to each other, to the various means by which settlement may be *negotiated*" and that it is the dialogue which defines what is in dispute.[30] Negotiation "is an institution of international law" situating itself "at the crossroads of international law and diplomacy."[31]

Negotiations basically "is the process of consideration of an international dispute or situation by peaceful means, other than judicial or arbitral processes, with a view to promoting or reaching among the parties concerned or interested some understanding, amelioration, adjustment, or settlement of the dispute or situation."[32] Parties "to a potential dispute adjust their policies and accommodate other party's interests" through *consultations* "before any harm has even occurred"[33] but the distinction with negotiations should not be stretched too far as they may gradually merge without clearly moving from one stage to another.[34]

Pourparlers are "*informal* discussions, generally preliminary to substantive negotiations and having the objective of promoting peaceful settlement".[35]

Informal negotiations "do imply that statements made by one or the other party are non-committal and should not be taken as final".[36]

Exchanges between the parties do not necessarily have to take the form of proper negotiations but they may take place *within the context* of proper negotiations or pre-negotiations.

"*Inter-parties correspondence* must be treated with great caution when a dispute is on the horizon", also because it "is likely to be disclosed" later to a Court or Tribunal.[37]

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[29] *Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility, Judgment,* I.C.J. Reports (1988), 69, Separate Opinion of Judge Shahabuddeen, 133, at 154.

[30] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 3, Dissenting Opinion of Judge *Ad Hoc* Caron, 74 at 75, para. 3 referring to the Pact of Bogota (emphasis added).

[31] A. Watts, 'Negotiation and International Law' in P. Borba Casella (Ed.), *Dimensio Internacional do direito Estudos em homage a G.E do Nascimento e Silva* (Sao Paulo, 2000), 519-536, at 519.

[32] A. Lall, *Modern International Negotiation Principles and Practice* (Columbia University Press, N.Y. and London, 1966), at 5.

[33] M. Waibel, *supra* n. 2, at 1087.

[34] C. Fombad, 'Consultation and Negotiation in the Pacific Settlement of International Disputes '1 *AJICL* (1989), 707-724, at 711-7112.

[35] A. Lall, *supra* n.32, at 18.

[36] A. Davérède, 'Negotiations Secret 'in *Max Planck Encyclopaedia of Public International Law* (OUP, Oxford, 2012), para. 2

[37] J. Gladstone, 'The Legal Adviser and International Disputes: Preparing to Commence or Defend

 DOI: 10.17103/sybil.23.3

States have pointed out that the "essence of negotiation is communication and discussion"[38] but they do not always refer to the *talks* they had in a way consistent with the notions just listed which is not surprising as in reality the borderline is not always well-defined although "one generally recognizes that negotiations involve the bringing of discussions into a sharper focus and more adversarial posture than was the case previously."[39] It is not surprising that Parties disagree about the nature, the content and significance of the *talks* they had. An Applicant may consider a full exchange of views as "diplomatic negotiations"[40] whereas the Respondent may be of the view that the maritime delimitation has been discussed only "in the *most preliminary way* without any structure."[41]

Part of a duty to negotiate is participation in official meetings to discuss communications and proposals.[42] Raising relevant issues at the UN in the presence of representatives of the other Party are not negotiations[43] neither are "idle chatters over dinners, or at a diplomatic reception."[44]

In the view of states negotiations seems thus to require a series of meetings in person around the table and this appears to correspond to the Court's approach *in general.*[45] The Court has referred to pre-negotiations as "exploratory discussions".[46] Looking at the record before it the Court may agree with the Applicant that detailed and substantive discussions did take place[47] and which were more than discussions " in the *most preliminary way* without any structure or detail as argued by the Respondent"[48] and that the record established that "those negotiations […] discussed in detail the methodology to be used in the delimitation exercise."[49]

The Court has distinguished negotiations from "mere protests or disputations". Negotiations "entail more than the plain opposition of legal views or interests between two

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Litigation or Arbitration 'in A. Zidar and J-P Gauci (Eds), *The Role of Legal Advisers in International Law* (Brill Nijhoff, London, Boston, 2017) 34 at 44 (emphasis added).

[38] *Obligations concerning Negotiations, Marshall Islands v. United Kingdom*, Memorial of the Marshall Islands, para. 176.

[39] A. Watts, *supra* n. 31, at 520.

[40] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Application Somalia, para. 7

[41] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Verbatim Records, CR 2016/10 (Kenya), at 48, para. 2

[42] *Obligation to Negotiate Access*, Verbatim Records, CR 2018/16 (Bolivia) at 60, para. 9 (c).

[43] *Application of the International Convention on the Elimination of all forms of Racial Discrimination (Qatar v. United Arab Emirates), Request for the Indication of Provisional Measures, Order of 23 July 2018, para. 36.*

[44] *Obligation to Negotiate Access*, Verbatim Records, CR.2018/6 (Bolivia), at 70, para. 56.

[45] *Application of the International Convention for the e Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures, Order of 19 April 2017*, I.C.J. Reports (2017) 104 at 125,*para. 59.*

[46] *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment*, I.C.J. Reports (1974), 3 at 14, para. 28.

[47] *Maritime Delimitation in the Indian Ocean*, Verbatim Records, CR. 2016/11 (Somalia) and at 16, para. 22, and at 45, para. 31.

[48] *Maritime Delimitation in the Indian Ocean*, Verbatim Records, CR 2016/10 (Kenya) at 48, para. 2.

[49] *Maritime Delimitation in the Indian Ocean, Preliminary Objections, Judgment of 2 February 2017*, I.C.J. Reports (2017) 3 para. 92.

 DOI: 10.17103/sybil.23.3

parties". Not even "a series of accusations and rebuttals" or "the exchange of claims and directly opposed counter-claims" would qualify as negotiations.[50] Discussions "limited to two parallel presentations without any attempt to compromise" would not qualify.[51] The minimum requirement is "a genuine attempt by one of the parties to engage in discussions with the other party, with a view to resolving the dispute"[52] but not *all* statements by an Applicant may be considered as genuine attempts to negotiate *relevant matters*.[53]

Subsequent to the Court's decision in the *Belgium Senegal case* that an exchange of correspondence over a period of eight months was considered to have been a genuine attempt to negotiate without any in-depth in-person negotiation[54] states continue to disagree whether the mere exchange of two Notes Verbales would suffice to fulfil a prior negotiations clause[55] or even a mere letter inviting the other party to negotiate would "by itself [be] sufficient to show a genuine attempt".[56] On the other hand, the Court considered that an exchange of Notes Verbales *and* one meeting held, followed by a negative response i.e. to be unable to accept an offer for arbitration did suffice to satisfy a prior negotiation clause.[57]

The particular circumstances of such exchanges —their frequency, their content and the (lack of) responses— are important factors for the Court to consider them as genuine attempts to negotiate without any subsequent meetings in person.

(D) THE LEGAL BASIS FOR NEGOTIATIONS

The freedom of any State to choose and conduct its foreign policy in "co-ordination with

[50] *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment of 1 April 2011,* I.C.J. Reports (2011), 70 at 132, para. 157. However, Parties still consider "the mere enumeration of claims during three brief meetings "as negotiations: *Application of the ICSFT and CERD case, Preliminary Objections,* CR. 2019/9 (RF) at 47, para. 4 referring to UKR position.

[51] *Maritime Delimitation in the Indian Ocean, Preliminary Objections, Judgment of 2 February 2017,* I.C.J. Reports (2017) 3, Dissenting Opinion of Judge *Ad Hoc* Guillaume, 79 at 86 para. 29.

[52] *Application of the ICSFT and CERD case, Request for the Indication of Provisional Measures, Order of 19 April 2017,* I.C.J. Reports (2017) 104, at 120 para. 43.

[53] CERD *case, Judgment of 1 April 2011,* I.C.J. Reports (2011), 70 at 139, para. 181

[54] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment,* I.C.J. Reports (2012), 422 at 433-435, paras. 24-26 and at 446, para. 58.

[55] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Verbatim Records CR 2018/16 (Iran) at 28-29, para. 3 and CR 2018/17 (United Sates) at 23, para. 4.*

[56] *Application of the CERD case (Qatar v. UAE), Verbatim Records CR 2018/14 (Qatar) at 12-13, para. 13.*

[57] *Application of the ICSFT and CERD, Request for the Indication of Provisional Measures, Order of 19 April 2017,* para. 53. The Court did confirm its position in its Judgment of 8 November 2019 on the preliminary objections in the same case: para. 76. Individual judges have previously opined that the legal significance to be attached to a bilateral exchange of letters could very well consist in considering them as attempts at a negotiated settlement: *CERD case Judgment of 1 April 2011,* I.C.J. Reports (2011) 70, Separate Opinion of Judge Simma, 188 at 190, para. 5, at 198-199, para. 22 and at 199, para. 25.

 DOI: 10.17103/sybil.23.3

that of another State" constitutes the very basis of any process of negotiations.[58]

A "general, customary law-based duty of co-operation with a view to a settlement"[59] is inherent in states' obligation to settle their disputes peacefully but no rule in international law "imposes a general obligation to States to settle their disputes *through negotiation*, instead of resorting to another peaceful means of their choice".[60] Negotiations may thus, at first glance, still "widely be regarded as essentially voluntary process"[61] and an obligation to negotiate "can only result from an undertaking voluntary entered into by States concerned through a treaty provision or *through any other legally valid or relevant form of expression of State consent.*"[62]

In the *Bolivia Chile case* the Court had to examine the wide variety of sources allegedly having created an obligation to negotiate.[63] There arguably is merely a *need to negotiate* when the subject-matter is the exercise of preferential rights or the implementation of a Judgment.

In case the legal framework for the negotiations has not been put in place "by an agreement between the parties or by the Court" the parties "are free to decide on the *format and content* of the process, the *object and purpose* of which must be compatible with the principles and norms of international law."[64] *The duty to negotiate* has gradually evolved in becoming one of the general principles of international law and it is a special application of a "principle which underlies all international relations."[65]

A prime example of a *pactum de contrahendo* is Article VI of the Non-Proliferation Treaty (NPT) —"the single most important provision of the Treaty" and its "cornerstone"[66]— it is linked to the provisional nature of the treaty itself[67], and consisting of both an obligation of conduct and an obligation of result.[68]

A judicial order to negotiate imposed *motu proprio* —by way of a provisional measure[69] or

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[58] *Nicaragua case, Merits, Judgment,* I.C.J. Reports (1986), 14 at 133, para. 265.

[59] A. Peters, 'International Dispute Settlement : A Network of Cooperational Duties', 14 *EJIL* (2003) 1-34, at 9 [doi/10.1093/ejil/chy002].

[60] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003,* ITLOS Reports (2003), 10 Separate Opinion of Judge Jesus, at 53.

[61] A. Watts, *supra* n.31, at 525.

[62] *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003,* ITLOS Reports (2003), 10 Separate Opinion of Judge Jesus, at 53 (emphasis added)

[63] *Obligation to Negotiate Access,* Judgment of 1 October 2018, paras. 91-175.

[64] GA Res. 53/101, 8 February 1998, Principles and Guidelines for International Negotiations, para. 2 (c).

[65] *North Sea Continental Shelf cases (Federal Republic of Germany /Denmark; Federal Republic of Germany / the Netherlands) Judgment,* I.C.J. Reports (1969) 3 at 47, para. 86.

[66] *Obligations concerning negotiations (Marshall Islands v. United Kingdom)* Memorial of Marshall Islands, para. 139 and Verbatim Records CR 2016/7 (UK), at 14, para. 20.

[67] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 833, Dissenting Opinion of Judge *Ad Hoc* Bedjaoui, 1108 at 1124-1125, paras. 60-64.

[68] *Obligations concerning negotiations (Marshall Islands v. United Kingdom)* Memorial of Marshall Islands, para. 97

[69] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 Match 2011,* I.C.J. Reports (2011) 6, at 27, para. 86(2).

 DOI: 10.17103/sybil.23.3

in the operative clauses of a judgment on the merits[70]— would normally determine the objective of the process Parties are obliged to undertake and may establish the legal parameters and factors to be taken into account but not the very content of the agreement to be decided by the Parties, except as requested to do so.[71]

Whatever the legal basis of a process of negotiations, the duty to perform it in good faith is inherent and there is no need to explicitly provide it. In case of a pre-existing obligation to negotiate, the duties under the good faith principle may be *strengthened* [72] but they are not different in nature and scope although their breaches —such as a refusal to enter into the process or actions to defeat the object and propose of the process— may then be considered more serious in terms of state responsibility.

(E) THE TIME FACTOR

Time is an essential feature of negotiations as a dynamic process and "surrounding factors largely determine the speed of negotiation"[73] which in turn "must inevitably contend with factors that have their roots in the past."[74]

Negotiations are transformative by nature as circumstances, priorities and perspectives usually do change in the course of the process. In order to be able to negotiate in good faith, the irreducible minimum objectives of the parties must "not be totally incompatible" but as they "tend to fluctuate with time"[75] what "had been absolutely and emphatically non-negociable"[76] may later become negotiable.

Parties may be under a self-imposed or judicially prescribed deadline to start, resume or to bring a process of negotiations to an end. It has been *jurisprudence constante* that the duration of a process and thus time as such is not an important let alone decisive factor in a judicial assessment of the conduct of the parties[77] but causing abnormal delays as part of a negotiating strategy to maintain the status quo or causing them in an unjustified manner is not in accordance with good faith[78] . In case of a *pactum de contrahendo* such as Article VI of the NPT the notion of "undue or abnormal delays" arguably also applies "in

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[70] *Gabicikovo-Nagymaros Project (Hungary/ Slovakia), Judgment,* I.C.J. Reports (1997) 7, at 83, para. 155(2) B.

[71] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment,* I.C.J. Reports (2007) 659 at 668, para. 18 and at 669, para 19(2) and at 763, para. 321 (4).

[72] R. Kolb, *supra* n. 3, at 197.

[73] A. Lall supra n.32, at 3.

[74] *Ibid*, at 52.

[75] *Ibid*, at 54.

[76] *Ibid*, at 129.

[77] *Applicability of the Obligation to Arbitrate under Section 21 of the United Headquarters Agreement of 26 June 1947, Advisory Opinion,* I.C.J. Reports (1988) 12, at 33-34, para. 55.

[78] *Affaire du Lac Lanoux (Espagne, France), 1957, XII RIAA,* 281-317, at 307. At the preliminary objections stage the Court may merely "note" that a Respondent has twice sent a Reply Note after the proposed date for a meeting had passed: *Application of the ICSFT and CERD case, Preliminary Objections, Judgment of 8 November 2019,* para. 118.

 DOI: 10.17103/sybil.23.3

commencing" *such* negotiations and "sustaining" them.[79]

Good faith does not allow "unreasonable delay"[80] in both making and responding to proposals. A process of negotiations should not exceed a reasonable period of time which will depend on the subject matter at hand and the particular circumstances.[81] A conventionally prescribed period of 6 months for negotiations on the organisation of an arbitration has been strictly upheld by the Court, while a period of almost 2 years of negotiations on the subject-matter of the dispute "has to be regarded as a reasonable time."[82] "Even in the case of a short contact, when it appears that the other party opposes a clear *non possumus,* or *non volumus,* the party attempting to break the ice has fulfilled its duties under good faith."[83]

(F) GOOD FAITH DURING NEGOTIATIONS HAS MANY FACES

(1) Good faith does apply

In their narrative and reasoning about a process of negotiations Parties are making use of bad faith as a political and moral argument rather than as legal one, in order to discredit the other Party, but this "does not detract from its parallel operation in the legal order as a legal concept" [84] acting "as an agent of creation of obligations and rules."[85]

Good faith is "consubstantial with the idea of negotiation"[86] and "to negotiate otherwise than in good faith is surely not to negotiate at all."[87] Good faith is "paramount in all legal areas permeated by reciprocity and bilateralism",[88] reciprocity being the bedrock of the good faith requirement giving rise to mutual, equivalent, and corresponding and duties.

It is well-known that —based on the principle of good faith— the original ILC Draft Articles did impose the application *ratione temporis* of the obligation contained in Article 18 of the Vienna Convention on the Law of Treaties —not to defeat the object and purpose of a treaty prior to its entry into force— from the moment when a State "has agreed to

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[79] *Obligations concerning Negotiations (Marshall Islands v. UK)* Memorial Marshall Islands, para. 185.

[80] *Obligation to Negotiate Access (Bolivia v. Chile)*, Memorial Bolivia, Vol. I, paras. 275-279.

[81] *Maritime Delimitation in the Indian Ocean,* Verbatim Records CR 2016/10 (Kenya), at 24, para. 24 and at 24-25, para. 25. *Application of ICSFT and CERD case,* Verbatim Records, CR 2017/2 (RF) at 62, para. 42 and CR 2017/3 (UKR), at 31, para. 17.

[82] *Application of the ICSFT and CERD case, Preliminary Objections, Judgment of 8 November 2019,* paras. 76 and 70.

[83] R. Kolb, *supra* n. 3, at 197. Systematic cutting short of meetings for allegedly futile reasons would not conform to good faith: *Application of ICSFT and CERD case,* CR. 2019/9 (RF) at 63, para. 33.

[84] *Ibid*, at 23, note 107.

[85] *Ibid*, at 31.

[86] R. Kolb, ' Aperçus sur la bonne foi en droit international public', 54 *Revue hellénique de droit International (2001) 383-428, at 408.*

[87] H. Thirlway, *supra* n. 8, at 25.

[88] R. Kolb, *supra* n. 3, at 41.

 DOI: 10.17103/sybil.23.3

enter into negotiations for the conclusion of a treaty" as long as "the negotiations are in progress."[89]

Although the general opinion was that the principle of good faith did apply during negotiations, and in fact the Conference "did not deny the substance of good faith during negotiations but only the form in which it which it has been presented",[90] the Draft Article did not make it at the Vienna Conference on the Law of Treaties out of an (unjustified) fear that states would be subject to strict obligations, hardly compatible with the flexibility inherent to negotiations.[91] What in 1969 has been considered by some states as too much of a progressive development of international law has, half a century later, slowly but gradually become judicial law through the *acquis jurisprudentiel* confirming and establishing objective standards, while the obligation under Article 18 "is now part of customary international law."[92]

In light of the *travaux préparatoires* of the Vienna Convention and *the acquis jurisprudential* good faith as a normative principle carries with it both *negative duties* to abstain from certain actions and conduct that would defeat the object and purpose of the process and *positive duties* to actively promote and preserve them. "Good faith [sometimes] prompt(s) the states to act positively to uphold the object and purpose of the treaty concerned" already during the proceeding negotiations.[93]

Circumstances of every process of negotiations vary, and a number of factors tend to increase the scope and intensity of "these good faith duties"[94] but the following core procedural and substantive duties will unreservedly and consistently impose themselves upon the parties throughout.

(2) Procedural and substantive good faith

A thin but fine line of distinction between *substantive and procedural good faith* seems to impose itself quite naturally, giving rise to *more substantive or rather procedural duties* as useful tools for any good faith assessment by both states and the ICJ. The processual and fluid nature of negotiations will cause both categories of duties to be partly overlapping throughout.

According to international scholars flexibility in bilateral negotiations produces as one of its disadvantages that there are "no definite rules of procedures that facilitate the

[89] Article 15 (a) ILC YB 1966-II, A/CN.4/Ser.A/1965/Add.1, at 161. On the initial draft proposals see *inter alia* E. Zôller, *La bonne foie n droit international public* (Pedone, Paris, 1977), at 55-57 and T. Hassan, 'Good Faith in Treaty Formation '21 VJIL (1980-1981) 443-481, at 467-476.

[90] T. Hassan, *supra* n.89, at 476.

[91] United Nations Vienna conference on the Law of Treaties, t. I, A/CONF.39/C.1/SR.19, 97-105.

[92] R. Kolb, *supra* n.3, at 45.

[93] L. Boisson-de-Chazournes, La Rosa and Mbengue, 'Article 18. Obligation not to defeat the object and purpose of a treaty prior to its entry onto force', in O. Corten and P. Klein (Eds.) *The Vienna Convention on the Law of Treaties. A Commentary* (OUP, Oxford, 2011) 369 at 398, para. 62.

[94] For a list of such factors see R. Kolb, *supra* n. 3, at 202.

 DOI: 10.17103/sybil.23.3

exchange of positions" hence "procedural rules need to be fixed"[95] . That is precisely what *procedural good faith sensu lato* is destined to achieve while at the same time partly remedying the fact that the Vienna Convention "does nothing to regulate the fairness of the conduct of treaty negotiation."[96]

Procedural good faith requires *inter alia* the willingness to compromise and in case of deadlock to conduct further negotiations.[97] *Substantive good faith* requires states to conduct themselves in a loyal and reasonable way which implies *inter alia* giving serious consideration to proposals tabled by the other party[98] and "fairly to take into account the needs and interests of other parties"[99] and thus to consider carefully proposals that involve a modification of one's own position.[100]

When analysing a process of negotiations through the prism of good faith the legal and factual matrix of the background should be taken into account but one should not forget that "negotiations often serve goals other than arriving at a settlement"[101] and that "the political reality of what compliance with the law requires shapes the bargaining process"[102], that is where the *substantive and procedural good faith* converge.

Trust is "likely to play a central role in resolving" disputes "only if the two sides are willing to negotiate in good faith"[103] whereas distrust "is considerably influenced by the nation's past experiences which are deposited in the collective memory."[104] As a salient structural factor trust thus provides thus the policy foundation for compliance with the good faith requirements.

Some acts, attitudes and approaches have been considered rather as recommended practices not yet coming within the realm of the *acquis,* as necessary pre-conditions for the start of the process in good faith.

(G) PRE-CONDITIONS FOR THE START OF THE PROCESS IN GOOD FAITH

Negotiation scholars in the field of international relations have rightly drawn our attention

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[95] A. Mondré, *Forum Shopping in International Disputes* (Palgrave Macmillan, Basingstoke, 2015, at 32.

[96] T. Hassan, *supra* n.89, at 470.

[97] T. Hassan, *supra* n. 89, at 478, 479 and 480.

[98] *Ibid*, at 476.

[99] *Ibid.*

[100] *Obligation to Negotiate Access,* Memorial Bolivia, paras. 255-268.

[101] A. Mondré, *supra* n. 95, at 154.

[102] Ph. Webb, 'Escalation and Interaction: International Courts and Domestic Politics in the Law of State Immunity 'in M. Wind (Ed.) *International Courts and Domestic Politics* (CUP, Cambridge, 2018) 206 at 217, table 9.1.

[103] E. Yuchtman Yaar, Yasmin Alkalay, 'The Role of Trust in the Resolution of the Israeli-Palestinian Conflict' in I. Alon and D. Bar-Tal (Eds.) T*he Role of Trust in Conflict Resolution: the Israeli-Palestinian Conflict and Beyond* (Cham, Springer Nature, Switzerland, 2016) 149-167, at 150.

[104] D. Bar-Tal and I. Alon, 'Sociopsychological Approach to trust (or Distrust) Concluding remarks' in in I. Alon and D. Bar-Tal (Eds.) T*he Role of Trust in Conflict Resolution: the Israeli-Palestinian Conflict and Beyond* (Cham, Springer Nature, Switzerland, 2016) 311-334, at 325.

 DOI: 10.17103/sybil.23.3

to the importance of pre-negotiations[105] because of their intrinsic link with the negotiations proper. Parties may for instance establish Joint Technical Commissions to discuss *preparatory* issues *leading to* bilateral maritime boundary *negotiations*[106] and meetings may be held to discuss "a *framework of modalities* for embarking on maritime demarcation" the purpose being *merely procedural* in order "to *structure* negotiations."[107] It has been rightly argued that some of the good faith requirements "ordinarily applied to the conduct of negotiations" are "equally appropriate in the context of *pre-negotiations*".[108]

(Un)conditional willingness to enter into a process of negotiations contribute to a favourable climate for the process and not resorting to any forms of intimidation during the pre-negotiation stage are *preconditions for the fulfilment of the good faith requirements* at a later stage. When during the actual process of negotiations parties conduct themselves in such a way as to seriously affect or undermine these conditions, such actions or omissions will then squarely come within the realm of good faith.

(1) Willingness to enter into the process

We should not "overlook the psychological value of the opening of negotiations" because the opening "is often a decisive step toward the conclusion of an agreement."[109] If the "will to move from the status quo" is lacking "there cannot be a negotiation"[110] while "difference in the power levels" of the parties "is one of the factors of prime importance which affect *movement toward negotiation.*"[111]

The "obligation *to be ready to negotiate* with a view to concluding an agreement" today still represents "the minimum of international co-operation".[112] Parties may not only disagree about their respective readiness to negotiate in good faith an agreement to implement a judgment of the Court but also on the subject-matter of the negotiations they were willing to enter.[113]

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[105] T. Hopman, *The Negotiation Process and the Resolution of International Conflict* (University of South Carolina Press, Columbia, 1996) at 180.

[106] Request for the Interpretation of the Judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca /Pulau Batu Puteh, middle Rocks and South Lodge (Malaysia* v. Singapore), Application Malaysia, para. 8.

[107] *Maritime Delimitation in the Indian Ocean,* Verbatim Records CR 2016/10 (Kenya) at 48, para. 5 and at 49-50, para. 8 (emphases added).

[108] *Obligations concerning Negotiations, (Marshall Islands v. UK) Memorial* Marshall Islands, para. 225 (emphasis added).

[109] *International Status of South-West Africa, Advisory Opinion:* I.C.J. Reports (1950), 128, Dissenting Opinion of Judge Ch. De Visscher at 188.

[110] A. Lall, *supra* n. 3, at 31 and 34.

[111] *Ibid.*, at 132 (emphasis added).

[112] *International Status of South-West Africa, Advisory Opinion:* I.C.J. Reports (1950), 128, Dissenting Opinion of Judge Ch. De Visscher at 189 (emphasis added).

[113] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 3, at 31, para. 69.

 DOI: 10.17103/sybil.23.3

(a) An Offer to Negotiate

"No rule of international law forbids governments to perform acts and make declarations which are incapable of producing legal effects."[114] Whether the "political willingness" to enter into or to resume negotiations is legally binding or not could be at the centre of debate between Parties like in the *Bolivia v. Chile case*.

An offer to negotiate —which may be preceded by a request to address grievances[115]— is a unilateral legal act aimed to create legal effects to the will expressed by the State.[116] Such an offer "does not necessarily demonstrate a State's willingness to resolve the dispute"[117] and it can neither be interpreted as "consent to participate" or "actual participation" in the process unless "this has been clearly expressed or follows indisputably from the attitude adopted by that party."[118]

In addition to good faith, also caution and reasonableness require states to be unambiguous and straightforward when making an offer to start negotiations. Indeed, within the context of the interaction between good faith and acquiescence, it has been noted "that there is no duty to react if and when the attitude of the other subject of law remains ambiguous, unclear and uncertain."[119] Whether effect should be given to tweets by a Head of State declaring openness to negotiations may be doubtful in light of the conditions attached to that openness.[120] Negotiators of a treaty "ne peuvent se contenter de situations ambigües",[121] good faith seems to require this from the very first steps towards the negotiation process.

An offer to start negotiations calls for some reaction within a reasonable period of time if the other party wishes to accept it.[122] Expecting a response within 2 weeks[123] would perhaps be too strict while a proposal to actually conduct the process within 2 weeks[124] does not seem unreasonable.[125]

Parties may differ on whether an offer to negotiate was "totally artificial" and thus not a real attempt.[126] A Note Verbale with an offer to negotiate should at least contain a

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[114] *Interhandel Case, Judgment of March 21rst, 1959:* I.C.J. Reports (1959) 6, Dissenting Opinion of Judge H. Lauterpacht, at 118.

[115] *Application of CERD (Qatar v. UAE),* Verbatim Records CR 2018/12 (Qatar) at 29, para.39.

[116] E. Suy, *Les actes juridiques unilatérales en droit international* (LGDJ, Paris, 1962) at 22.

[117] A. Mondré, *supra* n. 95, at 33.

[118] *Nottebohm Case (second phase), Judgment of April 6th, 1955:* I.C.J. Reports (1955) 4 at 20.

[119] R. Kolb, *supra* n. 3, at 97.

[120] *Alleged Violation of the 1955 Treaty on case,* Verbatim Records CR 2018/16 (Iran), at 76, para. 38.

[121] J.P. Cot, *supra* n. 20, at 146.

[122] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15June 1962:* I.C.J.Reports (1962) 6 at 23.

[123] *Application of CERD,* Application of Qatar, para. 18.

[124] *Application of CERD,* Verbatim Records CR. 2018/12 (Qatar) at 29-30, para. 39.

[125] In its Order of 23 July 2018, the Court did not go into this deadline at that stage.

[126] *Application of CERD,* Verbatim Records CR. 2018/13 (UAE) at 22, para. 10 and at 23, para. 11 and CR.2018/12 (Qatar) at 30, para. 42.

 DOI: 10.17103/sybil.23.3

suggestion of a meeting, a proposal how to meet and ask for a reply[127] in order to be considered as a genuine, first attempt to negotiate. A reply to an offer to negotiate should express the views of the addressee, it could propose an alternative schedule for the process, but at least that the receiving State was taking the matter into consideration.[128]

(b) A refusal to negotiate

The principle of good faith does not seem to exclude the discretionary power of states to refuse to enter into the (pre-) negotiation phase when they are under no any legal obligation to do so. However, a negative response to an offer to negotiate *without reasons being given* is considered contrary to good faith.[129]

States *may invoke a variety of reasons* to refuse to enter into or to resume negotiations. They may for instance hold the view that there is no dispute[130] in that situation "there cannot be any fruitful negotiation"[131] but it does not *ipso facto* prove bad faith.[132] They may argue that a mere request for information is not a real negotiation. They may hold different views on the subject-matter to be discussed or the overall objectives of the process or they may consider that there is no genuine prospect that the process could be useful. When the matter is *sub judice* a State may argue that under constitutional principle of the separation of powers it is "incapable" to accept an offer to negotiate while stressing that its inability to stop ongoing judicial proceedings "does not constitute an unwillingness to *dialogue.*"[133] However, one should add that in some cases, "what appears to be a refusal to negotiate is the rejection rather of a particular form or method of negotiation."[134]

Domestic policies may limit the leeway to start a process of negotiations, but whether the risk of serious domestic civil and or political unrest could be invoked as a valid reason for a refusal is another matter altogether.[135]

Absence of diplomatic relations may be an obstacle, but it does not necessarily have a negative impact on the willingness of the parties concerned to negotiate[136] and to have regular and frequent meetings, be it as part of a regional peace process[137] but in light of the

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[127] *Alleged Violations of the 1955 Treaty*, Verbatim Records CR.2018/17(US) at 31, para.26.

[128] *Application of CERD*, Verbatim Records CR.2018/14 (Qatar) at 12-13, para. 13.

[129] *Obligation to negotiate Access*, Verbatim Records CR.2018/10 (Bolivia) at 62, para. 17.

[130] *Application of the ICSFT and CERD*, Verbatim Records CR.2017/1 (UKR) at 23-24, para. 14 referring to the Russian Federation.

[131] A. Lall, supra n. 31, at 31.

[132] E. Zôller, *supra* n. 89, at 131.

[133] *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016*, I.C. J Reports (2016) 1148, at 1162, para. 56 and Verbatim Records CR.2018/4 (France) at 36, para. 3 (emphasis added).

[134] A. Lall, *supra* n. 32, at 130. See for instance CR Application Certain Activities at 21, para. 9

[135] See for instance A. Mondré, *supra* n. 95.

[136] P. Behrens, Diplomatic *Interference and the Law* (Hart Publishing, Oxford and Portland, Oregon, 2016), at 124, note 156. *Application of the CERD case*, Verbatim records CR. 2018/12 (Qatar) at 25, para. 27.

[137] *Armed Activities on the Territory of the Congo (New application 2002) (Democratic Republic of the Congo v; Rwanda), Provisional Measures, Order of 10 July 2002*, I.C.J. Reports (2002) 219 at 236, para. 44 (Rwanda's reply to an argument of the DRC).

 DOI: 10.17103/sybil.23.3

Court's jurisprudence[138] is not a sufficient reason to justify a refusal to enter into a process.[139] Furthermore, it does not prevent parties "from seeking the peaceful settlement of their disputes through judicial means."[140]

Of course, once a State "has made a commitment to enter into negotiations this step is not a gratuitous one" as "it is not the Court's function to contemplate that it will not comply with it."[141]

Explaining the lack of response to a communication containing an offer as neither acceptance nor refusal i.e. taking a neutral position[142] does not seem acceptable under the good faith requirement. Unwillingness to negotiate in reply to an offer may bring the Court to conclude that the offer was not a genuine attempt to negotiate but this does not necessarily amount to an implicit finding of bad faith on the part of the offering State.

Readiness "to accept the assistance" of a third party "would be evidence of the good faith of the parties".[143] . In case the UN Security Council "calls for bilateral negotiations, it would be hard for either side to reject that call".[144] In case of a pre-existing obligation to negotiate, refusing to enter the process constitutes a violation of that obligation. The duty not to defeat the object and purpose of the process may claim a more prominent role and parties may be expected to adopt a more pro-active attitude e. g. by taking more initiatives with regard to the format and venue and of course on matters of substance.

(2) (Un)conditional willingness

Does the discretionary power of states to enter or not into a process of negotiations, mean that they are free to attach conditions to their willingness as part of their political negotiation strategy, a freedom not yet touched let alone governed by the principle of good faith?

Unreasonable or excessive conditions which probably will be unacceptable to the other party do not only make a claim to offer into a process untenable[145] as they would only undermine the credibility of a party's willingness to negotiate, but they would run counter to the Court's requirement that a "attempt" to negotiate should be "genuine" and it would come close to coercive diplomacy.

Examples range from "insisting on a multilateral framework as the only acceptable

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[138] *United States Diplomatic and Consular Staff in Tehran, Judgment,* I.C.J. Reports (1980) 3 at 28, para. 54.

[139] *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 37, para. 84 (Rwanda).

[140] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* Verbatim Records CR.2018/30 (Iran) at 11, para. 8

[141] *Nuclear Test (Australia v. France), Judgment,* I.C.J. Reports (1974) 253 at 272, para. 60.

[142] *Application of CERD, Request for the indication of Provisional Measures, Order of 23 July 2018, para. 34 (UAE).*

[143] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 79 , para. 143.

[144] A. Mondré, *supra* n. 95.

[145] *Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility, Judgment,* I.C.J. Reports (1988), 69, Separate Opinion of Judge Shahabuddeen, 133, at 151.

 DOI: 10.17103/sybil.23.3

basis for negotiating",[146] over the process cannot start unless unacceptable concessions are made and must be limited to the implementation of one party's demands[147] and full capitulation to a series of non-negotiable political demands are a *conditio sine qua* non for readiness to start negotiations[148] to demanding a pre-commitment to the outcome of the process.[149]

A Respondent may consider the possibility of an unconditional dialogue being ruled out[150] because the Applicant has called for the withdrawal of armed forces from occupied territory "to permit the issue [of certain activities] to be discussed bilaterally."[151]

Acceptance of full implementation of a Judgment —"[which] is final and not subject to negotiations"[152]— may be put forward as a *conditio sine qua non* for a Party "to accept negotiations" on a different subject-matter;[153] such an approach "may simply be a part of a negotiating stance and for this reason need to be appraised carefully."[154]

Although the decision on the *negotiability* of a dispute or issues of concern belongs to the Parties, they have to demonstrate by "*substantive* evidence" their respective or joint opinion *in good faith* in that regard while openness to dialogue "is not a decisive factor".[155]

The Court has not yet expressed itself in general terms on the conditionality of willingness to negotiate. The pending case between Qatar and the United Arab Emirates provides the Court with an opportunity to do so. The Court's judicial decision in *Gabcikovo* that the Parties should negotiate "without pre-conditions"[156] must be read within the particular circumstances of that case and it "must be seen as a strict obligation exactly like the good faith conduct it implies"[157] and Parties should embark upon such a process with an open mind.[158]

(3) Creating a Favourable Climate

The importance of creating a favourable climate prior to the start of negotiations is beyond

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[146] *Ibid.*

[147] *Application of CERD*, Verbatim records CR. 2018/12 (Qatar), at 27, para. 32.

[148] *Application of CERD*, Application Qatar, para. 17 and Verbatim Records CR. 2018/12 (Qatar), at 26-27, para. 29-32.

[149] *Obligation to Negotiate Access*, Verbatim Records CR.2018/8 (Chile) at 27, para. 26.

[150] *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Application Costa Rica, para. 33.

[151] *Ibid.* at par. 30.

[152] *Alleged Violations of Sovereign Rights*, Verbatim Records CR. 2015/25 (Nicaragua) at 15, para. 19.

[153] *Ibid.* at 14-15, para. 18.

[154] *Alleged Violations of Sovereign rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 3, dissenting Opinion of Judge *Ad Hoc* Caron, 74 at 97, para. 72.

[155] *Alleged Violations of Sovereign rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 3 at 37, para. 93 and at 38, para. 99. (emphases added).

[156] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 79, para. 143.

[157] *Ibid.* Separate Opinion of Judge Bedjaoui, 120 at 140, para. 69.

[158] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment*, I.C.J. Reports (2010) 4, Separate Opinion of Judge *Ad Hoc* Torres Bernardez, 233 at 261, para. 92.

 DOI: 10.17103/sybil.23.3

doubt and parties may be "keen to create an atmosphere in which amicable talks might proceed" [159] and they should take unilateral and joint action in order to contribute to such a climate for instance by confidence building measures.[160] When in the *Gabcikovo case the* Court considered the suspension of a bilateral treaty as an action which has "contributed to a situation which was not conducive to the conduct of fruitful negotiations"[161] this seems to imply at least the expectation that states should create a favourable climate.

Once the process has started good faith requires parties to *maintain* that favourable climate[162] —e.g. in particular circumstances through agreeing to the "temporary non-exercise of the rights asserted" or "at least restraint in their exercise" [163] or by concluding interim arrangements to avoid further friction— and to abstain from action which could put that climate in jeopardy.

Accusations on allegedly other matters than the one in dispute, are not conducive to a good atmosphere for fruitful negotiations and demonstrate a lack of good faith[164] . But good faith does not seem to require that "in order to negotiate" over a Party's financing of terrorism, the other Party is "bound not to" make such accusations.[165]

(4) No Intimidation

"A difference in the power levels" of the parties "is one of the factors of prime importance which affect movement toward negotiation."[166] The "initial bargaining position before the start of the actual negotiations" is relevant "since it has an influence both on the bargaining process itself and on its results"[167], moreover shifts in the balance of power may occur during the process. Major Powers rightly hold the view that an imbalance between negotiating powers is unavoidable but not as such a ground for invalidity of an agreement.[168]

The "concept of intimidation" is "wider than that of threats made with the intention to change the opinion of the target"[169] but "as a bare minimum" it requires "at least the

[159] *Alleged Violations of Sovereign Rights,* Verbatim Records CR. 2015/25 (Nicaragua), at 28, para. 17.

[160] *Arbitral Award of 3 October 1899 (Guyana v. Venezuela),* Application Guyana, Annex 6, Letter UN Secretary- General of 15 December 2016.

[161] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 66, para. 107.

[162] GA Res 53/101, Principles and Guidelines for International Negotiations, para. 2 (e). (emphasis added).

[163] H. Thirlway, *supra* n. 8, at 23-24.

[164] *Application of ICSFT and CERD,* Verbatim Records CR. 2017/2 (RF) at 47, para. 62 and CR.2019/9/ (RF) at 45, para. 49.

[165] *Ibid.* Verbatim Records CR. 2017/3 (UKR) at 30, para. 15 and CR. 2019/20 (UKR) at 73, para. 32.

[166] A. Lall, *supra* n. 32, at 132.

[167] D. Gathier, *Morals by Agreement* (OUP, Oxford, 1986) as cited by K. Simonen, 'The Strong Do What They Can and the Weak Suffer What They Must But Must They? Fairness as a Prerequisite for successful Negotiations (Benchmarking the Iran Nuclear Negotiations)', 22 *JCSL* (2017) 125-145 at 128 [10.1093/jcsl/kjrx003].

[168] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019,* Verbatim Records CR. 2018/21 (UK) at 44-45, para. 10.

[169] P. Behrens, *supra* n. 136, at 225.

 DOI: 10.17103/sybil.23.3

indication, expressly or implied, of negative consequences."[170] "Historically, threats and ultimata played a significant role in diplomatic relations."[171]

Threatening to institute proceedings before the ICJ prior to the start of negotiations is putting pressure on the other party but it does not necessarily amount to an act of procedural bad faith *sensu lato*.

Coercion of a State during negotiations by the use or threat with the use of force leads to the invalidity of the treaty pursuant to Article 52 of the Vienna Convention. As part of a compromise a Declaration on the Prohibition of the Threat or Use of Economic Coercion or Political Coercion in Concluding a Treaty was adopted as a resolution accompanying the text of the Vienna Convention without forming part of it, after the amendment to expand Article 52 to include political and economic coercion had been withdrawn. Given the fact that "a substantial majority would have backed"[172] that amendment, the use of economic coercion during negotiations would be incompatible with the Declaration[173] although half a century later, the question still is "whether or not most States agree that the use of economic and military coercion is illegal [in negotiations]".[174]

"The *restriction* on the use of economic and military coercion in treaty negotiations has taken the form of a gradual process of introducing fairness into inter-State relations."[175] Economic sanctions imposed as "a peremptory demand for positive conduct"[176] in order to bring a party to the negotiating table[177], without an inquiry into "their effect on the principles governing the negotiation" [178] leaves "much to be desired in terms of fairness",[179] certainly when coupled with a series of "unreasonable" demands and additional principles which must be complied with prior to the lifting of measures imposed and which are said to be non-negotiable.[180]

Making the openness to make new steps dependent on the other party willing to make major changes in its conduct may raise doubts whether the offer was made in good faith.[181] On balance the "determination to use force unless the other side shows some signs of submission does not preclude negotiation" but "if there are to be negotiations there cannot be a total or exclusive adherence to the determination to use force".[182]

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[170] *Ibid.* at 226

[171] *Ibid.* at 225.

[172] K. Simonen, *supra* n. 167, at 131

[173] *Ibid.* at 139.

[174] *Ibid.* at 143. The CERD case between Qatar and the UAE will provide the ICJ an opportunity to confirm and clarify the 1969 Declaration.

[175] K. Simonen, *supra* n. 167, at 130 (emphasis added).

[176] P. Behrens, *supra* n.136, at 225.

[177] K. Simonen, *supra* n. 167, at 126.

[178] *Ibid.* at 125.

[179] *Ibid.*

[180] *Application of CERD,* Application of Qatar, paras 22 and 26 and Qatar's Request for the indication of provisional measures, para. 11.

[181] *Alleged Violations of the 1955 Treaty*, Verbatim Records CR. 2018/18 (Iran), at 14, para. 9

[182] A. Lall, *supra* n. 32, at 41.

 DOI: 10.17103/sybil.23.3

Referring to its lack of experience compared with that of the other Party's former colonial Power is clearly based on the inequality of power during negotiations but the argument should have been taken "so far as to suggest it as a ground for invalidity of the Treaty itself" to bring the Court to deal with it.[183]

In assessing the conduct of Parties prior and during negotiations individual judges seem more inclined than the Court to consider the respective power positions of the Parties. The Court should not have overlooked the well-known fact that "certain 'Notes' delivered by a government of a strong power to the government of a small nation, may have the same purpose and the same effect as the use or threat of force".[184] Individual judges may limit themselves to merely referring to the difference in power between the Parties;[185] in other circumstances they may express their opinion in a straightforward and unambiguous way finding that "the intent to bully, frighten and coerce [...] was all too obvious and the " general atmosphere was one of *intimidation and coercion*".[186]

(H) THE ACQUIS JURISPRUDENTIEL

Although issues arising from the legal discourse on good faith during negotiations "are fact- and circumstance-intensive" and the duties flowing from the principle good faith "cannot be applied in isolation of such factors"[187], the core of the *acquis jurisprudentiel* has been well-established and acknowledged as such by doctrine and states.

(1) Procedural Duties

Although when considering "whether negotiations have taken place, and whether they have failed or become futile or deadlocked" the Court "has come to accept less formalism in what can be considered negotiations",[188] it is clear that non-compliance with procedural duties risks to jeopardize the whole process in the first place. The main objective of these procedural duties of good faith is to create and preserve the necessary and best possible diplomatic architecture and circumstances for the parties to carry out their substantive duties and this in order to bring the process to a successful conclusion.

According the *acquis jurisprudentiel* the following acts and actions —in ascending order of importance— are not in conformity with these procedural duties.

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[183] *Territorial Dispute (Libyan Arab Jamahirya /Chad),* I.C.J. Reports (1994) 6, at 22, para. 41 and at 20, para.36.

[184] *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), Jurisdiction of the Court, Judgment,* I.C.J. Reports (1973) 49, Dissenting Opinion of Judge Padillo Nervo, 81 at 91.

[185] *Corfu Channel Case, Judgment of April 9th, 1949:* I.C.J. Reports (1949) 4, Dissenting Opinion of Judge Badawi Pasha,58, at 64 and Dissenting Opinion of Judge Krylov, 68 at 69.

[186] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Advisory Opinion of 25 February 2019,* Separate Opinion of Judge Robinson, paras. 93 and 95 (emphasis added).

[187] R. Kolb, *supra* n. 3, at 196.

[188] CERD *case, Judgment of 1 April 2011,* I.C.J. Reports (2011), 70, at 133, para. 160.

 DOI: 10.17103/sybil.23.3

(a) No contempt for agreed procedures[189]

Contempt for agreed procedures may take different forms but unilaterally "*disregarding* procedures agreed upon" does not satisfy the requirement that "States must conduct themselves so that the negotiations are meaningful."[190]

Not responding to communications that require reading, merit consideration and call for a response has been considered contrary to good faith.[191] Failing to send a delegation to a final session —which a State itself has proposed and the other party was ready to attend— without providing either advance notification or significant explanation seems not acceptable, even if security reasons have been invoked afterwards.[192] The attendance by one Party's Head of State at a Summit of Heads of State of a Regional Organisation providing "a golden opportunity" to "start a dialogue" would, arguably, "by itself constitute a genuine attempt to negotiate" while the failure of the other Party to attend was not.[193]

(b) No Unjustified Suspension, Interruption or Withdrawal from the Process [194]

Readiness to start a process, acceptance or rejection of a proposal, a decision to break off or resume leaves a large margin of interpretation for states and "places the principal emphasis on the intention of the parties." [195] Negotiation scholars in the field of international relations are telling us that the "breaking-off of a negotiation is a fait accompli", whereas "deadlock is an event one stage before break-off", a situation in which each "side issues a tacit message "to the other side "concerning the possible interruption of the process or, if it is already viewed a s a stalemate, the restarting of the discussions".[196]

Good faith may even require withdrawal from the process when it appears to that party that it is impossible to reach an agreement and when it wishes to recover tis freedom of action with regard to the object of the envisaged treaty.[197] It has been emphasized that during negotiations there is a mutual expectation of a minimum of good faith. A State is free to interrupt the process, and only acts of bad faith are forbidden.[198] Unilateral

[189] R. Kolb, *supra* n. 3, at 200.

[190] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011,* I.C.J. Reports (2011) 644 at 685, para. 132 and Lake Lannoux arbitration (Spain/ France), Reports of International Arbitral awards (RIAA) (1957), Vol. XII, 281-317, at 307

[191] *Obligation to Negotiate Access,* Verbatim Records, CR. 2018/11 (Chile) at 62, para. 10.

[192] *Maritime Delimitation in the Indian Ocean,* Application Somalia, para. 31 and Verbatim Records CR. 2016/10 (Kenya), at 51, para. 13.

[193] *Application of CERD, Application Qatar, para. 17 and* Verbatim Records CR. 2018/14 (Qatar), at 12, para. 9.

[194] R. Kolb, *supra* n. 3, at 200. Parties sometimes interchangeably use termination and suspension of the process: *Maritime delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua),* Application Costa Rica, paras. 7, 9 and 10 and Verbatim Records CR. 2017/ 7 (CR)), at 20-21, para. 5.

[195] *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) Preliminary Objections, Judgment of 26 May 1961:* I.C.J. Reports (1961), 17, at 31.

[196] G. Faure, 'Deadlocks in Negotiation Dynamics' in W. Zartmann G. Faure (Eds.) *Escalation and Negotiation in International Conflicts* (CUP, Cambridge, 2005) 23-52 at 26.

[197] United Nations Vienna conference on the Law of Treaties, t. I, A/CONF.39/C.1/SR.20, 99, para. 34.

[198] *Ibid.* at 104, para. 24.

 DOI: 10.17103/sybil.23.3

suspension of the process may of course take place without a reason being given[199] but the party concerned may also explain its decision.[200]

A distinction has been drawn between negotiations which are *permanently interrupted* and a process which after interruption has been *resumed* on many occasions to demonstrate "that the possibility of a settlement through negotiations never disappeared."[201] The other party may *appear formally* to accept an invitation to resolve disputes through negotiations and may not respond at all to an invitation to re-commence negotiations.[202]

(c) No Deliberate Acts to Aggravate the Dispute[203]

Measures taking during a process of negotiations and causing disproportionate harm to the other party, with little advantage to one own would almost by nature have *the effect* of aggravating the dispute.[204] Resorting "to propaganda and high-tuned accusations against the other party during the negotiations phase so as to try to manoeuvre the other party into a less favourable position"[205] would be an example of such an act. The same goes for the continuation of practices which are part of the subject-matter of a dispute in addition to a refusal to discuss the central issues of the dispute.[206]

For negotiations taking place in parallel with judicial proceedings, this procedural duty imposes itself alongside the related, but distinct cooperational duty for each of the Parties towards each other and towards the Court under the law of dispute settlement.[207] Actions which are unrelated to the controversy at hand and which is (going to be) the subject-matter of the negotiations may not amount to failing this particular procedural duty, but they may still be no contribution at all to the creation or maintaining of a favourable climate.[208]

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[199] *Application of ICSFT and CERD*, Verbatim Records CR. 2017/2 (RF), at 62, para. 43 and *Obligation to Negotiate Access*, Verbatim Records CR. 2018/6 (Bolivia) at 40, para. 33.

[200] By invoking the filing of an Application to the ICJ (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* Judgment of 2 February 2018, Verbatim Records CR.2017/7 (Costa Rica) at 20-21, para. 5 referring to Nicaragua or the fact that there are no pending issues: *Obligation to Negotiate Access*, Application Bolivia, paras.27-28.

[201] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment*, I.C.J. Reports (2012) 422, Separate Opinion of Judge Yusuf, 559 at 561, para. 5.

[202] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, Application Costa Rica, para. 10.

[203] R. Kolb, *supra* n. 3, at 200(vi).

[204] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Application Nicaragua, at 6, para. 11 (e); one should note that Nicaragua did refer to conduct causing harm to the interests of each other.

[205] R. Kolb, *supra* n. 3, at 200.

[206] *Application of the ICSFT and CERD* Verbatim Records CR 2017/1 (UKR) at 36, para.7 and CR. 2019/10 (UKR) at 14, para. 13. and *Application of the CERD case, Request Qatar for the indication of provisional measures, para. 18.*

[207] A. Peters, *supra* n. 59.

[208] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment*, I.C.J. Reports (2010) 4 , Separate opinion of Judge Greenwood, 221 at 228, para. 21.

 DOI: 10.17103/sybil.23.3

Parties should also "abstain from creating *faits accomplis* "prejudicing the outcome of the process."[209] When during bilateral negotiations accusations and counter-accusations over incursions are being exchanged[210] it is the mere occurrence of such incidents which is incompatible with the procedural duty not to aggravate the dispute.

(2) Substantive duties

(a) Preserving the Equality of the Parties

The "obligation to refrain from any action which might *interfere* with the subject-matter of a dispute while judicial proceedings are pending"[211] flows "from the very nature of the judicial process".[212] Good faith requires this obligation also to apply during negotiations. The political-legal context in which all negotiations should take place —"within the framework of mutual respect and preservation of the sovereignty of States"[213]— is all-encompassing over and beyond the good faith requirement.

Exception made for cases involving fraud and coercion, direct interference in both future and ongoing *arbitral proceedings and negotiations* through seizure and detention of documents protected by legal professional privilege certainly has been the most visible and far-reaching violation of the fundamental principle of good faith in recent years.

The Applicant did consider the seizure of relevant documents an unlawful impediment to the conduct "inter alia of future negotiations where its position would irreversibly be weakened."[214] In addition to the already existing balance of power[215] such conduct "manifestly distorts the character of future negotiations" as it would find itself at "a considerable negotiating" disadvantage.[216] Moreover, it "violates fundamental principles governing the conduct of negotiations" and it "totally destroys the equality and good faith that must prevail between the Parties"[217] as a result "trust was lost" and "relations [were] poisoned".[218]

The Court, in enjoining the Respondent from "interfering" in any way in communications with the Applicant's legal advisers emphasized that "*equality of the parties*

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[209] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* I.C.J. Reports (2004) 136, Separate Opinion of Judge Al-Khasawneh, 235, at 239, para. 13.

[210] *Territorial Land Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras Judgment) I.C.J.* Reports (2007) 659, at 681, para. 58.

[211] *LaGrand (Germany v. United States of America), Judgment,* I.C.J. Reports (2001) 466, at 498, para. 93 (Germany) (emphasis added).

[212] R. Jennings, 'The LaGrand case' 1 *LPCIT* (2002), 13-54, at 30 [doi:10.1163/15718034-12341393].

[213] See for instance Qatar's Application in the *Application of CERD case,* para. 13

[214] *Questions relating to the Seizure and Detention of Certain documents and Data (Timor-Leste v. Australia),* Request Timor-Leste for the Indication of Provisional Measures, paras 5 and 6.

[215] *Questions relating to the Seizure and Detention,* Verbatim Records, CR. 2014/1 (Timor-Leste) at 17, para. 4

[216] *Ibid.* at para.3

[217] *Ibid.* at 25, para. 17.

[218] *Ibid.* Verbatim Records CR. 2014/3 (Timor Leste), at 12, para. 3 replying to a question put by Judge Cancado Trindade.

 DOI: 10.17103/sybil.23.3

must be preserved when they are involved" in a process of negotiations.[219] Judge *Ad Hoc* Callinan dissenting, aptly observed that there might "be a problem about the use of the word 'interfere' because of its breadth and unspecific nature."[220]

(b) Conducting a Meaningful Process

"The duty to behave in a *constructive way* during negotiations has been recognised for a long time."[221] In order to pass judicial assessment through the prism of good faith negotiations have to be conducted in a *meaningful* way: parties must demonstrate by their conduct and actions —such as for instance the suspension of exploratory activities of a transitory character and an invitation to the other Party to negotiate provisional arrangements pursuant to Articles 74 (3) and 83 (3) UNCLOS[222]— a genuine intention to make progress.

The *authenticity* of the efforts to reach an agreement is an important factor for any judicial assessment of a process of negotiations.[223] Simply formally going through the motions —for instance arguably "solely for the purpose of claiming to have exhausted the requirements" of a prior negotiation's clause[224] would not reflect such a genuine intention[225] neither would simply be listening and then to give reasons for the dismissal of a proposal.[226]

Parties may disagree about the relationship between the good faith requirements and the element of meaningfulness as "two overarching" but separate "duties"[227] the second one being to "pursue (negotiations) without moving away from the goal set"[228] or the latter being just "a manifestation of the good faith requirement",[229] this view being in accordance with the *acquis jurisprudentiel*. Indeed, once the Court has considered negotiations during a particular period to have been "meaningful" they are recognised as having been conducted in good faith. When the Court reminds the Parties that they could continue the dialogue and that "with willingness "on both sides, *meaningful* negotiations can be

[219] *Questions relating to the Seizure and Detention of Certain documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014* I.C.J. Reports (2014) 147, at 161, para. 55 (3) and at 153, para. 27 (emphasis added).

[220] *Ibid. at 223, para.32.*

[221] R. Kolb, *supra* n. 3, at 195, note 2

[222] *Maritime Delimitation in the Indian Ocean,* Verbatim Records CR. 2016/10 (Kenya), at 27-28, para. 36

[223] *CERD case (2011), Judgment,* I.C.J. Reports (2011), 70 at 130, para. 150 (Russian Federation).

[224] *Application of the ICSFT and CERD, Verbatim* Records CR. 2017/2 (RF), at 21, para. 21 and CR. 2019/9, at 4, para. 50. and *Maritime Delimitation in the Indian Ocean, Verbatim* Records CR. 2016/ 10 (Kenya), at 25, para. 27.

[225] *North Sea Continental Shelf, Judgment,* I.C.J. Reports (1974) 3, at 46-47, para. 85. The same allegation has been made with regard to efforts of mediation aimed to provide a basis for good faith discussions: *Application of the CERD,* Application of Qatar, para. 17.

[226] *Obligation to Negotiate Access,* Verbatim Records CR. 2018/6 (Bolivia), at 61, para. 17

[227] *Obligation to Negotiate Access,* Memorial Bolivia, Vol. I, at 100, para. 230 and para. 235 and para. 237.

[228] *Obligation to Negotiate Access,* Reply Bolivia, para. 116.

[229] *Obligation to Negotiate Access,* Counter Memorial Chile, 4.31.

 DOI: 10.17103/sybil.23.3

undertaken"[230] this means in good faith.

The course of the process of negotiations and the contribution *each party* has made to the process are factors to be considered by judicial actors when evaluating actions by one party which allegedly are of such a nature "as to frustrate the negotiations" and "were not *meaningful*".[231]

"Preparatory steps" taken by one party "to ensure that it is ready to proceed" with a project, "is not, *in itself* contrary to the duty to negotiate in good faith."[232] To qualify as such a breach the record has to show "that the party concerned did not *intend* to engage in meaningful negotiations."[233]

(c) Taking into Account the Interests of the Other Party

Parties are under a duty "to pay *reasonable* regard to the interests of the other party"[234] a duty imposing itself whatever the kind of negotiations parties are involved in. Proposals must be reasonable, consider the interests of the other party and address the agreed subject-matter[235] but good faith does not "require States to forego their own interest".[236] Behaviour consisting in simply ignoring the interests of the other party "is *against the essence of negotiation*".[237]

(d) Changing Positions and Exchanging Proposals

It may be fairly be taken for granted that negotiations will always start with the parties taking rather opposing positions with regard to the issues at hand. Lall has aptly observed that it "might be possible for a series of negotiations over a considerable period of time to move an issue to a significantly different position from that which obtained before the commencement of the series of negotiations" but it is equally true that "revolutionary change through negotiations is a rarity indeed."[238]

Although "reversals of positions" in an attempt "to maximize the response of the other side" and "such tactics is one of the essence of negotiations" it could "lead to accusations of bad faith" giving rise to doubts by third parties "about the sincerity of the negotiating states."[239]

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[230] *Obligation to Negotiate Access (Bolivia v. Chile), Judgment of 1 October 2018, para. 127 and para. 176 (emphasis added).*

[231] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment,* I.C.J. Reports (2010) 4, Separate Opinion of Judge Keith, 121, at 127, para.17, at 128, para; 18 and at 130, para. 24 (emphasis added).

[232] *Ibid*. Separate Opinion of Judge Greenwood, 221, at 227, para. 16 (emphasis added).

[233] *Ibid.* (emphasis added).

[234] *Interim Accord, Judgment, I.C.J.* Reports (2011)644, at 685, para. 132 (emphasis added) and *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment,* I.C.J. Reports (1974) 3, at 33, para. 78.

[235] *Obligation to Negotiate Access,* Memorial Bolivia at paras 247-254.

[236] *Obligation to Negotiate Access,* Counter Memorial Chile 4.26.

[237] *Obligations concerning Negotiations, (Marshall Islands v. UK)* Memorial Marshall Islands v. UK, para. 185 (emphasis added).

[238] A. Lall, *supra* n. 32, at 288.

[239] *Ibid.* at 299.

 DOI: 10.17103/sybil.23.3

There is an "obvious tendency [by parties] to maintain original positions as firmly as possible"[240] which may be perceived as "extreme and far-fetched positions".[241] S*ystematic* refusal to take into consideration adverse proposals is contrary to good faith as the *Lake Lannoux Award* made clear back in 1957[242]. It is important to recall that it is *absolute intransigence* which in case of a pactum *de contrahendo* renders conduct contrary to good faith. [243]

During the process each party "formule des offres, des propositions que le cocontractant adverse est libre d'accepter ou de refuser"[244] but such rejection would only be considered a lack of good faith if it is out of hand.

(e) Accepting a Compromise

To negotiate "with no prospect of compromise is not" negotiate at all.[245] *The processual nature of negotiations* —which involves changing perceptions of respective and mutual attitudes and positions— is bound to have an impact on compliance by parties with their duty to accept a reasonable compromise. An initially cooperative approach may easily develop into a more adversarial posture.

It is jurisprudence *constante* that "insisting upon its own position without *contemplating* any modification of it" does not satisfy the requirement under the good faith principle that the negotiations must be meaningful.[246] When during a particular period of time Parties showed willingness to abandon their initial bargaining position the Court may note a degree of openness.[247] On the other hand, statements by political leaders could raise judicial concern when "they *suggested* an inflexible position".[248] Parties will always argue that they have shown "openness to compromise" and that the other party has been "intransigent".[249]

Willingness "to negotiate changes" in an initial draft may be taken into account by the Court when assessing the progress made, thereby noting "a more guarded attitude" of the Respondent compared to a positive approach by the Applicant.[250]

Working towards a compromise may be easier when competing interests are at stake

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[240] *Ibid.*

[241] *Alleged Violations of Sovereign Rights*, Verbatim Records CR. 2017/7 (CR), at 23, para. 14 and at 26, para. 25. See also Somalia's Application para. 30 in the *Maritime Delimitation in the Indian Ocean case.*

[242] *Lake Lannoux* at *307 a*nd E. Zôller, *supra* n. 89 at 64, para. 55

[243] *Lake Lannoux*, at 310-311 and 315.

[244] E. Zôller, *supra* n. 89, at 49, para. 43.

[245] *Application of CERD*, Verbatim Records CR. 2018/12 (Qatar), at 27, para. 33.

[246] *Interim Accord, Judgment, I.C.J.* Reports (2011)644 at 685, para. 132

[247] *Ibid.* at 686, para. 135; contra Judge *Ad Hoc* Roucounas, dissenting, 720, at 725, para. 11.

[248] *Ibid.* at 686, para. 135 (emphasis added).

[249] *Ibid.* at 684, para. 129 (Macedonia) and *Application of ICSFT and CERD*, Verbatim Records CR. 2017/2 (RF), at 46-47, para. 59 and 60 and *Maritime Delimitation in the Indian Ocean case*, Verbatim Records CR. 2016/10 (Kenya), at 25, para. 27.

[250] *Border and Transborder Armed Actions (Nicaragua v. Honduras) Jurisdiction and Admissibility, Judgment,* I.C.J. Reports (1988), 69 at 98, para. 74.

 DOI: 10.17103/sybil.23.3

than when parties negotiate about their respective legal rights.[251] Admittedly the duty to negotiate in good faith "cannot be equated with a duty to abandon one's position if that position is firmly grounded in law",[252] but parties will obviously differ in that important respect and it is only *a posteriori* that a judicial actor will authoritatively decide what the law says.

(f) Changing your Mind

It has been argued that a "legal obligation is durable; a policy choice is mutable" and "can be changed",[253] and that "States like individual may change their minds".[254] Are parties completely free —given their duty to accept a reasonable compromise— to change their minds at regular intervals following for instance a government or regime change, but without however suspending or interrupting the process or withdrawing from it?

An Applicant may consider the Respondent's change of long-held positions on two separate occasion as unacceptable[255] but only "[w]eighty circumstances are required to establish that a party intended *abruptly* to abandon a position long held by it". [256]

A "party's announcement at a press conference that its approaches toward the negotiation process will undergo substantial changes"[257] may be foreshadowing that party's subsequent unwillingness to continue negotiations on particular matters.

Flexibility of the Parties in their respective positions is a condition for third-party involvement in finding a solution to be helpful and instrumental.[258] Although one may safely argue that by the nature of things the trust which a party has accorded to the conduct of the other part may have induced it to change its position to its disadvantage[259] —thus potentially bringing into operation the doctrine of estoppel— it does not "necessarily follow" from the relation with good faith "to prohibit a state to change its policies".[260] Moreover, "in most cases where a simple legal position has been taken, estoppel will not

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[251] R. Kolb, *supra* n. 3, at 196.

[252] C. Tomuschat, 'Article 33 UN Charter 'in A. Zimmermann et al. (Eds), *The Statute of the International Court of Justice: A Commentary* (OUP, Oxford, 2012) 119-133, at 124, MN.17 and R. Kolb, *supra* n. 3, at 196, note 4.

[253] *Obligations concerning Negotiations (Marshall Islands v. Pakistan) and (Marshall Islands v. India) Verbatim* Records CR. 2016/ 2, at 50, para. 3 and CR.2016/1, at 59-60, para. 7 Marshall Islands referring to Pakistan' sand India's arguments respectively.

[254] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Verbatim Records CR. 2017/10 (Nicaragua), at 52, para. 13.

[255] *Dispute concerning the Status and Use of the Waters of the Silala River System (Chile v. Bolivia)*, Application Chile, para. 32.

[256] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J.* Reports (1995) 6, Dissenting Opinion of Judge Shahabuddeen, 51, at 57 (emphasis added).

[257] *CERD case (2011), Judgment,* I.C.J. Reports (2011), 70 at 138, para. 177.

[258] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 68, para. 113.

[259] R. Kolb, *supra* n. 3, at 102, note 268

[260] *Ibid.* at 102.

 DOI: 10.17103/sybil.23.3

apply at all, since no detrimental reliance can be proven."[261]

A "general doctrine of non-contradiction would vastly overestimate the potential and the role" of international law, although it is counterbalanced by the doctrine of estoppel[262] which is "shaped as a relational concept"[263] . The "*relative positions* of the parties" must have changed.[264]

A large degree of consistency may be valuable but, as the Court opined, "too much importance need not to be attached to a few uncertainties or contradictions, real or apparent"[265] the invocation of which[266] "always produce some result in the mind of lawyers". This may be described as "a sort of *estoppel minus quam imperfecum*".[267]

(g) Using Unambiguous Language

To negotiate in good faith requires parties to genuinely engage in a meaningful process with the intention to make it successful. Language, choice of words and avoidance of ambiguity are relevant indicators this respect.[268] Although a certain degree of ambiguity, lack of clarity and uncertainty are bound to surface particularly during the early phases of the process —they may even concern a Party's commitment to respect its commitment to negotiate[269]—, the good faith principle requires states to dispel them when they reach a more or less potentially decisive stage in the process.

Parties may indeed "expect that the other party's choice of words corresponds to their actual will"[270] and it would be contrary to good faith for a party to hide behind equivocal formulations in order later to benefit from the text's ambiguity.[271] Furthermore, when "one party to a bilateral negotiation [becomes] aware of a mistake of the counterparty on the proper meaning of a word, it [has] a duty under good faith either to signal or to notify the provision so as to accommodate the meaning attached to the word by the counterparty."[272]

Although a *joint* choice for indeterminate wording disguises the incompatibility

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[261] *Ibid.* at 104.

[262] *Ibid.* at 106.

[263] *Ibid.* at 108.

[264] As explained by Judge Gerald Fitzmaurice in the *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of 15 June 1962:* I.C.J. Reports (1962) 6, Separate Opinion, 52, at 63.

[265] *Fisheries case, Judgment of December 18th, 1951:* I.C.J. Reports (1951) 116, at 138.

[266] See for instance *Obligation to Negotiate Access,* Verbatim Records CR. 2015/ 21 (Bolivia) at 13, para. 13.

[267] R. Kolb, *supra* n. 3, at 112.

[268] For instance, in order not to exacerbate a situation a state may decide —during the pre-negotiations stage— to convey a grievance using the language of a 'complaint' rather than a "protest ': P. Behrens, supra n. 136, at 271, note 22. On the various aspects of the importance of language during negotiations see for instance *Obligation to Negotiate Access,* Verbatim Records CR. 2018/6 (Bolivia) at 45-55.

[269] *Obligation to Negotiate Access,* Verbatim Records CR. 2018/7 (Bolivia) at 70-71, para. 41.

[270] M.L. Gächter Alge, 'The Principle of Good Faith in Treaty Negotiations: Obligation to Choose Words in a Trustworthy Manner 'in S. Besson and P.Pichonnaz (Eds.), *Principles in European Law* (Genève, 2011) 139-160, at 147.

[271] J.P. Cot, *supra* n. 20, at 146.

[272] R. Kolb, *supra* n. 3, at 197, referring to the 1951*Pertulosa case.*

 DOI: 10.17103/sybil.23.3

between the parties' positions[273] the principle of good faith "and its innate concept of trust prevent treaty negotiators from resorting to this technique postponing the search for a mutual consent to the application or interpretation process",[274] ruling out what could be called 'constructive ambiguity'. The principle of good faith constitutes the "essential link between the negotiating process and treaty interpretation", hence an holistic approach to the law of treaties demands that Articles 26 and 31 of the Vienna Convention "need to be applied *from the very first step in treaty negotiations* and especially with regard to the choice of words expressing the common intentions of the negotiating States."[275]

The duty to create a favourable climate mentioned earlier may be undermined by the choice of particular words or terminology such as "requiring, calling, strongly urging and condemning".[276]

Providing no "straight and specific responses on the issues" and instead making "general and non-committal statements [...raising] semantic questions"[277] may be part of evasive and dilatory tactics raising doubts about that party's authenticity during the process.

(I) GENERAL APPROACH TOWARDS GOOD FAITH BY BOTH THE COURT AND THE PARTIES BEFORE IT.

The duties and practices coming within the good faith requirements as they can be found in the *acquis jurisprudentiel* are neither monolithic nor static: they cover a wide spectrum of conduct and omissions ranging from defaulting on procedural matters over consistent refusal to consider proposals to the exercise of coercion and the threat with the use of force. Responses by Parties and the Court will vary accordingly, also in light all other relevant-mitigating or aggravating factors and circumstances.

(1) Parties' General Approach

Back in 1958 there may have been, "a natural reluctance to ascribe bad faith to states, in the sense of a deliberate intention knowingly to circumvent an international obligation"[278] a decade later State practice was characterized by Cot as follows: "Le combat se déroule à fleurets mouchetés et les diplomates répugnent à y dégainer un sabre."[279]

Exchanges of accusations of bad faith during hearings before the Court used to be a rather unusual phenomenon but in recent times they certainly are on the increase.

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[273] M.L. Gächter Alge, *supra* n. 270, at 153.
[274] *Ibid.* at 160.
[275] *Ibid.* at 159 and 160 (emphasis added).
[276] *Application of the ICSFT and CERD,* Verbatim Records CR. 2017/2 (RF), at 47, para. 63.
[277] *Ibid. Verbatim* Records CR 2017/1 (UKR), at 55, para. 5 and para. 6.
[278] G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1954-1959: General Principles and Sources of international Law' 35 *BYIL* (1958) 183 at 209.
[279] J.P. Cot, *supra* n. 20, at 143.

 DOI: 10.17103/sybil.23.3

Whether the judicial presumption of good faith may partly explain the recent tendency of Parties to abandon the rather euphemistic allegation of "a lack of good faith" in favour of more straightforward and robust allegations of bad faith is difficult to say.

Still, states are trying to choose a formulation which may be perceived as less aggressive —such as lack of good faith, disregarding good faith, not-complying with it— rather than using more direct terminology such as infringing or violating good faith, breaching it and finally bad faith full stop .An Applicant, accusing the Respondent for not having negotiated at all, may take care to point out that it never argued that the Respondent had been "acting in bad faith" but that "it was not discharging its obligation in good faith".[280]

A Respondent may argue "that it cannot be said" that the Applicant "negotiated in good faith"[281] while the Applicant interprets this position as the Respondent merely *suggesting* "that it did not engage in negotiations in good faith".[282]

In advisory proceedings states have expressed themselves in a more or less subtle way such as "a series of events that have plenty to wish for in terms of good faith".[283]

Accusations could be made that not only the obligation not to defeat the object and purpose of the envisaged treaty in case of a *pactum de contrahendo* has not been pursued in good faith but in addition that the general, customary law obligation for states to perform all their obligations in good faith has been breached;[284] the prohibition of conduct that prevents the fulfilment of a treaty's object and purpose equally applies to the fulfilment of this customary international law obligation.[285]

For instance, during their pleadings Parties may formulate allegations of lack of good faith or bad faith[286] but stopping short of including them in their submissions. In other cases, such explicit accusations already present in the Application[287] may find their way into a submission asking the Court to declare that the Respondent should negotiate in good faith[288] implying that it has not been doing so in the past.

Such allegations of bad faith may not be based on "some general failure to negotiate in good faith"[289] but through specific allegations of breach namely degradation of the

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[280] *Obligations concerning negotiations* Verbatim Records CR. 2016/5 (Marshall Islands) at 16-17, para. 8.

[281] *Maritime Delimitation in the Indian Ocean case,* Written Reply of Kenya to the questions put by Judge Crawford: page 7, (2).

[282] *Ibid, Comments* in writing of Somalia on the written reply of Kenya; page 3, para. 9

[283] *Legal Consequences of the separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion of 25 February 2019,* Verbatim Records CR. 2018/24 (Guatemala), at 33, para. 14.

[284] *Obligations concerning Negotiations,* Application Marshall Islands, paras. 15 -17 and para. 18.

[285] *Ibid.* para. 55. The Applicant is in favor of extending the scope of the first obligation by also including activities that "render remote […] the achievement of the objectives": Memorial, para. 226.

[286] *Application of the ICSFT and CERD,* Verbatim Records CR. 2017/2(RF), at 36, para. 1 and CR.2019/9 (RF) at54, para. 7, at 54-55, para. 9 and at 63, para. 33.

[287] *Obligation to Negotiate Access,* Application Bolivia, para. 32 (B) and Verbatim Records CR. 2015/19 (Bolivia), at 34, para. 25.

[288] *Obligation to Negotiate Access,* Verbatim Records, CR. 2018/ 10, at 70, para. 9 (c).

[289] *Ibid.*, Counter-Memorial Chile, 4.47

 DOI: 10.17103/sybil.23.3

negotiation terms[290] and refusal to negotiate a particular issue[291] . It is the accumulation of conduct considered as improper which may lead to such an allegation.

An accusation that the Respondent was acting in bad faith by allegedly "systematically reducing the object and scope within which [it] was prepared to negotiate" has been considered a serious allegation.[292] The argument —explicitly referring to *Mavrommatis*— that the dispute cannot be settled as a result of the other Party's conduct[293] does imply that the other Party was unable or refuses to give way contrary to the good faith requirement, without the need to explicitly invoke it, although a further accusation was that a deadlock has been "manufactured" and has to be attributed to the other party.[294]

When demonstrating that an attempt to negotiate has been made, a Party may argue that the lack of progress was due to the other party's bad faith.[295] Allegations concerning *substantive duties of good faith* include describing the other Party as "unwilling to budge from its long-standing position"[296] , declining "to engage on the substance of the dispute" and "consistently" failing "to negotiate in a constructive manner" and "refusing to engage in an meaningful discussion";[297] or declaring itself "*unable to support … any outcome it may produce*."[298] In case of negotiations on nuclear disarmament this lack of good faith was even "*reinforced*" by modernising nuclear arsenal.[299]

Allegations also cover *procedural duties of good faith* such as "largely failing to respond to correspondence"[300], voting against a resolution establishing a Working Group tasked with only "to develop *proposals* to take forward negotiations"[301] and not proposing "an alternative initiative to pursue and conclude negotiations"[302] but opposing the efforts to even a more serious breach.[303]

Given the intrinsic link between procedural and substantive duties of good faith —which most clearly manifests itself in case of a *pactum de contrahendo*[304]— it is obvious that agreeing to "*discussions short of negotiations*" and to "*support he commencement of*

[290] *Ibid.*, 4.48.
[291] *Ibid.* 4.49.
[292] *Ibid.* Verbatim Records CR. 2018/9 (Chile) at 32, para. 37.
[293] *Alleged Violations of Sovereign Rights, Verbatim* Records CR. 2015/23 (Nicaragua) at 44, para. 58.
[294] *Ibid.* Verbatim Records CR. 2015/24 (Colombia), at 31, para. 15 and see also *Application of the ICSFT and CERD*, CR. 2019/10 (UKR, at 14, para. 14.
[295] *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 38, para. 86 and at 43, para. 98 (DRC).
[296] *Maritime Delimitation in the Indian Ocean case,* Verbatim Records CR. 2016/13 (Somalia) at 41, para. 11
[297] *Application of the ICSFT and CERD*, Application Ukraine, para. 23
[298] *Obligations concerning Negotiations,* Application Marshall Islands, para. 70 (first emphasis added).
[299] *Ibid.* Memorial Marshall Islands v. UK, para. 226 (emphasis added).
[300] *Application of the ICSFT and CERD*, Application Ukraine, para. 19
[301] *Obligations concerning Negotiations,* Application Marshall Islands v. UK, para. 69 (emphasis added).
[302] *Ibid.* Memorial Marshall Islands v .UK, para. 25.
[303] *Obligations concerning Negotiations, (Marshall Islands v. Pakistan),* Application Marshall Islands, para. 25.
[304] See for instance Memorial Marshall Islands (UK case), paras. 15-18.

 DOI: 10.17103/sybil.23.3

negotiations in the Conference on Disarmament"[305] and to participate in a Working Group does not protect a Respondent 's conduct —such as to improve its nuclear weapons— from being contrary to the objective of Article VI of the NPT and directly conflicting with it.[306]

In case of a *pactum de contrahendo* such as provided for in Article VI of the Non-Proliferation Treaty the breaches considered may consist both of actions contrary to substantive duties such as to improve nuclear weapons and breaches of procedural duties by opposing efforts of the majority of States to initiate the negotiations.[307] Also in the absence of an obligation to negotiate a combination of both duties may be the he subject of allegations.[308]

Is there room for the *minis rule because* for instance "manifestly unjustified interruption of negotiations "will be "sanctionable only in *extreme cases*"?[309] The burden of proof for an accusation of manifest bad faith is high as we will find out next but should the normative role of the principle of good faith in the international legal order not require that every lack of good faith in carrying out substantive duties be sanctioned?

(2) The Court's General Approach

As for instance demonstrated by the *Pulp Mills* case judicial review of good faith is bound to be a difficult and delicate task as judicial actors have to carefully navigate between a "strict legal straitjacket" which "would be of no utility" and "a complete absence of rules protecting the legitimate expectations" of the parties[310] thereby preserving the necessary flexibility parties are entitled to retain and demonstrate.

It is not within the Court's inherent jurisdiction to make *motu proprio* a judicial assessment of the Parties' performance of the obligation to negotiate in good faith. The jurisdictional clause must have endowed the Court with jurisdiction to examine whether the Parties were engaged in good faith negotiations.

A reminder to Parties in the reasoning of a Judgment of their duty to negotiate in good faith does not "entail a determination that a party had acted contrary to international law when no such determination on that point of law had been sought by the other party in its final submission".[311]

Judge H. Lauterpacht's warning that the Court, when examining its jurisdiction, "must

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[305] *Obligations concerning Negotiations, (Marshall Islands v. India)*, Application Marshall Islands, paras. 27 and 36 (emphases added).

[306] *Ibid.* paras. 58 and 64.

[307] Memorial Marshall Islands (UK case), paras. 15-18.

[308] Intransigence and breaking-off negotiations: *Obligation to Negotiate Access:* Verbatim Records CR. 2018/6 (Bolivia) at 30, para. 30 and at 44, para. 47 and CR. 2018/8 (Chile) at 17, para. 12 (b) and at 27, para. 25.

[309] R. Kolb, *supra* n. 3, at 200 (emphases added).

[310] *Ibid.* at 201.

[311] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J.* Reports (2003) 161, Separate Opinion of Judge Higgins, 225, at 228-229, para. 14 (mutatis mutandis).

 DOI: 10.17103/sybil.23.3

exercise the greatest caution in attributing to a sovereign State bad faith"[312] a fortiori applies when a case later reaches the merits.

The Court presumes that Parties have been negotiating in good faith unless and until the opposite is claimed and proven and in general the Court is not going beyond a "touch and feel" type of test.

The Court may consider the readiness to accept third parties' assistance as an indication of their good faith.[313]

(a)Material at the Court's disposal

The material at the Court's disposal consists of the facts and circumstances of the particular case, Parties' narrative of their negotiation process and their legal arguments. When embarking upon a process of negotiations states are aware of the good faith requirements as consolidated in the *acquis jurisprudentiel* and which later on will shape their litigation strategy.

"The one-sided presentations are 'counterbalanced' by equal opportunities for presentation" and "by the knowledge that the judges will evaluate the claim"[314] . However, since Parties are making an instrumental and selective use of the history of the dispute at hand and of the negotiations conducted to resolve it, the Court should be cautious in its assessment of the facts

The exact chronology of *unilateral* decisions taken by a party during a process of negotiations is relevant "in the event it has to be decided whether the parties negotiated in good faith"[315]. The Court may *merely report* that a process of negotiations has taken place but it may also feel obliged to describe in some detail the *nature* of the prior negotiations, and this also in order to bring to light what was the *main* reason they had broken down and "fully to ascertain the *scope and purpose*" of exchanges.[316]

The material presented by the Parties should be conclusive to allow the Court "to evaluate the significance of the meetings held"[317] and it expects to be informed " in particular [about] the way, duration, scope [and] stage of progress" of a process to be able to carry out its assessment[318] . When the process stretches over a period of several decades

[312] *Interhandel Case, Judgment of March 21st, 1959:* I.C.J. Reports (1959) 6, Dissenting Opinion of Judge H. Lauterpacht, 95 at 111.

[313] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7 at 79, para. 143.

[314] A. Mondré, *supra* n. 95, at 41.

[315] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7, Dissenting Opinion of Judge Herczegh, 176 at 192.

[316] *North Sea Continental Shelf, Judgment,* I.C.J. Reports (1969) 3, at 16, para. 5 and at 17, para. 7 and *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Judgment,* I.C.J. Reports (1973) 49 at 56, para. 18 (emphasis added).

[317] *Territorial Land Maritime Dispute (Nicaragua v. Colombia), Preliminary Objections, Judgment,* I.C.J. Reports (2007), 832 at 868-869, para. 119.

[318] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Provisional Measures Order of 8 December 2000,* I.C.J. Reports (2000) 182 at 200, para. 6

 DOI: 10.17103/sybil.23.3

Parties may feel no need to go over the history between them in any great detail.[319]

A detailed examination of the records of negotiations has been considered premature at the provisional measures stage[320] . It was pointed out that there is not "a single decision at *any* stage of the proceedings scrutinizing a lengthy record of negotiations for alleged bad faith of the party claiming the Court's jurisdiction" and that it would be "burdensome and unworkable for the Court, presumably requiring it to weigh competing accounts of what actually happened in many negotiating sessions".[321]

At the provisional measures stage the Court has to assess where it appears that a genuine attempt has been made[322]. The Court may conclude from the facts on the record that "it *appears* that [the] issues [concerning the ICSFT] could not be resolved by negotiations"[323] and it may express the view that the issues relating to the CERD "had not been resolved "by negotiations[324]. At that stage the Court does indeed not have to go into mutual accusations of bad faith.[325] At the preliminary objections stage the Court may express the view that the negotiations including diplomatic correspondence and face-to-face meetings "*indicate(s)* that a genuine attempt at negotiation" had been made.[326]

(b) The Evidence Required

Circumstantial evidence may be submitted but it has to "supported" not by disputable inference but by clear and convincing evidence showing "that the party concerned did not *intend to engage in meaningful negotiations*"[327] and compelling the Court to a "finding of the existence of bad faith".[328]

When the procedural and substantive duties of good faith require states to take positive action, and a Party formulates an allegation of omission, the Court will require "a lower standard of proof for State responsibility to be incurred".[329] The Court may of course

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[319] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Verbatim Records CR. 2017/5 CR) at 20-21, para. 5.

[320] *Application of the ICSFT and CERD, Verbatim* Records CR. 2017/3 (UKR) at 29, para. 10

[321] *Application of the ICSFT, Verbatim* Records CR. 2017/3 (UKR) at 27-28, para. 6 and at 28, para. 6.

[322] *Ibid. Provisional Measures, Order of 19April 2017,* I.C.J. Reports (2017) 104, at 121, para. 44 'emphasis added). See also *Application of the CERD case, Request for the Indication of Provisional Measures, Order of 23 July 2018*, para. 36.

[323] *Application of the ICSFT and CERD, Provisional Measures, Order of 19April 2017,* I.C.J. Reports (2017) 104 at 123, para. 52.

[324] *Ibid.* at 125, para. 59.

[325] Judge Bhandari was the only Judge to touch upon these accusations but only to state that they "cannot be assessed by the Court at this stage of the proceedings without prejudging the decision to be made in the subsequent phase of this case' Ibid. *Separate Opinion of Judge Bhandari,* 187, at 194, para. 13.

[326] *Application of the ICSFT and CERD case, Preliminary objections, Judgment of 8 November 2019, para. 120 (emphasis added).*

[327] *Interim Accord case, Judgment*, I.C.J. Reports (2011)644 at 685, para. 132 and *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment,* I.C.J. Reports (2010) 4 , Separate opinion of Judge Greenwood,221 at 227, para. 16 (emphasis added).

[328] *Interim Accord case, Judgment*, I.C.J. Reports (2011)644 at 685, para. 132

[329] K. del Mar, 'The International Court of Justice and Standards of Proof 'in K. Bannelier, T. Christakis

 DOI: 10.17103/sybil.23.3

come to the conclusion that the Respondent had "not met its burden of demonstrating that the applicant breached its obligation to negotiate in good faith".[330] The Court may draw "provisional" inferences from conduct or omissions which have been perceived or found as hampering or frustrating the pre-conditions listed earlier.

(c) The Court's Standard

Importance of progress or lack of it is no benchmark for assessing compliance with the good faith requirement. Lack of result is not *the standard* to measure whether the obligation to negotiate has been undertaken in good faith as the Court has to consider "whether the Parties conducted themselves in such a way that negotiations may be meaningful"[331] and this in turn depends on the course of the negotiations, the abstention from action which frustrated the process[332] and on the contribution made by either of the Parties to the process.

Although the Court will attach "corroborative weight" to "the conduct of the Parties in negotiations",[333] "it is not the same to negotiate in a bilateral relation on the apportionment of a common resource than to negotiate multilaterally about nuclear disarmament."[334]

In such a context the argument has been made that a judicial evaluation whether a state's efforts to negotiate are "in good faith *and/*or genuine" cannot be done in a vacuum but has to be made "in the context of the attitude and actions" of other states and that it cannot be carried out "irrespective" of the fact that other states may have breached the obligation to negotiate.[335]

But it was rightly pointed out that the "Court cannot order third States to enter into negotiations, and that one cannot negotiate alone. But a third State could breach an obligation to negotiate by its own conduct and the Court could determine as such".[336]

Finally, "the Court cannot address the merits of a bad faith case" by "parsing up the entrails of that case".[337]

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and S. Heathcote (Eds.) *The ICJ and the Evolution of International Law: the Enduring Impact of the Corfu Channel Case (Routledge*, London, 2012) 98 at 108.

[330] *Interim Accord case, Judgment*, I.C.J. Reports (2011) 644, at 686, para. 138

[331] *Ibid.* at 685, para. 134.

[332] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment,* I.C.J. Reports (2010) 4 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)Judgment,* I.C.J. Reports (2010) 4 , *Separate opinion of Judge Keith, 121 at 130, para. 24.*

[333] *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras: Nicaragua intervening), Judgment, I.C.J.* Reports (1992) 351, at 550, para. 317.

[334] R. Kolb, *supra* n. 3, at 196.

[335] *Obligations concerning Negotiations,* Verbatim Records CR. 2016/3 (UK) at 46, para. 9 (emphasis added). Judge Tomka supported this approach: *Separate Opinion of Judge Tomka,* 885 at 898, para. 38.

[336] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment,* I.C.J. Reports (2016) 833 Dissenting Opinion of Judge Crawford, 1093 at 1107 para. 33.

[337] *Obligations concerning Negotiations,* Verbatim Records CR. 2016/3(UK) at 15, para. 14.

 DOI: 10.17103/sybil.23.3

(d) The Failure of a Process

Depending "wholly or partly on the position of one of the States concerned" a process of negotiations may fail, although both parties have "each [been] acting in good faith, or not demonstrably in bad faith";[338] however in appropriate circumstances, it might be fully justified to raise doubts about the Parties' compliance with their respective and mutual obligation to negotiate on good faith.[339]

In case of a breakdown of a series of bilateral negotiations when a Party is said to have "finally" have abandoned its efforts to reach an agreement, the judicial presumption may entail that the determined continuance of the process should be regarded as a sign of good faith. When negotiations "stalled owing to diametrically opposed positions"[340] this does not necessarily imply a rebuttal of the presumption of good faith.

(e) Refraining from blaming

When examining the admissibility of a (counter) claim, the Court considered it irrelevant whether "the fact that diplomatic negotiations have not been pursued is to be regarded as attributable to the conduct of one Part or to the other".[341]

Having no inherent jurisdiction in that respect and unless explicitly requested to do so, the Court cannot determine with judicial authority in the operative part whether and to what extent conduct by (one of) the Parties could be considered to have significantly contributed to or perhaps even decisively caused the failure of a process of negotiations. Furthermore, there is no need for the Court to explicitly make such ascertainment in its reasoning. In almost all cases the Court has refrained from attributing the failure of a process to one of the Parties.[342]

In case of a merely descriptive prior negotiation clause there is no need for the Court "to examine whether *formal* negotiations have been engaged or whether the lack of diplomatic adjustment is due to the conduct of one party or the other"[343]. When the Court is called upon to pronounce itself on the legal consequences of a breakdown, the question of blaming (one of) the Parties does arise and with it the judicial review of good faith. The record before the Court however may make it impossible to blame solely one party.[344]

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[338] *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), Preliminary Objections, Judgment,* I.C.J. Reports (2017)3 Joint Declaration of Judges Gaja and Crawford, 63 at 64, paras. 4 and 5.

[339] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion,* I.C.J. Reports (2010) 403 Declaration of Vice-President Tomka 454 at 463, para. 29.

[340] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7, at 53, para. 73.

[341] *Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment, I.C.J.* Reports (2003) 161 at 210, para. 107.

[342] But see *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment,* I.C.J. Reports (2012) 422 at 447-448, para. 61 with regard to negotiations to organise arbitration proceedings.

[343] *Alleged Violations of the 1955 Treaty, Request for the Indication of Provisional Measures, Order of 3 October 2018,* para. 50.

[344] *Gabcikovo- Nagymaros Project (Hungary / Slovakia), Judgment, I.C.J.* Reports (1997) 7, at 65-66, para. 107 and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment,* I.C.J. Reports (2012) 422 at 44§, para. 59.

 DOI: 10.17103/sybil.23.3

In other cases, the Court did not feel the need to address the particular issue raised by one of the Parties that the lack of (further) progress in the process was caused by the bad faith displayed by the other Party.[345]

(f) Individual Judges Speak out

Individual judges seem to be less reluctant to engage with good faith aspects of the cases at hand. As far as the presumption of good faith at the provisional measures stage is concerned an individual Judge may consider the Court's conclusion on the risk of irreparable prejudice as contrary to the presumption of good faith[346] which imposes itself also on international judges when they deal with cases involving the honour of states[347] which should not lightly be *mise en cause* a fortiori at the provisional measures stage[348]. The burden of proof rests on the Party alleging a lack of good faith and this applies also at this stage of proceedings[349] . Given the Respondent's genuine commitment to its human rights obligations the presumption of good faith should have been *mise en oeuvre* to the benefit of the Respondent.[350]

The Court may attract criticism when a perception arises based on its reasoning and conclusions, that it had rewarded the part who allegedly negotiated in bad faith".[351] When the Court sees no need to address charges of bad faith that may seem to be "more a matter of formal presentation than of the reality",[352] hence the Court's review of the conduct and its conclusions may "entail a finding of bad faith which is not explicitly expressed".[353]

Apart from mentioning in passing that the negotiations during a particular period have bene conducted meaningful, the Court may not have to go into an accusation of bad faith implied in one of the submissions it had rejected as result of an earlier decision in the operative paragraph of its Judgment. This does not prevent an individual Judge to point that in his view neither of the Parties had breached the principle of good faith or had failed the good faith requirement.[354]

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[345] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J.* Reports (2002) 303 at 423 para. 243.

[346] *Application of the CERD (Qatar v. UAE), Request for the Indication of Provisional Measures, Order of 23 July 2018,* Dissenting Opinion of Judge *Ad Hoc* Cot, para. 26

[347] *Ibid.* para. 27.

[348] *Ibid.*

[349] *Ibid.* para. 28.

[350] *Ibid.* para. 29.

[351] *Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment,* I.C.J. Reports (2010) 4 , *Judgment,* I.C.J. Reports (2010) 14 Dissenting Opinion of Judge *Ad Hoc* Vinuesa 266, at 272, para. 20.

[352] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment,* I.C.J. Reports (2014) 226 Dissenting Opinion if Judge Abraham 321 at 328, para. 28

[353] *Ibid.* Dissenting Opinion of Judge Yusuf, 383 at 402, para. 54

[354] *Obligation to Negotiate Access, Judgment of 1 October 2018,* Dissenting Opinion of Judge *Ad Hoc* Daudet, para. 44.

 DOI: 10.17103/sybil.23.3

CONCLUDING OBSERVATIONS

This article is a modest contribution to the further study and development of the good faith requirements guiding parties when they design their participation in a process of negotiations in the shadow of the *acquis jurisprudentiel*.

Negotiations between states present themselves in cases before the Court in ever decreasing circles: they may form part of the general background to the dispute, the Court merely taking notice of the process or they may constitute a necessary pre-condition for the Court's jurisdiction or admissibility of the claims put forward. Latest developments have made a process of negotiations (part of) the subject-matter of the dispute compelling the Court to address and assess accusations of lack of good faith.

In recent years Parties have become less reluctant to make allegations of lack of good faith during negotiations, thereby broadening the range of conduct, behaviour and actions which in their view would come within the scope of legitimate expectations flowing from good faith as a general principle of law.

Parties' arguments with regard to good faith are either expressions of *opinio juris* in *statu nascendi* about more detailed duties beyond the existing *acquis jurisprudentiel* or at least reflections of what states consider to be recommended good practices. As such they provide fertile ground for judicial elaboration and refinement, provided the Court is willing to relax its policy of judicial economy, particularly when it is faced with implicit allegations of lack of good faith.

Given the continuous disagreement among states about the need to have meetings in person the Court may feel the need to elaborate its judicial notion of negotiations, beyond the case-specific factors and circumstances.

State practice has confirmed the importance of pre-negotiations to which the application *ratione temporis* of the good faith requirements should appropriately be extended.

As far as the application *ratione materiae* is concerned the Court may look favourably to the preconditions for the proper fulfilment of what good faith requires as presented by Parties in their arguments.

In case of an obligation to negotiate arguably each party is under a duty to *"initiate"* the process. An offer to negotiate should be rather detailed and a reply should contain alternative schedules while some kind of response to such an offer seems compulsory. Parties have a positive duty to actively table proposals instead of merely responding to proposals.

Whether conditionality as such of the willingness to negotiate forms part and parcel of good faith still waits for a clear Court pronouncement, as are the duty to create a favourable climate for the process and the prohibition to use coercion to bring a party to the negotiating table.

The Court could also express the view that decisions taken by parties prior to and

 DOI: 10.17103/sybil.23.3

during negotiations and which might be perceived by the other party as a lack of good faith should have been taken for plausible reasons.

More judicial attention to the use of clear and unambiguous language even before the start of negotiations and well throughout the process would also be a welcome development.

Given the normative function of the principle of good faith the Court should whenever the opportunity presents itself to make its view known on the undesirable application of the *de minimis rule*.

Finally, the recent increase in allegations of lack of good faith will bring the Court to move beyond its cautious touch and feel approach. Refinement and expansion of the *acquis jurisprudentiel* would allow the Court to carry out a more comprehensive and holistic assessment of the conduct of the Parties through the prism of good faith.

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The protection of migrant children in the European Union: a reading in the light of the Committee on the Rights of the Child's General Comment (Nos. 22 and 23) on the rights of the children in the context of the international migration

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Abstract: The article analyses the evolution of the international regulation of human rights by migrants with special attention to the adoption of general observations 22 and 23 on the rights of the child within the framework of international migration of the Committee on the Rights of the Child drafted together to the Committee on the rights of migrant workers and their families. Since 2013, the number of children, especially foreign unaccompanied children who have reached the territory of the European Union, has increased exponentially. The European legislator, involved in an unprecedented migration crisis, has made an important effort to adapt its regulations to the obligations established by the International Law of Human Rights; however, incompatible and chiaroscuro approaches remain in regulation.

Keywords: General Comment 22 and 23 Committee on the rights of the Child - Migrant child, migrant worker - unaccompanied child, unaccompanied minor refugee - Regulation Dublin III - Proposal Dublin IV Regulation - disembarkation platforms

(A) MIGRANT CHILDREN IN THE CURRENT CONTEXT

Children separated from their parents by expiry of visas, abandoned on a ship without government by the Mediterranean; trafficked to be drugged and their organs removed[1]. It might seem that the Committee on the Rights of the Child had a premonition when, just three months before 2018, *annus horribilis* for the Rights of the Child, it published the Committee on the Rights of the Child's Joint General Comment No. 22 on the general principles relating to the human rights of children in the context of international migration,[2] and the Committee on the Rights of the Child's Joint General Comment No. 23 on states' obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return.[3]

Unfortunately, this was not the case, since the problem of migrant children is not current, although in recent times it has reached dramatic levels.

One of the most relevant aspects of the migratory phenomenon is its evolution: since 2005 it has

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1 UNICEF, 'A Deadly Journey for Children. The Central Mediterranean Migration Route', (NYC, 2017). Electronic text available here, accessed 25 July 2019.

2 Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of the international migration, CRC/C/GC/22, Electronic text available here, accessed 25 July 2019.

3 Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of child, CRC/C/GC/23. Electronic text available here, accessed 25 July 2019.

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increased by more than 40%; currently there are 258 million people 3.5% of the world's population. According to the UNHCR, in 2017, there were 40 million internally displaced persons and another 26 million applicants or holders of international protection.[4]

Since 2006, the issue of migration has been consolidated in the Global Agenda through the first High-Level Dialogue on International Migration and Development of the United Nations General Assembly, by broadening the group of interested countries and inter-agency cooperation mechanisms. In 2013, the Second High-Level Dialogue included migration in the Agenda 2030 for Sustainable Development.[5] On 19 September 2016, the Member states of the United Nations adopted the New York Declaration for Refugees and Migrants,[6] aimed at promoting the establishment of a Global Compact for safe, regular and orderly migration. The Global Compact is framed within objective 10.7 of Agenda 2030 for Sustainable Development, in which Member states committed themselves to cooperate internationally to address all aspects of international migration, including humanitarian, development, human rights and other aspects; to make an important contribution to global governance and improve coordination in international migration;[7] to present a framework for comprehensive international cooperation on migrants and human mobility; to establish a set of workable commitments, a framework for follow-up and a follow-up system among Member states with respect to international migration. The final text of the Global Compact for Secure, Orderly and Regular Migration was adopted on 13 July 2018; although 153 countries signed it in Marrakesh on 11 December 2018,[8] the absence of some of the major receiving states augurs a grim scenario[9] which, a year later, is confirmed by the lack of concrete proposals.

The future does not augur a less alarming scenario: in 2050, South America will reach 30 million emigrants and multiply its share of immigrants by 50%; in Africa, 78 million are expected.[10] A report by the United Nations Organisation predicts a notable increase in the number of immigrants arriving on European Union territory, reaching 56.5 million, mainly from Africa. In 2017, the UN exposed an alarming reality: Europe, North America and Oceania are net receivers of international migrants; Africa, Asia, Latin America and the Caribbean are net emitters.[11] This explains well the difficulties encountered by multilateralism in finding solutions to regulate the phenomenon of migration and the rights of migrants,

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4 Report Of The Secretary General, 'Making Migration Work For All', (A/72/643), 12 december 2017, Par. 3,, electronic text available here, accessed 25 July 2019.

5 AG Res. 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development', 21 October 2015. Electronic text available here, accessed 25 July 2019.

6 AG Res 71/1'New York Declaration for Refugees and Migrants', 19 September 2016. Electronic text available here, accessed 25 July 2019.

7 IOM 'Global Compact for migration'. Electronic text available here, accessed 25 July 2019.

8 Intergubernamental Conference IOM, 'Global Compact For Safe, Orderly And Regular Migration', 13 July 2018. Electronic text available here, accessed 25 July 2019.

9 K. Daugirdas and J. D. Morteson, 'Trump Administration Ends Participation in Global Compact on Migration, Citing Concerns Regarding US Sovereignty', 112, Issue 2, April 2018, *American Journal of International Lawn (AJIL)* 311-313 at 312. [doi: 10.1017/ajil.2018.36].

10 United Nations Department of Economic and Social Affairs/Population Division, '*World Population Prospects: The 2015 Revision, Key Findings and Advance Tables*' (ESA/P/WP.242, New York, 2015) at 6-7. Electronic text available here, accessed 25 July 2019.

11 Ibid at 9.

DOI: 10.17103/sybil.23.4

not to mention the problems of approach that some governments show when dealing with a problem mainly of a social nature as if it were national security.[12] All of this leads to a scenario that we can define as, *"structural antagonism"* in multilateral negotiations.

Included in the large numbers of migration each year, 36 million children migrate alone or accompanied.[13] The often precarious nature of this movement is, according to UNICEF, one of the most vulnerable moments for the safety of children. Currently, according to UNHCR figures, there are 10 million refugee children, one million more are waiting for a favourable resolution; another seventeen million are internally displaced by various armed conflicts.

This is a decision-making process about which there are no representative statistics, where the child's opinion is hardly considered when families are faced with the decision to migrate. Girls and boys mobilize internationally for a variety of reasons: in search of opportunities, whether for economic or educational considerations; for reunification purposes, in order to regroup with family members who have already migrated; for sudden or progressive changes in the environment that adversely affect their living conditions; for situations arising from organized crime, natural disasters, family abuse or extreme poverty; to be transported in the context of a situation of exploitation, including child trafficking; to flee their country, whether out of well-founded fear of persecution for certain reasons or because their lives, security or freedom have been threatened by widespread violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances that have seriously disrupted public order.

While children often move with their parents, extended family members or other adults, in 2009 the UN Rapporteur on the Human Rights of Migrants warned that an increasing and significant number of children migrate independently and unaccompanied.[14]

Despite the increase in groups involved in international discussions, migration regulation continues to be inadequately reflected in development frameworks and sectoral policies; neither do they guarantee adequate protection of the human rights of all migrants, nor has public perception of human mobility improved.[15] However, the treatment of child migration by International Organizations has undergone a progressive specialization from a generic approach -generated during the great human exoduses- to a permanent, structured and specialized treatment in each of the different realities involved in the term 'childhood'.

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[12] About Mexico migrant crisis situation. I. Briscoe and A. Matute, '*México: Trump y el tapón migratorio*', 184 *Política Exterior* (2018) 93-99, at 98.

[13] UNHCR, 'Global Trends: Forced displacement in 2018'. Electronic text available here, accessed 25 July 2019.

[14] OHCHR, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of UN Rapporteur on the Human Rights of Migrants, Mr. Jorge Bustamante', UN Doc. A/HRC/11/7, 14 May 2009 at par. 19. Electronic text available here, accessed 25 July 2019.

[15] In 2004, a report from IOM (IOM report, 'The image of migrants in society' MC/INF/277, 18 noverber 2004 at par. 4. Electronic text available here, accessed 25 July 2019) alarms about the much negative public perception about migrants and about it depends on the grade and focus of the information given to society and encores the states to work for improving the situation. In 2017, an article (T. Raines, M. Goodwin and D. Cutts, 'The Future of Europe Comparing Public and Elite Attitudes', *Chatham House: research papers*, 2017. Electronic text available here, accessed 25 July 2019) explains the existence of a very different perception between the elites and the rest of citizens (much negative in the last group) about migrations in European Union state members.

 DOI: 10.17103/sybil.23.4

This development has had an unequal impact on the regulation of states: while some have established specific procedures to manage children crossing their borders, others continue to disregard international obligations imposed by the Convention on the Rights of the Child. In recent years there has been a change in public opinion in receiving countries - traditionally more sensitive to migration when children were involved - towards more intransigent positions that perceive children as the element used by the family to ensure their permanence in the territory of destination; this has given rise to regulations that place them in legal limbo, denying them the enjoyment of rights and even questioning the application of treaties.

For many of them -those who are unaccompanied but not exclusively- migration becomes a vital path that exposes them to abuse by traffickers and to detention due to lack of documentation. There is no systematic follow-up or monitoring of these situations. NGOs argue that this is a general but particularly pressing problem in some geographical areas.[16] For those who move safely, the impact of abandonment of their roots, of their known space has psychological effects as yet little studied.[17]

Having overcome the difficulties of the journey, the problems persist at the destination: according to UNICEF, only where there are safe and legal routes can migration offer opportunities for migrant children and the communities they join.[18] Even so, a refugee child is five times more likely not to attend school than a non-refugee child. Once in school, they are often discriminated, and their difficulties in adapting to the new system complicates their progression at normal rates. Outside the classroom, legal barriers prevent migrant children from enjoying services on an equal footing with native children, either because of discrimination or because of a lack of an adequate focus on protection measures.[19] Even those who have arrived in the territory for reasons other than violence suffer such discrimination in access to certain services in addition to needing basic elements for normal development.

In short, it seems that their status as migrants cancels out the special protection that international

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[16] Save the Children, 'Infancias robadas, informe mundial sobre la infancia 2017' (London, 31 May 2017). Electronic text available here, accessed 25 July 2019.

[17] Regarding this issue, a review paper stablished in 2008 that "The included studies did not unequivocally confirm that migrant youth are at high risk of developing mental health problems. Both higher and lower levels of problem behavior were found. However, numerous complexities arose that endanger the formulation of further conclusions on the risk of migration for child mental health (...) Finally, generalised conclusions in this research field may not be warranted since particular characteristics of the host countries may also influence the level of mental health problems in immigrant children. More specifically, the ways in which receiving countries select migrants, the attitudes of these countries towards migrants, and international differences in child wellbeing in host countries may account for the differences. As these factors are not taken into account in most studies, the results of our selected studies are difficult to interpret, as all the above-mentioned factors may blur their results and confound their main findings" (G. Stevens and W. Vollebergh, 'Mental health in migrant children', 49:3 *Journal of Child Psychology and Psychiatry* (2008) 276–294 at 279. Electronic text available here, accessed 25 July 2019. [doi: 10.1111/j.1469-7610.2007.01848.x]; see also, Y. Meir, M. Slone and I Lavi., 'Children of illegal migrant workers: Life circumstances and mental health', 34(8) *Children and Youth Services Review* (2012) 1546-1552. Electronic text available here, accessed 25 July 2019. [doi: 10.1016/j.childyouth.2012.04.008].

[18] UNICEF: *'Desarraigados: una crisis creciente para los niños refugiados y migrantes'* (New York, 2016). Electronic text available here, accessed 25 July 2019.

[19] As an example, the difficulties that have arisen for migrant children with a single parent or refugees for being aligned by children's teams in football competitions in a FIFA state after the modification by the latter regulations on international transfers of children in world regulation football, once the abuse suffered by children were known.

law and most domestic laws grant to children.

(B) CONCERN FOR MIGRANT CHILDREN IN THE UNITED NATIONS SYSTEM

Concern for the rights of migrants is not new on the international agenda. Since 1920, the International Labour Organization has coordinated initiatives aimed at promoting fair treatment for migrant workers and their families, the first fruits of which materialized in the 1949 Migrant Workers Convention and the 1975 Migration Convention. The UN, for its part, protected the right to free movement and to choose the place of residence at an early stage, obtaining normative reflection in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights. In this sense, the rights of migrants have been progressively established in the work agenda of the Organization until its consideration as a particularly vulnerable group.[20] However, the progress achieved in defining the rights of migrant workers has not followed a uniform trajectory, and it is usually in times of economic prosperity or expansion when the receiving states have shown greater commitment to the introduction of labour improvements[21] while, in times of crisis or deficit, limitations and setbacks have occurred around those rights surrounding the migrant (family unification, health, schooling, etc.).

In the following years, international action focused on strengthening the principles underpinning the conditions of access to employment for migrant workers and on finding that the rights of foreigners were not universally protected, because the application of existing international standards and human rights conventions to foreigners was imprecise and unclear. In 1985, the Economic and Social Council recognized the need to deepen efforts to improve the social situation of migrant workers and their families, through actions at the national, bilateral, regional and international levels. The General Assembly Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live called for further protection of those rights.[22] The Convention on the Rights of the Child does not specifically include the term migrant child; however, it served as a reminder that the status of children as a vulnerable group takes precedence over the specific context in which they find themselves. Its status as the most ratified Human Rights Treaty in history has made it possible, on the one hand, to break the invisibility they suffered in the general regulatory framework of migration to meet their specific needs and, on the other, to establish an interpretative authority whose *pro-actione* positioning has favoured the concretion of its articles in the migratory context.

In 1990, work began on drafting the International Convention on the Protection of the Human Rights of All Migrant Workers and Members of Their Families, which entered into force in 2003.[23] The

[20] M. Ferrer, 'La población y el desarrollo desde un enfoque de derechos humanos: inter- secciones, perspectivas y orientaciones para una agenda regional', (LC/L. 2425-P) 60 (CEPAL, Santiago de Chile, 2005).

[21] M. Abella, 'Los derechos de los migrantes y el interés nacional' in J. Martínez Pizarro and L. Reboiras Finardi, *La migración internacional y el desarrollo en las Américas*, LC/L. 1632-P (CEPAL, Santiago de Chile, 2001).

[22] GA Res. 40/144 13 December 1985.

[23] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted by GA Res. 45/158 18 December 1990, get into force 1 July 2003). United Nations, Treaty Series, vol. 2220, p. 3. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

relative lack of concern prior to the Convention can be explained by the small volume of its flows and its limited impact on the economic, political or social stability of the country, but also by a widespread conception that associated migration with the inevitable development of peoples. This does not mean that these people were completely unprotected, because they were covered by other universal instruments; however, the Convention recognized the importance of the welfare of the child and demanded that access to services and social benefits be provided to migrants on an equal footing with nationals. Despite the few ratifications and accessions — only 54 states, none from the European Union — that it has collected, its adoption and entry into force marked an important step in the recognition of the rights of migrant workers and their families in an irregular legal situation, since prior protection was not given in the particular treaties applicable to this group of persons.

The work of the Convention raised the awareness of the international community by generating a profound discussion on the criminality associated with migration. In 2003, the Global Commission on International Migration identified irregular migration as one of the main sources of vulnerability, especially that of women and children. In this sense, since 2004 the Palermo Protocols opened a space for international collaboration in relation to trafficking in persons and smuggling of migrants with particular attention to child victims.

Once the *basic legal corpus* for the protection of migrants had been constituted, the International Community has made progress in exploring grey spaces and difficulties in the application of the law through the work of special rapporteurs, treaty monitoring committees, reports from specialized agencies and bodies, and case law: thus, Resolution 2000/48 of the Human Rights Council — which established the mandate of the Special Rapporteur on the Human Rights of Migrants — demanded that its reports consider the rights of migrant children, which culminated in 2009 when it dedicated a specific report to the human rights of migrant children;[24] that same year, the Human Rights Council in its Resolution "Human Rights of Migrants: Migration and Children Human Rights"[25] recalled the obligation of states to respect and ensure the protection of the human rights of all children without discrimination under their jurisdiction, and urged them to establish and develop policies and programmes aimed at caring for migrant children based on the best interests of the child, non-discrimination, the right to participation, and the right to survival and development. For its part, the Global Migration Group has directed part of its work to focusing attention on the rights of migrant children and those children affected by migration, including, in 2014, the Joint Report on "Migration and Youth: Challenges and Opportunities", and it has also established specific positions on children in general spectrum reports.[26] The previous year, the Inter-Parliamentary Union (IPU) adopted a Resolution to promote the rights of migrant children, especially

[24] OHCHR, *supra* n.14.

[25] OHCHR Res. 12/06 1 October 2009 Human Rights of Migrants: migration and rights of the child.

[26] Remarkable in this topic are the papers published by the Migrant Working Group, specially: MWG, '*Global Migration Group Stocktaking Exercise on Protection-at-Sea Report and Recommendations*' (2015). Electronic text available here, accessed 25 July 2019. See further: MWG, '*Migration, Remittances and Finacial Inclusion: Challenges and Opportunities for Women's Economic Empowerment*' (2016). Electronic text available here, accessed 25 July 2019; and MWG, '*Migration and Youth: Challenges and Opportunities*' (2014). Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

separated and unaccompanied children,[27] and the IPU, ILO and OHCHR published a Handbook for Parliamentarians on Migration, Human Rights and Governance in November 2015.

At the regional level, in 2014 the Inter-American Court of Human Rights issued Advisory Opinion No. 21 on the Rights of the Child in the Context of Migration, which had been requested by the Mercosur states, where it develops human rights standards applicable to unaccompanied migrant children, migrant children and children of migrants[28], in addition to having developed a copious and interesting jurisprudence on the matter.[29] For its part, the European Union approved the Plan of Action on Unaccompanied Children (2010-2014), based on prevention, protection and the search for lasting solutions.[30] Furthermore, scientific doctrine[31] and civil society have also actively responded by highlighting this reality as well as the need to promote and protect the rights of migrant children and their families.[32]

From the point of view of cultural impact, a good parameter to measure the growing interest in migrant children is NGRAM in Spanish-speaking scientific and social literature, where it can be observed how since 1992 coinciding with the entry into force of the Convention on the Rights of the Child there has been a notable and continuous increase in the number of publications mentioning this term.[33] Migration in international studies and monographs appeared at the end of the last century as one of the most problematic derivatives of globalization.[34]

The Sustainable Development Goals have emphasized another aspect of migration: migration transversality. Beyond trying to highlight the value of migration itself in terms of remittances, student mobility, creation of added value, attracting human capital, among others Agenda 2030 has conveyed to states the need to address the issue of migration as a starting point for the fulfilment of other objectives.

An example of this transversality can also be seen in the intimate connection between the migratory phenomenon and the rights contained in the Convention on the Rights of the Child. This connection,

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[27] Inter-Parliamentary Union Res. 129/3 12 September 2013 *'El papel de los parlamentos en la protección de los derechos de los niños, en particular los niños migrantes no acompañados, y en la prevención de su explotación en situaciones de guerra y de conflicto'*, (A/129/3(c)-R.2). Electronic text available here, accessed 25 July 2019.

[28] IACHR Consultative opinion n. 21 about Rights of the Children in the context of Migration (OC-21/14) Electronic text available here, accessed 25 July 2019.

[29] IACHR cases: *Vadege Dorzema vs. República Dominicana* (IACHR Decision 24 october 2012). Electronic text available here, accessed 25 July 2019; *Pacheco Tineo vs. Estado plurinacional de Bolivia* (IACHR Decision 25 november *2013); Niñas Yean y Bosico vs. República Dominicana* (IACHR Decision 24 October 2012). Electronic text available here, accessed 25 July 2019.; *Niñas Yean y Bosico vs. República Dominicana* (IACHR Decision 8 September 2005). Electronic text available here, accessed 25 July 2019.

[30] European Parliament Com. 213 5 June 2010. Communication from the Commission to the European Parliament and the Council: Action plan on unaccompanied minors (2010 2014). SEC(2010)534. COM(2010)213 final. Electronic text available here, accessed 25 July 2019.

[31] J. Bhabha, Child Migration & Human Rights in a Global Age (Princeton University Press, New Jersey, 2016). [doi: 10.23943/princeton/9780691169101.001.0001].

[32] PICUM, *'Human Rights of Undocumented Adolescents and Youth'* (PICUM, Bruselas, 2014); also, C. Musalo, *Niñez y Migración en Centro y Norte América: Causas, políticas, prácticas y desafíos*, (Center for Gender & Refugee Studies, Buenos Aires y San Francisco, 2015). Electronic text available here, accessed 25 July 2019.

[33] Ngram Viewer. Searching by term "niños migrantes". Results available here, accessed 25 July 2019.

[34] F. Attinà, 'Tackling the migrant wave: EU as a source and a manager of crisis', 70/2 *REDI* (2018), 51-69 at 51. [doi: 10.17103/redi.70.2.2018.1.02]. Electronic text available here, accessed 25 July 2019.

DOI: 10.17103/sybil.23.4

together with the notable increase in migratory crises, led the Committee on the Rights of the Child to define, in 2015, the global situation as a human rights crisis that particularly affects unaccompanied children. Finally, the CMW and the CRC decided to carry out a Joint General Comment on the Human Rights of Children in the Context of International Migration in compliance with the mandate of the Human Rights Council urging to deepen the interaction and collaboration of the monitoring committees, and the harmonization of their forms of work.[35] After an open process, in which an open round of consultations with NGOs in the field of children was proposed, an amicus curiae round with International Organizations, Organisms and Agencies, within the CRC, the work was concretized in two General Observations: firstly, number 22 of the Committee on the Rights of the Child and number 3 of the Committee on the Rights of Migrant Workers on general principles relating to the human rights of children in the context of international migration; and secondly, number 23 of the Committee on the Rights of the Child and number 4 of the Committee on the Rights of Migrant Workers on the obligations of states concerning the human rights of children in the context of international migration in countries of origin, transit, destination and return.

The inseparable nature of both is evident. In the Committee's view, the implications of migration for children exceeded the formal limits set for a general comment - a maximum of 10,700 words is recommended - so it decided to devote two.

Following the Committee's own criterion which expressly indicates that the two should be read and considered together we will refer to both as the General Comment on the rights of migrant children.

(C) THE GENERAL COMMENT ON THE RIGHTS OF MIGRANT CHILDREN

As for the so-called conventional mechanisms, each United Nations human rights treaty has a body whose main purpose is to supervise the compliance of ratifying states with the specific provisions of the treaty.

The General Comments seek to clarify the content and scope of treaty obligations. They contribute to the compliance monitoring function by addressing highly relevant issues of treaty interpretation, including a preventive function in light of shortcomings highlighted by a large number of reports and guidance, as well as an assessment of good practice implementation.[36] In general, the Committee on the Rights of the Child constitutes an "authorized interpreter" although the terms included in the General Comments are recommendations for adequate implementation (they help national authorities to identify deficiencies, design policies and adopt measures to give effect to the rights contained in that instrument) and therefore do not necessarily imply obligations specifically accepted in the ratified Convention; therefore, their non-application may have negative consequences in the assessment of the periodic reports that states must present, but does not imply -directly- incurring international responsibility. The letter of the General Observations itself shows the degree of obligation that states must meet by distinguishing,

[35] OHCHR Res. 68/268 9 April 2014. Electronic text available here, accessed 23 July 2019.

[36] The Human Rights Committee has ruled on the purpose of the General Observations (CCPR/C/21/Rev.1); the General Assembly, about its nature and purpose (N° 40 (A/36/40).

 DOI: 10.17103/sybil.23.4

from the lowest to the highest level of obligation, between "should" and "must", which includes two levels of obligatory intensity -"shall" and "must"- as a matter of priority.

Thus, the joint elaboration of the General Comment on children's rights in a context of international migration by the Committee on the Rights of the Child and the Committee on the Rights of Migrant Workers has an integrative effect: on the one hand, it establishes an interpretative definition that applies to all Member states of the European Union as a party to the Convention on the Rights of the Child and, on the other hand, it avoids harmful effects that could occur in relation to migrant children due to their failure to ratify the Convention on the Rights of Migrant Workers and their Families. A joint reading of Observations 22 and 23 shows the following five main axes:

- Empower migrant children as holders of human rights by enervating the protection afforded by human rights treaties through their concretion in situations of risk and violation of rights in migrant children.
- Promote a comprehensive migration management system concerning states of origin, transit, destination and return that improves the conditions of migrant children and the application of the principle of national treatment and non-discrimination in the enjoyment of rights.
- Eliminate those approaches that result in migrants taking precedence over, and even cancelling out, their status as children; as well as those practices that tend to limit the enjoyment of rights because of the migrant status of their parents.
- Remember that states have the right to determine the conditions and flows of persons across their borders, but that excessively restrictive regulation may indirectly lead to situations of human rights violations and the promotion of criminal activities around the migratory phenomenon; also, that irregular access to foreign territory by a person may be subject to sanctions but never of a criminal nature and, consequently, may not imply the limitation of the human rights of migrants in an irregular situation.
- The conviction that excessively restrictive regulations on access to territory or repressive regulations on irregular stay can lead to situations of violation of human rights or lack of access to basic services for fear of being deported. For this reason, the Observation seems to advocate a sort of separation in the Administration that prevents the communication of data between those units dedicated to the protection of children and the provision of basic services (health, education, social assistance, etc.) and the units destined to regulate and execute migration policy. The Comment calls for the establishment of a "firewall" and the prohibition of the exchange and use for immigration enforcement purposes of personal data collected for other purposes, such as protection, reparation, civil registration and access to services. This is necessary to uphold the principles of data protection and to protect the rights of the child in accordance with the Convention on the Rights of the Child.

The members of both Committees insist on highlighting the character of children as a key element in the duty of states to respect, protect and fulfil their rights in the context of international migration, irrespective of their residence status or that of their parents or guardians. Responsibility for children connected to jurisdiction is absolute and covers the whole territory and even international waters, as well as any space

 DOI: 10.17103/sybil.23.4

restricted or reserved for the management of immigration.

The Committees urge that the migrant child be made visible as a reality that states must deal with in the framework of their policies and whose impact on these must be considered at the time of their evaluation — which includes the public dissemination of data and results — and the design of new policies. Such policies should be comprehensive, inter-institutional, connected between welfare authorities and other competent bodies (health, education, etc.) and inter-territorial; they should be endowed with enough resources, including budgetary resources and implemented by officials with continuous and periodic training on the rights of children, migrants and refugees and on statelessness, including intersectional discrimination.[37]

(1) General Principles

Comment No 22 focuses on establishing compliance with five general principles as the main element in the protection of the rights of migrant children:

- The prohibition of discrimination, which must operate regardless of the cause of the transfer (economic, seeking asylum or refuge, etc.). The Comment considers non-discrimination as the central axis on which to build the set of state policies and limits the discretion of the Governor to establish exceptions by indicating that these must be supported by international standards and norms, the best interests of the child and be proportional. The Committee points out the main grounds of discrimination but requires particular attention to those caused by gender identity.[38] As if it were a quality process, the Convention starts from the idea that the existence of situations of discrimination is connatural to the environment and that the duty of states cannot be limited to establishing legal parameters that prohibit it, but must actively act to reflect on and combat it.[39]
- General Comment No. 22 reflects the principle of the paramount consideration of the best interests of the child set out in General Comment No. 14[40] and its concreteness in the context of international migration. The best interests of the child relate both to the child's individual sphere and to his or her relational orbit with regard to the expulsion of his or her parents or guardians. Thus, "best interests' determination" as a structured and strictly guaranteed process designed to determine the best interests of the child on the basis of the best interests' assessment is configured as a complex process — including the development of individual sustainable reintegration plans — that must be addressed at each stage of the migration process and continued in the state of destination until such time as migrant

[37] Para. 11-22 General Comment No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of the international migration, CRC/C/GC/22, Electronic text available here, accessed 23 July 2019.

[38] Para. 24 GC no.22 (2017). Electronic text available here, accessed 23 July 2019.

[39] Ibidem at para. 26. Electronic text available here, accessed 23 July 2019.

[40] General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). Adopted by the Committee on the Rights of the Child at its sixty-second session (14 January – 1 February 2013). CRC/C/GC/14. Electronic text available here, accessed 23 July 2019.

 DOI: 10.17103/sybil.23.4

status ceases to be a factor in the child's life.[41] Other considerations, such as those relating to the overall control of migration, cannot prevail over considerations based on best interests.

- The third principle on which the General Comment rests the construction of policies relating to migrant children is their right to be heard, to express their views and to their participation developed in General Comment No. 12.[42] The Committees consider that states should establish procedures that allow children to express their views independent of those of their parents or family as parties to migration and asylum processes, and that their views be considered. As part of the process, their interests should be protected by a qualified representative who is also familiar with the child's ethnic, religious and cultural characteristics. Such representation is not a substitute for the child's right to be informed of his or her rights, services and resources available to him or her in his or her own language. For their part, states must remove all obstacles that prevent children from expressing their views and foster a context in which civil society organizations emerge for this purpose.[43]
- The fourth principle is the duty to respect the right to life, survival and development of every child. The Committee views the migration process as a period where the child's vulnerability is considerably undermined and recognizes the difficulty of establishing regular and safe channels for child migration. However, it requires the adoption of measures, including access to judicial and non-judicial remedies, aimed at preventing and reducing the risks associated with migration in states of origin, transit and destination. The Committee is concerned that the effects of migration processes, including migrant status itself, may directly or indirectly affect children's right to life, survival and development irrespective of their status or that of their parents in the state of destination.[44]
- Finally, the Committee recalls the responsibility of states in receiving migrants in their states and their duty to respect *non-refoulement* obligations under international refugee law: thus, it recalls the prohibition of expelling, individually or collectively, children from their jurisdiction when there is a risk of irreparable harm upon return, such as persecution, torture, serious human rights violations or other irreparable harm. The Comment recalls the full validity of international agreements on this issue and the existence of an unambiguous interpretation of the principle of non-refoulement without an effective process with all due process guarantees and the right of access to justice.[45]

(2) On age determination

A key issue for the implementation of the state obligation in relation to migrant children is the determination of age at the time of entry. Failure to do so not only violates the rights of the child when he or she is classified as adult and is therefore deprived of the protection system to which he or she should be

41 Para. 31-33 GC n.22 (2017). Electronic text available here, accessed 25 July 2019.

42 General Comment No. 12 (2009) The right of the child to be heard. Adopted by the Committee on the Rights of the Child at its Fifty-first session (Geneva, 25 May 2009 -12 June 2009). CRC/C/GC/12. Electronic text available here, accessed 25 July 2019.

43 Para. 38-39 GC No. 22 (2017). Electronic text available here, accessed 25 July 2019.

44 Para. 40-44 GC No. 22 (2017). Electronic text available here, accessed 25 July 2019.

45 Para. 45-47 GC No. 22 (2017). Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

entitled; but also when adults are erroneously considered minors, thereby harming the group of children covered by the system who are forced to live with that person. This situation wreaks havoc on the proper development of children and — as has already been stated by some authorities — also on the functioning of public services.[46]

It is not always easy for migrant children to provide the required documentation. In Observation No. 23, the Committee recalls that physical tests to determine the age of a migrant child should be carried out only if it is not possible to make decisions on the basis of documentary evidence[47] and, always by paediatricians or other professionals through a global assessment of their development and thus abandon other more intrusive methods;[48] on the other hand, there is scientific literature that sustains the fallibility of such methods.[49] The Committee points out the obligation to consider — unless there is proof to the contrary — documents presented by children to attest to their age as valid. It is also concerned about migrant children between the ages of 15 and 18 as they often receive much lower levels of protection and are sometimes regarded as adults or maintain ambiguous migration status, recalling that states must take adequate follow-up, support and transition measures for children approaching 18 years of age;[50] the Committee encourages states to adopt protection and support measures even after that age to assist them in the transition to coming of age.

(3) With regard to deprivation of liberty

The Comment recalls that, according to the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers, the detention of any child on the basis of the residence status of his or her parents constitutes a violation of human rights, and therefore, the detention of any kind of child as an immigrant should be prohibited by law. Such consideration extends to any situation in which a child is deprived of liberty for reasons related to his or her migratory status or that

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[46] Spanish Prosecutor General's Office. Menores extranjeros no acompañados: valoración de los documentos de identidad extranjeros en los expedientes de determinación de la edad, 2017 [request: 22 May 2019]. Electronic text available here, accessed 25 July 2019.

[47] However, as T. Smith and L. Brownlees Laura show, despite the subsidiarity of biometric and forensic methods, it is legally practical evidence that medical tests are not used as a last resort. (T. Smith and L. Brownlees, '*Age assessment practices: a literature review & annotated bibliography*', Discussion Paper (UNICEF. New York, 2011). Electronic text available here, accessed 25 July 2019.

[48] The Committee does not expressly mention them but by "physical evidence" it refers to the four types of exams - based on the four Daubert criteria to judicially validate a medical test - to which migrant children are subjected: a) the physical examination based on the Tanner scale; b) the radiographic examination of the carpus of the left hand (following some of the following scales: the Greulich and Pyle atlas, the Tanner-Whitehouse measurement or, the combination of both -FELS-); c) the radiographic examination of the denture (based on the methods of Logan and Kronfeld, Schour and Massler or Demirjial) and finally, d) the radiographic examination or computed tomography of the proximal clavicle limb (based on the Schmeling method).

[49] T. García, 'El procedimiento para la determinación de la edad de los extranjeros no acompañados. Bases para un nuevo modelo' (LLM Thesis on file Universidad Pontificia de Comillas, 2017). Electronic text available here, accessed 25 July 2019.

[50] Para 3 Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and General Comment No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of child, CRC/C/GC/23. Electronic text available here, accessed 25 July 2019.

DOI: 10.17103/sybil.23.4

of his or her parents, regardless of the name or reason given for the measure of deprivation of liberty of the child, or the name of the facility or the place in which the child is deprived of liberty. The Committee does not deny the legitimate interest of states in controlling and regulating migration at their borders, but considers that irregular entry and stay is not a crime against persons, property or national security and therefore the detention of children and their families as immigrants should be prohibited by law[51] and its abolition guaranteed in theory and practice.[52]

Children may not be criminalized or subjected to punitive measures, or deprived of liberty in proceedings relating to their migratory status or because they are alone; in this regard, it considers that the adoption of such a measure is excessively disproportionate, even amounting to cruel, inhuman or degrading treatment of migrant children. The Committee urges states to adopt measures that allow children to remain with their family members without being in custody, as the motivation to keep the family together and the contact with the family is insufficient to justify the deprivation of a child's liberty.

(4) With regard to access to justice

The Observation also emphasizes the right of children to have access to the bodies and courts that must decide on situations affecting them, as well as to the guarantees and remedies therein. It also recalls the obligation that such decisions be taken in the best interests of the child by proposing concrete measures to be taken in the case of migrant children during the process.[53]

(5) Right to an identity

The Committees are also concerned about the fulfilment of the right to a name, an identity and a nationality recognized in both Conventions. They affirm the existence of regulations that dissuade migrants from registering their children for fear of being asked about the regularity of their migration status, and urge states to prohibit the exchange of data between registration and immigration officials and recall that unregistered or stateless children are equally entitled to health, education, protection and other social rights. They also call for flexibility in international cooperation when forged documents had been obtained to facilitate the migration or registration of a child, and the child requests that the authentic documents be handed to him or her, without this entailing the application of punitive measures against him or her. They recall the duty of states to cooperate to prevent statelessness and the existence of a *forum necessitatis* involving the granting of nationality at birth or immediately thereafter if; failing that, the person becomes stateless; They proposes the repeal of laws that prevent migrant women —especially those under the age of 18— from contracting marriage from retaining, changing and transmitting their nationality to their children.

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51 Ibidem at para. 12. Electronic text available here, accessed 25 July 2019.

52 Ibidem at para. 5-10. Electronic text available here, accessed 25 July 2019.

53 Ibidem at para. 12. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

(6) The right to family life

The right to family life is especially complex for migrant children, so the Comment, after reaffirming its validity in conventional international law of universal and regional scope, addresses it in two different moments:

- First, when there is separation of parents or guardians, it being understood that while the right to family unity may interfere with the freedom of states to regulate the entry or stay of aliens in their territory, an expulsion measure must be interpreted negatively because of the impact it will have on a child to be deprived of his or her family member; such a measure may constitute a violation of the right to family unity. The Committees also denounce the existence of numerous cases of separation of parents and children for reasons of poverty and that poverty, in order to provide alternative care or to prevent their social reintegration, can never be applied as the sole reason for separating them from their parents; in this case, support measures must be applied by the state to alleviate this situation of poverty.[54]
- Secondly, with regard to the right to family reunification and, in this regard, the General Comment recalls that applications must be dealt with proactively, humanely and expeditiously and that, if rejected, the child must be informed of the reasons for the decision and of the remedies available to oppose it. In cases where the reunification of the child with his or her family in the country of origin, transit or destination must be determined, the decision will be addressed through a comprehensive analysis that includes his or her right to be heard and a plan for insertion into the new sustainable society. In the case of unaccompanied minors, the Comment establishes that reunification can only take place in a country that is safe for the child. In cases of family reunification, the Committee recalls the primary responsibility of states of destination, but also the duty of states of origin and transit to be flexible and agile insofar as it involves them. In this sense, it seems logical that the Observation does not offer a taxed solution for these cases but that the final destination, when approached from the perspective of the best interests of the child, is subordinated to the specific characteristics of the case.[55]

(7) State's right to control the entry and stay of foreigners

With regard to the state's right to control the entry and stay of foreigners in its territory, the Committees warn of the existence of a directly proportional relationship between excessively restrictive and expeditious migration policies with irregular migrants and the emergence of forms of abuse and exploitation of children, including abduction, trafficking in children or their use in begging or child labour. The Comment recalls the responsibility of states to take appropriate measures to prevent such activities during their stay in their territory and especially during transfer to the place of destination. The text recognises the special vulnerability of girls held in consultation rounds with international organisations and NGOs to trafficking, especially for sexual exploitation; this attention to diversity should be extended

[54] Ibidem at para. 28-31. Electronic text available here, accessed 25 July.
[55] Ibidem at para. 32-38. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

to lesbian, gay, bisexual, transgender or intersex children, as well as those who may have a disability. Paradoxically, in the face of the separation between units of the state, the text also indicates the need to apply a global protection of children specially girls- victims of sexual exploitation through better coordination between the different institutions of the state and with the participation of professionals from different areas. In relation to children who are victims of sale, trafficking or exploitation, the Comment proposes to orient the applicable law towards the granting of the most protective status among those available.[56]

(8) Standard of Living

The Comment recalls the obligation of states to ensure that migrant children enjoy a standard of living adequate for their physical, mental, spiritual and moral development, urging them to prepare detailed guidelines on standards of reception services, ensuring adequate space and privacy for children and their families. In relation to temporary accommodation, it should consider gender separation, be suitable for persons with disabilities, the particularities of motherhood and should not unnecessarily restrict the daily movements of children by effectively imposing restrictions on their movement. It also provides that states should promote their access to housing. The Comment also recalls the special and often urgent mental health needs of migrant children.[57] It promotes a holistic approach to the right to health and recalls that restrictions imposed on the right to health of adult migrants because of their nationality or migration status could also affect the right to health, life and development. The right to education is also mentioned in the General Comment —in reference to both primary education and vocational training— which must be provided on an equal footing with nationals of the country in which they live and ensuring the elimination of any grounds of discrimination; targeted and alternative education is also promoted where necessary and the possibility of participating fully in examinations that enable them to obtain recognized training. The document affects the fear of migrants to be deported or sanctioned when using social services, therefore, the Comment promotes that providers are not required to present any document; as well as the separation in the Administration between those units dedicated to provide services and those dedicated to suppress irregular immigration.[58]

(D) EUROPEAN UNION LEGISLATION ON MIGRANT CHILDREN IN THE LIGHT OF THE GENERAL COMMENT

In 2016, 1,259,265 people applied for international protection in Europe; in 2017, 650,000 more did. According to data from the International Organization for Migration (IOM), more than 5,000 people lost

[56] Ibidem at para. 39. Electronic text available here, accessed 25 July 2019.

[57] Some NGOs have already warned of mental health problems in children associated with migration as an invisible crisis. Human Rights Watch, *'EU/Greece: Asylum Seekers' Silent Mental Health Crisis'* (HRW, New York, 2017) at Some NGOs have already warned of mental health problems in children associated with migration as an invisible crisis. Electronic text available here, accessed 25 July 2019.

[58] *Supra* no. 30 at para. 54-58. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

their lives trying to reach European coasts from Morocco, Libya, Turkey or Egypt. In addition, there are an estimated 353,348 irregular entries into European Union territory via unsafe routes.

The European Union has repeatedly expressed, in recent years, the complexity of the situation of migrant children in its territory: assuming UNICEF data, it recognizes that there are 5.4 million migrant children, which means 7.4% of all migrants in the territory of the Union and that one in four asylum seekers in a European Union country is a child; of these, 96,000 are unaccompanied children. According to Eurostat, during 2016 the number of asylum-seeking children in some of the states of the Union reached 386,435; 173,450 of whom arrived in Greece by sea; 181,436 went to Italy and 8,162 to Spain. In 2017, the figure fell to 188,930.[59]

(1) Original European Union Law

Article 3(2) of the TEU states that 'the Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures relating to external border controls, asylum, immigration and the prevention and combating of crime'. The policies to develop this area of freedom, security and justice have followed three multiannual programmes: the Tampere Programme (1999-2004), the Hague Programme (2005-2009) and the Stockholm Programme (2010-2014).

Article 3.3 of the TEU expressly establishes the Union's obligation to promote the protection of the rights of the child. For its part, Article 24 of the Charter of Fundamental Rights recognises children as independent and autonomous holders of rights and that the best interests of the child should be considered paramount for public authorities and private entities. All Member states are party to the European Convention on Human Rights and Fundamental Freedoms and to the Conventions signed within the framework of the Council of Europe.

All Member states have ratified the Convention on the Rights of the Child and, with a few exceptions,[60] all are parties to the Additional Protocols. On the contrary, neither the Member states, nor the European Union itself, participated in the negotiations that led to the Convention on the Rights of Migrant Workers and their Families;[61] nor have they ratified it.

The European Union has not foreseen a specific definition of "child"; the paradox arises that in those European policies complementary to the states (education, health, migration, etc.) it delegates the interpretation to the internal law of each state — which normally implies the application of Article 4 of the Convention on the Rights of the Child which considers children only to those under 18 years of age —,

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[59] European Commission, '*Compilation of data, situation and media reports on children in migration Part 1 - data and situation reports*' (Brussels, European Commission, 23 February 2018). Electronic text available here, accessed 25 July 2019.

[60] The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict has been ratified by all EU member states except Estonia. The Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography has been ratified by all EU member states except the Czech Republic, Finland, Ireland, Luxembourg and Malta.

[61] *Supra* no. 23. It got into force 1 July 2003, just fifty-two states have ratified the Convention. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

whereas when it comes to European freedoms such as the freedom of movement of citizens of the Union the Commission extends this consideration to those under 21 years of age or under the care of their parents.[62]

Furthermore, the Union has legislative powers in the field of immigration and asylum from third countries. In the case of migrant children, the cases covered by Community law refer to situations of long duration for reasons of work, asylum and subsidiary protection, as well as the situation of immigrants in an irregular situation. In addition to the abovementioned Article 24 of the Charter of Fundamental Rights of the Union, Articles 18 and 19 of the Charter regulate the right to asylum and protection in the event of refoulment, expulsion and extradition.[63]

Therefore, the normative framework for the protection of migrant children on Union territory pivots on the interaction between the Charter of Fundamental Rights, the European Convention on Human Rights and the Convention on the Rights of the Child; however, until the adoption of the Charter, the European legislator refrained from assigning any concrete value to the Convention on the Rights of the Child in matters of migration; however, since then, references in Union law and judgments have been constant.[64]

(2) Secondary european union legislation

(a) *Legal framework of the fundamental rights of migrant children in the European Union*

In Europe, several of the fundamental rights recognized by the Convention on the Rights of the Child fall within the competence of the Member states, but they do fall within the competence of the European Union's secondary legislation to guarantee that children can enjoy them without discrimination because of their migrant status. In many respects, current migrants from third countries benefit from the body of rules and judicial decisions rooted in the ECJ aimed at preventing discrimination between European citizens displaced within the territory of the Union. On the other hand, its current real effectiveness arises to a large extent from its concurrence, in the territory of the Member states, with the Charter of Fundamental Rights and the regulations arising within the Council of Europe.

Migrant children from third countries enjoy access to state-funded education under similar conditions to nationals, but are excluded from complementary assistance. In the case of access to education for children seeking international protection, it must be similar to that of nationals, but not identical, which means that, in many Member states, they receive education in migrant detention centres where, in addition, their normal beginning and development is disrupted by the conditions deriving from the asylum system. Nevertheless, the European Union has undermined the protection of migrants by

[62] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. Electronic text available here, accessed 25 July 2019.

[63] FRA, "*Handbook on European law relating to the rights of the child*" (European Union, Luxemburg, 2015) at 31. Electronic text available here, accessed 25 July 2019.

[64] Ibidem.

 DOI: 10.17103/sybil.23.4

obliging states to recognize and transfer qualifications obtained in their country of origin or countries in transit even in the absence of documentary evidence.[65]

With respect to the Right to Health, migrant children from third states have access to health in the territory of the European Union in terms similar to those enjoyed by nationals, but subject to limitations except when they are in a situation of special vulnerability or there is a risk to their lives. The European Social Charter, various pronouncements of the European Committee of Social Affairs[66] are the essential support for children's rights to social benefits and health services regardless of their migratory status.

Only an overall view — and not one focused exclusively on European Union legislation — can ensure their relative conformity with the General Comment on the rights of migrant children.

(b) *The Dublin System and its impact on migrant children*

In 2006, the Commission laid a foundation for promoting and protecting the rights of the child in its internal and external policies through its Communication "Towards an EU Strategy on the Rights of the Child". In 2007, the Communication "An EU Agenda for Children's Rights" was adopted, which affirmed the need to implement the "child rights perspective" in all EU measures affecting children, recognised the absence of reliable aggregate data on children — particularly unaccompanied children —, identified those who had been trafficked and sexually abused as particularly vulnerable, and recalled the mandate of the Charter of Fundamental Rights to the Commission on its duty to verify respect for recognised fundamental rights.[67]

In 2010, the European Parliament adopted the Communication from the Commission to the European Parliament and the Council on the Action Plan for Unaccompanied Children (2010-2014). The Plan sought to establish specific reception measures and procedural guarantees for children, applicable from the moment the child is located until a durable solution is found. At that time, the concern was to ensure adequate representation of the child in the proceedings, actions were proposed to address the failure of care provided to unaccompanied asylum-seeking children, as well as the adoption of measures to prevent the disappearance of unaccompanied children in the care of the public authorities of the states Parties.[68]

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does not explicitly protect the right to asylum, but the jurisprudence of the European Court of

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[65] Art. 8 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. L 337/9. Electronic text available here, accessed 25 July 2019.

[66] *ECSR Cases*: ECSR Decision Defence for Children International vs. Belgium, case no 69/2011, 23 October 2012. Electronic text available here, accessed 25 July 2019. See also ECSR Decision International Federation of Human Rights Leagues vs. France, case no 14/2003, 8 September 2004, at 35 – 37. Electronic text available here, accessed 25 July 2019.

[67] Commission Communication of 4 July 2006 - Towards an EU strategy on the rights of the child. COM(2006) 367 final. Electronic text available here, accessed 25 July 2019.

[68] European Parliament Com. 213 5 June 2010 Communication from the Commission to the European Parliament and the Council: Action plan on unaccompanied minors (2010 – 2014). SEC (2010)534. COM (2010)213 final. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

Human Rights[69] points to indirect protection for asylum seekers and refugees, imposing limitations on states' sovereign right to deny access to their territory.[70] These limits are determined in the application of Articles 2 and 3 of the ECHR in relation to the expulsion or extradition of a foreign person to a third country or between countries of the European Union.

Article 21 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection contained a taxable list of vulnerable persons among applicants for international protection, whose special situation must be assessed when determining the material conditions of reception by Member states.

This list includes, among others, "minors, unaccompanied minors, pregnant women, single parents with minor children, victims of trafficking in human beings". Articles 23, 24 and 25 specifically mention children and victims of torture and violence, implicitly placing them in a hierarchically superior position in comparison with other particularly vulnerable groups of applicants.[71]

The Common European Asylum System (CEAS), the aim of which is to ensure criteria common to all Member states and to ensure a minimum of benefits available to applicants and beneficiaries of international protection, has already introduced improvements in the second version of the Dublin System with regard to migrant children, such as: a) a revision of the concept of family members with priority consideration of the best interests of the child in legislative developments and measures to be implemented by countries; b) the incorporation of measures for the protection of unaccompanied minors through the adoption of formulas for representation and guardianship; (b) the incorporation of measures for the protection of unaccompanied minors through the adoption of formulas for representation and guardianship; (c) the obligation of states to guarantee the schooling of children and access to the health system from the moment they submitted their application; (d) it gave preference to procedures for family reunification when there are dependent minors; and, finally, (e) it required supervision by a legal representative of the child of the procedure in taking a decision on their application.[72]

Despite these improvements, on 26 August 2013, in the report on the Plan for Unaccompanied Minors, the Parliament found it "deplorable that the protection of minors is "significantly and persistently under-funded" compared to other areas of humanitarian action" and urged the Commission to include unaccompanied children in the European Asylum and Immigration Fund and, among other measures, considered it essential to introduce a coordinated method of data management at EU level by

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[69] Among others, *Mubilanzila Mayeka v. Belgium* ECHR No. 13178/03 12 October 2006 regarding to a five years old girl unaccompanied who was jailed with unknown women. Electronic text available here, accessed 25 July 2019; Khlaifia and others vs. Italy ECHR No. 16483/2012 6 December 2016. Electronic text available here, accessed 25 July 2019.

[70] ECHR, 'Asylum Court talks Human Rights Education for Legal Professionals", Council of Europe, 2016. Electronic text available here, accessed 25 July 2019.

[71] European Directive 2013/33/EU of the European Parliament and of the Council. Laying down standards for the reception of applicants for international protection. DOUE L 180/96, 26 June 2013. Electronic text available here, accessed 25 July 2019.

[72] Art. 6 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national L 50-1. 25/2/2003. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

strengthening the role of Frontex and Europol and by involving the European Migration Network.[73]

According to UNHCR, the biggest problem identified in the implementation of the Dublin II Regulation was the absence of common protection criteria in all Member states that are part of the system and divergences in national practices in informing applicants or assessing the vulnerability of individuals and their needs. For its part, the Grand Chamber of the ECJ recognised in a judgment on Joined Cases C-411/10 and C-493/10 that the fundamental rights of applicants for international protection were not guaranteed in all Member states, which prevented the automatic application of the Regulation.[74]

The third version of the Dublin Regulation[75] included improvements with respect to the previous system for migrant children, including its material extension to stateless children; the implementation of the principle of the best interests of the child in relation to the possibilities of family grouping, their well-being and their protection in cases of particular vulnerability; and the strengthening of family reunification in the hierarchy of criteria (Articles 7.3, 9 and 10) for the granting of international protection; provided for the creation of a standard form for the exchange of information on the family of unaccompanied minors; set up a family procedure in the event that several members of a family or unmarried minor siblings submit simultaneously, or at close dates, an application in the same Member state, bringing together the responsibility for examining the application of all of them to a single state; required a personal interview of the applicant[76] and the right to lodge a judicial appeal against the transfer decision with the right to free legal assistance and, where appropriate, the assistance of an interpreter[77]; finally, it requires applicants to be informed of the application of the Regulation, of the procedure for transfer of responsibility and of the transfer to another state, in writing and in their own language.[78]

Dublin III was thus shaped by the above-mentioned Regulation, by Regulation (EU) 603/2013 on the Eurodac system,[79] by Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013

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73 Motion for a European Parliament resolution on the situation of unaccompanied minors in the EU. 2012/2263(INI). 26 August 2013. Electronic text available here, accessed 25 July 2019.

74 ECLI:EU:C:2011:865. Electronic text available here, accessed 25 July 2019.

75 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. L180/31. DOUE 26.3.2013. Electronic text available here, accessed 25 July 2019.

76 Ibidem at Art. 5. Electronic text available here, accessed 25 July 2019.

77 Ibidem at Art. 27. Electronic text available here, accessed 25 July 2019.

78 Ibidem at Art. 4. Electronic text available here, accessed 25 July 2019.

79 Regulation (EU) no. 603/2013 of the European Parliament and of the Council on the establishment of EURODAC for the comparison of fingerprints for the effective application of regulation (EU) no. 604/2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person and on requests for the comparison with EURODAC data by member states' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) no. 1077/2011 establishing a European agency for the operational management of large-scale it systems in the area of freedom, security and justice. L 180/1. 29 June 2013. Electronic text available here, accessed 25 July 2019. The Database, common to all Member States and Norway, Switzerland and Iceland, serves to identify asylum seekers and irregular migrants crossing the border; With this, the authorities will determine whether they have already applied for asylum in another Member State.

 DOI: 10.17103/sybil.23.4

on common procedures for granting and withdrawing international protection ("Procedures Directive")[80] and by Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection ("Reception Directive").[81] To complete this reform, Regulation 118/2014 amending implementing Regulation (EC) No 1560/2003 was also adopted in 2014.[82]

In 2016, the European Commission published a report —echoing an earlier one published by the House of Lords—[83] in which it held that the conditions of reception of unaccompanied minors in several Member states amounted to systematic detention and that they failed to comply with obligations under EU and international law. In particular, it stressed the absence of minimum conditions in reception centres in several Member states; the lack of a unified system of age determination and the use of invasive systems; unequal access to legal advice, mental health care and unequal education services in the states of the Union; non-compliance with the obligations arising from the Reception Conditions Directive; non-compliance with the objectives set by the 2010-2014 Plan; lack of implementation of the provisions on family reunification and their impact on the increase in criminal activities of trafficking, sale and organised crime and the responsibility of states for several disappearances of migrant children. The report also denounced the merely formal incorporation into European and Member state law of the principle of the "best interests of the child" and its lack of application in many cases, including its perception as an obstacle to the effectiveness of migration policy. It was alarmed at the lack of external audits of state action and urged solidarity among members in sharing the burdens of childcare; it recognized the work of NGOs as benchmarks for the lack of real action by countries and the lack of support for local institutions from the Central Administrations of Member states;[84] finally, it stated that the right to family reunification is applied to a limited extent to migrant children in the states of the Union.

Shortly afterwards, the Comment on the state of implementation of the priority actions under the European Migration Agenda was adopted, the sixth annex of which refers to ongoing measures contributing to the protection of children in migration.[85]

This document sets out the measures, complementary to the Action Plan (2010-2014), which the European Union has implemented since then and which follows the following axes: a) Additional and

[80] European Directive 2013/32/EU of the European Parliament and of the Council On common procedures for granting and withdrawing international protection. 26 June 2013. L180/60. Electronic text available here, accessed 25 July 2019.

[81] Supra 72.

[82] Commission Implementing Regulation (EU) no 118/2014 Amending regulation (ec) no 1560/2003 laying down detailed rules for the application of council regulation (ec) no 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national. 30 January 2014. 8 February 2014 L39/1. Electronic text available here, accessed 25 July 2019.

[83] Authority of the House of Lords, 'Children in crisis: unaccompanied migrant children in the EU' 34 (*HL Paper, London 2016)* at 41 and 90 on. Electronic text available here, accessed 25 July 2019.

[84] Ibidem at 98. The report refers to the situation in the United Kingdom, however, affirms that the situation described occurs in most of the member state. Electronic text available here, accessed 25 July 2019.

[85] Communication from the Commission to the European Parliament, the European Council and the Council progress report on the implementation of the European Agenda on migration. COM(2016) 85 final 10/2/2016. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

specific funding to achieve the objective of protecting migrant children in the European Union; b) Multilateral management through financial support to international organizations, organizations and agencies related to child and migration competencies; c) Collaboration and financial support to third sector organizations for the care of migrant children; (e) Specific budget allocation to the Asylum, Migration and Integration Fund for the early identification and protection of child victims of human trafficking and unaccompanied minors at risk of trafficking; f) Promotion in civil society and the University of the rights of migrant children and the fight against sale and trafficking through the fund through Erasmus+ program; g) Development of Guidelines on the realization of the best interests of the child - including means for age determination and family tracing- by the European Immigrant Support Office; (i) Promote cross-border recognition of judicial decisions containing protective measures, including guardianship of unaccompanied and separated children through EURJUST; (j) Publication of guidelines and good practice guide on the application of rights to migrant children.[86]

In May and June 2016, the Commission published its proposal for the reform of the Dublin III Regulation.[87] As stated by the Institution itself, the reform aims to ensure a better balance between responsibility and solidarity between Member states, promoting equal conditions for all applicants to avoid secondary movements of migrants within the territory of the European Union. Some of the proposed amendments have an impact on migrant children:

- It supports the training and preparation of those responsible for assessing the application, the child's condition of special vulnerability, as well as the existence of signs in the child of having been trafficked, sold, tortured or exploited. Those responsible must know the rights of the child in accordance with the United Nations Convention, and have been prepared to determine the primacy of the best interests of the child in the specific processes they must resolve. In this sense, European legislation is in line with the provisions of the General Comment regarding the preparation of personnel responsible for the reception and management of migrant children.
- The methods applied in the countries of the Union for determining age vary significantly in nature and scope. There are several questionable aspects in the practice of each state, but one of the most controversial is the repetition of medical tests to which they must submit, especially applicants for international protection. The Commission proposes that medical tests for age determination, carried out in one Member state, should be binding on the other states; this proposal is in line with the Committee's position on the Comment on migrant children for the sake of reducing the number of medical tests to which they are subjected.

[86] Note that according to article 27 of the European Directive 2011/95/EU about Refugees recognition, refugee children who have acquired long-term residence rights can access education under the same conditions as nationals. Electronic text available here, accessed 25 July 2019.

[87] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member state responsible for examining an application for international protection lodged in one of the Member states by a third-country national or a stateless person. COM (2016) 270 final. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

- It is proposed that a maximum period of 5 days be set for the appointment of a legal guardian or representative within 10 days of the appointment of the guardian or representative to formalise the application in the best interests and welfare of the child. The maximum number of persons represented by the same person is not expressly determined, but the aim is to avoid a disproportionate number that would prevent the effective accompaniment of each child. In this sense, the reform directs what is established by the General Observation with regard to clear and transparent procedures for the migrant, but continues to rest the decision on a single instructor when the Observation requires a larger and more diverse number of professionals. The fact that representation can fall not only on a natural person but also on an organization raises doubts about the effectiveness of representation. However, it is established that the state that has appointed the child should also consider complaints lodged by the unaccompanied child in relation to his or her guardian.
- The reform proposal does not remove the application of the border procedure but is limited to situations where the unaccompanied child comes from an unsafe country, represents a danger to national security or public order, has misrepresented or omitted information to the authorities about his or her identity and circumstances, has submitted false or missing documentation, there are reasonable grounds to consider a third country as a safe country for the child. In this respect, the reform proposal is more demanding in relation to the obligation of the third state to ensure that it takes charge of the protection of the unaccompanied child.
- The Commission proposes an equalisation of rights and duties in the fields of employment, social security, education, health and integration programmes with European citizens, although these benefits would only be accessible once international protection has been recognised, but not to applicants. However, the Committee has stated unequivocally that a child's living conditions and rights cannot be linked to the migratory status of his or her parents: access to such programmes cannot, therefore, depend on the stage of the proceedings at which the migratory status of his or her parents is at.
- The proposal allows states the possibility of limiting the freedom of movement within the state of persons receiving specific social benefits under the asylum system. This calls into question Article 26 of the Geneva Convention, which guarantees the freedom of movement of refugees and expressly prohibits persons enjoying international protection from living in a state of the European Union other than the one that granted it. Such a limitation would not directly contravene the General Comment, but may jeopardize the enjoyment of other rights connected with free movement.
- Improvements are also proposed with regard to the transfer of unaccompanied children between member countries. The proposed amendment strengthens the right to information and an effective remedy and expressly provides that decisions on transfer of responsibility are made in writing and guaranteeing the suspensive effect of the remedies. However, it limits the possibility of recourse to situations where there is a risk of inhuman or degrading treatment in the country of destination, when transfer decisions are based on criteria of dependency on relatives or minors and when the transfer decision has not considered family criteria.

 DOI: 10.17103/sybil.23.4

For its part, in November 2017, the European Parliament reached a provisional agreement pending approval by the Plenary on a compromise text adopted in the Parliament's Committee on Civil Liberties, Justice and Home Affairs (hereinafter LIBE) on the proposed amendment.[88] The document was not adopted by Parliament's plenary session and is currently July 2019 still included in the so-called "outstanding issues". The report proposes substantial improvements from the perspective of the General Observation, among which the following should be noted:

- It indicates that the placement or confinement of children, whether or not accompanied by their families, is never in the best interests of the child and always constitutes a violation of the rights of the child and should therefore be prohibited.[89]
- It states unequivocally that in cases of transfer of a child to the responsible state, multidisciplinary assessment shall involve competent personnel specialized in the rights of the child and in child psychology and development, and shall also involve, at a minimum, the child's guardian and legal adviser.[90]
- It provides that officials and staff serving the National Authorities of Member states shall receive training in Child Rights, Child Psychology and Child Development. This training will also include modules on risk assessment focusing on care and protection according to the individual needs of the child, with special emphasis on early identification of victims of trafficking and abuse, as well as training on good practices to prevent disappearances.
- It constitutes separated minors as a distinct category of unaccompanied minors and proposes different specific attention for them.[91]

The new European Parliament emerging from the May 2019 elections must decide whether it wishes to resume adoption of the report adopted in LIBE; if so, it would be a good document for the trialogue with the Commission and the Council; however, the Council has not yet reached formal agreement on its own text. Until a common agreement is reached which satisfies all Member states at Council level, interinstitutional trialogue negotiations cannot begin.

The impossibility of approving the reform of the CEAS and Dublin III in the previous legislature is premonitory of the difficulties that the issue will encounter in the present legislature, especially because of the fierce negotiation demonstrated by the Visegrad Group. In this sense, separating the specific legislative development of the protection of migrant children from the regulation of migration and international protection in general could be a solution.

(c) *Assessment of proposals on migration management and their impact on migrant children*

In April 2017, the Communication from the Commission to the Council and the Parliament on the

[88] Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. (COM(2016)0270 C8-0173/2016 2016/0133(COD)). Electronic text available here, accessed 25 July 2019.

[89] Ibidem at Amendment 20. Electronic text available here, accessed 25 July 2019.

[90] Ibidem at Amendment 100. Electronic text available here, accessed 25 July 2019.

[91] Ibidem at Amendment 4. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

protection of migrant minors was adopted.[92] The Communication, while commending the efforts made by Member states, recognized that the sharp and sudden increase in the number of migrant child arrivals had put pressure on national systems and administrations and revealed gaps and deficiencies in the protection of all categories of migrant children.

The objective was to propose a series of coordinated and effective measures to respond to the urgent gaps in the protection of minors and the needs they face once they arrive in Europe, ranging from identification, reception or the application of procedural safeguards to the implementation of durable solutions; to progress towards a comprehensive EU approach to migration management; and to ensure the effective protection of migrant minors with a view to strengthening cross-border cooperation.

A perspective is evident in the approach from migration management focused on the arrival of children seeking international protection towards a broader approach that includes irregular migration for economic reasons that seeks to protect children on a global scale, including in countries of origin and transit. It addresses several of the issues mentioned in the General Comment on the rights of migrant children. These include:

- The importance of registering all migrant children by taking steps to develop civil registration services in partner countries and on European territory;
- The need to strengthen the protection of migrant children during migration routes through cross-border cooperation and development cooperation;
- The adoption of a non-intrusive data collection system for children and the application of child-friendly and gender-sensitive approaches to the collection of fingerprints and biometric data. When the results are inconclusive, the person is presumed to be a minor, being given the benefit of the doubt in line with EU legislation. However, it does not welcome the ultimate spirit of the General Comment which indicates that an age determination procedure should only be used as a last resort: this means that they have to start with an interview and that the identity documents that they provide (passports, birth certificates, consultation registration certificates, etc.) are always considered valid, unless there is proof to the contrary;
- The negative impact of detention on minors is recognized and the search for alternative systems is encouraged; however, this is not prohibited, but is limited to exceptional circumstances, when strictly necessary, only as a last resort, for the shortest possible period of time and in no case in prison facilities;
- The establishment of effective monitoring systems at national level is promoted and should also contribute to the good functioning of reception centres, ensuring that commercial interests (in the case of centres run for profit) do not prevail over the protection of minors. However, the independent nature of the supervisory systems proposed in the General Comment is not envisaged;
- It stresses the importance of formal education being received irrespective of their status or that of their parents, and of it being effective and allowing them, in accordance with the rules in force in each state, official recognition of the studies carried out and the continuity of their training, although children will

[92] Communication from the Commission to the European Parliament and the Council The protection of children in migration SWD (2017) 129 final. COM (2017) 211 final. Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

have access to education, "depending on the length of their stay". On the other hand, it also makes no reference to the separation between units of the administration responsible for the provision of services and units dedicated to the implementation of the migration control policy requested by the Committee in the General Comment;

- Early and effective access to inclusive formal education is promoted, and the training of teachers to prepare them to work with children from diverse backgrounds is a key factor for integration. However, no mention is made of the need to introduce specific aspects into school curricula on migration flows and the rights of migrants, an issue advocated by the General Comment; however, it should be recalled that the EU has no competence to determine either the content or the scope of national educational provisions.
- It promotes family tracing and reunification/family unit procedures by requiring states to make full use of cooperation channels through the central authorities provided for in the Brussels II bis Regulation on parental responsibility and the creation of a European guardianship network. It should be remembered that, according to the ECHR, the family is the natural environment for the growth and well-being of a child. However, if a family cannot provide adequate care and protection it may be necessary to move to an alternative care environment. This separation interferes with respect for family life and therefore the alternative care regime can only be a temporary measure and that the child should ultimately be reunited with his/her family in compliance with Article 8 of the ECHR.[93] In this respect, it should be recalled that the EU must apply the case law of the Court when it states - in Olsson v Sweden - that children are placed in foster care, they retain their right to maintain contact with their parents so that the child can be effectively reintegrated into their family.[94]
- Decisions to return children to their countries of origin must respect the principles of non-refoulment and the best interests of the child; they must be based on case-by-case assessments and follow a fair and effective procedure guaranteeing their right to protection and non-discrimination. Priority should be given to better cooperation with countries of origin through, inter alia, improved family tracing and reintegration conditions.

Owning to the change in the migration scenario -from a fundamentally refugee crisis between 2013 and 2016 to the current migration crisis unparalleled since the Second World War- and with strong political tension in some of its Member states over speeches calling for absolute border control and the criminalisation of irregular migration, the European Union is once again immersed in a complex situation. The anti-European discourse of some governments in the south — and the fear that it will spread to other states — has led to a greater willingness on the part of the countries in the north of the Union to respond to the Commission's requests for cooperation. Perhaps, this has facilitated the resettlement of migrant children arriving in Greece and Italy[95] but, on the contrary, it has increased the stigmatisation of the

[93] KA v. Finland, ECHR (2003) Series A No. 27751/95. Electronic text available here, accessed 25 July 2019.

[94] Olsson v. Sweden, ECHR (1988) Series A No. 10465/83. Electronic text available here, accessed 25 July 2019; also, Eriksson v. Suecia, ECHR No. 11373/85. Electronic text available here, accessed 25 July 2019.

[95] The statistics of the European Commission in April 2019 seem to strive to show the work of the European States to alleviate the migratory pressure in Italy and Greece: The data reflects that more than 34% of the resettlements of

 DOI: 10.17103/sybil.23.4

migratory phenomenon.

Migration remains a problem for the European Union, although it has decreased in the last year. Irregular migrants continue to cross the external and internal borders of European countries. It is paradoxical to observe that while national governments of state members continue, for the most part, to manage the situation autonomously under their own standards and particular interest, the media hold the European Union responsible for the lack of adequate response.

While there is no progress on reform agreements, European leaders are exploring parallel solutions such as the one adopted at the June 2018 European Council when it was proposed to create regional controlled centres and landing platforms in third countries for migrants rescued in naval operations.[96]

Of course, it is premature to analyse the conclusion of the European Council, which is not very specific, but it is possible to highlight some elements in relation to the rights of migrant children:

- It should be stressed that the Council Conclusions document does not include any reference to migrant children but clearly the initiative to get ahead would affect them;
- The aim of the proposal is framed within migration reduction strategies by seeking to reduce the motivation of migrants and therefore their exposure to the risk of crossing -which would have very positive effects in the case of unaccompanied minor- and to favour "a fast and safe processing" of migrants' applications, which should benefit refugee children and applicants for international protection;
- In principle, European Union law does not prevent the establishment of controlled centres on its territory unless it affects the inalienable sphere of private life and fundamental rights and freedoms; however, it is clear that there is a high risk of segregation and stigmatisation which would be contrary to the Convention on the Rights of the Child;
- The usefulness of the measure with regard to migrants already in the territory of a Member state is questionable, since the transfer to such a centre could only take place on a voluntary basis, since their detention and transfer is not admissible simply because they are migrants. In the case of children, it would only be admissible if the transfer presents advantages from the perspective of their superior interest and it would be questionable -little aesthetic, at best- if the advantage argued was family reunification in the centre;
- With regard to the transfer of rescued persons to landing platforms within the European Union, European legislation on asylum and international protection is fully applicable to them. With regard to children, the question does not differ from what has been said for controlled centres: it is worth asking whether these facilities will be able to receive all the means necessary to meet their needs. Pending the final design of these platforms, their compatibility with the right not to be held against their will simply because they are migrants is questionable;
- With regard to the installation of landing platforms for migrants outside European territory is important to remark its connection with a new European Union naval operation "for research and

unaccompanied children came from these countries. Electronic text available here, accessed 25 July 2019.

[96] European Council Conclusion (28 June 2018). Electronic text available here, accessed 25 July 2019.

 DOI: 10.17103/sybil.23.4

rescue" in accordance with the new rules that would be adopted in the next years. Considering that European Council would be proposing the creation of disembarkation platforms and controlled centres in relation to migrants rescued in the context of search and rescue at sea operations (hereinafter, SAR), the International Law of the Sea will be applicable.[97] In this situation the key question would be to determine the place where the rescue of migrants took place:

(i) Migrants rescued in the territorial waters of third states are not under the control and jurisdiction of the Member states of the Union and, therefore, are not subject to European Union asylum law, but are subject to the law of the responsible third state.[98] However, the principle of *non-refoulement* would prevent people from disembarking in a country where they could suffer inhuman and degrading treatment. In any case, given that people are disembarked by the European Union, all platforms should comply with the guarantees contained in the Convention on Refugees and the European Convention on Human Rights. In the other hand, if the disembarking is not possible, the migrant children must remain under protection of the European Union or the state pavilion until their finally distribution by agreement between the member states or relocated in a third safe country. The disembarking cannot forget the principles of best interest of the child and the further family reunification.

(ii) Migrants rescued at high sea are not subject to European Union law unless they have been rescued by state vessels flying the flag of a Member state or shipping under European Union international civil or military operation. Thus, in legal certainty, they could be transferred to platforms located both inside and outside European territory, as long as these were considered safe by the Union.

(iii) Migrants rescued within the territorial waters of the Union -that is to say, in its territorial sea or contiguous zone by state vessels of Member states- cannot be sent to platforms outside the European Union without first having access to asylum procedures in the European Union and

[97] The United Nations Convention of the Law of the Sea codified the longstanding tradition in the customary International law of the sea of duty of rescue people in distress (Article 98 UNCLOS 1982. Electronic text available here, accessed 23 July 2019). In 1989, Article 10 of the Convention on Salvage stablished that Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea (Convention on Salvage of 1989 Electronic text available here, accessed 23 July 2019). The article also, prevent that states parties shall adopt the measures necessary to enforce that duty by the vessels under its pavilion. The duty to provide assistance encompasses asylum-seekers and refugees, as it applies in all maritime zones and to every person in distress without discrimination. However, the specific legal framework governing rescue at sea does not apply to interception operations that have no search and rescue component. The obligation to provide assistance is provided for in the 1974 International Convention for the Safety of Life at Sea (hereafter, SOLAS). According to Regulation 33(1) of Chapter V the master of a ship at sea in the position to assist persons in distress is bound to proceed to their assistance. The Governments of states parties are responsible for ensuring that necessary arrangements are made for distress communication and co-ordination in their area of responsibility and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the setting up, operation and maintenance of SAR facilities. In 2004, the amendment of SOLAS included additional obligations upon states parties to cooperate in order to ensure that ships' masters are allowed to disembark rescued persons at a place of safety, irrespective of the nationality or status of those rescued.

[98] Any agreement that the European Union reaches with a third State for the landing of migrants must respect International Human Rights Law.

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knowing the full outcome of their application for international protection. Failure to do so would be tantamount to a hot return.

If the proposal goes ahead, migrants would be located in these spaces in standby until the final decision about their entry in the territory of the Union: either through a positive assessment of their application for asylum, for international protection or until they obtain a work permit; the rest would remain there until they are returned to their states of origin. Undoubtedly, the European Union would be responsible for ensuring that throughout the asylum procedure the guarantees set out in the Convention on the Rights of the Child and in the General Comment on migrant children (i.e. the right to be heard, to have a guardian, consideration of the best interests of the child, etc.) as well as the obligation to provide the basic services due to them (education, health, family life, personal development, etc.) are complied with.

It seems a complex solution in operational terms whose failure could lead to objective international responsibility on the part of the European Union. On the other hand, the option of outsourcing the management of such centers and platforms through third States or International Organizations seems a possibility but would not elude the European Union from a possible responsibility *in vigilando* for any violation of human rights.

This is a legally complex operation that involves risks from a technical and media point of view – a sensitive issue considering the reduced social credit in the Union on this issue –; however, the European Union would be more autonomous and would obtain the not inconsiderable advantage of no longer being subordinated to the action of states – and punctual political party interest- in the implementation of migration policy.

(E) CONCLUSIONS

Migration has been one of the major concerns of the international community since 1970; since then it has alternated between successes -primarily in relation to the rights granted to migrants- and major failures in the anticipation and control of migratory flows and trafficking. For the last 20 years, migration has been at the heart of studies and the international agenda. The recent negotiations to promote a Global Compact for safe, regular and stable migration have not received the support of the main receiving states. The evolution of the number of migrants and the countries of origin and destination of migrations seems to bring the multilateral negotiations to a structural antagonism.

International organizations and NGOs in the migration sector have long warned about the drama of children facing migration, especially if it is not done safely.

In 2017, after describing the current state of migratory flows as a humanitarian catastrophe for children, the Committee on the Rights of the Child agreed to elaborate, with the Committee on Migrant Workers, General Comment 22 and 23 on the rights of the child in the context of international migration. Both General Comments do not create new rights, but concretise the rights set out in the Convention on the Rights of the Child in the context of international migration.

The arrival of migrants on the territory of the European Union is not recent; however, a combination

of various factors has led to a remarkable increase in the volume of arrivals since 2011. The increase in immigration coupled with economic difficulties has exacerbated the anti-immigration discourse in several Member states.

The European Union is responsible for migration and asylum. In recent years it has developed its action on migrant children, particularly unaccompanied migrant children: it has established action plans, adapted the asylum reception system and improved the standards for the treatment of children by states at the Union's external borders. However, the reports are critical of the results achieved and, reform after reform, it is emphasised that essential issues such as the best interests' principle have been accepted only for formal purposes.

Reports show that the treatment of migrant children is unequal depending on the member country in which they are found, and that there is a need for external and independent verifiers to audit state performance.

It is paradoxical to observe that while states do not fulfil their commitments of solidarity in the distribution of migrants, it is the European Union that takes the lion's share of the criticism.

Despite the criticism regarding the hidden motives of the legislative reforms in the area of migration, the fact is that the Commission has made a significant effort to improve legislation on the protection of migrant children, and particularly in the case of unaccompanied minors. The conversion of the European Asylum Support Office (EASO), which will become the European Union Asylum Agency and the extension of its mandate, seems to open the way for the verification of Member states' compliance with their obligations under Union law.

This effort does not imply that European legislation and the actions of its Member states are in accordance with the General Observation on the rights of the child in the context of international migration. The European Union has abstained from introducing some issues of focus: on the one hand, the separation between units of the administration dedicated to the provision of basic services and those dedicated to the execution of migration policy; on the other hand, the Union is unable to obtain from its Member states a common position on the degree of openness in migration policies under the premise that, those especially repressive, may constitute violations of human rights within the framework of International Law and the European Union's own Law.

While the tension between Member states increases and in the absence of an agreement for the approval of the Dublin IV Regulation, internal political tensions and the advent of governments that openly postulate against immigration have led the European Council to look for alternative measures for migration management through the establishment of controlled centres and platforms for the disembarkation of migrants in third states. So far its formulation warns of a lack of focus on the rights of migrant children.

The absence of available information does not allow for detailed analysis. Valued the disincentive effect on migrants and its impact on the number of victims the implementation of the measure raises doubts about its compatibility with the Convention on the Rights of the Child and its General Comment on the rights of the child in the context of international migration. On the other hand, the extension of the stay in

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the centres and disembarkation platforms could lead to a progressive invisibility of migrant children; undoubtedly the greatest damage to this particularly vulnerable group and a step back in the compliance with International Law of Human Rights.

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Human Rights Committees: Their nature and legal relevance in Spain

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Abstract: This article analyses the state of the enforcement mechanisms of human rights treaties, frequently constituted as "committees", evaluating the effectiveness of their resolutions and their incidence in Spain. In particular, a more in-depth examination of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee for the Elimination of Discrimination against Women (CEDAW Committee) will be carried out.

Keywords: Human rights Committees Treaties Spain Rule of Law

(A) INTRODUCTION

Recent reports from the human rights committees have referred to Spain in relation to issues such as gender-based violence, access to housing, expulsion of immigrants and historical memory. These issues are highly topical and come into conflict with respect for basic human rights and people's dignity. It is therefore necessary to examine closely the nature and relevance of these bodies, which must be understood not only within the area of international but also of national law, which is where they have effect.

There are surprisingly a small number of studies regarding human rights treaty-based bodies and the effectiveness of its resolutions in domestic law. Nevertheless, Human Rights Committees recent jurisprudence is of special interest in the study of the development of International Human Rights Law.

The monitoring system of human rights treaty-based bodies, frequently constituted as "committees", will be analysed below. Originating as quasi-jurisdictional monitoring tools, these committees nonetheless play a highly relevant role in the protection of fundamental rights in most States that make up the international community. After setting out the system of the current treaty bodies, it will be necessary to pronounce on the effectiveness of the decisions issued by those bodies by highlighting the rule of law, which has its correlate in both national and international legal systems. Understanding of these instruments by States' national courts is necessary and urgent, since dialogue between courts at both levels is essential to guarantee the protection of fundamental rights.

It should be noted that the research will focus on three of these bodies: the Human Rights Committee (monitoring body of the International Covenant on Civil and Political Rights, ICCPR, 1996), the Committee on Economic, Social and Cultural Rights (monitoring body of the International Covenant on Economic, Social and Cultural Rights, ICESCR, 1996) and the Committee on the Elimination of

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Discrimination Against Women (body overseeing the Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW, 1979).

These treaty-based bodies (and not others) have been chosen for a well-founded reason: the important work carried out by these committees in the interpretation of violations of fundamental rights has been widely recognised. The Human Rights Committee plays a central role, given the absence of a universal international human rights court and the limitations of the Human Rights Council. Its interpretative and monitoring functions are ineluctable in the international community. It is, actually, controlling the most widely ratified human rights treaty: International Covenant on Civil and Political Rights (ICCPR).

The Committee on Economic, Social and Cultural Rights is the monitoring body of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and its recommendations and reports are highly topical and important, especially when considering its two rulings against Spain. An analysis of this Committee entails an analysis of the monitoring bodies of the 1966 International Covenants, which leads to a more comprehensive insight into the concept of human rights and their different dimensions. Furthermore, gender-based discrimination is one of the most common violations of human rights around the world, being widespread in all regions although varying in scale. Supreme Court Judgment 1263/2018, which ordered Spain to accept the application of the CEDAW Committee ruling in *González Carreño v Spain*, is highly relevant, and thus cannot be omitted from this analysis.

Furthermore, it will be analysed the differences among the human rights mechanisms in the International Community to figuring out what is the substantive nature of the Human Rights Committees and to what extend that may affect to the effectiveness and legal relevance of its pronouncements.

(B) MONITORING SYSTEM OF HUMAN RIGHTS BASED-BODIES

People's legal capacity and capacity to act in international law have traditionally been undermined by the exorbitant subjectivity of the States in the international community. It emerged with the sole (although not always feasible) aim of regulating interstate relations. This primary and principal subjectivity of the States is still the maximum expression of the essence of international law. However, after the two world wars of the 20th century, a new and progressively communal concept materialized[1]. Following the phenomenon of international organisations (nowadays at its culmination) and, particularly, after the process of humanization of international law[2], the order of things has tended to counteract the State's position,

[1] A. J. Rodríguez Carrión, *Lecciones de Derecho Internacional Público,* (Tecnos, 2006), at 75.

[2] The so-called "process of humanization of international law" was the means which enabled the shift of focus and the transformation of international public law into a regulatory corpus much closer to society. As Cançado Trindade states, "the recognition of the centrality of human rights corresponds to a new ethos of our times. Such process of humanization manifests itself, in my view, as I have been sustaining for years, in all domains of the discipline: the foundations of international law, its subjects, its new conceptual constructions, the basic considerations of humanity permeating on all its chapter, and the quest for the international rule of law for the realization of justice and maintenance of peace. Such process, in turn, discloses the new jus gentium of our times. The International Law for humankind" (A. A. Cançado Trindade, 'International Law for Humankind: Towards a New Jus Gentium', 317 *R. des Cours*, (2005) 336, at 271). These obligations extend to compliance with international human rights law in all its manifestations.

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qualifying its place within the international community and making certain room for other institutions with legal capacity, albeit in a limited fashion. In this regard, and within the process of humanization of international law, international human rights law may be the most decisive instrument for structuring the relationship between two very different subjects of international law: States and people. If to that duo we add the international organisations, particularly the United Nations and its fundamental role in developing these rights, the equation results in an international community that imposes restrictions on States with regard to respect for human rights of their citizens through different kinds of norms.

The *Charter of the United Nations* was the first step towards a heterogeneous system constructed through this process whose importance, as Carrillo Slacedo points out, lies in the imposition of legal obligations in the field of human rights on both States and the United Nations organisation itself[3]. The different nature of the human rights provisions (convention-based, custom-based and institutional)[4] shows the importance acquired by this branch of international law despite its youthfulness, given that it started to emerge in the aftermath of the Second World War, a period crucial to the matter at hand. At the same time, it is indicative of the fragmentation and complexity involved in articulating its effectiveness in the international community, as well as in States' national legal systems.

In any event, the spearhead of human rights in international law has been the development of the conventions. The Universal Declaration of Human Rights (1948) was the first text to include these rights at an international, general and universal level. However, the first general convention on human rights was adopted at a regional level: the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The International Covenants of 1966, at a universal level, and the American Convention on Human Rights of 1969 complete a series of international instruments that form the fundamental and fairly homogeneous core of the ever-expanding list of general human rights.

A short while later, human rights treaties started to address certain groups considered to be particularly exposed, giving rise to specific (in contrast to general) human rights. Thus, the broad development experienced by this branch of international law has allowed the provisions of the conventions adopted to be not only of a general nature but also to address groups that suffer from a particular form of discrimination that affects them specifically, through the use of conventional instruments to protect specific rights, depending on the focus of attention at the time.[5] The beneficiaries of these rights are limited to members of the group. This type of treaty includes the Convention on the Elimination of Racial Discrimination (1965), the Convention on the Elimination of all Forms of Discrimination Against Women (1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989), the International Convention on the

3 J. A. Carrillo Salcedo, *Soberanía del Estado y Derechos Humanos en el Derecho Internacional Contemporáneo,* (Tecnos, 2001, Madrid) 186, at 39.

4 C. Fernández Casadevante Romaní, 'La práctica española relativa a los órganos internacionales de control de los derechos humanos: un estudio introductorio', in C. De Casadevante Romaní (ed.), *España y los órganos internacionales de control en materia de Derechos Humanos* (Dilex, 2010) 17-49, at 17.

5 C. Jiménez Sánchez, 'Los Derechos Humanos de las mujeres en Europa y Latinoamérica: perspectiva jurisprudencial internacional', 40 *ARAUCARIA* (2018) 483-510 [doi: 10.12795/araucaria.2018.i40.22].

Protection of the Rights of All Migrant Workers and Members of Their Families (1990) and the Convention on the Rights of Persons with Disabilities (2006).

Due to the importance of the subject matter of these treaties, all international human rights conventions have a monitoring instrument, the purpose of which is to oversee compliance with the treaty provisions by signatory States. These instruments are no more than bodies created under the treaty itself and which are given certain specific competences, whether in the text itself or in an additional protocol. These human rights treaty bodies are established as independent expert committees (although their members are from the States party) and their basic competence involves the obligation of States to present regular reports regarding compliance with the convention provisions. In co-operation with agents in civil society, the body is commissioned with examining and replying to those reports, recommending guidelines for the State. As Casadevante Romaní puts it, "despite the apparent weakness of this monitoring technique in view of the fact that the State is the author of the report, it is worth highlighting that clearly it has its relevance due to the public release and discussion of the report, and the legal effects of the observations and recommendations made."[6]

Furthermore, human rights treaty bodies can deploy two other notable competences: interstate complaints and individual complaints.[7] While interstate complaints have not been well received by States,[8] individual complaints have brought about a change in the level of protection of human rights offered by the committees. Their constitution as international quasi-jurisdictional last instance bodies to which individuals may appeal amplifies the legal personality of the individual in the international community, and broadens the obligations of the State to comply with the international human rights treaties to which it is party, as analysed below.

(C) NATIONAL AND INTERNATIONAL RULE OF LAW

The rule of law is a general principle whereby the State is bound to comply with the obligations that it has contracted. It is considered to be a core value in every state at national and international levels, and is the basis on which rights inherent to people should be protected. In the words of the Secretary-General of the United Nations, it is "a principle of governance by which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."[9] This "principle of governance" entails the independent application of international human

6 C. Fernández Casadevante Romaní, 'La práctica española...', *supra n.* 4, at 19.

7 Furthermore, some bodies have less common competences, such as the visits system established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the confidential investigation included in several human rights instruments, such as the Optional Protocol to the CEDAW.

8 K. M. Smith, *International Human Rights,* (Oxford University Press, 2017), 472.

9 Report of the Secretary General on the rule of law and transitional justice in societies that suffer or have suffered from conflicts, UN Doc. S/004/616.

rights norms, and guarantees that the state acts through channels consistent with the other principles of justice such as supremacy of the law, separation of powers or, in a more direct way, legality.

The human rights treaty bodies are convention-based mechanisms that play an essential role in the development of international law and human rights by protecting people from serious atrocities perpetrated under the halo of state sovereignty. In this regard, it has been widely considered that observations, recommendations and even decisions of the human rights committees do not have legally binding effects on the state. However, it must be considered that a state's subjection to the rule of law stems precisely from the obligations assumed by that state within the framework of consensus and willingness governing the international community. In the Spanish Constitution, the rule of law is clearly set out in article 1.1, which must be read in conjunction with articles 9.2 and 9.3. In addition, article 10.2 establishes that state bodies must interpret the provisions in accordance with the international treaties,[10] and the task of the human rights committees is to offer a legitimate interpretation of the treaties,[11] as they are the bodies that oversee respect for the treaties in the practices of the state.

The peculiar structure of international law makes it inevitable that the principle of good faith (which is a general principle of law) is at the centre of this issue,[12] although that does not prevent the obligatory nature of good faith from being denied. Good faith is enshrined in the Preamble to the Charter of the United Nations and is one of the guiding principles in Resolution 2625 (XXV), and also in customary international law, and it must apply to all the provisions of international law. Likewise, the *pacta sunt servanda* principle plays a pre-eminent role in treaty-based international law by reinforcing the principle of good faith.

The *Declaration of the High-level Meeting of the General Assembly on the rule of law at the national and international level* reaffirms that commitment to the rule of law must guide the activities of States and give legitimacy to their actions. In addition, the importance of the issue is highlighted by reaffirming that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and they belong to the universal and indivisible core values and principles of the United Nations."[13]

Further, it must be taken into consideration that in a single-tier (moderate) system, as found in Spain and most European countries, the unity of the legal system is undeniable, and state compliance with international rules is an obligation under the national legal system.[14] International provisions that bind Spain become part of the national legal system once published in the Spanish Official State Journal, with no further action being required. Thus, the international legal system is an unequivocal part of the national legal system[15] and, therefore, it must be stated categorically that the decisions, recommend-dations and

[10] A. H. Catalá i Bas, 'Diálogo entre tribunales y creación de un sistema de protección de derechos humanos en red', 28 *Revista Europea de Derechos Fundamentales* (2016) 13-47.

[11] A. García, *La interpretación de la Constitución*, (Centro de Estudios Constitucionales, Madrid, 1984), at 400.

[12] H. Valencia Restrepo, 'La definición de los principios en el Derecho Internacional Contemporáneo', *36 Revista Facultad de Derecho y Ciencias Políticas*, (2007), 69-124.

[13] *Declaración de la reunión de alto nivel de la Asamblea General sobre el estado de derecho en los planos nacional e internacional*, 24 September 2012, A/RES/67/1.

[14] P. Niken, 'El Derecho Internacional de los Derechos Humanos en el derecho interno', *56 Revista IIDH*, (2012), 11-68.

[15] C. Fernández Casadevante Romaní, *La interpretación de las normas internacionales*, (Aranzadi, Pamplona, 1996).

observations of the human rights committees of the treaties ratified by Spain are of a binding nature. Although different degrees of *self-enforcement* of international rules can exist,[16] that fact is not a ground to refuse to respect the rules. As stated in article 29 of the Spanish Act on Treaties and other International Agreements (Ley de Tratados y Otros Acuerdos Internacionales) "All the authorities, bodies and institutions of the state must respect the obligations of the international treaties in force to which Spain is a party and ensure adequate compliance with those treaties"[17]. Further, article 30 of that Act underscores that the treaties prevail over other infra-constitutional provisions, which is reaffirmed in articles 95 and 96 of the Spanish Constitution.

The binding nature of the international rules requires a conjoint approach to the rule of law at national and international levels, and failing to connect the two when analysing them is to stray from the constitutional order itself.

(D) ACCEPTANCE OF THE COMMITTEES' COMPETENCE BY SPAIN

Spain, therefore, is bound by the treaties it has signed and non-compliance with their provisions is in contravention to the rule of law. The development of international human rights law over the last 60 years has been remarkable and the States of the international community have agreed to consider its central role in international law. However, the problem persists when observing the varying degrees to which States agree to comply with the provisions of human rights treaties, despite the high number of ratifications of the majority. At times this is behind the low degree of compliance with their provisions, when also considering the mechanism of flexibility of reservations.[18] It is true that the effectiveness of this branch of international law is its biggest weakness. Nonetheless, the lack of effectiveness is not as high as often claimed and the degree of state compliance with human rights treaties and their monitoring bodies is comparable to that in national law. In fact, more than 80% of judgments of the European Court of Human Rights are respected by the States involved, and the decisions of the human rights committees have led to dozens of legislative amendments in many jurisdictions.

Spain has ratified all but one of the 18 treaties on human rights (adding conventions and protocols), the exception being the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. This convention imposes rights which for European States involved a costly dispute with border controls and the management of migration. Therefore, the majority of them have not signed or ratified it, and it is the main human rights treaty with the fewest States party to it (54).[19] The Convention established the Committee on the Protection of the Rights of Migrant Workers and Members of their Families (CMW), to whose control Spain is not subject.

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[16] X. González de Rivera I Serra, 'Conversaciones entre la norma internacional y la norma interna: la aplicación por los órganos judiciales", *5 Revista jurídica de Derechos Sociales,* (2015) 260-291.

[17] Act 25/2014 on Treaties and other International Agreements, BOE No. 288, 28 November 2014.

[18] JR. Dw Hill, 'Avoiding obligation: Reservations to Human Rights Treaties', *60 Journal of Conflict Resolution,* (2015) 1129-1158 [https://doi.org/10.1177/0022002714567947].

[19] There are other accompanying texts such as the *Optional Protocol to the International Covenant on Economic, Social*

Spain is bound by eight human rights committees at the universal level:

(1) As regards the Human Rights Committee, the monitoring body of the *International Covenant on Civil and Political Rights*, Spain ratified the treaty in 1977, thereby accepting the creation of the Committee. Likewise, in 1985 it ratified the Optional Protocol, by which individual communications were added as a monitoring technique of the Committee. Thus, Spain is subject not only to the articles of the Covenant, which entails changing national law where necessary, but also to the decisions of this treaty-monitoring body. In this regard, article 1 of the Optional Protocol establishes that a state party to the Covenant that becomes a party to the Protocol recognises the competence of the Committee to receive and consider communications from individuals. However, pursuant to the reservation made by Spain, it is a body subsidiary to other international jurisdictions such as the ECHR:

> "The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, on the understanding that the provisions of article 5, paragraph 2, of that Protocol mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement".

(2) In 1984 Spain ratified the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW, 1979), which, together with the Optional Protocol ratified in 2001, extends the competences of the Committee to individual communications. At article 8, the Protocol also establishes a confidential investigation inquiry which can be initiated when there are grave or systematic violations by a state party. In addition, under the Protocol, at the time of signing or ratification the state may declare that it does not recognise the power of the Committee to undertake the above-mentioned confidential investigation, a declaration not made by Spain.

(3) A different case is that of the second International Covenant on Economic, Social and Cultural Rights, the adoption of which reflected the qualitative and quantitative changes experienced by the United Nations during the 1960s. In this case, the monitoring body was not created within the treaty, but rather afterwards by Resolution 1985/17 of the United Nations Economic and Social Council (ECOSOC), with the objective of monitoring the functions of this body and not the activities of States regarding the articles of the Covenant. However, it was in 2008, through the adoption of the Optional Protocol, that the Committee's competences came to include the classic trio: reports, interstate complaints and individual complaints. It also establishes the technique of confidential investigation. Spain ratified the Protocol in 2013.

(4) The Convention against Torture, ratified by Spain in 1987, establishes the Committee's competences as being the presentation of reports and the mechanisms for interstate and individual complaints. However, the Optional Protocol to this Convention, ratified by Spain in 2006, extends the competences of the Committee to include regular visits to detention centres by way of a subcommittee on prevention, a monitoring technique shared with the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1987).

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and Cultural Rights (24) and *the Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (40 ratifications) with fewer States parties, but they are not texts establishing catalogues of rights.

 DOI: 10.17103/sybil.23.5

(5) As for the *Convention on the Elimination of Racial Discrimination*, ratified by Spain in 1969, on 13 January 1988 the state made the following declaration establishing procedural limitations on the Committee's actions:

> "The Government of Spain recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Spain claiming to be victims of violations by the Spanish State of any of the rights set forth in that Convention.
> "Such competence shall be accepted only after appeals to national jurisdiction bodies have been exhausted, and it must be exercised within three months following the date of the final judicial decision".

(6) In the case of the Committee on the Rights of the Child, it must be emphasised that its competence is imposed in the *Convention on the Rights of the Child* itself, and there can be no voluntary acceptance of that competence[20]. Ratified by Spain in 1990, it is the human rights treaty with the highest number of ratifications (196).

(7) Other committees whose competence Spain has accepted are the Committee on the Rights of People with Disabilities (through ratification of the Optional Protocol to the Convention in 2007); and

(8) the Committee against enforced disappearance, established by the *International Convention for the Protection of All Persons from Enforced Disappearance* and ratified by Spain in 2009. Article 30 of the Convention establishes the competence of this body to examine individual communications submitted by relatives of a disappeared person.

(E) THE HUMAN RIGHTS COMMITTEE AND SPAIN'S IRREGULAR COMMITMENT

The International Covenant on Civil and Political Rights proclaims basic and classic human rights by including, for the first time in a binding text, a universal and general catalogue, and it is one of the most recognised and renowned instruments in the international community. Its impact in Europe is highly relevant, since all the European States are parties to the Covenant and all but two, the United Kingdom and Switzerland,[21] are parties to the Optional Protocol. Many party States have been the subject of adverse decisions of the Human Rights Committee.

It is clear that there is a gradation of the rights included in the Covenant, which affects their direct effect, where it is declared that it is automatically applicable without further implementing measures being necessary for some of its provisions, for example, the prohibition of torture or slavery,[22] but not others[23], which suffer from a certain lack of precision. This lack of clarity must be related to the large number of signatory States, and to the need for generalisation on some issues that in different legal systems must be

[20] C. Fernández Casadevante Romaní, 'La práctica española... *supra n. 4*, at 25.

[21] Th status of ratifications of Human Rights Treaties is available electronically at: http://indicators.ohchr.org.

[22] C. Rodríguez Rubio, 'La eficacia de las resoluciones del Comité de Derechos Humanos', in A. Cuerda Ruezu (ed), *Las tensiones entre la criminalidad internacional y las garantías propias de un Estado de Derecho en un mundo globalizado*, (Universidad Rey Juan Carlos, 2008) 147-173, at 151.

[23] *La apertura constitucional al Derecho Internacional y Europeo de los Derechos Humanos. El artículo 10.2 de la Constitución española*, (Consejo General del Poder Judicial, Madrid, 1999), at 126.

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described in detail in the national systems of protection. Clear proof of this is article 14.5,[24] in relation to which, in its judgment of 21 October 1985, Spain's Constitutional Court considered the connection between the International Covenant and articles 24.1 (on effective judicial protection) and 10.2 of the Spanish Constitution. Indeed, in 2000 the Committee found that Spain had breached this article by not providing for the right to a second criminal hearing, which has led to successive amendments of the Organic Law on Judicial Power extending the appeal procedure.

The activity of the Human Rights Committee has been profuse in relation to all the state parties, including the countries of Europe. Up to 2018, the Committee's individual communications mechanism had admitted 37 communications against Spain and decided on the merits of the cases. In the most recent, in 2014, the Committee found that the state had extradited a suspected terrorist (Mr Ali Aarrash) to his country of nationality (Morocco) without having first ascertained that his life or physical integrity would not be at risk, thereby violating article 7 of the Covenant,[25] which had already been the main subject of General Recommendation 31 (2004) of the Committee. The Committee applied an interpretation that is close to the peremptory norm (*ius cogens*) of international law, which *non-refoulement* is, in a way similar to the ECHR. In the Views of the Committee, Spain had the obligation of:

> "(i) providing adequate compensation for the violation of his rights, taking account of the acts of torture and ill-treatment to which he was subjected as a result of his extradition to Morocco; and (ii) taking all possible steps to cooperate with the Moroccan authorities in order to ensure effective oversight of the author's treatment in Morocco."[26]

Previously, in 2013, the Human Rights Committee had criticised Spain for violation of articles 7 and 2.3. Prior to her acquittal in the National High Court, where she was charged with collaborating with an armed group, Ms *Achabal Puertas* had complained that she was the victim of torture while being held incommunicado at Civil Guard headquarters in Madrid. The Committee considered that Spain was under an obligation to provide Ms *Achabal Puertas* with an effective remedy which had to include an impartial, effective and thorough investigation of the facts, and it is under an obligation to prevent similar violations by putting a definitive end to the practice of incommunicado detention.

Differences of opinion between the Human Rights Committee and the European Court of Human Rights (ECtHR) are highlighted in this case, having the ECtHR determined it was inadmissible, with the succinct explanation of not having found any violation of the Convention articles. That, however, made it possible for the Committee to examine the case, as Spain had made a reservation to the Optional Protocol to the Covenant by which it gave priority to the ECHR.

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[24] "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

[25] Article 7 of the International Covenant on Civil and Political Rights establishes: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

[26] Decision approved by the Committee in its 111th session period (7 to 25 July 2014), Communication No. 2008/2010, CCPR/c/111/D/2008/2010, 30 September 2014.

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The decision in *Achabal Puertas* was seen as a signal by the Committee directed to the European States who share that provision, by offering its mechanism of individual complaints as a remedy to a possible lack of effectiveness on the part of the ECtHR.[27]

In the final Observations on the sixth regular report of Spain, the Human Rights Committee reproaches Spain for not guaranteeing the direct application of the International Covenant on Civil and Political Rights in national legislation, despite the contents of article 10 of the Spanish Constitution, and for the absence of a specific procedure to implement the decisions adopted. In fact, the information presented by Spain for the implementation of the decisions in *Achabal Puertas* and *Aarrass* was insufficient according to the Committee's assessment in its follow-up report,[28] even though Spain had installed video camera surveillance systems in police stations and approved Instructions 11/2015 and 12/2015, but without including specific provisions on the prevention of torture.

The main concerns about Spain also include the situation of unaccompanied minors, an issue that is a major focus in the Observations on the sixth report.[29] The issues of unaccompanied foreign minors and the use of police force were graded B and C in the follow-up recommendations of the Committee.[30] To that must be added a third issue (given the lowest grade (E)), namely the lack of investigation into human rights violations during the Civil War and the Francoist dictatorship, a matter in the Committee again urged Spain:

> "The Committee regrets that the State party does not intend to repeal the 1977 Amnesty Act and that no measures have been taken to implement its recommendations regarding: (a) the investigation, prosecution and punishment of perpetrators and redress for victims of past human rights violations, in particular for victims of international crimes; and (b) the review of the legislation on the search for, exhumation and identification of disappeared persons and the provision of adequate resources."

Similarly, in the Committee's Observations on Spain's sixth report, the State was urged to review the Citizen Security Act. The Committee was particularly concerned about the practice of summary deportations (*devoluciones en caliente*) in Ceuta and Melilla, rejecting the special regime that the Act grants to these territories, and it sought the creation of an independent mechanism with authority to suspend negative decisions on expulsions.

Even when the nature of the Committee´s decisions and recommendations has to be distinguished from those from an International Court, such as the European Court of Human Rights, it cannot be denied that the States are subject to the rule of law in the terms they have ratified the Optional Protocol and, then

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[27] H. Gerards, 'Inadmissibility decisions of the European Court of Human Rights. A critique of the lack of reasoning', *14 Human Rights Law Review,* (2004) 148-158 [doi: 10.1093/hrlr/ngt044].

[28] Informe sobre el seguimiento de las observaciones finales del Comité de Derechos Humanos, CCPR/C/122/3, de 18 de abril de 2018.

[29] In the concluding observations on the sixth periodic report of Spain, the Committee is concerned about the situation of unaccompanied minors and asks the State to develop a standard protocol for determining their age and urges the State to always take into account the best interests of the child in all decisions concerning unaccompanied minors (para. 23 et seqq.).

[30] In the Committee's evaluation report, the letters B, C and E correspond to the following assessments of replies:
B: Reply/action partially satisfactory
C: Reply/action not satisfactory
E: Information or measures taken are contrary to or reflect rejection of the recommendation.

it would be more than incongruent not to follow the recommendations emanated from this and other bodies. Something that expressly has denied the Constitutional Court and Supreme Court[31], arguing its lack of "legal character" in order to avoid the execution of the recommendations. Nonetheless, still remains some hovels about the execution of European Court of Human Rights sentences, showing up little differences between legal and quasi-legal bodies of protection

In support of that idea, the Human Rights Committee General Comment No. 33 stated that:

> "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the languages of the Covenant, and the determinative character of the decisions."[32]

Moreover, the absence of an international human rights court leads us to see the Human Rights Committee as the sole mechanism occupying to universal human rights at individual communications level, accompanied only by the Committee on Economic, Social and Cultural Rights we are going to examine down below.

(G) COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, SPAIN AND ACCESS TO HOUSING

While the International Covenant on Civil and Political Rights was the product of a classic and westernised vision of human rights, the second of the international covenants gave a voice to another part of the international community, one that increased in size and influence during the 1960s. The new nations born of decolonisation clamoured for a more realistic view of the situation faced by millions of people and the prevailing causes in situations of destitution and impoverishment, along with cultural neo-imperialism. The creation of both covenants was based on the idea that civil and political rights should be immediately applicable, otherwise economic, social and cultural rights would be applied progressively. [33] This dichotomy between human rights, now resolved, was certainly the reason why the International Covenant on Economic, Social and Cultural Rights did not automatically incorporate a monitoring body. As remarked above, this emerged as a substitute for the ECOSOC verification system, which was later established as a true human rights committee in the 2008 Optional Protocol, 42 years after the adoption of the Covenant.

In the years following its creation, the Committee on Economic, Social and Cultural Rights (CESCR) has made recommendations and observations on the reports presented by Spain (six until 2018), and has adopted decisions condemning Spain on two occasions.

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[31] STC 70/2002, de 7 de abril y STS 141/2015 de 11 de febrero.

[32] General Comment No. 33. The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, Human Rights Committee, CCPR/C/GC/33, 3 November 2008.

[33] A. Cançado Trindade, 'La protección internacional de los derechos económicos, sociales y culturales', *Estudios de Derechos Humanos,* (Instituto Interamericano de Derechos Humanos, 1994).

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In the final Observations on the sixth regular report by Spain,[34], the CESCR recommended that Spain take the legislative measures necessary to ensure that economic, social and cultural rights enjoy the same level of protection as civil and political rights, "including by means of the remedy of amparo."[35] In addition, the Committee remained concerned about untenable disparities between the regions in the enjoyment of these rights and recommended that Spain better coordinate social welfare services. Similarly, it was concerned about the effect of austerity measures introduced after the economic crisis, discrimination between men and women, unemployment, and the working and living conditions of migrants in Temporary Migrant Reception Centres (Centros de Estancia Temporal) in Ceuta and Melilla.

However, it has been the right to housing and the issue of evictions that has most concerned the Committee in relation to Spain, so much so that Spain is one of only three countries to be condemned by the Committee, the others being Ecuador and Italy.

In the final observations of its report, the CESCR recommends that the state address the social housing deficit, regulate the private housing market, review its tenancy legislation and provide for effective judicial mechanisms to guarantee protection.[36] As for evictions, the Committee has complained to the state of the need to adopt a protocol that incorporates reasonableness and proportionality, and which ensures, among other things, compensation or alternative suitable accommodation for people in impoverished conditions who suffer eviction.

In addition to these observations, the two condemnations in 2015 and 2017[37] must be taken into account. The first decision ruled against Spain for violation of articles 11.1, which involves the obligation of the States to provide their citizens with an adequate standard of living, including housing, clothing and food (which in no case entails a subjective right of individuals to housing, but rather the obligation of the State to create favourable conditions for individuals to be able to access housing) and 2.1 of the Covenant, by which the parties commit to taking steps to achieve the full realisation of the rights recognised in the treaty.

After she had failed to pay several instalments of her mortgage, there was a possibility that the author would lose her home following auction of her property as ordered by Court No. 31, although there had been no notification of the mortgage enforcement proceedings.

The Committee considered that the State party had an obligation to provide the author with an effective remedy:

> "in particular: (a) to ensure that the auction of the author's property does not proceed unless she has due procedural protection and due process, in accordance with the provisions of the Covenant and taking into account the Committee's general comments Nos. 4 and 7; and (b) to reimburse the author for the legal costs incurred in the

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34 Concluding Observations on the sixth periodic report by Spain, 25 April 2018, Committee on Economic, Social and Cultural Rights, adopted by the Committee at its 63rd session period (12-29 March 2018), E/C.12/ESP/CO/6.

35 *Ibid.*, para. 6.

36 *Ibid.*, para. 36.

37 Decision adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights concerning Communication No. 5/2015, 21 July 2017 and Communication No. 2/2014, Decision adopted by the Committee in its 55th session period (1-19 June 2015), 13 October 2015.

processing of this communication."

The CESCR also recommended that the State should include guarantees of non-repetition and prevent similar violations in the future. However, this was not the only occasion on which Spain has been condemned. In July 2017, in the decision approved by the Committee concerning Communication No. 5/2015, the State was again condemned for violating articles 11.1 and 2.1 of the Covenant, this time with the addition of article 10, referring to the protection of the family.[38] On this occasion a family with two minor children was evicted from social housing belong to the Madrid Housing Institute because they were unable to pay the rent, and all their appeals had been rejected. In its decision, the Committee obliged the State, in parallel with the earlier decision, to provide the authors with an effective remedy: to grant them public housing if needed, to award them financial compensation for the violations suffered, and to pay the authors' costs of the proceedings before the CESCR.

(H) COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN AND THE JUDGMENT 1263/2018 OF THE SPANISH SUPREME COURT

Article 17 of the CEDAW created what is known as the "Committee", originally with functions limited to the regular presentation of reports by States parties and the issuance of general and particular recommendations. For that reason, the adoption of the additional Optional Protocol in 1999 was welcome news as it greatly extended the competences of the monitoring body and made it possible to receive communications from individuals or groups of individuals under the jurisdiction of States parties for violations of the Convention, after they have first exhausted all national appeals. The CEDAW has a peculiar character which distinguishes it from other human rights catalogues in that it is not a mere declaratory text, but rather, in addition to being a compilation of the fundamental rights of women, it establishes an action plan for the States parties and international organisations.[39]

Spain has assumed most of those commitments and has so far presented eight regular reports to the Committee. The last, prepared in combination with the seventh report and presented in 2015, represents an advance with regard to the recommendations established by the Committee in light of the sixth report presented in 2009, largely due to the adoption of different legislative instruments such as Organic Act 1/2015, which modifies the Criminal Code with regard to violence against women, and Act 12/2009 on asylum and subsidiary protection, which includes the recognition of gender-based persecution in the contexts of refuge and asylum (although with restrictions).

[38] The article 10.1 of the Covenant prescribes: "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses."

[39] I. Jaising, 'The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and Realisation of Rights: Reflections on Standard Settings and Culture', in M. Shivdas et. Al. (eds), *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context,* (Commonwealth Secretariat, London, 2010) 9-13.

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However, the CEDAW Committee still has reservations about the actions of Spain based on the seventh and eighth reports. It has highlighted its concern over the reduction of resources allocated to the prevention of and fight against discrimination during the recession, reminding that more in this context, it should give "priority to women in vulnerable situations and avoid retrogressive measures."[40]

The ruling against the State in *González Carreño v Spain* (prior to Spanish Supreme Court Judgment 1263/2018, analysed below) must be noted, given that the Committee continued to consider that there was a lack of understanding of the Convention by the State and it urged that judges and lawyers be provided with training in this matter[41]. The Committee called on Spain to:

> "Provide legal education and regular training for government officials, judges, lawyers, senior judges, prosecutors, police officers and other law enforcement officials on the Convention and the Optional Protocol and on their application, so that the Convention and the Optional Protocol can serve as an effective framework for all laws, court decisions and policies on gender equality and the advancement of women."

Regarding gender-based violence, the CEDAW Committee urged the State to revise Act 1/2004 so as to include other forms of gender-based violence, apart from violence in close relationships, such as police and workplace violence, or violence by care providers. It was particularly concerned about the high number of children killed by their fathers and the lack of forethought in this area. Furthermore, there was criticism of the deterioration of protective services and the limited availability of shelters for women and children, particularly in rural areas. In addition, the Committee insisted on the need to provide mandatory training for judges, prosecutors, police officers and other law enforcement officials by including a gender-sensitive perspective in all preventive procedures applying criminal law provisions in cases of violence against women. It also encouraged the State to collect statistics broken down by sex.

Returning to the case of *González Carreño v Spain*, the change of course resulting from Spanish Supreme Court Judgment 1263/2018 should be noted. This judgment brought an end to the series of negative judicial decisions (four in all)[42] on the enforcement of the condemnation by the CEDAW-Committee adoption of views[43] that urged Spain to grant the author appropriate reparation, to conduct an exhaustive and impartial investigation, and to strengthen application of the legal framework to ensure that the competent authorities exercise due diligence when dealing with situations of domestic violence,[44] following findings of violations of articles 2, 5 and 16 of the Convention. Ms González Carreño's youngest daughter was murdered by her father, Ms González Carreño's former partner, who had been convicted of gender-based violence. Ms González Carreño had appealed repeatedly to the authorities to prevent the

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[40] Concluding Observations on the seventh and eighth periodic reports of Spain, Committee on the Elimination of Discrimination Against Women, 29 July 2015, para. 8.

[41] *Ibid.*, para. 10.

[42] The history of Ms González Carreño's case to have the State held liable for the abnormal functioning of the administration of justice includes four judicial decisions in the negative prior to the said judgment of the Supreme Court: in 2005 by the Ministry of Justice, in 2008 by the National High Court, in 2009 by the Supreme Court and in 2011 by the Constitutional Court.

[43] R. Abril Stoffels, 'The 'effectiveness' of CEDAW Committee González Carreño v. Spanish', 19 *SYbIL* (2015), 365-372 [doi: 10.17103/sybil.19.27].

[44] Decision adopted by Committeé at its 58th session period (30 June – 18 July 2014), Communication No. 47/2012, 15 August 2014, Committee on the Elimination of Discrimination Against Women, CEDAW/C/58/D/47/2012.

father from visiting the child unsupervised but that condition was always refused, with fatal consequences for the child.

In its judgment, the Spanish Supreme Court applied a judicial criterion that took into consideration the international and national legal principle of the rule of law, and rejected the contention that the decisions of the committees were mere recommendations, in line with the words in Order 260/2000, dated 13 November, issued by the Constitutional Court in Appeal 5427/1999, where it established that "the international treaties and agreements on Human Rights are unavoidable instruments for the interpretation of the fundamental rights under the Spanish Constitution (article 10.2 Spanish Constitution). Thus, an appellant should have an adequate and effective remedy for asserting before the Spanish courts the nullity of his criminal conviction when his human rights have been violated pursuant to an international treaty signed by Spain." Although the judgment recognises that there is no direct procedure in Spain's system to enforce the Committee's decision, it accepts that it is binding on the State party, and also considers it to be "the authority that enables a claim to be brought against the State for financial liability arising from the abnormal functioning of the administration of justice, as the last means to obtain reparation."[45] Thus, by overturning the contested judgment and obliging the Administration to pay 600,000 euros as compensation for moral damage, it confirms the breach of Ms González Carreño's fundamental rights in the terms set out by the CEDAW Committee.

That judgment puts an end to a legal analysis based on a scant understanding of international law and its single-tier system. Further, it makes it clear that the considerations of the monitoring bodies of the human rights treaties signed by Spain have an evident and unavoidable interpretative value.[46] As expressed in General Comment no. 33 of the Human Rights Committee, "The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument". A similar statement is included in General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, asserting that "the Committee on the Elimination of Discrimination against Women and other actors at the national and international levels have contributed to the clarification and understanding of the substantive content of the Convention's articles, the specific nature of discrimination against women and the various instruments required for combating such discrimination."[47]

Whether the CEDAW Committee is officially representing the interpretation of the Treaty or not, the countries ratifying the Optional Protocol assumed that it is, since they are accepting the Committee competence to receive and consider individual communications, having the opportunity not do to so.

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45 Supreme Court Judgment 1263/2018, 17 July 2018.

46 C. Gutiérrez Espada, 'La aplicación en España de los dictámenes de Comités Internacionales: la STS 1263/2018, un importante punto de inflexión', *10 Cuadernos de Derecho Transnacional,* Octubre (2018), 836-851 [doi: https://doi.org/10.20318/cdt.2018.4406].

47 General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010.

(J) DISTINGUISHING COMMITTEES FROM OTHER HUMAN RIGHTS MECHANISMS

(1) International Human Rights Courts: The European Court of Human Rights

The cases before the different UN treaty-based bodies are not to be equated to sentences of International Courts. Nonetheless, some gaps remain regarding the effectiveness of International Courts pronouncements in the same way these are also present in the cases before the Committees. The differences between Courts and Committee has more to do with proceeding than with final decisions. The ability to receive and consider communications from individuals make Committees very close to International Courts, some voices having expressed there is no difference when States have ratified the text including these competences[48].

From an International Law perspective, the nature of the Human Rights Committee and European Court of Human Rights is the same: they are both treaty body control mechanisms. Their function is to control the fulfilment of the treaty and also to offer citizens the opportunity to enforce human rights in their own countries. Besides, the decisions made by either of them have to be considered *res iudicata*. This is best illustrated by the fact that most European States are giving priority to the European Court of Human Rights or another procedure formulating a reservation in the Optional Protocol of the Human Rights Committee. If the States are not having a sense of obligation about the Committee, why should it be necessary?

It is quite clear that the obligations themselves are emanated from the ratified treaties, and not directly from the Committees decisions. But the Committee adoption of views reflect violations of these treaties. While these conventions are part of the rule of law, the States must comply effectively with Committees observations in the same way they have to comply with International Courts sentences, in the sense expressed by the Human Rights Committee in its General Comment No. 33. when observing that "the Optional Protocol sets out a procedure, and imposes obligations on States Parties to the Optional Protocol".[49]

Certainly, the States ratifying the Optional Protocol have accepted the competence of the Committee to receive and consider communications. Also this General Comment express forcefulness with explicit recognition of the obligation of States Parties to refrain any retaliatory measures against authors of the communications.

As another example, we can observe how the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women declares in its preamble "States parties to the Protocol should undertake to respect the rights and procedures provided by the Protocol and cooperate with the Committee on the Elimination of Discrimination against Women at all stages of its proceedings under the Protocol;". Along with the non-permission of any reservation.

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[48] C. Fernández de Casadevante Romaní, 'La ejecución de sentencias y decisiones de tribunales y comités', in C. Escobar Hernández et. Al. (eds), *Los Derechos Humanos en la Sociedad Internacional del siglo XXI* (Colección Escuela Diplomática, 2009), 179-198.

[49] General Comment No. 33. The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, Human Rights Committee, CCPR/C/GC/33, 3 November 2008.

A further consideration is the difference between the "views" and the "recommendations" adopted by a Committee. Following article 7.4 of the CEDAW´s Optional Protocol the State must consider each of them as distinctive things: "The State Party shall give due consideration to the views of the Committee, together with its recommendations". As illustrated in the Protocol, different ways to accomplish different things are being considered. In the same line, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights expressed "After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations". If we add to this the formal legal language used by most of Committees, it is clear that we are in front of something of very different nature of a mere recommendation's mechanism. For instance, in the Optional Protocol to the International Covenant on Civil and Political Rights we can observe the words "jurisdiction" or "competence". In the European Covenant of Human Rights, the Court is described as follows "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights", which can be identified as the same function of the Committees regarding its own rules.

As I have already mentioned, we must look to the procedure in order to find the substantial differences between International Courts of Human Rights and Committees. Even when the Human Rights bodies are alto entitled to adopt interim measures when it is desirable to avoid irreparable damage to the author of the communication,[50] Committees do not hold oral hearings, being the totality of the process written. We can find in the Committees more procedural economy, with the role of the "expert" and a much more confidential process. The lack of transparency have been seen by the Spanish Supreme Court as an element to rest efficacy to the decisions emanated from the Human Rights Committee[51].

In the same way it is essential to distinguish between the enforceability and enforcement whether of the sentences (International Courts) or resolutions (Committees). As ECHR make clear in article 46, the States are responsible for the observance of the Court pronouncements, which is based in good faith, giving the competence to monitor execution to another body designed by the Treaty: The Committee of Ministers. This body is -of course- a political one, being the same reflection proposed for the Human Rights Committees, and the execution of sentences is not to be compared to those in the domestic level.

Regarding the efficacy, apart from the particular execution of judgments of the ECtHR we have to consider there is a *res interpretata* effect, since States have a legal obligation to take the full body of the Court´s case law into account[52]. Every ECtHR judgments would also have also *erga omnes* effects[53], since

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[50] In this regard, Vid., B. Vázquez Rodríguez, 'Interim Measures Requested before International Courts and Quasi-Judicial Bodies in the Protection of Human Rights: Do They Also Protect the Right to Participate in Public Affairs?', 22 *SYbIL* (2018), 77-115.

[51] The Spanish Supreme Court expressed in the sentence STS 141/2015, de 11 de febrero the following: 'El mencionado Comité de Derechos Humanos de la ONU no tiene no tiene carácter jurisdiccional de modo que sus resoluciones o dictámenes carecen de aptitud para crear una doctrina o precedente que pudiera vincular a esta Sala de lo Penal del Tribunal Supremo".

[52] O. M. Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', 28 *The European Journal of International Law*, (2017), 810-843 [doi:10.1093/ejil/chx045].

[53] S. Almeida, 'La ejecución de Sentencias del Tribunal Europeo de Derechos Humanos: la singularidad y eficacia del

it "focuses on law enforcement and establishes that on the basis of general international law"[54]. In the same way, the International Court of Justice in Barcelona Traction Judgment expressed that *erga omnes* are "obligations of State towards the international community as a whole".[55] Besides, it is widely recognised that the compulsory nature of the Court´s case law is not confronted with the declarative and not executive essence of the judgments, since that Court does not constitute a higher instance and the legal proceedings are not automatically re-opened[56].

After an erratically tendency in the Constitutional Court[57], the Law 7/2015 admitted the possibility to appeal for a review of sentence (*recurso de revisión*) in case there is no other possibility.[58]

Even when we can argue that the *res interpretata* and the *erga onmes* effects can be assumed in the Human Rights Committees, it is essential to underline the lack of a specific mechanism for re-open the cases after the views have been adopted, which make up the main difference between the ECtHR and the Human Rights Committees.

Even though, this is not a situation created by the presumption that they are legally different things, but crafted by the different degree of compromise from the States (in this case, Spain), since the obligations are still the same (emanated from a Human Rights Treaty): *erga omnes* and affecting basic human rights. Actually, in the commented Sentence 1263/2018, the Supreme Court clearly expressed that the lack of observance of CEDAW´s adoption of views constitutes a grave breach of articles 14, 15, 18 and 24 of the Spanish Constitution, accepting a Human Rights Committee resolution as a valid element to formulate a claim for the patrimonial responsibility of the State.

In addition, we can argue a much bigger concretion in the ECtHR pronouncements, structured in formal sentences. Besides, judicial bodies are not only to be defined by the decisions adopted but also through their structure and authority, which is certainly different in design and legal intention.

(2) Human Rights Council Mechanisms

(a) *Universal Periodic Review (UPR)*

Created by the General Assembly in the UNGAR 60/251, this mechanism of the UN Human Rights Council tries to be a neutral process to analyse the fulfilment of human rights obligations by States each

Sistema de Protección de Derechos Humanos', IV *RyD República y Derecho,* (2019), 1-39, at 23.

54 O. M. Arnardóttir, 'Res Interpretata...., *supra n.* 32, at 821.

55 *Barcelona Traction, Light and Power Company Limited, Second Phase, Judgement, 5 February 1970, ICJ Reports* (1970), 3, párr. 33.

56 S. Almeida, 'La ejecución de Sentencias...., *supra* n. 33, at 21.

57 The Constitutional Court stand for the automatic execution of ECtHR judgement on *Barberá, Messegué and Jabardo v. Spain* (Bultó Case) in 1998, granting "recurso of amparo" and ordering provisional measures, when in 1994 it had rejected the execution of *Ruiz Mateos v. Spain* judgment, denying its supranational character.

58 Article 328.2 of the Law 7/2015 declares: "se podrá interponer recurso de revisión contra una resolución judicial firme cuando el Tribunal Europeo de Derechos Humanos haya declarado que dicha resolución ha sido dictada en violación de alguno de los derechos reconocidos en el Convenio Europeo para la Protección de Derechos Humanos y Libertades Fundamentales y sus Protocolos, siempre que la violación, por su naturaleza y gravedad, entrañe efectos que persistan y no puedan cesar de ningún otro modo que no sea mediante esta revisión."

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five years. As considered in the resolution it is "based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies".

The nature of the different UN Human Rights mechanism is well structured and non-overlapping system. In this case, UPR offers recommendations to States after a whole process of examination, including the participation of civil society and the State itself. The recommendations are based in the promotion and protection of human rights in general, not focusing in individual claims or situations.

Even though, the Human Rights Council is the main political human rights body in the United Nations [59], and the considerations of the UPR are also anchored to that idea. Nevertheless, the examination is a huge effort of the international community thought as the trident "international organizations-States-civil society". The participation of all these subjects is granting a certain degree of complete monitoring process, also complementing another procedure.

In the treaty-based bodies the concluding observations to the periodical reports of States play an important role in the process of evaluating a country situation, and maybe that is the closest tool to be compared with the UPR. However, the second is not linked to specific treaty obligations, covering "all States and all norms"[60], providing a forum for the universal promotion of human rights.

Contrary to the responsiveness of the ECtHR with the doctrine of the margin of appreciation, in the UPR universality of human rights constitutes an axiom. This is essentially a barrier to efficacy but also a guarantee for the promotion of Human Rights. Universality reflects also when other States make its own recommendations to another inside the UPR, which have been seen as a tool to emphasise bilateral, state-to-state relations[61]. As stated by Cowan, "in the UPR sovereignty is formally respected and, indeed, small countries felt that its modalities offered an unprecedented opportunity for their voices to be heard"[62], something really far for the poor interactions emanated on treaty-based mechanisms.

(b) *Special Procedure*

The emphasis of the Special Procedure is substantially different from other mechanisms. The idea of "urgent" and "alarming" violations of human rights by a State moves the focus away country-specific perspective with the support of the High Commissioner of Human Rights (OHCHR). Reports based on researches and visits to the territory, and also complains to be addressed by the State included in the procedure, always those whose protection of human rights is more worrying. What we find in this tool is a change of focus on the prevention and promotion of Human Rights to a later stage, when it is urgent to address the protection of fundamental and basic rights. In the words of HOEHNE, "Special Procedures

[59] F. D. Gaer, 'A Voice Not a Echo: Universal Periodic Review and the UN Treaty Body System', 7 *Human Rights Law Review* (2007), 109-139 [doi: 10.1093/hrlr/ngl040].

[60] *Ibid.*, at 125.

[61] E. MacMahon et al, 'A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council', 18 *Global Governance* (2012), 231-248, at 235.

[62] J. K. Cowan and J. Billaud, 'Between learning and schooling: the politics of human rights monitoring at the Universal Periodic Review', *Third World Quarterly* (2015), 1175-1190, at 1181 [doi: https://doi.org/10.1080/01436597.2015.1047202].

mechanisms thus resulted from compromises and ad hoc solutions, rather than from a plan or predefined strategy".[63]

At the moment, the Special Procedure counts 44 thematic mandates and 12 country-specific. It clearly reflects that this mechanism is not examining all human rights violations, but only the more alarming territories[64], frequently those who are undergoing a political crisis or an armed conflict, such us Syria or Sudan. Nevertheless, it has been discussed whether the Special Procedures are also entitled to supervise Humanitarian Law[65], given the particular and worrying situations of those territories and the unavoidable necessary interaction between Human Rights Law and Humanitarian Law. In any case, this is something that moves away from the competences of the treaty-based bodies.

From a legal perspective, this is a non-conventional body, depending on Human Rights Council and observing the general situation of human rights in a specific country, without having an explicit mandate of surveillance from a treaty. Furthermore, its competence has not been singularly accepted by States, but adopted by the former Commission of Human Rights and now developed by the Council.

(c) *Complaint Procedure*

This Human Rights Council mechanism is the closest to the Human Rights based bodies' competence to receive and consider individual communications in the whole UN Human Rights system. Based on the former 1503 procedure, the 2007 renovated mechanism is directed to address violations of all human rights worldwide.

The main difference with the Committees is that this is a universal tool, since a communication can be submitted whether or not the State has ratified any of the Human Rights treaties. It also, of course, undermine the effectiveness of their decisions and transform their legal nature, pushing it away from being a quasi-judicial organ.

Apart from that, the Human Rights Council is to decide on the experts (based on working groups and State delegations). This is a restricted and intergovernmental UN body, in contrast to the Committees. Whether the admissibility criteria are almost the same, there is no need to base the communication on a specific treaty, but in any violation of human rights committed by a State, and not politically motivated. Moreover, this is a subsidiary mechanism in respect to treaty bodies and Special Procedure, as it is stated in the admissibility criteria that requires "not already being dealt with by a Special Procedure or a Treaty Body". Actually, the possible measures to be taken by the Human Rights Council are limited to the following:

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[63] O. Hoehne, 'Special Procedures and the New Human Rights Council. A Need for Strategic Positioning', 4 *Essex Human Rights Review* (2007), 16, at 5.

[64] The 12-country mandate at the Special procedure are currently: Belarus, Cambodia, Central African Republic, Democratic People's Republic of Korea, Eritrea, Islamic Republic of Iran, Mali, Eritrea, Occupied Palestinian territories, Somalia, Sudan and Syria.

[65] Ph. Alston et. al, 'The Competence of the UN Human Rights Council and its Special Procedures in relation to Armed Conflict: Extrajudicial Executions in the War on Terror', 19 *European Journal of International Law* (2008), 183-209. [doi: https://doi.org/10.1093/ejil/chn006].

"- To keep the situation under consideration and wait for further information from the State concerned.
-To keep the situation under consideration and appoint an expert to monitor the situation and report back to the HRC.
-To discontinue considering the situation.
-To refer the matter to the 1235 public procedure.
-To recommend that the country be urgently reviewed through the UPR.
-To give a follow-up to the process, if the State fails to comply with HRC decisions or refuses to cooperate.
-To recommend the OHCHR to provide technical and capacity building assistance to the country concerned"[66].

This lack of quasi-judicial nature has been an obstacle for individuals, since the efficacy of its decisions is still more difficult to maintain than those from the UN treaty-based bodies. This is something that is evidenced in the procedure, practice and shortage of cases.

(I) FINAL THOUGHTS

The human rights treaty-based bodies are quasi-jurisdictional mechanisms whose main objective is to guarantee compliance with the conventions they protect and, in that sense, Spain and other States that have ratified the conventions are obliged to comply with the treaty provisions. The observations and recommendations in response to the reporting method must be included in this point, as must the assent to other methods, such as confidential investigation and regular visits, when the State in question has consented to be bound by them.

Due to the lack of an international human rights court and effective national mechanisms for the interpretation of the norms in conjunction with the international treaties, the decisions of the human rights committees are increasingly relevant as it is necessary to appeal to these bodies of last resort in order to assess the commitments acquired by the State on certain occasions.

The Human Rights Committee has a symbiotic relationship with the European Court of Human Rights, where there are sometimes dissonant and sometimes concordant opinions. This double channel allows citizens to appeal on a dual (universal or regional) track for recognition of possible violations of their fundamental rights. There is a hierarchy between the two bodies, with priority given to the ECtHR, but that does not lessen the effectiveness of the Committee. Moreover, although the ECtHR is a jurisdictional body, which distinguishes it from the Committee, the result is not much different if the citizen is seeking recognition of a violation of rights and the binding effect on the State to comply with the decision of the corresponding body, although there are differences with regard to the enforcement mechanisms that the national legal system provides for each result.

In its short lifetime, the Committee on Economic, Social and Cultural Rights has twice had grounds to condemn Spain, which, apart from Ecuador and Italy, is the only country to have that particular blemish. That fact is representative of the part that Spain may play in the protection of human rights around the world, since these are not only fundamental civil rights and freedoms, but also have a wider and more complex nature to which Spain and its neighbouring countries must respond.

66 Implementation of UN General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human rights Council', A/HRC/3/CRP.3, 1 December 2006.

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Gender-based violence is one of the great challenges of this century, not only in Spain but in most countries, and it is unacceptable that in a case as conclusive as *González Carreño*, the legal system gave a number of simplistic excuses so as to avoid admitting an evident liability, now accepted in Supreme Court Judgment 1263/2018, which considers that international law is not a mere anecdote in Spain's legal system and, likewise, that the protection of minors who are victims of gender-based violence is not a secondary necessity.

Human Rights Council mechanisms have different focus from treaty-based bodies, and clearly seek to be complementary and develop a positive synergy with them. Only treaty-based bodies can be defined as quasi-judicial methods, being those from the UPR, Special Procedure and Complaint's Procedure in a much more political and institutional nature.

In general, Spain complies with its obligation of regular information to the committees analysed above and, to a certain extent, it has accepted some of the recommendations made by these bodies in previous session periods. It cannot be denied that there has been an advance in the understanding of the dimensions of the human rights phenomenon, and in the legislative and social systems created in the last 20 years. However, it is essential that the recommendations and decisions of these bodies are accepted, and that the national legal system is equipped with a specific implementation procedure that permits direct application of the provisions of these treaties, which should take place at the EU level.

Likewise, there are issues of vital importance that remain unresolved, issues in which Spain can be a leading country with respect to human rights in Europe. For that purpose, there should be reconsideration of the current policies on migratory flows, non-accompanied minors, hot returns, access to housing, equality between men and women, and effective judicial protection that truly grants individuals the ability to have breaches of their human rights recognised prior to completion of the procedures in the international bodies of last resort.

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A commentary on the Supreme Court's Judgment of 17 July 2018 (STS 1263/2018) and its supposed impact for a legally binding value of the decisions adopted by the Committee on the Elimination of Discrimination against Women (CEDAW)

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Abstract: The present contribution analyses the Judgment of the Spanish Supreme Court of 17 July 2018. This judgment given by its Contentious-Administrative Chamber is thoroughly considered along the commentary, explaining the factual and procedural background of Ángela González's claim consisting of the request of a compensation for the dramatic murder of her daughter by her ex-partner in a gender-violence context. Accordingly, after the exhaustion of local remedies, the appellant cleverly brought her claim before the Committee on the Elimination of Discrimination against Women, which adopted a decision recommending Spain to indemnify her for the damages suffered. Subsequently, on the basis of this favorable decision, the appellant sought a compensation for the State liability due to an abnormal functioning of the Administration of Justice, whose denial was appealed before the Supreme Court. Finally, the Supreme Court considered the CEDAW's decision as a "valid premise" to file a request of State liability and notably declared such decision as "legally binding/obligatory" for Spain, although the CEDAW's decisions have not that nature according to its Convention and Optional Protocol. As a result, the Supreme Court adjudged an economic reparation for the claimant and affirmed that Spain breached its international obligations. In brief, the commentary concludes with some reflections on the future implications that this arguable judgment of the Supreme Court may entail in relation to the international obligations of the State and the domestic enforcement of the decisions adopted by the CEDAW and by other UN treaty bodies analogously.

Keywords: CEDAW's decisions – Supreme Court's Judgment, STS 1263/2018 – UN Treaty Bodies – breach of international obligations – human rights' enforcement

(A) INTRODUCTION

The Supreme Court of Spain, by means of the Fourth Section of its Contentious-Administrative Chamber, delivered on 17 July 2018 its Judgment 1263/2018[1] in answer to the appeal made on behalf of Ángela González Carreño (Adelina along the judgment), in which -on the basis of the decision adopted by the Committee on the Elimination of Discrimination against Women- sentenced the Spanish State to indemnify the appellant as a consequence of the State liability, due to an *abnormal functioning of the Administration of Justice*, since her daughter was murdered by her ex-partner during a visiting

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[1] STS 1263/2018, 17 July 2018.

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arrangement in 2003.

First of all, the Committee on the Elimination of Discrimination against Women (hereinafter, the CEDAW) is a United Nations treaty body that consists of 23 experts on women's rights. This Committee was established by the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter, the Convention).[2] Interestingly, this Convention prescribes, among other obligations, the States parties to submit regular reports to the Committee on how the rights (recognized by the Convention) are implemented.[3] Besides, this Convention was amended by means of an Optional Protocol which enabled the CEDAW, whether the State party has expressly accepted these procedures, to receive communications from individuals (or groups) submitting to the Committee claims of violations of rights protected under the Convention.[4] Notably, both the Convention and the Optional Protocol entered into force for Spain on 4 February 1984 and 6 October 2001 respectively.[5]

The Judgment object of this commentary swiftly became well-known because, on the one hand, it ended up a long judicial process (over fifteen years) in a dramatic case of gender violence, and, on the other hand and more importantly for the purposes of this contribution, it recognized certain legally binding nature (even though, it is yet to be defined) to a decision which, in principle and as it will be argued, is not compulsory. As such, despite the judgment was delivered just one year ago, it has been already discussed by several scholars[6]. Moreover, this decision is the latest of a series of recent judgments given by the Supreme Court of Spain dealing with distinct Public International Law matters, some of which have been criticized by different authors as a result of the arguable approach to Public International Law carried out

[2] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

[3] In order to ensure the protection of human rights and within the framework of the United Nations, there exist several councils and committees that act as mechanisms to monitor the accomplishment and implementation of human rights and have contributed to a certain institutionalization on this matter. Besides the CEDAW, there are other human rights treaty bodies, although most of those mechanisms have a nature "more political than judicial", such as the Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRC), the Committee against Torture (CAT) or the Committee on the Rights of the Child (CRC).

[4] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83.

[5] Spain ratified the Convention on 18 December 1983 and the Optional Protocol on 14 March 2000 (BOE no. 69, 21 March 1984 and BOE no. 190, 9 August 2001). See P. Durán y Lalaguna, "The CEDAW's Reception in Spain. The Gap between Law and Practice", 9 *Yearbook on Humanitarian Action and Human Rights* (2011) 53-66, at 61 ss.

[6] Among others, see: C. Escobar Hernández, 'Sobre la problemática determinación de los efectos jurídicos internos de los "dictámenes" adoptados por comités de derechos humanos. Algunas reflexiones a la luz de la STS 1263/2018, de 17 de julio', 71 (1) *Revista Española de Derecho Internacional* (2019) 241-250 [doi:10.17103/redi.71.1.2019.3.01]; and, C. Gutiérrez Espada, 'La aplicación en España de los dictámenes de comités internacionales: la STS 1263/2018, un importante punto de inflexión', 10 (2) *Cuadernos de Derecho Transnacional* (2018) 836-851 [doi:10.20318/cdt.2018.4406].

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by the Supreme Court.[7]

(B) THE JUDGMENT OF THE SUPREME COURT

(1) Factual and procedural background

This case began by means of a request of State liability, filed by Ángela González, because of an "abnormal functioning of the Administration of Justice", seeking that its inadequate functioning caused the murder of her daughter by her former partner. This claim was brought taking into account that, according to Ángela, the murder could have been avoided whether the Administration of Justice would have correctly worked by keeping the visiting arrangements with surveillance established at a first moment.[8] Nonetheless, this regime was modified by a later ruling which allowed the contact between the father and their daughter without surveillance.[9] This last circumstance "determined" the murder of Ángela's daughter by her ex-partner on 24 April 2003.[10] In Ángela's view, a high-risk situation existed, as proved by the 47 lawsuits that she lodged, and, in addition, the Public Prosecutor did not intervene in every legal proceedings, there were some mistakes in the social services' reports and, finally, some judicial decisions disregarded the psychological expert evidence. Such irregularities, if they would have not existed, would have avoided, in that high-risk situation, the murdered of Ángela's daughter.[11] Consequently, in her view, there was an abnormal functioning of the Administration of Justice.

The aforesaid request of State liability was denied by a Ministry's resolution of 3 November 2005 and subsequently dismissed by the National High Court's Judgment of 10 December 2008. Moreover, the Judgment of the National High Court of 10 December 2008 was confirmed on 15 October 2016 by the Fourth Section of the Supreme Court's Contentious-Administrative Chamber (interestingly, the same section that rendered the Judgment object of the present contribution which, in the end, admitted this claim).[12]

Nevertheless, the National High Court's Judgment of 10 December 2008 was appealed by Ángela "in *amparo* before the Constitutional Court, alleging a violation of her constitutional rights to an effective remedy, to security, to life and physical and moral integrity, not be subjected to torture or cruel or degrading treatment or punishment, and to equality before the law".[13] The appeal was declared

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7 See, for instance, M. García García-Revillo, 'Falta de jurisdicción de los tribunales españoles para conocer de delitos contra el medio ambiente (pesca IUU) cometidos por españoles mediante buques de pabellón extranjero en alta mar', 69 (2) *Revista Española de Derecho Internacional* (2017) 345-351 [10.17103/redi.69.2.2017.3.02]; or, E. Jiménez Pineda, '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)', 22 *Spanish Yearbook of International Law* (2018) 439-450 [doi: 10.17103/sybil.22.23].

8 STS 1263/2018, *supra* n.1, third legal basis (*fundamento de Derecho*).

9 *Providencia*, 6 May 2002.

10 STS 1263/2018, *supra* n.1, third legal basis.

11 *Ibid.*

12 *Ibid.*

13 Communication No. 47/2012, Decision of 16 July 2014 adopted by the Committee on the Elimination of Discrimination

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inadmissible on 13 April and 17 June 2011 by the Constitutional Court as lacking "constitutional relevance".[14] This non-admission, understood as the exhaustion of local remedies, allowed Ángela to bring her claim to the CEDAW in accordance with article 17 of the Convention on the Elimination of All Forms of Discrimination against Women and, more specifically, article 4 (1) of its Optional Protocol.[15]

Accordingly, the CEDAW adopted its decision under article 7 of the Optional Protocol on the applicant's case on 16 July 2014 declaring, among other considerations, that Spain "has infringed the rights of the author and her deceased daughter (...)".[16] Besides, the Committee made two recommendations in the decision to Spain concerning the author of the communication, namely: "(i) grant the author appropriate reparation and comprehensive compensation commensurate with the seriousness of the infringement of her rights; (ii) Conduct an exhaustive and impartial investigation to determine whether there are failures in the State's structures and practices that have caused the author and her daughter to be deprived of protection".[17]

On the basis of the Committee's views, the applicant, in order to enforce this "dictum" from the CEDAW, brought before the Spanish State two different requests.[18] Nonetheless, up until then, the effectiveness of the decisions given by the UN Treaty-based bodies, as professor Abril Stoffels pointed out, depended largely on the will of the States and hence the lack of willingness remained the major impediment of the CEDAW's decisions.[19] Consequently, professor Abril highlighted at that time being that "even if the CEDAW Committee determines that the State has failed to fulfil its obligations to CEDAW and recommends granting the author appropriate reparation and a comprehensive compensation, nothing can guarantee that these actions are finally implemented. As a matter of fact, this is what happened in Angela v. Spain case."[20]

Firstly, Ángela filed an "extraordinary appeal for review" on 16 October 2014 seeking the annulment of

against Women at its fifty-eighth session (CEDAW/C/58/D/47/2012), para. 2.21, italic emphasis in the original.

14 STS 1263/2018, *supra* n.1, third legal basis.

15 The article 17 of the Convention establishes in its paragraph one that "[f]or the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women (hereinafter referred to as the Committee) consisting, at the time of entry into force of the Convention, of eighteen and, after ratification of or accession to the Convention by the thirty-fifth State Party, of twenty-three experts of high moral standing and competence in the field covered by the Convention. The experts shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems".

The article 4 (1) of this Optional Protocol very precisely provides that "[t]he Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.". In the same vein, Rule 58 of the Rules of Procedure of The Committee on the Elimination of Discrimination Against Women reads as follows "1. The Secretary-General may request clarification from the author of a communication, including: e) Steps taken by the author and/or victim to *exhaust domestic remedies*", italic emphasis added.

16 Communication No. 47/2012, *supra* n.13, para. 10.

17 *Ibid*, para. 11, a).

18 STS 1263/2018, *supra* n.1, third legal basis, 3º), 1ª).

19 R. Abril Stoffels, 'The "effectiveness" of CEDAW Committee Decisions: Angela González Carreño v. Spain', 19 *SYbIL* (2015) 365-372, at 371 [doi:10.17103/sybil.19.27].

20 *Ibid.*

the previous Ministry's resolution of 3 November 2005 and likewise the enforcement of the dispositive part of the CEDAW's Decision 47/2012 by granting a comprehensive reparation, including a compensation of 1.263.470,09 euros.[21] With regard to this first request, on 17 July 2015 Ángela received the administrative dismissal and afterwards appealed that decision whereby a contentious-administrative appeal, also dismissed by a Judgment of 25 April 2016 from the Contentious-Administrative Chamber of the National High Court.[22] Subsequently, the plaintiff appealed the aforesaid decision before the Fourth Section of the Third Chamber of the Supreme Court, which finally rejected the appeal on 25 September 2017.[23]

Secondly, in parallel proceedings, on 6 February 2015 the applicant lodged a new request of State liability due to an abnormal functioning of the Administration of Justice.[24] Throughout this request, Ángela sought the full reparation in accordance with the Communication No. 47/2012 adopted by the CEDAW. This request was implicitly rejected, situation that enabled the claimant to bring a new contentious-administrative appeal, by means of a special procedure for the protection of fundamental rights, before the National High Court, reaffirming the claim for the Spanish Administration to compensate her in the amount mentioned above.[25] The third section of the contentious-administrative chamber of the National High Court rejected again Ángela's appeal by a Judgment given on 2 November 2016.[26]

Last but not least, Ángela appealed on 7 April 2017 that judgment before the Contentious-Administrative Chamber of the Supreme Court, whose writ of 5 June 2017 finally admitted this case, triggering the proceedings that concluded in the Supreme Court's Judgment object of this commentary.[27]

In light of the above, a preliminary consideration can be mentioned concerning the various proceedings -bewilderingly described by the Supreme Court along the judgment- instituted on behalf of Ángela González in order to achieve a full reparation of the doubtlessly serious and dramatic crime of their common daughter made by her ex-partner. Having said that, the inarguable need of justice in form of compensation may have sidestepped the due respect of the domestic procedure, specially considering legal institutions as, among others, res judicata or abuse of process. In addition, this attempt to repair Ángela's lost may have caused, in a nutshell and as it will be further explained, the possible overestimation of the legal value of the CEDAW's decision.

(2) Merits

The Fourth Section of the Contentious-Administrative Chamber of the Supreme Court analysed several aspects along the merits of its judgment. Thus, along the current section the most important of those aspects will be summarized on an attempt to identify the crucial elements of the judgment. The value given

21 STS 1263/2018, *supra* n.1, third legal basis, 3º), 1ª).

22 SAN 1328/2016, 25 April 2016.

23 STS 3418/2017, 25 September 2017.

24 STS 1263/2018, *supra* n.1, third legal basis, 3º), 2ª).

25 *Ibid.*

26 STS 1263/2018, *supra* n.1, first and second facts (*antecedentes de hecho*). See SAN 4193/2016, 2 November 2016.

27 *Ibid,* third, fourth and fifth facts. See ATS 5786/2017, 5 June 2017.

 DOI: 10.17103/sybil.22.6

to the CEDAW's decision on Ángela's claim in order to adjudge the compensation is considered first and foremost.

(a) *Res judicata*

In order the Supreme Court to address the merits of the case, it firstly shall ensure the lack of a previous judgment about the identical facts and subject and on the same legal grounds. The assurance of the lack of this situation is specially significant in the present case taking into account the distinct procedures of different nature brought by Ángela González at both national (Administrative and judicial proceedings) and international levels (i.e. the CEDAW).

Accordingly, the National High Court's Judgment of 2 November 2016 appealed before the Supreme Court had declared that the request of a full compensation was the same that at the very beginning of the procedures (in 2004) but, interestingly, after the CEDAW's decision (in 2014), it is substantially based on such decision and therefore there was no identity in the terms of article 222.1 Civil Procedural Act.[28] As such, the exception of res judicata did not exist. In this regard, the Court asserted an unconventional argument, namely: "this tribunal, *whilst deeply regretting the deadly ending*, does not find in the case at hand an abnormal functioning of the Administration of Justice."[29]

Once at the Supreme Court's appeal proceedings, the appellant, logically, adhered herself to the previous ruling on the lack of res judicata, even though adding objections on the other arguments given along the appealed decision.[30] With regard to the State Administration view on res judicata, the State Attorney noted that "several judgments have been pronounced by Spanish tribunals denying the claim of a full compensation" and the real aim of the appellant was "to modify the final character of the judgment" in such a manner that "the legal institution of res judicata became inapplicable".[31] By the same token, the Public Prosecutor, alluding to the Judgment of the Constitutional Court 245/1991 of 16 December related to the domestic enforcement of the Judgments given by the European Court of Human Rights,[32] contended that "the Convention [European Convention on Human Rights] does not oblige to give internal effect to the European Court Judgments whereby the annulment of res judicata authority [...]".[33] Consequently, according to the Public Prosecutor, the same criteria should apply to the Convention on the Elimination of All Forms of Discrimination against Women.

In light of the above, the Supreme Court, in examining the questions "object of cassation's interest" (*sic*) and by means of a very succinct statement, adjudged that the exception of res judicata does not apply in

[28] Civil Procedural Act [LECiv]. Concretely, its article 222.1, intitled "material res judicata" (*"cosa juzgada material"*) establishes that: "the res judicata of the final and without appeal judgments, upheld or dismissed, shall exclude, in accordance with the law, a further proceeding whose object is identic to the object of the proceeding in which the judgment was given".

[29] STS 1263/2018, *supra* n.1, first legal basis, 3º), 2º). Precisely, the original words in Spanish mentioned by the court are: "este tribunal, *aun lamentando profundamente el fatal desenlace*, no aprecia que en el caso que nos ocupa existiese un funcionamiento anormal de la Administración de Justicia", italic emphasis added both in the original and in the translation.

[30] *Ibid*, fourth legal basis, 2ª).

[31] *Ibid*, fifth legal basis.

[32] STC 245/1991, 16 December 1991.

[33] STS 1263/2018, *supra* n.1, sixth legal basis.

 DOI: 10.17103/sybil.23.6

this case because of two reasons: I) "it was refused in the appealed judgment and that decision has not been contested"; and, II) "the offence does not come exclusively from the facts decided at that time, but also from the actions and decisions of the Administrations in answering to those [facts]."[34]

(b) *The CEDAW's communication no. 47/2012 González Carreño v. Spain*

(i) The admissibility of the submission: exhaustion of local remedies and miscarriage of justice

As mentioned before, the non-admission of the appeal on 13 April 2011 by the Constitutional Court due to the lack of "constitutional relevance" entailed an exhaustion of local remedies that enabled Ángela to bring her claim before the Committee on the Elimination of Discrimination Against Women on the basis of articles 2, 5 and 16 of the Convention.[35] Notwithstanding the unambiguous interpretation of article 4 (1) of the Optional Protocol, in which accordance the CEDAW shall not consider communications that have not exhausted "all available domestic remedies" with the sole exception of remedies "unreasonably prolonged or unlikely to bring effective relief",[36] the main objections raised by Spain in the "process" at the CEDAW were related to the inadmissibility of Ángela's claim because "domestic remedies had not been properly exhausted".[37]

From the Spanish State perspective, the appropriate proceedings to achieve a full compensation for an abnormal functioning of the Administration of Justice was via the miscarriage of justice and not by virtue of the State liability.[38] In this sense, both procedures would be different: in order to obtain a reparation based on a miscarriage of justice, it is necessary a prior judgment which "expressively recognizes it"; while the reparation due to an abnormal functioning of the Administration of Justice does not require a previous judicial declaration as stated in article 292 of Spanish Organic Law on Judicial Power [LOPJ].[39] As such, according to the State Attorney, the murder "did not seem connected with an abnormal functioning of a court or its personnel".[40] Concerning other subsidiary arguments mentioned by the claimant, the State summarized that "no infringement of the Convention, particularly articles 2 and 5, was committed since the Spanish authorities did not act negligently".[41]

Regarding the objections to the admissibility raised by Spain, Ángela's lawyers contended that her litigation was aimed to "show that there was a miscarriage of justice and not merely a judicial error".[42] Notwithstanding the lack of an argument relating to the exhaustion of local remedies, the claimant

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34 *Ibid*, seventh legal basis, third question, *in fine*.

35 See above p. 4.

36 In this sense, International Justice Resource Center, "Exhaustion of Domestic Remedies in the United Nation System", last updated August 2017.

37 Communication No. 47/2012, *supra* n.13, para. 4.1. ss.

38 *Ibid*, para. 4.2.

39 *Ibid*. Concretely, article 292 of the LOPJ establishes that "[d]amages caused to any assets or rights through judicial error, as well as those resulting from abnormal operation of the Administration of Justice, shall grant those who have suffered damage the right to compensation from the State, except in cases of force majeure, pursuant to the terms of this Title". Translation on the Communication No. 47/2012.

40 *Ibid*, para. 4.6 *in fine*.

41 *Ibid*, para. 4.4.

42 *Ibid*, para. 5.1.

 DOI: 10.17103/sybil.22.6

concluded her reasoning expressing her disagreement with the State's considerations and adding that the "version of events presented by the State party is distorted".[43]

In respect of admissibility and in view of the foregoing, the Committee firstly noted that "the same matter has not been and is not being examined under another procedure of international investigation or settlement".[44] Moving towards the main exception on admissibility, i.e. the exhaustion on internal remedies, which was indeed the only objection analysed by the CEDAW, the Committee "must determine whether, in light of the Convention, the author exerted reasonable efforts to bring before national authorities her complaints regarding the violation of rights arising from the Convention".[45] In this sense, the Committee recalled that the author (*sic*) after the death of her daughter brought "several administrative and judicial appeals alleging miscarriage of justice on the part of the State",[46] being all rejected. What is more, the appellant "filed an appeal in amparo before the Constitutional Court in which she alleged the violation of her fundamental rights [...]".[47] Therefore, taking into account that Spain had not pointed to other possible "legal avenues that could have been effective to respond to the specific and complete demands of the author, the Committee considers that internal remedies have been exhausted with regard to the complaint concerning the establishment by the authorities of an unsupervised visiting regime and the lack of redress for the negative consequences resulting from that regime".[48] Thus, the Committee considered that the communication was admissible.

(ii) The merits

Once affirmed the admissibility of the communication, the Committee dealt with the merits of Ángela's claim. Briefly, the State Administration argued that the author of the communication did not mention any breach of the Convention along her cases before the Spanish tribunals.[49] In addition, in spite of the complex familiar context and the tragical outcome, according to the State's position "[t]here was never a moment in which the child was not being monitored and watched over by the social services under the court, always working in her interest".[50] Moreover, the State provided a list of actions undertaken to eradicate all forms of discrimination against women since 1987 and also mentioned "activities carried out with a view to the training of justice system employees".[51] On the other hand, the author of the communication contended to the State's observations on 9 August 2013 arguing mainly that "[i]n order to discharge its duty of diligence, it is not enough for the State to adopt legislation on the subject; it is necessary for the legislation to be applied."[52] Additionally, from Ángela's perspective, the State party made

43 *Ibid*, para. 5.3.
44 *Ibid*, para. 8.2.
45 *Ibid*, para. 8.6.
46 *Ibid*.
47 *Ibid*, italic emphasis in the original.
48 *Ibid*.
49 *Ibid*, para. 6.1.
50 *Ibid*, para. 6.5.
51 *Ibid*, paras. 6.6 and 6.7 respectively.
52 *Ibid*, para. 7.6.

 DOI: 10.17103/sybil.23.6

"no comment on the lack of a satisfactory assessment of the best interests of the child or the violation of her right to be heard in judicial proceedings"[53] and, taking into account the reasons explained, requested the Committee to make several recommendations to Spain.[54]

The Committee started addressing the communication submitted to its considerations stating that the question was "that of the responsibility of the State for not having fulfilled its duty of diligence in connection with the events that led to the murder of the author's daughter" and averring that "the decisive factor is therefore whether those authorities applied principles of due diligence and took reasonable steps with a view to protecting the author and her daughter."[55] In this line, the Committee recalled that "these elements reflect a pattern of action which responds to a stereotyped conception of visiting rights based on formal equality which, in the present case, gave clear advantages to the father despite his abusive conduct and minimized the situation of mother and daughter as victims of violence, placing them in a vulnerable position."[56]

Notwithstanding that, as the Committee recalled, the authorities of Spain initially "took actions to protect the child in a context of domestic violence",[57] it alluded to article 2(a) of the Convention whereby States parties have the obligation "to ensure by law or other appropriate means the realization and practise of the principle of equality of men and women".[58] In the same vein, the CEDAW noted that Ángela suffered "harm of the utmost seriousness and an irreparable injury as a result of the loss of her daughter" and that "her efforts to obtain redress have been futile."[59] Consequently, the Committee concluded that "the absence of reparations constitutes a violation by the State party of its obligations under article 2 (b) and (c) of the Convention".[60] Furthermore, the obligation to investigate the existence of failures, negligence or omissions on the part of public authorities was discharged too.[61]

Taking into consideration the foregoing, the Committee concluded that "the State party has infringed the rights of the author and her deceased daughter under articles 2 (a-f); 5 (a); and 16, paragraph 1 (d) of the Convention, read jointly with article 1 of the Convention and general recommendation No. 19 of the

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53 *Ibid,* para. 7.7.

54 The requested recommendations are the following: "(a) complete redress and/or appropriate compensation, including, inter alia, payment with interest of unpaid child support; reimbursement with interest for the rent the author had to pay during the three years she was denied use of the family dwelling; pecuniary and non-pecuniary costs; symbolic redress, including, inter alia, the creation of a fund in memory of Andrea for child victims of domestic violence, tailored to organizations active in that field; (b) compensation to the author for physical and mental damages; (c) impartial and exhaustive investigation into the failures that occurred in implementing orders of protection, including ascertaining the responsibility of public officials; (d) public apology to the author for the failures in protecting her and her daughter; (e) impartial and exhaustive investigation into the failures that occurred regarding Andrea's right to be heard; (f) impartial and exhaustive investigation into the failures that occurred regarding the authorization of unsupervised visits. The author also asks that a recommendation be made to the State party to review its legislation on domestic violence, including aspects relating to the application of measures of protection, response to complaints of domestic violence and visiting and custody rights of an abusive parent", *Ibid,* para. 7.8.

55 *Ibid,* para. 9.2.

56 *Ibid,* para. 9.4.

57 *Ibid,* para. 9.5.

58 *Ibid,* para. 9.7.

59 *Ibid,* para. 9.8.

60 *Ibid.*

61 *Ibid,* para. 9.9.

 DOI: 10.17103/sybil.22.6

Committee." [62] As such, amongst other general recommendations, [63] the Committee made two *recommendations* to the State party with regard to the author of the communication, namely: "(i) [g]rant the author appropriate reparation and comprehensive compensation commensurate with the seriousness of the infringement of her rights; (ii) conduct an exhaustive and impartial investigation to determine whether there are failures in the State's structures that have caused the author and her daughter to be deprived of protection".[64]

(c) *Lack of a process to enforce the CEDAW's decision*

The pronouncement of a favourable decision to Ángela's claim by the CEDAW on 16 July 2014 was cleverly used by the appellant before the Spanish courts and tribunals. Notably, this decision was the crucial element for the Supreme Court to admit the cassation appeal whereby a writ given on 5 June 2017. The crucial nature of CEDAW's decision is reflected into the two questions with an "objective cassation's interest". First, which should be the appropriate process to request the Spanish State to enforce the CEDAW'S decisions.[65] Second, whether the inexistence of a process in the Spanish legal system allowing to enforce those decisions did not entitle to seek autonomously the observance of the aforesaid decisions.[66]

Indeed, already the appealed judgment of the National Supreme Court of 2 November 2016 laid down that "it does not exist in the Spanish legal system a process that allows in this case the executive enforcement of the recommendations made in the CEDAW's decision".[67] In this sense, the appellant, the State Attorney and the Public Prosecutor argued the lack of a process in Spain to enforce the decision of the Committee. In the first case, as an evidence of the abnormal functioning of the Administration of Justice,[68] while, in the second and third cases, as a result of the lack of legally binding value of those decisions.

On this point, the State Administration denied the breach of the International Treaties because, even though they are legally binding for the State, "they do not contain any provision which affirms that the Decisions of the Committee of the CEDAW are binding, mandatory and executive and article 7 of the

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[62] *Ibid,* para. 10.

[63] In general, the Committee recommended to Spain as State party in the Convention and in the Optional Protocol to: "(i) [t]ake appropriate and effective measures so prior acts of domestic violence will be taken into consideration when determining custody and visitation rights regarding children and so that the exercise of custody or visiting rights will not endanger the safety of the victims of violence, including the children. The best interests of the child and the child's right to be heard must prevail in all decisions taken in this regard; (ii) Strengthen application of the legal framework to ensure that the competent authorities exercise due diligence to respond appropriately to situations of domestic violence; (iii) Provide mandatory training for judges and administrative personnel on the application of the legal framework with regard to combating domestic violence, including training on the definition of domestic violence and on gender stereotypes, as well as training with regard to the Convention, its Optional Protocol and the Committee's general recommendations, particularly general recommendation", *ibid,* para. 12.

[64] *Ibid,* para. 11.

[65] STS 1263/2018, *supra* n.1, fourth fact. Concretely, the question originally in Spanish says: "cuál debe ser el cauce adecuado para solicitar del Estado español el cumplimiento de los dictámenes del Comité de la CEDAW".

[66] *Ibid.*

[67] *Ibid,* first legal basis.

[68] *Ibid,* fourth legal basis, 2ª).

 DOI: 10.17103/sybil.23.6

Protocol just confers the faculty of transmitting "views" and "recommendations"".[69] Likewise, in the Public Prosecutor's understanding there is no specific and autonomous process to seek the fulfilment of CEDAW's decisions, denying that "the international texts invoked allow to affirm the hypothetical existence of a breach of the international obligations, even recognizing the responsibility in relation to a citizen, entails automatically the existence of a subjective right of the citizen that entitles to seek with immediate executive effect the individual enforcement".[70]

Remarkably, the Supreme Court summarized the lack of a domestic process to enforce the CEDAW's decision when it dealt with the second legal question of cassation's interest declaring that "there is a clear conformity between the parties about the fact that according to the international norms and the domestic law adduced, there is not a specific and autonomous process in order to request the enforcement of the CEDAW's decisions."[71]

(d) *Main questions of cassation's interest*

As a consequence of the previous conclusion, the Supreme Court deduced that the essential question to determine was whether the process of State liability claim due to an abnormal functioning of the Administration of Justice is or not appropriate to achieve an administrative decision which allows the enforcement of the Decision 47/2012 given by the CEDAW.[72]

In this regard, the Court "gives a positive answer" to the nature of the Committee's decision as a premise in order to file a request of State liability taking into account, in short, the following considerations.[73] Firstly, although the Convention has not introduced in the domestic legal system a higher supranational institution and even though neither the Convention nor the Protocol establish the executive nature of CEDAW's decisions, "there cannot be doubt that they will have binding/obligatory value for the State party which recognized the Convention and the Protocol since article 24 of the Convention stipulates that "States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention"".[74]

Secondly, the decision is rendered by a "body created within the international legislation that, by express stipulation in article 9.6 of the Spanish Constitution, belongs to our domestic legal system" and

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[69] *Ibid,* fifth legal basis.

[70] *Ibid,* sixth legal basis.

[71] *Ibid,* seventh legal basis, second question.

[72] *Ibid,* seventh legal basis, third question.

[73] *Ibid.* Exactly, the words in Spanish of this ratio decidendi were: "es esencial determinar si el Dictamen del Comité de la CEDAW, por su propia naturaleza, puede ser, en sentido amplio, el presupuesto que permita formular esa reclamación de responsabilidad patrimonial. Daremos una respuesta positiva en función de las siguientes consideraciones".

[74] *Ibid.* Similarly, the Supreme Court recalled in the judgment that according to article 7.4 of the Optional Protocol "[t]he State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee", emphasized by the express acknowledgment of the CEDAW's competence by means of article 1 of the Optional Protocol, voluntarily accepted by Spain. This article one establishes that "[a] State Party to the present Protocol ("State Party") *recognizes the competence of the Committee on the Elimination of Discrimination against Women* ("the Committee") to receive and consider communications submitted in accordance with article 2", italic emphasis added.

 DOI: 10.17103/sybil.22.6

additionally "as a result of article 10.2 of our Constitution, the norms related to fundamental rights will be interpreted in accordance with the Universal Declaration of Human Rights and the treaties and international agreements about those subjects ratified by Spain".[75]

Thirdly, according to the Supreme Court, "there is no obstacle for the violation of several rights recognized by the Convention and declared by the decision of the CEDAW to [...] be a determinant element in order to prove violation of the fundamental rights of the appellant" since those treaties and international agreements are "also hermeneutic instruments of the fundamental rights of the Spanish Constitution according to its article 10.2".[76]

Fourthly, the CEDAW's declaration "binding for Spain as a State party which has recognized [...] the competence of the Committee ex article 1 of the Optional Protocol [...]" implies the violation of the rights recognized in the Convention "which is referred to a universal legal principle recognized by several international texts such as the Convention, the Universal Declaration of Human Rights of 1948 -article 7-, the Rome Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 -article 14- and the Charter of Fundamental Rights of the European Union -article 21-".[77]

Fifthly, and importantly, "the CEDAW's decision must be considered, in this case and with its particularities, as a valid prerequisite in order to lodge a State liability request regardless of the previously denied one".[78] Finally, the Supreme Court declared regarding the third question of cassation's interest that neither the exception of res judicata nor the principle of legal certainty do apply with regards to the first judgment denying the liability because the current judgment "is not reviewing or declaring invalid those administrative and judicial decisions, but instead recognizing the existence of a different premise".[79]

The fourth and last question of cassation interest consisted of the affirmation whereby "international law and international obligations acquired by Spain are Law that the State, as a rule of law democratic State, shall respect and effectively apply in a manner that the rights and freedoms, proclaimed in the Constitution and the international treaties concluded by Spain, are real and concreted".[80] Thus, the Supreme Court considered the lack of a specific process to enforce the decisions of the Committee "in itself as a breach of a legal and constitutional obligation", highlighting the tribunal the special relevance of dealing with a special process for the protection of fundamental rights.[81] Consequently, the Supreme Court

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75 *Ibid.* In this sense, the previous find of the tribunal has a special relevance because there is a claim of a breach of fundamental rights based on the declaration made by the international body recognized by Spain, "the declaration of the international body has been made within the framework of an expressly regulated due process with the full participation of Spain", and, due to article 9.3 of the Spanish Constitution, "international obligations related to the enforcement of the decisions of international bodies of control whose competence has been accepted by Spain belong to our domestic legal system", *ibid.*

76 *Ibid.*

77 *Ibid.* On this point, the court considered that the violation was in relation to both article 14 of the Spanish Constitution -right to equality and non-discrimination on grounds of gender- and its article 24 -right to an effective remedy- and also to its article 15 -right to respect moral integrity-.

78 *Ibid.* For a domestic law perspective in this regard, see M. López Benítez, 'Una aproximación a la normativa sobre violencia de género desde el Derecho administrativo', 50 *Revista General de Derecho Administrativo* (2019) 1-40, at 33.

79 STS 1263/2018, *supra* n. 1, seventh legal basis, third question.

80 *Ibid*, seventh legal basis, fourth question.

81 *Ibid.*

 DOI: 10.17103/sybil.23.6

affirmed that the Administration violated the fundamental rights of the appellant and did not implement the CEDAW's decision, to which it was obliged under the terms set out in the Convention and in the Optional Protocol. As a result, the Court declared null and void both the appeal judgment and the administrative decision and, as well, it determined the obligation to repair such violation.[82] With the aim of achieving this last purpose, the Court fixed a compensation of 600.000 euros, being that quantity almost the half of the reparation requested by the appellant but, according to the Court, a "sufficient and proportionate amount."[83]

(3) Conclusion of the Supreme Court

In light of the above, the Supreme Court declared that: (1) the inexistence of a specific and autonomous process to enforce into the Spanish legal system the recommendations of a CEDAW's decision hampers the autonomous request of the enforcement of those decisions; (2) despite the lack of an appropriate process, it is possible to admit this decision as an enabling premise to lodge a State liability's request; and (3) the Administration violated the appellant's fundamental rights.[84] Therefore, the Supreme Court by settling the cassation appeal: (1) adjudged that the appeal (filed on behalf of Ángela against the Judgment rendered on 2 November 2016 by the third section of the Contentious-Administrative Chamber of the National High Court) was plausible and nullified that 2016 Judgment; (2) partially upheld the contentious-administrative appeal, condemning the Administration to compensate in the amount of 600.000 euros because of the moral damages suffered by Ángela; and (3) did not to assign the cost of the appeal.[85]

(C) TOUR D' HORIZON: POTENTIAL IMPLICATIONS OF THE JUDGMENT FOR THE FUTURE JURISPRUDENCE OF THE SUPREME COURT AND FOR THE LEGAL VALUE OF THE CEDAW'S DECISIONS

Article 1.6 of the Spanish Civil Code [Cc] establishes that "the jurisprudence will complement the legal system with the doctrine that, in a reiterated manner, is established by the Supreme Court in interpreting and applying the law, the costume and the general principles of law."[86] In this sense, the general interpretation traditionally given by scholars and practitioners to this provision results in the understanding that there is jurisprudence from the Supreme Court -able to complement the legal system- as soon as there are two judgments applying the same interpretation to a certain law. Therefore, and at least in principle, the Judgment commented along this article does not "create" jurisprudence, even though a further judgment of the Supreme Court carrying out the same interpretation would trigger the consideration of this interpretation as jurisprudence. Nevertheless, the potential impact and influence for

82 *Ibid.*

83 *Ibid.* See above p. 5.

84 *Ibid*, eighth legal basis.

85 STS 1263/2018, *supra* n. 1, decision (*fallo*).

86 The original version of the Cc in Spanish reads as follows: "La jurisprudencia complementará el ordenamiento jurídico con la doctrina que, de modo reiterado, establezca el Tribunal Supremo al interpretar y aplicar la ley, la costumbre y los principios generales del derecho". Nonetheless, the legal debate about the concept of jurisprudence exceeds the scope of this article.

DOI: 10.17103/sybil.22.6

future cases of the interpretation given by the Supreme Court to the CEDAW's decision are doubtless. In any case, the effects of the judgment are final and binding concerning Ángela's claim.

At first glance, as professor Concepción Escobar pointed out, the nature and effects vis-à-vis the public authorities (of the decisions of the international bodies for the protection of human rights) have been object of a permanent debate both in the doctrine and in the jurisprudence.[87] In a nutshell, the answer to that dilemma "has been neither clear nor uniform, having a hard praetorian component" and "based on individual solutions, effective exclusively on a case-by-case basis".[88] In this regard, there has been just one constant element, i.e., the doctrine of the Constitutional Court about the meaning of article 10.2 of the Spanish Constitution and, as professor Escobar upholds, the special hermeneutic effect of the international treaties about human rights in order to define the essential content of the constitutionally recognized rights. Unlike the Constitutional Court, the Supreme Court had been so far reluctant to recognize that the decisions of the international bodies for the protection of human rights may have any effect into the Spanish legal system.[89] The previous assertion, logically, until the Supreme Court's Judgment on Ángela's case of July 2018, which has been rightly defined by professor Escobar as a "Copernican revolution".[90]

In principle, the decisions given by the CEDAW (initiated by a communication as in the case of Ángela's claim) shall be brought before the attention of the State party concerned and "within six months, the receiving State Party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been provided by that State Party".[91] However, the process within the Committee initiated by a communication, logically, must not be understood as a contradictory process before a court plenty of guarantees.[92] Although, the Supreme Court is paradoxically implementing in this case a decision arising from the communication process before the CEDAW as an appropriate premise with an obligatory/legally binding value. In this sense, it could be envisaged under the reasoning of the Supreme Court, in addition to the desire of ruling justice, the understanding of these "procedures" as authentic judicial proceedings before a court sensu stricto. In any case, the legal effects of the CEDAW's decisions, even if they cannot be considered binding, must be analysed at least from a hermeneutic perspective, regardless of whether such interpretation is or not an "authentic interpretation".[93]

Taking into consideration the number of UN bodies for the protection of human rights, as professor Casla pointed out, "raising the legal weight of UN decisions on individual complaints could lead to a greater use of this redress mechanism."[94] On this point, this author gave the example of the Government

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87 C. Escobar Hernández, *supra* n.2, at 243.

88 *Ibid.*

89 *Ibid.*, p. 244.

90 *Ibid.*

91 Article 6 (2) of the Optional Protocol.

92 See C. O'Rourke, 'Bridging the enforcement gap? Evaluating the inquiry procedure of the CEDAW Optional Protocol', 27 (1) *American University Journal of Gender, Social Policy and the Law* (2019) 1-30, at 4 ss.

93 C. Escobar Hernández, *supra* n.2, at 248.

94 K. Casla, 'Supreme Court of Spain: UN Treaty Body individual decisions are legally binding', *EJIL Talk!*, published on

 DOI: 10.17103/sybil.23.6

of the United Kingdom that justified the rejection of several recommendations adopted by the Universal Periodic Review declaring (regarding the Optional Protocols) that "the UN process is not an appeal mechanism, it cannot reverse decisions of the domestic courts, and it cannot result in an enforceable award of compensation for the applicant."[95] For these reasons, according to professor Casla, with whom I agree, "jurisprudential turn would take this excuse away from governments and could lead to more international cases from lawyers and claimants."[96]

(D) CONCLUSION

The judgment of the Supreme Court commented along this contribution implies a revolutionary decision not only for Spain but also for comparative Constitutional Law and International Law of Human Rights. What is more, this judgment is the latest of a series of sentences -given by the Spanish Supreme Court- dealing with different fields of Public International Law whose approach is at least controversial.

To sum up, the revolutionary element of this judgment is found on its main ratio decidendi since the Supreme Court considered a decision adopted by the Committee on the Elimination of the Violence Against Women as a "valid premise" to file a request of State liability. As such, the Supreme Court understood the aforesaid CEDAW's decision as a new element that enabled the Court to admit an appeal in cassation and likewise to overcome the procedural obstacle of the res judicata, given the fact that there were several judicial decisions with the triple identity of subject, object and legal basis. Moreover, the decision of the Committee is deemed by the Court along its judgment as "legally binding/obligatory" for Spain as the State party which recognized (*sic*) the Convention and the Optional Protocol.

Importantly, the claim brought on behalf of the appellant is undeniably legitimate, specially taking into consideration the dramatic crime suffered by Ángela in the person of her daughter, who was terribly murdered by Ángela's ex-partner. In this sense, the legal strategy carried out by her lawyers was finally successful, after several administrative requests and different lawsuits and appeals before the highest Spanish judicial institutions. In the same vein, the step bringing her claim before a UN treaty body committee shows the special commitment with Ángela's case while a noteworthy legal knowledge, without thereby existing an abuse of proceedings. In this context, it seems that this will (and even this need) to do justice is behind the verdict of the Supreme Court, as the obiter dictum "whilst deeply regretting the deadly ending" present in previous judgments of the National High Court apparently reflects.

Nevertheless, the comprehensible wish of justice to compensate the appellant for the damages suffered shall under no circumstances justify a judicial decision which in somehow exceeds the legal system. In my opinion, the interpretation of the value of the CEDAW's decisions may be risky since it forces the State to accept and apply domestically certain obligations in respect of which the State has not been committed internationally. By the same token, the ruling of the Supreme Court seemingly misunderstands the nature

1 August 2018.

95 *Ibid.*

96 *Ibid.*

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of the Committee considering that, as a UN treaty body, its essence is political and not judicial. Last but not least, the existence of several UN committees for the protection of human rights, able to adopt decisions about the enforcement of human rights according to its respective treaty, distrusts even more the approach taken by the Supreme Court, considering the likely hazard for the legal certainty and the hypothetical opening of a "new appeal proceeding". Moreover, even though the CEDAW's decisions have not, according to its Treaty and Optional Protocol, legally binding value, sight should not be lost, as noted by professor Escobar, that, on the one hand, those decisions may (and indeed) have legal effects from a hermeneutic perspective, conclusion that is in line with article 10.2 of the Spanish Constitution. On the other hand, this judgment answers to the particular circumstances of the case and its findings must not be extended to another situation.

Finally, this author would not like to end these lines without standing up for the Supreme Court, whose judgment in this case -in spite of its inconsistent approach- clearly answers to the need of implementing in the Spanish legal system the treaties of human rights in which Spain is party. Thus, in order to confirm whether the Supreme Court upholds the particular approach carried out in this case or it modifies this interpretation, scholars and practitioners must expectantly but patiently wait for the following judgment of the Supreme Court dealing with a decision adopted by the CEDAW (or by another UN treaty body). In the meanwhile, international lawyers may keep debating about whether the ratification by the Supreme Court of this "incipient jurisprudence" would open the floodgates or, conversely, it would imply a further step in the international protection and enforcement of human rights.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

The Legal Value of the Views and Interim Measures Adopted by United Nations Treaty Bodies

(A Response to the Opinions of E. Jimenez Pineda, C. Jiménez Sánchez and B. Vázquez Rodríguez)

Jorge CARDONA LLORENS*

(A) INTRODUCTION

There is a clear and growing interest in the international law literature in the legal value of the views and interim measures adopted within the framework of treaty-body-based complaint mechanisms. One reason for this interest is surely the extension to all United Nations (UN) system human rights treaty bodies of the system of individual complaints or communications from individuals.

However, this interest is particularly apparent in the Spanish international law literature, especially since Spanish Supreme Court Judgment 1263/2018, delivered on 17 July 2018.[1] The comments of various Spanish and foreign authors on this judgment were not long in coming.[2] This is not surprising. A supreme court judgment recognizing the binding or obligatory nature of the views of human rights treaty bodies is worthy of comment. Was it a misstep by Spain's highest judicial authority or a step forward in the protection of human rights?

The articles by Eduardo Jiménez Pineda and Carolina Jiménez Sánchez published in this volume of *SYbIL* present two alternatives. For Jiménez Pineda, "the interpretation of the value of the CEDAW's [Committee on the Elimination of Discrimination against Women] decisions may be risky since it forces the State to accept and apply domestically certain obligations in respect of which the State has not been committed internationally".[3] Furthermore, "the ruling of the Supreme Court seemingly misunderstands the nature of the Committee considering that, as a UN treaty body, its essence is political and not judicial". In short, for this author, the judgment is a misstep by the Supreme Court that can be regarded as an excess

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1 Supreme Court Judgment [STS] 1263/2018, 17 July 2018.

2 In addition to the articles contained in this Yearbook, see, among others: C. Escobar Hernández, 'Sobre la problemática determinación de los efectos jurídicos internos de los "dictámenes" adoptados por comités de derechos humanos. Algunas reflexiones a la luz de la STS 1263/2018, de 17 de julio', 71 (1) *Revista Española de Derecho Internacional* (2019) 241-250 [doi:10.17103/redi.71.1.2019.3.01]; C. Gutiérrez Espada, 'La aplicación en España de los dictámenes de comités internacionales: la STS 1263/2018, un importante punto de inflexión', 10 (2) *Cuadernos de Derecho Transnacional* (2018) 836-851 [doi:10.20318/cdt.2018.4406]; and K. Casla, 'Supreme Court of Spain: UN Treaty Body individual decisions are legally binding', *EJIL Talk!*, published on 1 August 2018 (and the comments to it from various authors).

3 See his contribution in this same volume here.

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of zeal, which does not accommodate the state's international obligations.[4]

In contrast, for Jiménez Sánchez, "human rights treaty-based bodies are quasi-jurisdictional mechanisms whose main objective is to guarantee compliance with the conventions they protect".[5] In her opinion, "from an International Law perspective, the nature of the Human Rights Committee and European Court of Human Rights [ECtHR] is the same: they are both treaty body control mechanisms". Furthermore, "although the ECtHR is a jurisdictional body, which distinguishes it from the Committee, the result is not much different if the citizen is seeking recognition of a violation of rights and the binding effect on the State to comply with the decision of the corresponding body". The logical consequence for this author is that, although "[it] is quite clear that the obligations themselves are emanated from the ratified treaties, and not directly from the Committees' decisions", "the Committees' adoption of views reflects violations of these treaties" and "States must comply effectively with Committee observations in the same way they have to comply with International Court sentences". From this perspective, the Supreme Court judgment would constitute a step forward in the protection of the rights of individuals in Spain.

These positions are representative of those taken in the literature to date, where the judgment is either criticized for opening the doors to recognizing the legal effects in Spain of treaty-body views whose binding nature is rejected[6] or praised for recognizing that the views of treaty bodies have binding legal effects.[7]

This issue is not so different from that addressed in the previous volume of this *Yearbook* by Beatriz Vázquez Rodríguez concerning the legal value of interim measures.[8] As we will see, the legal value of the interim measures adopted by treaty bodies is closely related to the legal value that we give to their views.

In any case, all the positions agree on one point: the Supreme Court judgment marks a radical departure from the previous case law of the Spanish Supreme and Constitutional Courts and, if it is confirmed, will have significant consequences for the Spanish legal system.

But which position should we take in this debate? Law is a science, not a religion. The aim is not to believe that one opinion is more correct than another, but to demonstrate the correct position. To this end, in my view, it is necessary to address three issues before we can position ourselves on the Supreme Court ruling:

(1) the need to distinguish between the various acts adopted by treaty bodies;
(2) the object and purpose of the views and interim measures of treaty bodies; and
(3) the domestic applicability of acts that are legally binding in international law.

(B) THE ACTS ADOPTED BY TREATY BODIES

4 Although the author ultimately justifies the judgment, despite his inconsistent approach, he considers it to constitute a response to the need to implement in the Spanish legal system the human rights treaties to which Spain is a party.

5 See her contribution in this same volumen here.

6 For example, Escobar Hernández, *supra* n. 2.

7 For example, Gutiérrez Espada, *supra* n. 2.

8 B. Vázquez Rodríguez, 'Interim Measures Requested before International Courts and Quasi-Judicial Bodies in the Protection of Human Rights: Do They Also Protect the Right to Participate in Public Affairs?', 22 *SYbIL* (2018) 77-115.

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Treaty bodies can adopt several types of acts in accordance with the various functions assigned to them. It is important to distinguish between these acts, as each type has different legal effects. For the purposes of this article, we will look at three types of such acts (the most often cited): *concluding observations*, which are adopted after interactive dialogue with each State party to a treaty and addressed exclusively to that State party; *general comments,* which are adopted by treaty bodies and addressed to all States parties; and *views* and *interim measures*, which are adopted by treaty bodies in the framework of the system of individual complaints or communications from individuals.

(1) Concluding observations

The main function attributed to treaty bodies is regular monitoring of the States parties to the convention that they serve. In this context, following the regular review conducted of each State party, the committees approve concluding observations, in which they set out, in accordance with the provisions of the treaties themselves, the "suggestions and recommendations"[9] that they deem appropriate after analysing all the information received and the interactive dialogue with the state's delegation.

The legal value of these concluding observations is that indicated by the literal meaning of the terms used in the convention, i.e. "suggestions and recommendations". Whatever the corresponding treaty body might indicate therein cannot be considered binding. What is legally binding on the state is the treaty itself. The state appears before the corresponding committee to report on the progress made and the difficulties and obstacles encountered in the performance of its obligations under the treaty. Based on the state's report, the rest of the information in the committee's power and the interactive dialogue with the state's delegation, the committee then drafts concluding observations with the aim of bolstering the progress made and suggesting and recommending actions to help the state fulfil its obligations. However, should the state fulfil those obligations without following those suggestions and recommendations, it will not be in breach of any obligation. It is the obligations arising under the treaty themselves that are binding on the state, nothing else. The suggestions and recommendations are intended exclusively to assist the state in fulfilling them, and it may or may not follow them.

(2) General comments

Another function attributed to treaty bodies is the formulation of *general comments*.[10] These are documents that seek to better explain to the States parties and to society at large the content of the obligations arising under each treaty. They are drafted by the committees, usually when, as part of their monitoring function, they observe that there are non-uniform or even contradictory interpretations of the treaty's provisions or when they observe particular difficulties for the understanding or application of the

9 This is the expression used in almost all the conventions. See, among others: the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 *UNTS* 3, Art. 45.d; the Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 *UNTS* 3, Art. 36.1; the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 *UNTS* 171, Arts. 36.1 and 40.4; and the Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 *UNTS* 13, Arts. 36.1 and 21.1.

10 Called *general recommendations* in the case of the CEDAW.

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obligations in general.

The legal value of general comments is related to their object and purpose: to improve understanding of the content and consequences of the obligations arising under the corresponding convention. Accordingly, the committees are usually especially careful about the terminology used, distinguishing in particular between the modal verbs *should*, *shall* and *must* when explaining states' obligations. They thus aim to distinguish what, in their view, is only a recommendation from a deduced obligation or an imperative obligation clearly established in the convention.

General comments are especially important when they are drafted jointly by two or more treaty bodies.[11]

In any case, although they are an interpretation of the convention performed by a treaty body that has been given the competence to do so, this interpretation can be challenged by the States parties. Thus, the treaties provide that the general comments will be transmitted to the UN General Assembly with the comments, if any, of the States parties. These comments may object to the committee's stated interpretation of a given treaty provision. However, if the committee's interpretation is not challenged, a *juris tantum* presumption of acceptance of the interpretation by the States parties to the treaty can be considered to exist.

In other words, general comments have legal value for the purpose of interpreting the corresponding convention's provisions, especially if that interpretation has not been challenged by the States parties.

(3) Views and interim measures

Finally, there are the views and interim measures adopted by treaty bodies in the framework of the system of individual complaints or communications from individuals. This procedure, which was originally exceptional in nature, has ultimately been recognized for all treaty bodies through supplementary declarations provided for in the convention itself or through the optional protocols to the main human rights treaties.[12] In this case, we are dealing with the attribution to each committee, through a specific act

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[11] This is, for example, the case of *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices* (CEDAW/C/GC/31-CRC/C/GC/18, of 14 November 2014); *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families* [CMW] *and No. 22 (2017) of the Committee on the Rights of the Child* [CRC] *on the general principles regarding the human rights of children in the context of international migration* (CMW/C/GC/3-CRC/C/GC/22, of 16 November 2017); and *Joint general comment No. 4 (2017) of the CMW and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return* (CMW/C/GC/4-CRC/C/GC/23, of 16 November 2017).

[12] Currently, eight of the human rights treaty bodies may, under certain conditions, receive and consider individual complaints or communications from individuals: 1) the Human Rights Committee (CCPR) may consider individual communications alleging violations of the rights set forth in the International Covenant on Civil and Political Rights by States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 *UNTS* 171; 2) the Committee on Elimination of Discrimination against Women (CEDAW) may consider individual communications alleging violations of the Convention on the Elimination of All Forms of Discrimination against Women by States parties to the Optional Protocol to the Convention on the Elimination of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000), 2131 *UNTS* 83; 3) the Committee against Torture (CAT) may consider individual complaints alleging violations of the rights set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by States parties who have made the

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of attribution other than the ratification of the treaty creating them, of the competence to determine whether or not the convention has been violated in a specific case and, prior to that, the possibility of adopting interim measures. These are legal acts of a different nature from that of concluding observations and general comments. The origin of the treaty bodies' competence to adopt views and interim measures is different. The mere ratification of the human rights treaty gives them the competence to adopt concluding observations and general comments, in the framework of the monitoring function assigned to treaty bodies. With views and interim measures, however, we are no longer strictly speaking of the monitoring function and, thus, a legal act accepting this new competence of the treaty bodies is required. Whether by preparing a supplementary declaration or ratifying an optional protocol, the States parties assign a new, different, specific competence to the treaty bodies, allowing them to rule on complaints in individual cases of violation of the respective convention.

The key question raised by the two articles on the topic published in this volume of *SYbIL* is: what is the international legal value of these views? The present article will expand that question, in response to the article published in the previous volume of *SYbIL*, to include consideration of the legal value of interim measures as well.[13] However, before responding to this question, it is necessary to take a more thorough look at the object and purpose of both types of acts.

(C) THE OBJECT AND PURPOSE OF THE VIEWS AND INTERIM MEASURES OF TREATY BODIES

(1) The object and purpose of views

As explained, views are a legal act whereby a treaty body determines whether or not there has been a

necessary declaration under Art. 22 of the Convention (adopted 10 December 1984, entered into force 26 June 1987), 1465 *UNTS* 85; 4) the Committee on the Elimination of Racial Discrimination (CERD) may consider individual petitions alleging violations of the International Convention on the Elimination of All Forms of Racial Discrimination by States parties that have made the necessary declaration under Art. 14 of the Convention (adopted 7 March 1966, entered into force 4 January 1969), 660 *UNTS* 195; 5) the Committee on the Rights of Persons with Disabilities (CRPD) may consider individual communications alleging violations of the Convention on the Rights of Persons with Disabilities by States parties to the Optional Protocol to the Convention (adopted 13 December 2006, entered into force 3 May 2008), 2518 *UNTS* 283; 6) the Committee on Enforced Disappearances (CED) may consider individual communications alleging violations of the International Convention for the Protection of All Persons from Enforced Disappearance by States parties that have made the necessary declaration under Art. 31 of the Convention (adopted 20 December 2006, entered into force 23 December 2010), 2716 *UNTS* 3; 7) the Committee on Economic, Social and Cultural Rights (CESCR) may consider individual communications alleging violations of the International Covenant on Economic, Social and Cultural Rights by States parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013), A/RES/63/117; and 8) the CRC may consider individual communications alleging violations of the Convention on the Rights of the Child or its first two Optional Protocols on the sale of children, child prostitution and child pornography (OPSC) and on the involvement of children in armed conflict (OPAC) by States parties to the Third Optional Protocol on a communications procedure (OPIC) (adopted 19 December 2011, entered into force 14 April 2014), A/RES/66/138.

Finally, Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3, gives the CMW competence to receive and consider individual communications alleging violations of the Convention by States parties that made the necessary declaration under Art. 77. However, this individual complaint mechanism will only become operative when 10 States parties have made the necessary declaration under Art. 77 and has not yet entered into force.

[13] Vázquez Rodríguez, *supra* n. 11.

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violation of a given human rights treaty in a given case, following the presentation of an individual communication by an alleged victim and provided certain requirements have been met, including the prior exhaustion of all domestic remedies.

The prior exhaustion of domestic remedies is required for the state's act to be final, that is, for it no longer to be possible for it to be remedied within the domestic legal system itself. However, one essential point to take into account is that treaty bodies (like human rights courts) are not appellate courts of last resort for judgments delivered in the national system. The committees are competent to consider possible violations of the rights guaranteed by the treaties concerned, but not to act as an appellate instance with respect to national courts and tribunals. Thus, the committees cannot in principle examine the determination of the administrative, civil or criminal liability of individuals, nor can they review the question of innocence or guilt. Similarly, the committees cannot review the facts and evidence in a case already decided by the national courts.

In other words, the competence of the treaty bodies within the framework of the competence to study individual communications is limited to determining whether or not there has been a violation of any of the rights recognized under the respective treaty in a specific case. And that is precisely the specific content of the treaty body's view: to decide, after analysing the arguments put forward by the author of the communication and by the state in the framework of a dispute, whether or not the facts denounced before it constitute a violation of the convention.

After making this determination, the committee may formulate the recommendations it considers suitable to remedy the violation. However, it is important to distinguish between these two things. The view is one legal act and the recommendations regarding the potential remedy another.

The texts of the optional protocols are clear on this point. For example, Article 9.1 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights provides that "After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned".[14] Therefore, the legal value of views and of recommendations can be (and, in fact, is) different.

And what is the international legal value of these views? The texts of the treaties and optional protocols are admittedly vague in this regard. They either say nothing on the issue[15] or use the formula "The

[14] In the same sense, see, for example: Art. 7.3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women ("After examining a communication, the Committee shall transmit its views on the communication, together with its recommendations, if any, to the parties concerned"); Art. 10.5 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure ("After examining a communication, the Committee shall, without delay, transmit its views on the communication, together with its recommendations, if any, to the parties concerned"); etc.

[15] International Convention on the Elimination of All Forms of Racial Discrimination; Optional Protocol to the International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Optional Protocol to the Convention on the Rights of Persons with Disabilities; and International Convention for the Protection of All Persons from Enforced Disappearance.

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State Party shall give due consideration to the views of the Committee".[16]

What is the "due consideration" merited by a committee's view in an individual complaint procedure?

The interpretation of "due consideration" must be based on the object and purpose of the procedure in which the view is adopted. To that end, the attribution of specific and special competence to the committee, through a specific and special declaration of willingness by the state, to hear individual complaints is of particular importance. What competence is it attributed? To determine whether or not the convention has been violated in a specific case. It is not a matter of exercising generic control over compliance with the convention (as in the case of the regular monitoring that gives rise to concluding observations), or of offering a generic interpretation of the convention (as in the case of general comments), but rather of determining, in a specific case, whether or not the convention has been violated. And that function is a judicial function, not a monitoring one.

The committees consist of experts of high moral standing and recognized competence in the field covered by the convention. The committee members, although elected by the States parties from among their nationals, serve in their personal capacity and have strict standards to guarantee their independence and impartiality.[17] The individual complaints procedure is an adversarial procedure, in which the respondent state's rights of defence are guaranteed, as it may access all the documentation and submit the allegations it considers appropriate. The rules of procedure are public.

In light of these factors, it can be said that there are no substantive differences between the actions of the committees when they are exercising their attributed competence of examining individual communications and those of human rights courts, such as the European Court of Human Rights, when they exercise their jurisdiction over individual complaints.

There are certainly formal differences, such as the name of the international body ("court" in one case, "committee" in the other) or the term used for the decision ("judgment" in one case, "view" in the other). However, beyond these formal differences, with regard to neither the statute of the members (form of election, nature of the mandate, independence), the body's powers (ensure the interpretation and application of the respective convention), the system for the attribution of competence (a treaty), nor the adversarial procedure followed (with the participation of the respondent state, all of whose rights of defence are guaranteed) can substantive differences be said to exist between the work of the European court and that of the committees when they are fulfilling their judicial functions.

With regard to the formal differences, it must not be forgotten that one of the defining characteristics of international law as a legal system is its markedly non-formalistic nature. Thus, as the International Court of Justice indicated in analysing whether a not a joint communiqué was a treaty, whether a document "does or does not constitute such an agreement essentially depends on the nature of the act or transaction to which [it] gives expression; and it does not settle the question [of whether or not it is binding]

[16] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Art. 9.2). In the same sense, see: the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Art. 7.4); and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Art. 11.1).

[17] See the *Guidelines on the independence and impartiality of members of the human rights treaty bodies ("the Addis Ababa guidelines")*, adopted by all UN treaty bodies.

 DOI: 10.17103/sybil.23.7

simply to refer to the form in which that act or transaction is embodied",[18] regardless of its particular designation (treaty, convention, protocol, memorandum, etc.) or how it was concluded (in writing, orally, virtually, etc.). The same can be said of the terms used to designate a body or its decisions.

In such a non-formalistic system, special importance cannot be attached to the fact that the body is called a "committee" and not a "court"; that its decisions are called "views" and not "judgements"; or that it is not expressly stated that "The High Contracting Parties undertake to abide by the views of the Committee in any case to which they are parties", but rather simply that "The State party shall give due consideration to the views of the Committee". What matters is "the nature of the act" and, in this case, in light of all the circumstances, it is clear that the act has a judicial nature that is binding on the state that has granted the committee the competence to determine whether or not the convention has been violated.

As the International Court of Justice noted in its Advisory Opinion of 13 July 1954, "It depends on the intention of the [States] in establishing the [Committee], and on the nature of the functions conferred upon it by its [Optional Protocol]. An examination of the language of the [Optional Protocol] has shown that the [States] intended to establish a judicial body; moreover, [they] had the legal capacity [...] to do so".[19]

(2) The object and purpose of interim measures

Having determined the judicial nature of treaty bodies' views and, therefore, their legally binding nature, we must now also consider that of the interim measures adopted in the framework of the individual communications procedure.

Interim measures, also referred to as precautionary *or* provisional measures,[20] are adopted to protect the rights of the parties pending the final decision in a dispute without jeopardizing any subsequent decisions on the admissibility or merits of the case in question. In fact, interim measures were designed as a tool for preventing further human rights violations and may be defined as a means through which a judicial or quasi-judicial body (hereinafter, international body) is able to prevent irreversible harm to persons who are in a situation of imminent risk, extreme gravity and urgency.

Interim measures have a dual precautionary and protective nature. They are protective because they seek to prevent irreparable harm and preserve the exercise of human rights. They are precautionary insofar as they are intended to preserve a legal situation under consideration by the committee. Their precautionary nature aims to preserve rights at risk of grave violation until the committee can examine the

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[18] *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Reports (1978) par. 96, at 40.

[19] The question then raised was whether the sentences of the United Nations Administrative Tribunal were legally binding for the General Assembly. In that case, the Court noted: "It depends on the intention of the General Assembly in establishing the Tribunal, and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body; moreover, it had the legal capacity under the Charter to do so." *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Reports (1954) 18.

[20] In the African system, the measures adopted by the African Commission and the African Court are called provisional measures, whilst in the Inter-American system, the measures endorsed by the Inter-American Commission are referred to as precautionary measures and the measures adopted by the Inter-American Court are called provisional measures. In the context of the European Court on Human Rights, these measures are called interim measures. Finally, the International Court of Justice also uses the term provisional measures to refer to these measures.

 DOI: 10.17103/sybil.23.7

complaint. Their object and purpose are to ensure the integrity and effectiveness of the committee's decision on the merits and, thus, to prevent infringement of the rights at stake, which could adversely affect the useful purpose (effet utile) of the final decision. Interim measures also enable the state concerned to implement the final views and comply with the ordered reparations.

Interim measures are different from the "*protection measures*" referred to, for example, in Article 4 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure. However, the difference between them is not simple. Interim measures differ from protection measures mainly in terms of their purpose. Protection measures are the measures that states must adopt to ensure that individuals under their jurisdiction are not subjected to any human rights violation, ill-treatment or intimidation as a consequence of communications or cooperation with the committee. The different purposes of the two types of measures justify their being regulated in separate articles. Protection measures are adopted whenever the perpetrator or representative justifies a risk of reprisal (acts of reprisal often appear after the complaint has been registered or even once the decision has been adopted). Interim measures are adopted when the case is registered (in practice, there have been no cases in which they were adopted later, although in theory it is possible). The treaty bodies distinguish between when each type of measure is adopted, especially based on the purpose thereof. However, the distinction is not always clear. In any case, it has no practical consequences for the purposes of the present paper since the legal regime for both types of measures is the same. We will thus not discuss it any further.

The possibility for an international body competent to hear a dispute to adopt interim measures is considered a general principle of law. In the Electricity Company case of 1939, the Permanent Court of International Justice clearly identified the power to order interim measure as a general principle of international law.[21] The International Court of Justice took the same position in the LaGrand *case* of 1999.[22] As the *Institut de Droit International* has pointed out, "It is a general principle of law that international and national courts and tribunals may grant interim relief to maintain the status quo pending determination of disputes or to preserve the ability to grant final effective relief."[23]

The adoption of interim measures as an inherent power of international human rights judicial bodies was also expressed by the Inter-American Court of Human Rights in the Velásquez Rodríguez *case* of 1988, on the basis of Articles 63(2-39) and 33 of the American Convention on Human Rights, Articles 1 and 2 of the Statute of the Court, and Article 23 of the Rules of Procedure.[24]

Although treaty bodies are not, strictly speaking, judicial bodies, when they are dealing with an individual communication, they are exercising a quasi-judicial function and should therefore have that

[21] *The Electricity Company of Sofia and Bulgaria (Interim Measures of Protection)*, Order of 5 December 1939, PCIJ Series A/B No. 79, at 199.

[22] *LaGrand Case (Germany v. United States of America) - Request for the Indication of Provisional Measures of Protection*, Order of 3 March, ICJ Reports (1999), par. 21 and 22.

[23] See: *Resolution on Provisional measures* adopted by the Institut de Droit International at the session of Hyderabad in 2017, par. 1.

[24] *Case of Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), IACHR.

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competence recognized.

In sum, all international human rights bodies that receive complaints or individual communications, whether judicial or not, have the ability to adopt interim measures in the context of individual communication procedures. This is either recognized by the relevant treaties establishing these procedures[25] or by the given treaty body's own rules of procedure.[26]

In the case of judicial bodies, the dispute over the mandatory nature of interim measures was finally settled in the LaGrand *case* by the International Court of Justice. In that case, the Court adopted a teleological approach, declaring:

> "The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. It follows from that object and purpose, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article."[27]

This doctrine has been affirmed repeatedly by the ECtHR, the Inter-American Court on Human Rights (IACHR) and the African Commission on Human and Peoples' Rights (ACHPR).

In the case of the ECtHR, two Grand Chamber judgments have given the Court an opportunity to clarify this obligation, based particularly on Article 34 (individual applications) of the European Convention on Human Rights: Mamatkulov and Askarov v. Turkey, of 4 February 2005[28]; and Paladi v. the

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[25] Art. 5 OP-CEDAW, Art. 6 OPIC-CRC, Art. 4 OP-CRPD, Art. 31 (4) CED, and Art. 5 OP-CESCR.

[26] For the three oldest procedures, namely ICCPR, CAT and CERD. In the cases of the ECtHR and the IACHR, it is recognized in the Rules of Procedure.

[27] *LaGrand Case (Germany v. United States of America),* Judgment of 27 June 2001, ICJ Reports (2001), par. 102.

[28] *Mamatkulov and Askarov v. Turkey,* (App. 46951/99 and 46827/99), (Grand Chamber Judgment) (2005) ECtHR 64. The applicants were two Uzbek nationals and members of an opposition party in Uzbekistan. They were arrested in Turkey on suspicion of murder and an attempted attack, and extradited to Uzbekistan in spite of an interim measure indicated by the Court under Rule 39 of the Rules of Court. Their representatives maintained in particular that, in extraditing the applicants, Turkey had failed to discharge its obligations under the Convention by not acting in accordance with the indications given by the Court under Rule 39 of its Rules of Court. In this judgment, the Court concluded, for the first time, that, by failing to comply with interim measures indicated under Rule 39 of the Rules of Court, a State party had failed to comply with its obligations under Art. 34 of the Convention. The Court noted in particular that, under the Convention system, interim measures, as they had consistently been applied in practice, played a vital role in avoiding irreversible situations that would prevent the Court from properly examining the application and, where appropriate, securing for the applicant the practical and effective benefit of the asserted Convention rights. Accordingly, in those conditions, a failure by a State which had ratified the Convention to comply with interim measures would undermine the effectiveness of the right of individual application guaranteed by Art. 34 and the State's formal undertaking in Art. 1 to protect the rights and freedoms in the Convention. Lastly, the Court reiterated that, by virtue of Art. 34, States which had ratified the Convention undertook to refrain from any act or omission that might hinder the effective exercise of an individual applicant's right of application. A failure to comply with interim measures had to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Art. 34.

 DOI: 10.17103/sybil.23.7

Republic of Moldova, of 10 March 2009.[29] This jurisprudence has been repeated in many other cases.[30]

In the case of the IACHR, according to Article 19(c) of the Statute of the Inter-American Commission on Human Rights, the Commission has the power "to request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons". In its case law, in *the* Constitutional Court v. Peru case of 2001, the Court stated that the provision established in Article 63(2) of the Convention makes it binding for the state to adopt the interim measures ordered by the Court. This reasoning relies on one main argument: states must comply with their conventional international obligations in good faith and in conformity with the fundamental principle of international law pacta sunt servanda, which is supported by international case law and practice.[31] In fact, according to the Court's view, states are supposed to abide by the Commission's requests, based on the principles of good faith and effectiveness.[32]

Likewise, in the International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v. Nigeria *case* of 1998, the ACHPR declared the binding nature of its interim measures. According to the Commission, states are bound by Article 1 of the African Charter

[29] *Paladi v. the Republic of Moldova* (App. 39806/05), Judgment of 10 March 2009 (Grand Chamber Judgment), (2009) ECtHR 182. The applicant, who suffered from a number of serious illnesses, complained about the unlawfulness of his detention pending trial and that, during that time, he had not been given appropriate medical care. He also alleged that the authorities had failed to comply swiftly with the Court's interim measures ordered under Rule 39 of the Rules of Court stating that the applicant should not be transferred back to the prison hospital until the Court had had an opportunity to examine the case in breach of Art. 34 of the Convention. The Court held that there had been a violation of Art. 34 of the Convention, on account of the Moldovan authorities' failure to comply with the interim measure, issued under Rule 39 of the Rules of Court, in which the Court asked them to keep the applicant in the Republican Neurology Centre of the Ministry of Health. In this judgment, the Court reiterated in particular that interim measures that it might have cause to adopt under Rule 39 of its Rules of Court served to ensure the effectiveness of the right of individual petition established by Art. 34 of the Convention. The Court further explained that there would be a breach of Art. 34 if the authorities of a Contracting State failed to take all steps which could reasonably have been taken in order to comply with the measure indicated by the Court. In addition, the Court noted that it was not open to a Contracting State to substitute its own judgment for that of the Court in verifying whether or not there existed a real risk of immediate and irreparable damage to an applicant at the time when the interim measure was indicated or in deciding on the time limits for complying with such a measure.

[30] See also, among others: *Kondrulin v. Russia*, judgment of 20 September 2016; *Shamayev and Others v. Georgia and Russia*, judgment of 12 April 2005; *Aoulmi v. France*, judgment of 17 January 2006; *Olaechea Cahuas v. Spain*, judgment of 10 August 2006; *Mostafa and Others v. Turkey*, judgment of 13 January 2007; *Aleksanyan v. Russia*, judgment of 22 December 2008; *Ben Khemais v. Italy*, judgment of 24 February 2009; *Grori v. Albania*, judgment of 7 July 2009; *D.B. v. Turkey* (no. 33526/08), judgment of 13 July 2010; *Al-Saadoon and Mufdhi v. the United Kingdom*, judgment of 2 March 2010; *Trabelsi v. Italy*, judgment of 13 April 2010; *Toumi v. Italy*, judgment of 5 April 2011; *Makharadze and Sikharulidze v. Georgia*, judgment of 22 November 2011; *Mannai v. Italy*, judgment of 27 March 2012; *Abdulkhakov v. Russia*, judgment of 2 October 2012; *Labsi v. Slovakia*, judgment of 15 May 2012; *Rrapo v. Albania*, judgment of 25 September 2012; Zokhidov v. Russia, judgment of 5 February 2013; Salakhov and *Islyamova v. Ukraine*, judgment of 14 March 2013; *Savriddin Dzhurayev v. Russia*, judgment of 25 April 2013; *Trabelsi v. Belgium*, judgment of 4 September 2014; *Amirov v. Russia*, judgment of 27 November 2014; *Sergey Antonov v. Ukraine*, judgment of 22 October 2015; *Andrey Lavrov v. Russia*, judgment of 1 March 2016; and *Klimov v. Russia and Maylenskiy v. Russia*, judgments of 4 October 2016.

[31] Provisional Measures, Order of the Inter-American Court of Human Rights of 14 August 2000, in Provisional Measures Compendium: July 2000 June 2001, Series E, No 3, p 143, par. 14.

[32] For example, in *the Colotenango v. Guatemala* case of 2001 and the *James et al. v. Trinidad and Tobago* case of 2009.

DOI: 10.17103/sybil.23.7

on Human and Peoples' Rights. In fact, one of the African Commission's functions is to support States parties in complying with their obligations under the Charter.[33]

Although not strictly judicial bodies, treaty bodies have maintained the same position in relation to the mandatory nature of interim measures.

In the Mansaraj v. Sierra Leone *case of 2001*, the Human Rights Committee (HRC) declared that non-compliance with its interim measures constituted a clear violation of the general duty of cooperation with the Committee under the Covenant of Civil and Political Rights and its Optional Protocol.[34] In the Glen Ashby v. Trinidad and Tobago *case of 2002*, it declared that non-compliance with the Committee's interim measures would undermine the Committee's work.[35] In Piandiong v. The Philippines, the HRC declared that "Having been notified of the communication, the State party breaches its obligations under the Protocol, if it proceeds to execute the alleged victims before the Committee concludes its considerations and examination, and the formulation and Communication of its views".[36] It further emphasized that this breach was "particularly inexcusable" given the request for interim measures. The HRC's position in this regard has also been reinforced in its General Comment No. 33, which mentions 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".[37] The HRC has also mentioned the obligation to respect interim measures in some of its *concluding observations*.[38] In these concluding observations, the Committee recalls that each State party has to fulfil its obligations under the Covenant and the Optional Protocol, including requests for interim measures, in accordance with the principle of *pacta sunt servanda*.

The Committee against Torture (CAT) has taken a similar position to the HRC's. In Brada v. France, the CAT stated:

> "The State party's action in expelling the complainant in the face of the Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations

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[33] 137/94-139/94-154/96-161/97: *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) / Nigeria*, par. 113-114.

[34] *Anthony Mansaraj, Gilbert Samuth Kandu-Bo, Khemalai Idrissa Keita, Tamba Gborie, Alfred Abu Sankoh (alias Zagalo), Hassan Karim Conteh, Daniel Kobina Anderson, Alpha Saba Kamara, John Amadu Sonica Conteh, Abu Bakarr Kamara, Abdul Karim Sesay, Kula Samba, Nelson Williams, Beresford R. Harleston, Bashiru Conteh, Victor L. King, Jim Kelly Jalloh and Arnold H. Bangura v. Sierra Leone*, Views, HRC, UN Doc. CCPR/C/72/D/839/1998, Communication Nos. 839, 840, 841/1998, 16 July 2001.

[35] *Ashby v. Trinidad and Tobago*, Views, HRC, UN Doc. CCPR/C/74/D/580/1994, Communication No. 580/199421, March 2002,

[36] *Piandiong v. The Philippines*, HRC, UN Doc. CCPR/C/70/D/869/1999, Comm. No. 869/1999, para. 5.2. See also HRC, Israil v. Kazakhstan, HRC, UN Doc. CCPR/C/103/D/2024/2011, Comm. No. 2024/2011, para. 7.1.

[37] HRC, General comment No. 33, *Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc. CCPR/C/GC/33, 5 November 2008, para. 19.

[38] See, e.g., Concluding Observations on Uzbekistan, UN Doc. CCPR/CO/83/UZB, 26 April 2005, para. 6; Concluding Observations on Tajikistan, UN Doc. CCPR/CO/84/TJK, 18 July 2005, para. 8; and Concluding Observations on Canada, UN Doc. CCPR/C/CAN/CO/5, 20 April 2006, para. 7.

 DOI: 10.17103/sybil.23.7

under article 22 of the Convention."[39]

The CAT has generally made these decisions in the face of the State party's denial of any binding effect of requests for interim orders. In Sogi v. Canada, the State party argued the non-binding nature of requests for interim measures and subsequently contended that non-compliance with such a request by returning the complainant to India did not entail a violation of Articles 3 and 22 of the Convention. In this regard, the Committee stated that:

> "[T]he State party's obligations include observance of the rules adopted by the Committee, which are inseparable from the Convention, including rule 108 of the rules of procedure, which is specifically intended to give meaning and scope to article 3 and 22 of the Convention."[40]

Although one could point to like-minded case law of the other treaty bodies, it would be more illuminating to conclude with a special reference to the Committee on the Rights of the Child. Despite being the last committee to have been given the competence to receive individual communications and adopt interim measures, through the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (OPIC), it was the first to adopt Guidelines with a view to interpreting Article 6 of the Optional Protocol on interim measures.[41] The purpose of these Guidelines is to explain to states and the potential authors of communications the concept of interim measures, the criteria that the Committee will use for their potential adoption or denial, and the legal value of those interim measures. Although the document refers exclusively to Article 6 OPIC and to the specific situation of children as potential victims, it can be viewed as a synthesis of the opinion of all treaty bodies on the nature, object and purpose of interim measures. In this regard, the last paragraph, referring to the legal value thereof, provides:

> "The Committee is of the view that interim measures issued under article 6 of the OPIC impose an international legal obligation on State parties to comply. A failure by the State party concerned to implement the interim measures would undermine the effectiveness of the individual communications procedure and render the case moot. Such non-compliance would entail a violation of article 6 of the OPIC, which expressly establishes the Committee's competence to issue interim measures."[42]

In sum, the case law discussed above makes clear that adherence to requests for interim measures should be considered binding by states that have authorized the relevant committee to receive individual complaints, as non-compliance with interim measures undermines the integrity of those individual complaint systems.

Also, the practice of interim measures has been widely accepted by State parties with few

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[39] *Brada v. France*, CAT, UN Doc. CAT/C/34/D/195/2002, 24 May 2005, para. 13.4. See also: CAT Committee, *Agiza v. Sweden*, UN Doc. CAT/C/34/D/233/2003, para. 13.9; *Pelit v. Azerbaijan*, UN Doc. CAT/C/38/D/281/2005, para 11; and *Tebourski v. France*, UN Doc. CAT/C/38/D/300/2006, para. 8.7.

[40] *Sogi v. Canada*, CAT, UN Doc. CAT/C/39/D/297/2006, para. 10.11.

[41] *Guidelines for Interim measures under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, adopted by the Committee on the Rights of the Child at its 80th session (14 January to 1 February 2019).

[42] *Ibid.*, par. 9.

 DOI: 10.17103/sybil.23.7

exceptions.[43] This is reflected in the very high level of compliance, suggesting that most States parties accept the binding nature of such requests.

Naturally, this does not mean that the state must comply with the adoption of interim measures and accept them until the end of the process before the committee. Interim measures must be an exception. They must be adopted exclusively "in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations". The Committee on the Rights of the Child has sought to clarify these concepts. The aforementioned Guidelines specify:

> "Hence, for the purposes of making a decision on the adoption of interim measures, the Committee considers that:
>
> (a) "exceptional circumstances" refers to a grave impact that an action or omission by a State party can have on a protected right or on the eventual effect of a pending decision in a case or petition before the Committee;
>
> (b) "irreparable damage" refers to a violation of rights which, due to their nature, would not be susceptible to reparation, restoration or adequate compensation. This also implies that, in principle, there is no domestic remedy that would be available and effective; and
>
> In analyzing those requirements, the Committee considers that the risk or threat must be imminent and can materialize; if the risk is not imminent, the author may request the interim measures at a later stage, when the risk becomes imminent."[44]

Accordingly, if a state considers that these circumstances are not met, it can make that allegation to the Committee for it to withdraw the interim measures. The Guidelines themselves state as much, indicating that:

> "Since the information on which the Committee relies is at that time preliminary (notably, in the absence of State party's observations), a decision on interim measures can be reviewed in light of further information provided by the parties."[45]

However, it is one thing to appeal the decision to adopt interim measures and another thing entirely to deny their binding nature.

(D) THE DOMESTIC APPLICABILITY OF ACTS THAT ARE LEGALLY BINDING IN INTERNATIONAL LAW

Having determined that both views and interim measures are legally binding at the international level, we must now turn to the question their domestic legal value. This question poses problems of international and domestic law.

In relation to international law, there are two elements that must be taken into consideration. The first is the general principle expressed in Article 27 (Internal law and observance of treaties) of the Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as

[43] It is true that, as Vázquez Rodríguez notes (*supra* n. 11, at 114), there have been several cases of non-compliance with interim measures. However, these cases are far outnumbered by those in which the measures have been accepted by states. Moreover, in most cases in which the interim measures have not been adopted, the state has sought a legal argument to justify the rejection. This legal argument is usually not their lack of a binding nature (see the documents Vázquez Rodríguez cites in footnote n. 161 of her paper).

[44] *Ibid.*, par. 2 and 3 (emphasis in the original).

[45] *Ibid.*, par. 8.

 DOI: 10.17103/sybil.23.7

justification for its failure to perform a treaty." The second is the obligation explicitly provided for in almost all human rights treaties, whereby "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."[46]

The Committee on the Rights of the Child interpreted this second provision in its General Comment No. 5, explaining that "For rights to have meaning, effective remedies must be available to redress violations. This requirement is [...] consistently referred to in the [...] major international human rights treaties. [...] So States need to give particular attention to ensuring that there are effective [...] procedures available to [subjects protected by the Convention]. These should include the provision of [...] information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other assistance. Where rights are found to have been breached, there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration [...]."[47]

In other words, taking "all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Convention" includes not only implementing the convention's provisions, but also guaranteeing the existence of effective remedies when they are breached.

In accordance with these two provisions, it is clear that the international framework imposes an obligation to eliminate any obstacle there may be in the domestic legal system to guarantee and enforce the rights recognized in human rights treaties. Failure to do so constitutes a breach of international legal obligations.

However, it is an obligation of result and not an obligation of conduct. Therefore, the procedure and way in which the goal is achieved remain the exclusive responsibility of the state, in accordance with the provisions of its domestic law. Each domestic legal system has its own rules regarding how to guarantee and enforce the rights recognized in human rights treaties. That is precisely why, when a committee determines that there has been a violation of the treaty's provisions in a given case, it limits itself to "recommending" possible solutions to remedy that violation.[48] The state can make the reparations following those recommendations or use another procedure to achieve that goal. The obligation imposed by the treaties is for the state "to inform the Committee, within six months after the views, of the action

[46] This provision can be found in the same or similar terms in: the International Covenant on Economic, Social and Cultural Rights (Art. 2); the International Covenant on Civil and Political Rights (Art. 2); the International Convention on the Elimination of All Forms of Racial Discrimination (Art. 2); the Convention on the Elimination of All Forms of Discrimination against Women (Art. 2); the Convention on the Rights of the Child (Art. 4); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (Art. 2); the International Convention on the Rights of Persons with Disabilities (Art. 4); the African Charter on Human and Peoples' Rights (Art. 1); the African Charter on the Rights and Welfare of the Child (Arts. 11, 18, 21, 28 and 29); the Arab Charter on Human Rights (Art. 3); the American Convention on Human Rights (Art. 2); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") (Art. 1); and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (Art. 3).

[47] General Comment No. 5 (2003) on *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, UN Doc. CRC/GC/2003/5, par. 24.

[48] See *supra* n. 17, on the difference between "views" and "recommendations".

 DOI: 10.17103/sybil.23.7

taken and envisaged in the light of the views and recommendations of the Committee".[49] It is not obliged to follow the committee's recommendations.

How the rights are implemented and guaranteed with access to effective remedies if a violation is determined to have taken place is, therefore, a question of domestic law. Consequently, whether or not to recognize the direct effect of the committees' views, the establishment of an administrative or judicial procedure to obtain reparation if a violation is found to have occurred, and even how the reparation is made all fall under the discretionary competence of the state. This stands in contrast with the result to be achieved: the state must implement and guarantee all the rights recognized in the human rights treaties it ratifies.

(E) CONCLUSION

In light of the conclusions reached in the preceding sections, it is possible to determine whether or not Judgment 1263/2018, of the Fourth Section of the Judicial Review Chamber of the Spanish Supreme Court, of 17 July 2018, referred to in the introduction to this paper, was correct.

The CEDAW's view determining that Ángela Rodríguez Carreño's rights were violated under the Convention on the Elimination of All Forms of Discrimination against Women[50] is obligatory for Spain. Spanish Supreme Court Judgment 1263/2018 recognizes this.

However, the truth is that this finding is hardly novel in Spanish case law. Previous case law had not denied that legal value. In fact, neither the National High Court judgment appealed before the Supreme Court of Spain in the Ángela Rodríguez case nor the National High Court's previous case law denied Spain's potential international legal obligation to comply with the views of treaty bodies. What they did not accept was that those views had a direct effect on Spanish law and that it fell to the courts to implement that effect.

In the words of the National High Court, human rights treaties "do not impose on the States parties the duty to immediately and directly compensate the injured parties when the Human Rights Committee concludes that a state has violated the rights or freedoms recognized in the Convention, but rather the obligation to establish a procedure that makes it possible to claim the appropriate compensation".[51] And, in its opinion, it is not the purview of the Spanish courts "to asses compliance by the Spanish state with the Committee's view, nor to demand such compliance from the Spanish government, which must be enforced before the competent international authority".[52] In other words, the National High Court does not deny that the views of treaty bodies, within the framework of communications procedures, are legally binding on Spain; however, in its opinion, it does not fall to it to rule on this issue. Anyone wishing to

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[49] See, for example, the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (Art. 11.1); the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Art. 9); or the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Art. 7.4).

[50] UN Doc. CEDAW/C/58/D/47/2012, of 15 August 2014.

[51] STS 1263/2018, *supra* n. 1, first legal basis.

[52] *Ibid.*

 DOI: 10.17103/sybil.23.7

demand that Spain comply with the view must do so before the competent international authority.

The recognition of legal effects in the Spanish legal order of a binding act of an international body with judicial functions is not a new issue in Spain. Since Spain's accession to the European Convention on Human Rights, it has been a recurring issue in relation to the domestic application of the judgments of the European Court of Human Rights. However, in this specific case, in the wake of the complex and meandering case law of the Spanish Supreme and Constitutional Courts,[53] a solution was reached, first, provisionally, by the Supreme Court,[54] and then definitively through the reform of Article 5 bis of the Organic Law on Judicial Power [LOPJ].[55] And that reform was undertaken even though (or, perhaps, precisely because), in the specific case of the European Court of Human Rights, there is a competent international authority before which to seek the responsibility of states that do not comply with its judgments: the Committee of Ministers of the Council of Europe.

The legislative reform does not recognize the direct applicability of the judgments of the European Court of Human Rights, but rather simply establishes a review procedure before the Supreme Court "when the European Court of Human Rights has declared that said decision has been issued in violation of one of the rights recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and gravity, has persistent effects that cannot be ended by any means other than through such review."[56]

In other words, if the effects do not persist, or can be ended by some way other than through review of a Supreme Court judgment, this extraordinary procedure cannot be used. And, in that case, who should implement the European Court judgment declaring the violation of a fundamental right? The answer should be the state, through its liability for the violation of fundamental rights. Failure to do so would mean that the Spanish legal system does not respond to the legally binding recognition of the violation of a citizen's fundamental rights and, therefore, would entail the violation of the principle of the effective protection of the rights of citizens, an essential principle for any democratic society.

Whilst all of these considerations can be asserted in relation to the judgments of the European Court of Human Rights, in light of the conclusions reached in the previous sections, we can also affirm that they

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53 The Supreme Court initially refused to recognize any type of internal effect for the judgments of the European Court of Human Rights (see, for example, the Supreme Court Judgment of 4 April 1990). Likewise, in Judgment 245/1991, of 16 December 1991 (STC 245/1991), the Constitutional Court noted that "the European Convention on Human Rights does not oblige states to give internal effect to the European Court's judgments that would annul the authority of *res judicata*".

54 In 2014, the Spanish Supreme Court, sitting in plenary session, ruled on the feasibility of judicial review as a procedural means of compliance with ECtHR resolutions declaring a violation of fundamental rights. The ruling, dated 21 October 2014, established that "as long as there is no express legal provision in the legal system for enforcing judgments delivered by the ECtHR finding that the fundamental rights of a party convicted by the Spanish courts have been violated, the appeal for review provided for under Article 954 of the Law on Criminal Procedure fulfils this purpose" (see: "Acuerdo del Pleno No Jurisdiccional de la Sala Segunda del Tribunal Supremo de 21-10-2014, sobre la viabilidad del Recurso de Revisión como vía procesal para dar cumplimiento a las resoluciones del TEDH en el que se haya declarado una vulneración de derechos fundamentales que afecten a la inocencia de la persona concernida").

55 Organic Law 7/2015, 21 July 2015, amending Organic Law 6/1985, of 1 July, on Judicial Power (Spanish Official Gazette (BOE) No. 174, 22 July 2015).

56 Art. 5bis LOPJ.

 DOI: 10.17103/sybil.23.7

should be predicable in relation to the views and interim measures of human rights treaty bodies.

However, it is not the same thing to say that the effective protection of fundamental rights requires any citizen who is the victim of a violation of those rights to be redressed as to say that the procedure to be followed in Spain to obtain that redress, when the violation has been determined to exist by an international body, is that of a special review procedure or a liability claim against the state in the courts. Such remedies are costly, slow and not always accessible. Victims of such violations have usually been litigating in the domestic courts and, then, in the international framework for many years. As noted, the obligation accepted by the state to take all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the human rights conventions involves providing for accessible mechanisms to obtain an appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration.

This objective was one of the goals explicitly provided for under the 1st National Human Rights Plan approved by the Spanish government on 12 December 2008.[37] Measure 5 of the Plan provided, "An action protocol will be adopted for complying with the views and recommendations of the UN system's various human rights protection committees. In particular, guidelines will be established to process the recommendations of such committees with the aim of providing suitable reparation to the interested parties." However, the Plan did not ultimately achieve this goal. And, as of late 2019, we have only the solution proposed in Spanish Supreme Court Judgment 1263/2018. A solution that, moreover, unlike the judgments of the European Court of Human Rights,[38] was not adopted generically but rather exclusively for the case tried.

The Spanish state cannot accept this solution. Until an accessible and effective procedure is put into place for obtaining suitable reparation in cases in which a human rights violation is determined to have taken place by an international body that has been given the competence to do so, it will remain in breach of its international obligation "to take all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the Human Rights Conventions".

[37] See the full text at: https://www.ohchr.org/Documents/Issues/NHRA/Spain_NHRAP.pdf.

[38] See *supra* n. 37.

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Asylum Policies in the European Union: Convergences Between the Internal and External Dimensions: An Introduction

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The articles presented in this Agora are written in the framework of the research project 'Asylum policies of the European Union: convergencies between the internal and external dimensions' funded by the Spanish Ministry of Economy and Competitiveness (MINECO) and the FEDER funds.[1] The topics addressed in the articles were discussed in a seminar held at the University of Deusto on April 28, 2019.

The research project, titled EURASYLUM, is administered by the Pedro Arrupe Human Rights Institute at the University of Deusto. The institute is affiliated with both the Faculty of Law and the Faculty of Social and Human Sciences. The research group of the Human Rights Institute, recognized by the Basque Goberment as 'Derechos Humanos y Retos-socioculturales en un mundo en transformación' is led by Dr Dolores Morondo, Head Researcher of the Institute as well as the Jean Monnet Chair EU Economic and legal Integration for People, represented by Professor Laura Gómez, are cofunders of this project.[2]

The research team of the EURASYLUM project is comprised of Professor Javier Andrés González Vega from the University of Oviedo; Professor Paula García Andrade from the University Pontificia of Comillas; and the following professors at the University of Deusto: Laura Gómez, Felipe Gómez, Steffen Rasmussen, Sergio Caballero, Cristina Churruca, and José Ramón Intxaurbe. The work team is composed of various researchers including Professor Elspeth Guild (Radboud University), Thomas Gammeltoft (University of Aarhus), Violeta Moreno-Lax (Queen Mary University), Silvia Morgades (Pompeu Fabra University) and Carmen Pérez Gónzález (University Carlos III de Madrid) as well as by Professors María Nagore and David Ferández Rojo. The main researcher is Joana Abrisketa Uriarte, Professor at the University of Deusto.

The project originated from the premise that an assessment of EU asylum policies and their eventual reform, would become of particular interest. The arrival of over a million refugees during 2015 and 2016, together with the migrants at risk at sea and the disembarkation debate, revealed legal vacuums which led to European institutions and governments having to address the phenomenon both in short-term and

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[1] 'Las políticas de asilo de la Unión Europea: confluencias entre las dinámicas interna y externa' (DER 2017-82466-R, 2018-2020), Spanish Ministry of Economy and Competitiveness (MINECO) and the FEDER funds.

[2] Research Team 'Derechos Humanos y Retos-socioculturales en un Mundo en Transformación' (IT1224-19) (2019-2021), Vasque Government, Deparmtent of Education, Call for the Recognition of Research Groups of the Basque University System, 2018 and Jean Monnet Chair EU Economic and Legal Integration for People, EAC/A03/2016 (2017-2020).

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long-term perspectives. It was, therefore, appropriate and timely to examine the application of the asylum processes of the EU in its internal and external dimensions.

This perspective was confirmed by the newly elected European Commissioner, President Ursula von der Leyen on the 10 September 2019, when she called for a 'New Pact on Migration and Asylum'. She highlighted that this should involve a comprehensive approach, looking at external borders, the asylum and repatriation systems, the Schengen Area of Free movement and working with partners outside the EU. She made the call in a letter to the future Commissioner for Home Affairs Ylva Johansson. Asylum and migration will inevitably remain at the centre of EU politics during the next mandate[3].

In this context, the global trend of international policies on the control and deterrence of migration and its reflection in EU asylum policies are analysed in the present Agora. The internal dimension of the EU's asylum policy is examined, as are the instruments used by the EU and its Member States concerning third States.

The CEAS reform proposal launched by the European Commission between May and July 2016 shows that the criteria set forth in the Dublin III Regulation are so entrenched that it will be difficult to change them. The difference between the Dublin III Regulation currently in force, and the proposal for its reform, lies in the fact that the proposal defines an overarching policy framework. It emphasizes that protection in the region and resettlement from there to the EU should become the model for the future. The system for allocation of asylum seekers in the EU, is presently conceived as a broad strategy to end irregular migration flows into the EU.

Furthermore, an intergovernmental approach has become the most preferred method of the EU frontier Member States. On 23 September 2019, France, Germany, Italy and Malta drafted a joint declaration of intent on a controlled emergency procedure through which Member States would assume voluntary commitments for a predictable temporary solidarity mechanism. This practice, justified in the context of disembarkation not only undermines the CEAS, but also weakens the significance of the Geneva Convention of 1951 on the Status of Refugees and the EU integration project. The Joint declaration appears primarily designed to address the 'disembarkation crisis' in the Central Mediterranean. However, collective and integrated responses are also urgently needed.

In the context of the current legal framework, by which legal entry is severely restricted, refugees and people in search of protection still arrive thorough irregular channels. EU law and policies on borders and visas do not expressly address the situation of refugees trying to access protection. The Schengen Borders Code bound European States by the principle of *non-refoulment*, in the sense that the regulation applies to any person crossing the internal or external borders of Member States regardless of whether they entered irregular or not. This principle encompasses a preventive protection, involving refugees or people in need of protection benefitting from a right of entry if a refusal would directly and unavoidably lead them

3 Von der Leyen, U., *Mission letter*, 10 September 2019, (accessed 27 November 2019).

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to treatments contrary to their human rights. Precisely, humanitarian visas would serve as an instrument which would permit entry due to the application of the principle of *non-refoulement* (see Silvia Morgades's article in this Agora).

Finally, the current mechanisms enshrined in CEAS do not correspond either to the principle of solidarity or to the guarantee of rights, and the current reform of the CEAS does not remedy this orientation. The stalemate in the negotiations on the reform of the CEAS over the past three years demonstrates the difficulties of the European Union Member States to find common grounds on asylum policies. However, if this stalemate allows the institutions to begin with fresh ideas and a new approach, it can be seen with certain optimism.

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Shrinking Protection Space Through Gatekeeping and Fencing Strategies: The impact of EU's Migration Control on the Protection of Asylum Seekers and Forced Migrants at EU's External Borders

Cristina CHURRUCA MUGURUZA*

Abstract: Forced migrants fleeing violent conflict, human rights abuses, persecution and other threats to life and livelihoods are entitled to the protection of their fundamental rights. Although in proportion there are few seeking refuge in the EU their protection space at external borders is shrinking. Starting with an explanation for the growing sophistication and inhumanity of European policies this article seeks to highlight the impact of the European migration control on the protection of forced migrants. It shows how in the complex framework of the European management and control of migration policy, border spaces of un-protection have been created through gatekeeping and fencing strategies at EU external borders.

Keywords: Protection forced migrants migration management gatekeeping and fencing strategies

(A) INTRODUCTION

Protection is widely understood in terms of rights. This rights-based approach to protection is most clearly summarized in the definition provided by in 1999 by a wide group of humanitarian and human rights organizations regularly convened by the International Committee of the Red Cross in Geneva. This definition which has been adopted by the Inter Agency Standing Committee (IASC) and the UNCHR among other agencies affirms that protection is:

> 'all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law.'[1]

Protection, in these terms, has a double dimension: the recognition that people have fundamental rights to protection and the obligations of duty bearers to respect these rights, that is, to ensure protection. When states are unwilling or unable to provide this protection because of violent conflict, human rights abuses, persecution and other threats to life and livelihoods, people are often forcibly displaced and seek protection outside their countries. Under these circumstances forced migrants and asylum seekers are entitled to the protection of their fundamental rights.[2]

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[1] S. Giossi Caverzasio, *Strengthening Protection in War: a Search for Professional Standards* (ICRC, Geneva, 2001), at 19.

[2] The Report of the *World Commission on Forced Displacement* argue that 'given the multiple factors and motives propelling forced displacement, and the complex and fluid patterns and processes of displacement (...) international intervention should be predicated on the needs and rights of the forcibly displaced, irrespective of the category or cause of

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Within the global context, the proportion of those displaced by crisis seeking refuge in the EU is very small.[3] Migration flows are mixed, meaning that economic migrants travel the same routes as asylum-seekers and refugees. Human rights concern of these mixed flows include the need to reduce or prevent the deaths of migrants on their way to Europe, to help families to know the fate of their missing relatives and to identify and process asylum seekers in order to protect refugees and their rights. Other concerns are the ill-treatment of migrants at borders, including practices that violate their freedom and security, and detention regimes at European Union's borders that do not adequately respect minimum human rights standards. However, even the respect for human dignity and the respect for human rights is a foundational value which the EU and its Member States share and are committed to promote, the protection space for asylum seekers and forced migrants in the Union is shrinking.[4]

The EU's approach to migration control forms part of a global process of containment of unwanted migrations and outlawing of the ability of the world's poor and marginalize to circulate. This process has been accompanied by a constant erosion of the rights of migrants and refugees and asylum seekers to enter and settle in developed countries. There is also a resistance to finding the means to implement a normative doctrine of protection and a preference for managing protection through case and situation specific policies and instruments.[5] From this starting premise, the aim of this article is twofold. On one hand it wants to provide an explanation for the growing sophistication and inhumanity of European politics which leads to increasingly smaller spaces where migrants can claim their rights and be treated with dignity. On the other hand, it seeks to highlight the impact of the European migration control on the protection of forced migrants and asylum seekers at EU external borders. In particular it wants to show how in the complex framework of the European policy of management and control of migration, border spaces of un-protection have been created through gatekeeping and fencing strategies. In order to do so, it will first investigate alternative conceptual diagnosis to understand European border security and migration management dynamics. Then to understand how the protection space of forced migrants at the EU borders is shrinking, the EU legal and policy framework in the field of migration will be briefly set out.

(B) INTERPRETING EU'S BORDER PROTECTION CRISIS

Since the early 1990s, rich states and international agencies have increasingly moved towards a policy of

displacement. Rights to protection and other entitlements belong to everyone, and most certainly to forcibly displaced people. They are not contingent on a particular legal status.' Chumir Foundation for Ethics in Leadership and the Humanitarian Policy Group of the Overseas Development Institute (ODI), *Research Report World Commission on Forced Displacement* (New York, June 2019).

3 UNCHR, *Global Trends. Forced displacement in 2018* (UNCHR, Geneva, 2019), at 18-22.

4 Roger Zetter proposes the concept of protection spaces to better explain the protection needs of forced migrants. Spaces refer to the different «geographies» in which forced migrants including refugees and asylum seekers find themselves at different temporal stages of their journeys. This concept underlines the imperative to look at «needs-based» or «rights-based» protection instead of or in addition to the conventional, «status-based protection» as the only or a sufficient response to current migration challenges. See, R. Zetter *Protecting Forced Migrants: A State of the Art Report of Concepts, Challenges and Ways Forward* (Swiss Federal Commission on Migration, Bern, 2014).

5 *Ibid.* at 63.

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containment designed to prevent unwanted migrants and asylum seekers from leaving their countries of origin. Castles gives several reasons to explain this process. First, forced migration is growing in volume and importance as a result of endemic violence and human rights violations. Second, policymakers try to implement differential policies for different categories of migrants. Third, there is a growing understanding that migration, both economic and forced, is an integral part of global and regional economic integration processes. Fourthly, it has become clear that immigrants do not simply assimilate into host societies, but instead tend to form communities and retain their own languages, religions and cultures. Finally, migration has become highly politicized and is now a central theme of both national and international policy. [6]

Much of the political class and population of immigrant-receiving countries perceive immigrants from poor countries in the South as a problem for national identity and social cohesion, and even as a threat to national security. This is part of a securitization agenda in which the excluded South is perceived as a source of conflict, terrorism and instability and in which the idea of national and international security takes precedence over human security. As Huysmans points out, the Europeanization of migration policy favours the securitization of migration, which supports a radical political strategy aimed at excluding certain categories of people by considering them as a danger (for example, to cultural values, to the provision of social assistance, to public security, to health, etc.) [7]. Non-governmental and social organizations such as the church have criticized the demonization of migrants and the use of language that deprives them of their human condition by treating them as threats.[8]

Along with the dynamics of securitization, it is undeniable that a strong humanitarian discourse focused on the protection of migrants has also emerged. [9] Both discourses of securitization and humanitarianism have a long history of several decades in the context of the European Union but their interaction in the field of border security and migration management has intensified and gained significant momentum in recent years, especially, as it will be mentioned in the next section, since the Arab Spring and the adoption of the Global Approach to Migration and Mobility. In fact, the same border security authorities that committed themselves to saving the lives of 'irregular' migrants are also complicit in creating the conditions that make them vulnerable to various forms of violence, both directly and indirectly. The humanitarian discourse has been co-opted and used by the authorities themselves who commit human rights violations to justify the obstruction and prohibition of independent search and rescue missions of civil society in the Mediterranean or the practice of summary returns in land border control operations on the Southern Border. In recent years, EU discourse reflects a change 'towards an increasingly human rights friendly narrative that depicts migrants as victims and smugglers as

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6 S. Castles, 'The International Politics of Forced Migration', 46-3 *Development*, (2003) 11-20 [doi: 10.1177/1011637003046003]

7 J. Huysmans, 'The European Union and the Securitization of Migration', 38-5 *Journal of Common Market Studies* (2000) 751–77 [doi: 10.1111/1468-5965.00263].

8 M.White and R.Syal, 'Archbishop of Canterbury: 'don't demonise immigrants'', *The Guardian*, 27 Octubre 2014..

9 P. Pallister-Wilkins, 'The Humanitarian Politics of European Border Policing: Frontex and Border Police in Evro", 9-1 *International Political Sociology* (2015), 53–69

perpetrators" of migrants death and abuse at sea'.[10] In general there is a growing criminalization of hospitality practices and solidarity with irregular migrants which has been described by Carrera as 'policing humanitarianism'.[11]

The growing sophistication and inhumanity of European migration control policy cannot be explained only appealing to the contradictions between discourse and practice in migration management policy. The process of (in) securitization of border control entails practices whereby the deaths turned into public spectacle of some people while attempting to enter the EU justify discussing the legitimacy of these border control policies, while masking the situation of the tens of thousands of people detained and returned, as well as the number of people prevented from entering the EU. As Vaughan-Williams highlights it is not only that the EU's borders are in crisis, but also that the basis on which border security authorities could be challenged and held accountable is also in crisis[12]

The biopolitical perspective offers interesting analytical possibilities to explain this process and the persistently violent nature of EU border control. Foucault's conception of a biopolitical regulation of life, a technology of capitalism's own government and at the same time a condition for its development, provides a conceptual framework to interpret the current management of migration.[13] With these lenses the global prohibition of undocumented and spontaneous migration is understood as a new manifestation of the security-development nexus and the interconnection between racism, migration and development become a fundamental element of biopolitical governance[14].

Different authors have used Giorgio Agamben's work to better understand the 'negative' dimensions of these biopolitical border practices: the so-called 'Thanatopolitical' dynamic that often exposes 'irregular' migrants to dehumanising and lethal conditions[15]. Agamben reintroduces the role of sovereign power to recover the violent potential of the tanatopolitical drift within biopolitical forms of governance[16]. Other scholars of critical studies on borders and migration largely reject Agamben's theses

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[10] V. Moreno Lax, 'The EU Humanitarian Border and the Securitization of Human Rights: The 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm', 56-1 *JCMS* (2018), 119 140 at 119 77 [doi: 10.1111/jcms.12651].

[11] The notion of 'policing humanitarianism' has emerged to describe not only cases of formal prosecution and sentencing in criminal justice procedures, but also wider dynamics of suspicion, intimidation, harassment and disciplining. See, S. CARRERA, *Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update,* Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union PE 608.838 - December 2018.

[12] N. Vaughan-Williams, *Europe's Border Crisis. Biopolitical Security and Beyond* (Oxford University Press: London, 2015), 121-151

[13] A. Salinas Araya, 'Biopolitics. Synopsis of a concept', 6-2 *Hybris. Revista de Filosofía* (2015) 101-137.

[14] M. Duffield, 'Racism, migration and development: the foundations of planetary order', 6-1 *Progress in Development Studies (2006)* 68-79.

[15] *Cfr.* Bigo, D., 'Detention of Foreigners, States of Exception, and the Social Practices of Control of the Banopticon' in Rajaram, P.K., and Grundy -Warr, C., *Borderscapes: Hidden Geographies and Politics at Territory's Edge* (University of Minnesota Press: Minneapolis, MN, 2007) 57 101.; De Genova, N. and Peutz, N., (Eds.), *The Deportation Regime: Sovereignty, Space, and the Freedom of Movement (*Duke University Press, Durham, NC and London, 2010); Kinnvall, C. and Nesbitt-Larking, P., 'Securitising Citizenship: (B)ordering Practices and Strategies of Resistance'. 23-3 *Global Society* (2013) 337 59 [doi: 13600826.2013.790786].

[16] Agamben, G., *Homo sacer. Sovereign power and bare life*, Stanford University Press, Stanford, CA, 1998; Agamben, G., *Means Without Ends*, University of Minnesota Press, Minneapolis, MN, 2000.

warning that an exclusive focus on thanatopolitics, which privileges sovereign power and control over political struggle and dispute, does not take into account the role of the migrant's agency in the configuration and resistance of contemporary border regimes[17]. They claim a different view that, as Sandro Medrazza points out, 'prioritizes the subjective practices, desires, expectations and behaviours of the migrants themselves'[18]. Based on Esposito's work and resorting to Derrida's concept of 'hostipitality', the work of Nick Vaughan-Williams is of special interest. He calls for a reconceptualization of the border as a 'place of encounter with the Other'[19].

(C) EU FRAMEWORK FOR THE MANAGEMENT AND CONTROL OF MIGRATION AT EXTERNAL BORDERS

The EU migration policy constitutes a complex patchwork collection of both political and legal instruments, cooperation arrangements, as well as a wide range of operational and capacity-building programmes involving many different actors. This management system has three main components: action inside the Union, action with partners outside the Union and action at EU external borders. This section only briefly outlines the competence and the existing EU policies that manage and control migration claiming to protect the human rights of migrants at the EU borders.[20]

The Amsterdam Treaty of 1999 made the EU (then European Community) competent for migration and asylum policies. Since the entry into force of the Lisbon Treaty in December 2009, the EU and its Member States share competence in the Area of Freedom, Security and Justice (AFSJ) (Article 4(2)(j) Treaty on the Functioning of the European Union (TFEU). Article 67(1) TFEU provides that the EU 'shall constitute an [AFSJ] with respect for fundamental rights' (emphasis added). The Court of Justice of the European Union (CJEU) has now jurisdiction to review legislation that would not meet human rights standards. In addition, Article 3.2 TEU calls for 'appropriate measures with respect to external border controls'. The EU therefore sets out to establish common standards about controls at its external borders. Articles 78 and 79 TFEU lay down the legal basis for EU action to prevent irregular immigration and protect the rights of migrants at EU external borders. Article 78(1) provides that '[t]he Union shall

[17] Contributions from the autonomy of migration approach conceive migration as a creative force within the social, cultural and economic structures. See, Garelli, G. y Tazzioli, M., 'Counter-mapping, Refugees and Asylum Borders' en Mitchell, K., Jones, R. y Fluri, J.L., *Handbook on Critical Geographies of Migration* (Edward Elgar Publishers:Cheltenham, Northamton, MA, 2019) 307-409; Garelli, G. and Tazzioli, M., 'Containment beyond detention: The hotspot system and disrupted migration movements across Europe', *Environment and Planning D: Society and Space* (2018) [doi: 10.1177/0263775818759335]; R. Esposito, "Biopolítica y filosofía de lo impersona" in R. Esposito, *El dispositivo de la persona* (Amorrortu: Buenos Aires, 2011); A. Mcnevin, 'Ambivalence and Citizenship: Theorising the Political Claims of Irregular Migrants', 41-2 *Millennium: Journal of International Studies* (2013) 182–200 [doi: 10.1177/0305829812463473].

[18] S. Medrazza, 'The gaze of autonomy: capitalism, migration and social struggle' in V. Squire (Ed.), *The Contested Politics of Mobility Borderzones and Irregularity (Routledge, London, 2010) 121-142.*

[19] Vaughan-Williams, *supra* n.13, at 123.

[20] F. Attina, 'Tackling the migrant wave: EU as a source and a manager of crisis', 70-2 *Revista española de derecho internacional* (2018) 49-70, [doi: 10.17103/redi.70.2.2018.1.02] and J.M. Goig Martínez, 'La política común de inmigración en la Unión Europea en el sesenta aniversario de los Tratados de Roma (o la historia de un fracaso), 32 *Revista de Derecho de la Unión Europea*. Madrid (2017) 71-111.

develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and *ensuring compliance with the principle of non-refoulement'* and that '[t]his policy *must be in accordance* with the *Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees*, and other relevant treaties' (emphasis added).[21] Article 79(1) states that '[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'. This requires a common policy on external border management. Article 3.2 TEU calls for 'appropriate measures with respect to external border controls'. The EU therefore sets out to establish common standards with regard to controls at its external borders and to gradually put in place an integrated system for the management of those borders. In addition migration has also become a specific component of the EU's Common Security and Defence Policy (CSDP). CSDP missions and operations have been adopted with the aim of tackling migrant smuggling, such as Operation Sophia (EUNAVFOR Med)[22] and the EU integrated border management assistance mission in Libya (EUBAM Libya).[23]

The Global Approach to Migration (GAM) was first defined by the European Council in December 2005.[24] It was the first attempt to address the whole range of migration related issues with third countries in the area of migration and asylum. The approach comprises the whole migration agenda, including legal and irregular migration, combating trafficking in human beings and smuggling of migrants, strengthening protection for refugees, enhancing migrant rights and harnessing the positive links that exist between migration and development. The Stockholm Programme adopted in 2009 also acknowledged the importance of consolidating, strengthening and implementing the global approach to migration. [25]

In 2011, coinciding with the increment on the irregular arrivals by sea and land caused by the 'Arab

[21] The current legal standards of the EU setting out the fundamental right to asylum are the Asylum Procedures Directive 2013/32/EU, the Reception Conditions Directive 2013/33/EU, the Qualification Directive 2011/95/EU (which are currently in the process of being revised), as well as the EU Charter on Fundamental Rights. The application of those instruments should in any case be compliant with the European Convention on Human Rights and the Geneva Convention. For a critical commentary on the European Commission's proposal for the reform of the Common European Asylum System presented in 2016 and how it erodes migrants human rights see Joana Abrisketa article "The reform of the Dublin III Regulation: how to build or not to build further enforcing mechanisms" in this volume.

[22] F.Vacas Fernández, 'The European operations in the Mediterranean Sea to deal with migration as a symptomFrom the Italian operation Mare Nostrum to Frontex operations Triton and Posseidon, EUNAVFOR-MED and NATO's assistance in the Aegean Sea', 20 *Spanish yearbook of international law*, (2016) [doi: 93-117 10.1177/0011392116638089].

[23] On 17 December 2018, the European Council amended and extended the mandate of the European Union Integrated Border Management Assistance Mission in Libya (EUBAM Libya) from 1 January 2019 until 30 June 2020 to actively support the Libyan authorities in contributing to efforts to disrupt organised criminal networks involved notably in smuggling migrants, human trafficking and terrorism. Council Decision (CFSP) 2018/2009 of 17 December 2018, OJ 2018 L322/25.

[24] At the Justice and Home Affairs Council meeting on 1 December 2005, the Commission presented its Communication: 'Priority actions for responding to the challenges of migration: First follow-up to Hampton Court' (doc. 15204/05). The matter was considered by the General Affairs and External Relations Council on 12 December 2005 and adopted by the European Council on 13 December (ST 15744 2005 INIT EN, 13.12.2005).

[25] European Commission, 'Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme', COM (2010) 171 final, Brussels, 20.4.2010, at 8.

spring', the global approach was evaluated. As a result the Commission adopted a renewed Global Approach to Migration and Mobility (GAMM) to build up a coherent and comprehensive approach to collect the benefits and address the challenges deriving from migration[26]. The GAMM focuses on four main priorities: improving the organisation of legal migration and facilitated mobility, preventing and reducing irregular migration in an efficient, yet humane way, strengthening the synergies between migration and development, and strengthening international protection systems and the external dimension of asylum. GAMM claims to take into account the human rights at stake in movements across borders, by placing emphasis on establishing legal channels of migration and protecting human rights, including international protection. It expressly purports to be 'migrant-centred', mentioning the human rights of migrants as a cross-cutting issue.[27]

Protection of forced migrants is also an explicit concern of the June 2014 European Council strategic guidelines for legislative and operational planning within the AFSJ for the 2015-2020 period. The guidelines stress the need to adopt a holistic approach to migration, making the best possible use of regular migration, affording protection to those who need it.[28] Yet combating irregular migration and managing borders effectively is the main concern.[29] The Guidelines raise questions about the role of the EU Charter of Fundamental Rights and rule of law in the AFSJ and how access to international protection of asylum seekers and refugees will be guaranteed.[30]

The unprecedented migration and so-called refugee crisis in the Mediterranean triggered the adoption of the European Commission European Agenda on Migration on 13 May 2015. The Agenda purpose is to set up a comprehensive framework a 'to address immediate challenges and equip the EU with the tools to better manage migration in the medium and long term in the areas of irregular migration, borders, asylum and legal migration'.[31] The Agenda proposes immediate measures to cope with the crisis in the Mediterranean and measures to be taken over the next few years to manage all aspects of immigration more effectively. In the longer term it proposes three areas of action: the completion of the Common European Asylum System, a shared management of the European border and a new model for legal migration.[32] To implement the Agenda, the Commission identified priority actions that has led to the development of 'a new EU migration infrastructure, with new laws, new systems for coordination and cooperation, and direct operational and financial support from the EU' to ensure a more humane and efficient migration management.[33] The question is, does this system ensure a human rights based

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[26] European Commission, 'The Global Approach to Migration and Mobility', COM (2011) 743 final, Brussels, 18.11.2011 at 2.

[27] *Ibid.* 5-6.

[28] European Council, Conclusions, 26/27 June 2014, EUCO 79/14, Brussels, 27.06. 2014, paras. 7-8.

[29] *Ibid.* Para 9

[30] S.Carrera and E.Guild, 'The European Council's Guidelines for the Area of Freedom, Security and Justice 2020 Subverting the 'Lisbonisation' of Justice and Home Affairs?', *CEPS Essay* No. 13 / 14 (2014) at 10.

[31] European Commission, 'A European Agenda on Migration', COM (2015) 240 final, 13.5.2015 at 2.

[32] *Ibid.* 17-18.

[33] For a detailed report on the implementation of the Agenda see: European Commission, Communication from the Commission to the European Parliament, the European Council and the Council, *Progress report on the Implementation of the European Agenda on Migration*, Brussels, COM (2019) 481 final, 16.10.2019.

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migration management in particular in the EU external borders?

(D) PROTECTING EU BORDERS OR PROTECTING MIGRANTS? LAND GATEKEEPING AND FENCING STRATEGIES

The so-called EU's migration comprehensive policy framework has been described as a comprehensive and robust non-entrée regime.[34] 'Fortress Europe' has been built to protect European borders and to address the so-called mobility-migration-citizenship nexus.[35] This non-entrée regime has persistently reduced the protection space for refugees, asylum seekers, forced migrants and in general people in mixed migration flows within the EU.[36] The increase in mixed migration flows into the EU and heightened security concerns have strengthen the focus on protecting the EU's external borders. The prevention of and combat against irregular migration to the EU is one of the few areas where member States have been able to find common ground. With this aim there has been an increasing interest on developing ways of controlling the access and stopping refugees and irregular migrants crossing the EU's external borders.[37] Border migration control policies can be distinguished on the basis of whether they follow a 'gatekeeping' or a 'fencing' strategy. Gatekeeping strategies aim at controlling and restricting migrants' access to protection from European Union and Member States institutions on land or at sea.[38] Fencing measures actively target illegal migrants to stop them from entering to the EU territory and expel them in case they enter.

A gatekeeping strategy on land is the European Commission idea of setting up 'Hotspots' to assist

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34 See, Orchard, P. *The non-entrée regime. In A Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge: Cambridge University Press, 2014), at 203-237 [doi:10.1017/CBO9781139923293.008]; R. Zetter, R., "Creating Identities – diminishing protection: securitising asylum seeking in the EUMS", in Kneebone, S., Stevens D., and Baldassar., L. (eds), *Refugee Protection and the Role of Law: Conflicting Identities* (Abingdon: Routledge, 2014), at 22–35.

35 S. Carrera (Ed). *The Nexus between Immigration, Integration and Citizenship in the EU*. Collective Conference Volume/April 2006, 2 CEPS Challenge Papers (2006).

36 In parallel it has minimized the possibility of legal routes to access asylum while it has progressively externalized migration control outside European borders. To put it bluntly, the denounce made by the Special Rapporteur on the human rights of migrants, François Crépeau in 2013 that the European Union 'washes its hands of its responsibility of guaranteeing the human rights of those persons attempting to reach its territory' still applies today. Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, 'Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants', 24 April 2013, UN Doc. A/HRC/23/46, para. 58.

37 The EU-Turkey Statement from March 2016, which is closely linked with the implementation of the hotspot approach in Greece, aims to reduce the irregular migration flows from Turkey to the EU. Other measures for protecting the EU's external borders have focused on reinforcing EU border management rules, such as the Schengen Borders Code, and strengthening and upgrading the mandates of relevant EU agencies, such as Frontex, EU-LISA, Europol and EASO. On the other hand, in connection with a number of key shortcomings in the EU's information systems, efforts were made to improve use of the opportunities offered by information systems and technologies for security, criminal records, and border and migration management. This included strengthening existing IT systems (SIS II, VIS, Eurodac, ECRIS-TCN), establishing new ones (ETIAS, Entry/Exit System) and improving their interoperability. For an overview of EU policies and actions that focus on the protection of the external borders against so-called 'illegal' immigration and the return of illegally staying migrants before entering the EU by sea, see: S. Cogolato et al, Migrants in the Mediterranean: Protecting human rights, (European Parliament, EP/EXPO/B/DROI/2015/01(2015) [doi (pdf): 10.2861/342397].

38 A. Triandafyllidou, 'Controlling Migration in southern Europe (Part 1): Fencing Strategies', 7 *IRI* (2010) at 1.

frontline Member States, namely Italy and Greece, confronted with disproportionate numbers of arrivals in registering those who come; addressing initial reception needs; identifying vulnerabilities and undertaking security checks.[39] Asylum and return procedures may also take place in the hotspots. The hotspot approach introduced by the Commission in the European Agenda on Migration in 2015 was formally endorsed by the Justice and Home Affairs Council meetings of 25-26 June 2015.[40] It has since 2015 applied to all disembarkations of migrants rescued at sea as well as to unauthorised landings in the Eastern Aegean islands and in the most affected areas of Southern Italy. With a capacity of over 1,500 places per hotspot they host only in the five ones in Greece over 30,000.[41] The European Asylum Support Office (EASO), the EU's law enforcement Agency (Europol) and the European Border and Coast Guard Agency (Frontex) have deployed experts directly in the hotspots to support national authorities in registering and screening new arrivals, investigating smuggling and other criminal activities, and registering and interviewing applicants for international protection.[42] If officially, the hotspot approach aims at helping immigrants and States at the borders, unofficially it is a measure to deter potential immigrants from leaving and arriving at the EU.

Given the fundamental rights challenges arising FRA has been providing fundamental rights expertise to the European Commission, EASO and Frontex on diverse aspects of their operations in Greece and Italy, since the hotspot approach began mid-2015. In November 2016, FRA formulated 21 individual opinions to address the fundamental rights shortcomings identified in the implementation of the hotspot. Despite efforts to improve the situation, many of the suggestions contained in the 21 opinions FRA formulated at the time remain valid in 2019. Taking the situation in both EU Member States together, FRA finds that only three issues were properly addressed. On eight opinions, there have been developments without resulting in significant improvements on the ground. In 10 out of 21 opinions, there was no significant progress. The persisting challenges in the five areas FRA highlighted in 2016 are: international protection; child protection; identification of vulnerable people; security; return and readmissions.[43] The human rights situation in the Greece hotspots has become such egregious that the head of FRA, Michael O'Flaherty, considers the plight of trapped migrants on the islands 'the single most worrying fundamental rights issue that we are confronting anywhere in the European Union.'[44]

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39 European Commission, *The Hotspot approach to managing exceptional migratory flows*, 2015. Other EU gatekeeping strategies are the operations for sea border surveillance like Frontex, the Schengen Border Code, the Internal Security Fund and the CSDP operations against human smuggling and trafficking networks.

40 M.M. Mentzelopoulou and K. Luyten, 'Hotspots at EU external borders State of play', European Parliamentary Research Service, *PE 623.563* (2018) at 2.

41 There are currently five hotspots in Greece (on the islands of Chios, Kos, Leros, Lesvos and Samos), with a total capacity of 6 338 places. Another five hotspots were established in Italy (in Lampedusa, Messina, Pozzallo, Taranto and Trapani), with a total capacity of 1 850 places. According to UNCHR data there are 30,700 people, mostly women and children in Greece staying under precarious conditions putting at risk their well-being. UNCHR, FACT SHEET Greece, October 2019.

42 *Supra* n. 42, 2-4.

43 FRA, Update of the 2016 *Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the 'hotspots' set up in Greece and Italy*, FRA Opinion 3/2019 [Hotspots Update] Vienna, 4 March 2019 at 6.

44 N. Nielsen, 'Greek migrant hotspot now EU's 'worst rights issue'', *Eurobserver*, Brussels, 7 November 2019.

 DOI: 10.17103/sybil.23.9

Other voices have joined the agency's complaint to raise concerns about the prolonged detention of refugees and migrants in the hotspots, their deplorable conditions and the need to improve and expand reception capacity among others the UN Human Rights Committee, UNHCR, the Council of Europe's Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).[45] The delays in registering asylum applications and lack of support or basic reception conditions have also been denounced by several NGOs.[46] The Parliamentary Assembly of the Council of Europe has expressed that 'detention of asylum seekers in the 'hotspots' on the Aegean islands may be incompatible with the requirements of the European Convention on Human Rights (ETS No. 5), due notably to procedural failures undermining the legal grounds for detention and inadequate detention conditions'.[47] Finally, the international president of MSF Christos Christou has called for the urgent evacuation of children and the most vulnerable from the camps. He accused European leaders of keeping some 38,000 refugees and migrants trapped on Greek islands in unsafe and shocking conditions comparing the situation in camps in Greece 'to war zones and that it was outrageous to witness such conditions in Europe'.[48]

As oppose to gatekeeping which is a common policy, fencing has emerged as part of individual states response to migration pressure. Before 2015, only three countries had resorted to erecting fences at external borders to prevent migrants and refugees from reaching their territories: Spain (where building work was completed in 2005 and extended in 2009), Greece (completed in 2012) and Bulgaria (in response to Greece, completed in 2014). Contrary to Article 14(2) of the Schengen Borders Code, which stipulates that 'entry may only be refused by a substantiated decision stating the precise reasons for the refusal', an increasing number of Member States have gradually embarked on the construction of border walls or fences with the aim of indiscriminately preventing migrants and asylum seekers from accessing their national territories.[49] Without explicit EU rules on the erection of fences at external Schengen borders, Member States have built barriers and fences with third countries (notably Morocco and Russia), including pre-accession candidates (the Republic of North Macedonia, Serbia and Turkey) and one EU Schengen candidate country, Croatia. Fences have also been constructed within the Schengen area, such as the fence between Austria and Slovenia.[50]

These fences are a cause for concern because of the human rights' violations committed against migrants who get extremely limited access to territory and to the asylum procedure. Although arrivals have been reduced after 2015, push-backs and expulsions at the border, exerted with some violence by the forces of law and order, continue to happen constantly (both in Croatia and Serbia and in Melilla).[51] Persons

45 *Supra* 42, 5-6.

46 Ph. Amaral, *Forgotten at the gates of Europe: Ongoing protection concerns at the EU's external border* (Jesuit Refugee Service, Brussels, 2018) 16-17.

47 Parliamentary Assembly - Council of Europe, 'Human rights impact of the 'external dimension' of European Union asylum and migration policy: out of sight, out of rights?', Doc. 14307, Reference 4298 (2017), para 5.

48 Ch. Christou, *European Leaders: Stop Punishing Asylum Seekers on the Greek Islands*, Open Letter, 27 November 2019.

49 European Parliament, 'Management of the External Borders', *Fact Sheets on the European Union* (2019) at 4.

50 *Ibid.*

51 Amaral, *supra* n.48 at 13-15.

 DOI: 10.17103/sybil.23.9

wishing to apply for asylum still do not have guaranteed access to the asylum application due to a great lack of information or ill-treatment by the authorities of the Member States. These difficulties are compounded by severe shortcomings in the translation and interpretation of languages, lack of complete information on the rights of persons arriving at borders and the obstacles posed by the Dublin Regulation in the Common European Asylum System[52].

Although extrajudicial push-backs happen in almost complete impunity, there are some positive developments. Several allegations of violation of the principle of non-refoulment by member States under Article 4 of Protocol No. 4 to the European Convention on Human Rights (ETS No. 46) have been processed by the European Court of Human Rights. The European Court of Human Rights convicted Spain in 2017 of breaching the prohibition of collective expulsion under Article 4 of Protocol No. 4 and Article 13 of the Convention by its border control at the fences of Melilla.[53] A group of Sub-Saharan migrants managed to climb the three fences, but were immediately apprehended by the Spanish civil guard and handed over to the Moroccan authorities. They were not subjected to any identification procedure nor had the chance to express their wish to apply for asylum, let alone to receive assistance from lawyers, interpreters or medical personnel. The Spanish authorities argued that the events occurred outside their jurisdiction: as the migrants had not passed the border crossing point in Melilla, they had not entered Spanish territory. The European Court of Human Rights, however, made it clear that member States cannot escape their responsibility and prevent asylum seekers from making an asylum claim.

(E) CONCLUSION

The respect for human dignity and the respect for human rights is a foundational value which the EU and its Member States share and are committed to promote. Yet as this article has evidenced the protection space for asylum seekers and forced migrants at the European Union external borders is shrinking. EU's non-entrée regime has persistently reduced the protection space for refugees, asylum seekers, forced migrants and in general people in mixed migration flows coming to the EU.

The EU's approach to migration control forms part of a global process of containment and outlawing unwanted migrations. The growing sophistication and inhumanity of European migration control policy cannot be explained only appealing to the contradictions between discourse and practice in migration management policy. This process should be understood as a fundamental element of biopolitical governance which exposes forced migrants to dehumanizing conditions. Despite a human rights friendly narrative there is a growing criminalization of hospitality practices and solidarity. In this context instead of choosing to protect migrants the EU has opted for a management approach to the control of migration that is gradually undermining the normative foundations of protection. Despite the official discourse there is a lack of a coherent, human rights-based approach to migration. In particular,

[52] *Ibid.* at 3. CEAR, Informe 2019 de la Comisión Española de Ayuda al Refugiado (CEAR) Las personas refugiadas en España y Europa (CEAR, Madrid, 2019) at 60, 74, 118.

[53] N.D. and N.T. v. Spain (No. 8675/15 and 8697/15) [Article 4 Protocol 4, Article 13 ECHR], 3 October 2017.

gatekeeping and fencing strategies controlling and restricting migrant's access to protection and stopping refugees and irregular migrants crossing the EU external borders raise particular scandalous human rights concerns. Gatekeeping strategies aim at controlling and restricting migrants' access to protection from European Union and Member States institutions on land or at sea. Fencing measures actively target illegal migrants to stop them from entering to the EU territory and expel them in case they enter. This practice calls into question the values of respect for human dignity and human rights on which the EU is founded.

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Seeking Coherence Among Member States: the Common European Asylum System

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Abstract: The objective of the CEAS is to create a common set of rules regarding asylum. The expectation was that a common set of rules would result in equivalent outcomes in the Member States. But, twenty years on, and in the third phase of legislative reform of the CEAS, differences in recognition rates continue to be enormous. This undermines the legitimacy of the whole CEAS project. But it is not the end of the problem, differential treatment of beneficiaries of international protection by different Member States is resulting in people being forced to move from one Member State where they have received protection to another and seek asylum again there because there are no integration conditions in the Member State which has (often reluctantly) ostensibly given them protection the content of which is empty.

Keywords: CEAS, solidarity, coherence, human rights

(A) INTRODUCTION

Competence to develop a Common European Asylum System (CEAS) was given to the EU in 1999.[1] The objective is to create a common set of rules regarding asylum including state responsibility for asylum applications, conditions of reception, receipt of applications and their determination as well as rights on receipt of either refugee status or subsidiary protection. The expectation was that a common set of rules would result in equivalent outcomes in the Member States. This is necessary to justify the CEAS rule that an asylum seeker only gets one consideration of his or her claim to protection within the whole of the EU. If the way in which the person is treated, and the claim determined is consistent then the outcomes should be more or less the same irrespective of the Member State which considers the application. But, twenty years on, and in the third phase of legislative reform of the CEAS,[2] differences in recognition rates continue to be enormous.[3] This undermines

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1 E. Guild, 'The Europeanisation of Europe's asylum policy', 18 (3-4) *International Journal of Refugee Law* (2016), at 630-651.

2 S. Morgades-Gil, 'The Right to Benefit from an Effective Remedy against Decisions Implying the Return of Asylum-seekers to European Safe Countries: Changes in the Right to Appeal in the Context of the European Union's Dublin System vis-à-vis International and European Standards of Human Rights', 19 (3) *European Journal of Migration and Law*(2017), at 255-280.

3 According to the European Asylum Support Office Annual Report 2018 the country with the highest recognition rate in 2018 was Ireland 86% and the lowest was the Czech Republic at 11%. The countries of

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the legitimacy of the whole CEAS project. But it is not the end of the problem, differential treatment of beneficiaries of international protection by different Member States is resulting in people being forced to move from one Member State where they have received protection to another and seek asylum again there because there are no integration conditions in the Member State which has (often reluctantly) ostensibly given them protection the content of which is empty. In this contribution I will examine these challenges facing the EU regarding the CEAS.

(B) COHERENCE IN THE CEAS

The question of coherence in the CEAS is one of very substantial concern to all the EU institutions and the Member States. The arrival of more refugees than expected in 2015 - 2016 has brought to the surface a wide range of contradictions within the CEAS which care no longer possible to paper over. The biggest problem for people seeking international protection is finding somewhere safe for them and their families to live. Their residence will depend on what they are allowed to do and for how long and what services are made available to them to integrate into their new homes. Many beneficiaries of international protection may choose to return to this home states once the conditions which made the flee change. But many others will put down roots and become part of their new home society. The willingness of state authorities to engage actively and positively with people needing international protection varies from Member State to Member State but also, it is important to recognise, from one crisis in a country of origin to another. The media frequently castigates some Central and Eastern European Member States for the refusal to accept asylum seekers. Yet it is worth remembering that Poland has received approximately ½ million Ukrainians a year since the 2014 annexation of Crimea by the Russian Federation. Many of these people are fleeing various kinds of violence but they are not encouraged to apply for asylum. Instead the Polish authorities issue them with (albeit temporary) work and residence permits and they are immediately encouraged to join the labour market.[4] The EU institutions in the face of the Ukrainian crisis, followed suit and lifted the mandatory visa requirement in June 2017 for Ukrainians so that they can arrive regularly in the EU. The arrival of Ukrainians into the EU is not an issue for the CEAS at all. But the arrival of Syrians, Afghans and Iraqis has been and continues to be. In addition to measures to making arrival difficult (visa requirements,

origin are not substantially different for a fuller analysis see E. Guild, 'Does the EU need a European migration and protection agency?' 28 (4) *International Journal of Refugee Law* (2016) at 585-600.

[4] A. Grzymala-Kazlowska and A. Brzozowska, A., 'From Drifting to Anchoring. Capturing the Experience of Ukrainian Migrants in Poland', 6 (2) *Central and Eastern European Migration Review* (2017) 103-122.

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carriers sanctions, etc.)[5] once on the EU's territory the operation of the CEAS and the limits of its coherence also create hurdles.

There are four main challenges to coherence within the CEAS. These are:

- Where are the asylum seekers? (the Dublin Regulation[6]) Under the Dublin Regulation, Member States determine where asylum seekers should make their applications. On the basis of these rules, the state which is responsible for the claim is also responsible for the care of the asylum seeker while the application is being considered. Further once the application is determined, that Member State is also responsible for the integration of the accepted refugees and the expulsion (in theory at least) of those rejected. This means that state authorities which do not invest sufficiently in asylum reception infrastructure to meet demand (like Greece or France) are unwilling to accept asylum applications preferring temporary deafness to asylum claims coupled with the hope that the absence of any support and both prohibitions on employment and heavy handed police action against foreign homeless persons will encourage people to 'move on'.[7] The result is itinerant asylum seekers trying to find reception conditions somewhere.
- Whose responsibility are the asylum seekers? (the Dublin Regulation) As some states fail to invest in asylum support infrastructure, asylum seekers move elsewhere in search of conditions under which they will be able to make their asylum applications and stay safe and housed during the determination period. In order to deter asylum seekers from moving in search of dignity of reception, the CEAS includes the Eurodac database which holds the fingerprints of all asylum seekers (and persons who are apprehended irregularly crossing an external border). The purpose is to enable asylum authorities in any Member State to check the fingerprints of any asylum seeker before them to see whether their state is indeed responsible or whether the individual has been fingerprinted in another Member State in which case he or she should be the responsibility of that Member State. While in theory the list of grounds of responsibility of a Member State is long commencing with recognised family members (first degree only) in another Member State, in fact the main ground is the state through which the asylum seeker entered the EU. This is the ground which applies to most asylum seekers as if they had first degree family members they would arrive as family members (not as asylum seekers) or if they had visas or residence permits (another ground) they would be fixed in a Member State and not moving around. So, in fact the state of first entry is the default ground for state responsibility. This of course punishes

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5 L. A. de Vries, and E. Guild, 'Seeking refuge in Europe: spaces of transit and the violence of migration management', 45 (12) *Journal of ethnic and migration studies* (2019) 2156-2166.

6 Council Regulation *604/2013*, OJ 2013 L 180/31.

7 P. Bourbeau, P. 'Migration, resilience and security: Responses to new inflows of asylum seekers and migrants', 41 (2) *Journal of Ethnic and Migration Studies* at 1958-1977; I. Kalpouzos, and I. Mann, I. 'Banal crimes against humanity: the case of asylum seekers in Greece', 16 *Melb. J. Int'l L.*, (2015) at 1.

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Member States with long and uncertain external borders such as Greece, Italy and Spain. Though there is nothing self evident about this. The Member State with the most uncertain external border is Cyprus with an international Green Line running down it. On one side the Turkish Cypriot government runs one part of the island without the benefit of international recognition (or EU membership). The other part of the island is an EU Member State and part of the CEAS but does not recognise the Turkish Cypriot authorities or the legitimacy of the dividing Green Line as a border at all. Yet the lack of a properly defined border and the possibility of 'massive' movement of Turkish or other third country nationals from the Turkish Cypriot side of the island to the EU Member State side has never been realised. Or if it has, it has never been recognised politically speaking. There are a sufficient number of political problems in urgent need of resolution in Cyprus that no one seems keen to engage in the politics of fear around migrants and asylum seekers.[8] The Dublin system is baroque to say the least and does not work.[9] According to the European Asylum Support Office (EASO) only about 3% of asylum seekers in the EU are ever actually subject to a Dublin transfer to another state. But that does not stop the fear of being 'Dublin-ed' being potent among asylum seekers.[10] Though many alternatives to the Dublin system have been proposed over the years, some Member States seem wedded to the system and continue to try to find means to make it work, mainly by introducing more and more coercion into it.[11]

- What are the outcomes of asylum procedures? (Qualification Directive [12] and Procedures Directive[13]): the EU has already adopted two phases of the Qualification Directive which sets out who qualifies for refugee status, closely following the UN Convention Relating to the State of Refugees 1951 and its 1967 Protocol and the Procedures Directive which establishes the common rules of the determination of asylum procedures and appeal rights. Neither measure is ideal according to refugee experts.[14] However, they do provide a floor of rights and procedures which ought to result in some harmonisation. But as mentioned in the introduction, this has not led

[8] C. Thorleifsson, 'Disposable strangers: far-right securitisation of forced migration in Hungary', 25 (3) *Social Anthropology* (2017) 318-334.

[9] E. Guild, C. Costello, M. Garlick, V., Moreno-Lax, and S. Carrera, *Enhancing the common European asylum system and alternatives to Dublin* (Study for the European Parliament, LIBE Committee, 2015).

[10] K.M. Greenhill, 'Open arms behind barred doors: fear, hypocrisy and policy schizophrenia in the European migration crisis' 22 (3) *European Law Journal*, (2016) 317-332.

[11] E. Guild, C. Costello, and V. Moreno-Lax, *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece: Study* (Policy Department: Citizens' Rights and Constitutional Affairs, European Parliament, 2017).

[12] Council Directive 2011/95, OJ 2011, L 337/9-337/26.

[13] Council Directive 2005/85, OJ 2005, L 326/13.

[14] S. Peers, 'EU Immigration and Asylum Law' in D. Patterson, and A. Södersten (eds), *A Companion to European Union Law and International Law* (Wiley Blackwell 2016) 519-533; H. Dörig, I. Kraft, H., Storey, and H. Battjes, 'Asylum Qualification Directive 2011/95/EU' in K. Hailbronner, and D. Thym, *EU Immigration and Asylum Law* Nomos (Verlagsgesellschaft mbH & Co. KG, 2016) 1109-1284.

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to great coherence in outcomes for asylum seekers across the Member States. While the average rate of protection (refugee status and subsidiary protection) is 37% across the EU, in fact the recognition rate varies. According to the European Asylum Support Office Annual Report 2018 the country with the highest recognition rate in 2018 was Ireland 86% and the lowest was the Czech Republic at 11%. The countries of origin are not substantially different. So it seems that common procedures and rights do not result in equal outcomes.

- What happens afterwards? Once a Member State makes a decision on an asylum claim, that is supposed to be the end of the story. For those who are granted protection, however, they are just as 'trapped' in the Member State which made the decision as they were while the application was being considered. There is no mutual recognition across the EU of positive decisions, even of those recognised as refugees under the UN Convention. So the refugee is required to remain in that one Member State. There is the possibility that after five years residence there if the refugee has worked and integrated sufficiently there that he or she may be granted long term residence status under the Directive[15] of that name which was extended to include refugees. At that point he or she will be able to move and reside in another Member State.[16] In the meantime, if the refugee is within the Schengen zone, normally, the Member State which issued him or her a residence document on the basis of that status, has also notified that residence document as valid for short stays (90 days out of every 180 days) across the Schengen area.[17] This means that a refugee can go on holiday within the 26 state zone to visit friends etc. But he or she must return to the state which recognised him or her after the 90 days. This is all rather theoretical as there are no systematic border controls on intra-Schengen movement (with some exceptions currently in place).[18] If a refugee stays longer this is not something which is obviously apparent to the authorities of the state where he or she is. That is so unless the refugee does something to come to the attention of those authorities, like make a further application for international protection. This is what happened in C-163/17 *Jawo* a case which came before the Court of Justice of the European Union. The relevant facts were as follows: Mr *Jawo*, a Ghanaian national, applied for asylum in Germany (2014); but in 2014, before he went to Germany, Italy granted Mr *Jawo* a national humanitarian residence permit valid for one year. However, the grant of the residence permit in Italy meant that Mr *Jawo* was no longer eligible for reception conditions in Italy and no integration measures were available. He ended up on the street with no assistance so

[15] Council and Parliament Directive 2011/51, OJ 2011, L 132/1.

[16] Other than Denmark, Ireland or the UK which do not participate in the Directive.

[17] E. Guild, E. Brouwer, K. Groenendijk, and S. Carrera, S., *What is happening to the Schengen borders?* (CEPS Paper in Liberty and Security in Europe 2015), at 86.

[18] T.D. Alkopher, and E. Blanc, E. 'Schengen area shaken: the impact of immigration-related threat perceptions on the European security community', 20 (3) *Journal of international relations and development*, (2017) 511-542.

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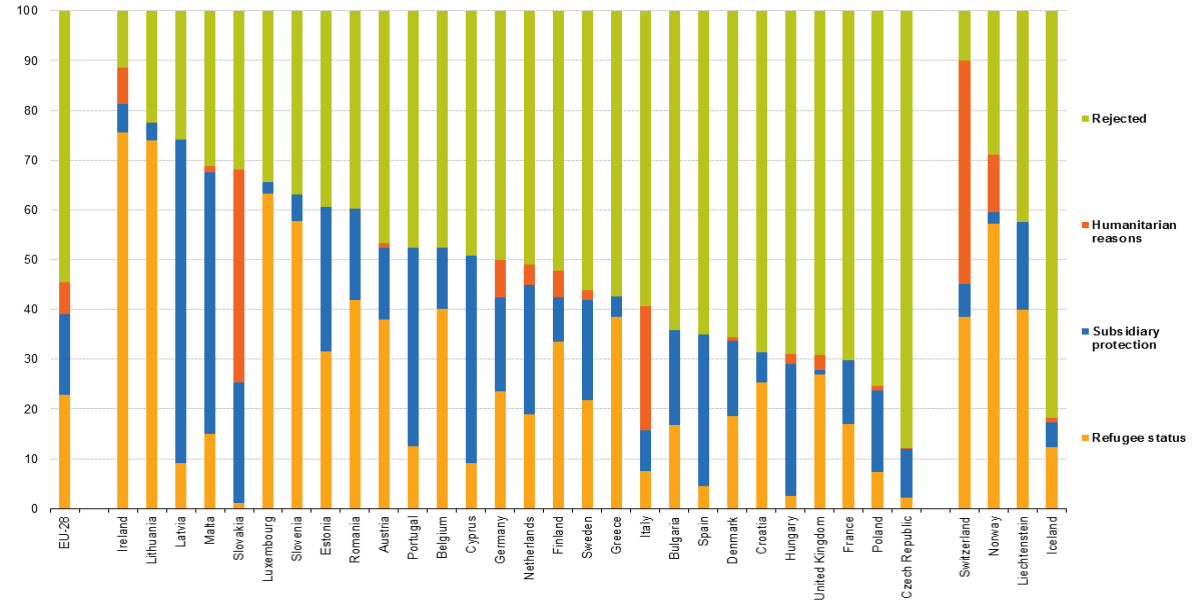
he went to Germany and sought asylum again and was include in reception conditions there. A similar case in respect of a family granted subsidiary protection in Bulgaria and then moving to Germany came before the Court at about the same time (C-297/17 Ibrahim & ors (19/03/19)). The argument of Mr *Jawo* and the Ibrahim family was that they must be entitled to make a fresh asylum claim as the conditions applicable as beneficiaries of humanitarian or subsidiary protection in Italy or Bulgaria constitute inhuman or degrading treatment contrary to Article 4 EU Charter of Fundamental Rights and Article 3 European Convention on Human Rights (ECHR). Although the Court was unsympathetic to various of their arguments (and those of the state see below), the problem remains what happens when after the grant of a protection status, the beneficiaries are refused further reception conditions under EU law and left to struggle on the street.

Outcomes of Asylum Applications: Eurostat 2018



Note: based on original (not rounded) figures.
Source: Eurostat (online data code: migr_asydcfsta)

(C) SOLIDARITY IN THE CEAS

The 'big' idea as a solution to all the woes of the CEAS which policy makers have been working on since 2015 is what they call 'relocation'. But first the question of solidarity: according to Article 80 Treaty on the Function of the European Union '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,

 DOI: 10.17103/sybil.23.10

between the Member States. Whenever necessary, the acts of the Union adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle'.

There is little agreement among the Member States as to what exactly solidarity means but some of them, and in the institutions it is seen as a possible solution to many of the woes of the CEAS. But from the perspective of the asylum seeker the question is whether EU solidarity is going to be an engine of inclusion or exclusion. In 2016 the EU put into place an emergency (mandatory in part) relocation scheme for 160,000 Syrians (and others according to a calculation of recognition in the recent past) arriving in Greece and Italy. It was based on the Dublin Regulation and set out a complex relocation key on the basis of which all Member States were allocated a number of spaces which they were expected to make available relocation of asylum seekers from the two countries which considered themselves 'overloaded'.[19] It was based on the principle of solidarity, though the Dublin Regulation is not a solidarity measure. A number of Member States were particularly exercised about the decision which was adopted by majority vote. Two of them challenged the direction before the Court of Justice (C-643/15 Slovakia & Hungary v Council 6 September 2017) on the basis that this was not a solidarity measure and that the mechanism chosen for adoption was unlawful. The challenge failed but on the ground that this was only an emergency measure as the Court held: 'Thus, in the circumstances of this case, there is no ground for complaining that the Council made a manifest error of assessment when it considered, in view of the particular urgency of the situation, that it had to take … in the light of Article 80 TFEU and the principle of solidarity … provisional measures imposing a binding relocation mechanism…' (para 253).

Accordingly, the Commission proposed a revised relocation system as part of the revision of the Dublin Regulation which at the time of writing is still before the institutions, though it is going nowhere fast. But the lessons from relocation are not entirely satisfactory from any perspective. The reality on the ground for people is not equivalent depending on where they were relocated and it is not clearly that they are remaining where they were sent.[20] As the *Jawo* and *Ibrahim* scenarios reveal, between asylum seeker and refugee there may be systemic advantages to remaining an asylum seeker rather than being recognised as a beneficiary of international protection. When inequality extends beyond recognition and grant of status then for people, getting protection is unwelcome.

Returning then to the *Jawo* decision, a number of challenges is evident immediately. First, the Court held that 'Each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European

[19] E. Thielemann, 'Why refugee burden-sharing initiatives fail: Public goods, free-riding and symbolic solidarity in the EU' *56* (1) *Journal of Common Market Studies* (2018) 63-82; A. Niemann and N. Zaun'EU refugee policies and politics in times of crisis: theoretical and empirical perspectives' *56*(1), *Journal of Common Market Studies* (2018) 3-22.

[20] S. Lavenex, "Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' 56 (5) *Journal of Common Market Studies* (2018) 1195-1212.

 DOI: 10.17103/sybil.23.10

Union is founded, as stated in Article 2 TEU (para 80);…The principle of mutual trust requires, particularly as regards the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law' (para 81). This is a good statement of how the treaties see Member States but the problem is that it does not necessarily correspond with how states treat people on the ground. As regards the problem of inhuman and degrading treatment the Court stated that '[I]t is immaterial, for the purposes of applying Article 4 of the Charter, whether it is at the very moment of the transfer, during the asylum procedure or following it that the person concerned would be exposed, because of his transfer to the Member State that is responsible within the meaning of the Dublin III Regulation, to a substantial risk of suffering inhuman or degrading treatment' (para 88). This is a more realistic recognition of the realities which people like Mr *Jawo* are facing. The finding is reinforced by the Court where it stated '[T]hat [where a] particularly high level of severity is attained where the indifference of the authorities of a Member State would result in a person wholly dependent on State support finding himself, irrespective of his wishes and personal choices, in a situation of extreme material poverty that does not allow him to meet his most basic needs, such as, inter alia, food, personal hygiene and a place to live, and that undermines his physical or mental health or puts him in a state of degradation incompatible with human dignity' (para 92). This is a high standard which the Court is setting and it will have to be examined whether it is an interpretation of the Charter which is consistent with the European Court of Human Rights decisions on Article 3 ECHR and the treatment of asylum seekers or refugees. But the Court compounds the problem of coherence when it finds also that it is not necessarily a sufficient ground for a finding that an applicant for international protection would, in the event of transfer to another Member State, be faced with a situation of extreme material poverty. Instead the person must show the existence of exceptional circumstances that are unique to him or her and mean that if transferred he or she would be, because of his or her particular vulnerability, irrespective of his or her wishes and personal choices, in a situation of extreme material poverty after having been granted international protection. In effect the Court has found that only individual circumstances can justify stopping a return to another Member State under Article 4 Charter.

Yet, the Court accepts that the interpretation of Article 4 Charter must be consistent with the ECtHR's interpretation of Article 3 ECHR, where the subject matter comes within the scope of EU law. In 2011, the ECtHR had to decide an Article 3 claim by two men who had been refused asylum in the UK. The first, Mr *Sufi*, had arrived in the UK in 2003 and claimed asylum on three grounds: his membership of a minority clan, the claims persecution by a militia; the militia's killing of his father and sister and harm to him. His application was rejected on credibility grounds. The second, Mr *Elmi*, a member of the *Isaaq* clan in Somalia was granted asylum in the UK. But following serious criminal offence

 DOI: 10.17103/sybil.23.10

convictions his expulsion was ordered. They claimed before the ECtHR that would be at risk of ill-treatment if they were deported to Somalia. In the proceedings before the ECtHR the question arose whether the men had to show that their specific and individual circumstances had to reveal that they would be singled out for treatment contrary to Article 3ECHR. The Court held 'An applicant [does not need] to show the existence of special distinguishing features if he could otherwise show that the general situation of violence in the country of destination was of a sufficient level of intensity to create a real risk [re] Article 3 ... To insist in such cases that the applicant show the existence of such special distinguishing features would render the protection offered by Article 3…illusory. Moreover, such a finding would call into question the absolute nature of Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment' (para. 217 *Sufi* & *Elmi* ECtHR 28/06/11).

Clearly between the two judgments there is space for concern.[21] The question is how to resolve the apparent inconsistency. A number of approaches are possible which stretch from judicial rejection of inconsistency to resolving the problem for people on the ground. Among the options, as I see it are the following:

- The ECtHR could use the *Bosphorus* solution that it will respect the EU legal order as providing equivalent human rights protection in the absence of evidence to the contrary.[22] This would be a tacit acceptance that the EU should sort out the treatment of beneficiaries of international protection and that the Court of Justice's *Jawo* principle should be left an internal issue of equivalence; the level of violence in the Member States would be a matter for the Court of Justice even where that violence is destitution applicable to a small category of people beneficiaries of international protection;
- The Court of Justice of the European Union could refine the 'singling out' requirement expressed in *Jawo* to ensure that it is consistent with the ECtHR's judgment in *Sufi* and *Elmi*; this would mean castigating Member States which do not provide for beneficiaries of international protection but also requiring other Member States to accept their applications a form of solidarity with beneficiaries of international protection rather than between states;
- Leaving the field of the courts and their interpretations, clearly there is a problem on the ground. The EU legislator could think of ways to resolve the issue possibly by extending the Reception Conditions Directive[23] to include post recognition stages

[21] C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2015); J. Mink, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and the Prohibition of Torture and other forms of Ill-Treatment' 14(2), *European Journal of Migration and Law* (2012) 119-149.

[22] C. Costello, 'The Bosphorus ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' 6(1), *Human Rights Law Review* (2006) 87-130.

[23] European Parliament and Council Directive 2013/33/EU, OJ 2013 L 180/96.

 DOI: 10.17103/sybil.23.10

while the beneficiary of international protection is receiving integration assistance to become self-reliant.

The reality on the ground is the problem – it seems that some Member States are unwilling or unable to provide post recognition or grant of status integration assistance to beneficiaries of international protection. So long as people with a protection status are not able to integrate and become self-reliant they need assistance. How long they will need assistance is indeed a matter of the specific situation of each person. While in some states the non-governmental sector is active providing such assistance, this is usually only possible with state financial support. What is key is that Member States must not tacitly drive out their refugees through the failure to provide integration conditions for them.

The issue of treatment of beneficiaries of international protection is only the latest step in dealing with coherence in the CEAS. There is nothing surprising or unexpected about the problem – it is inherent in a system which has developed in spite of the reluctance of some interior ministries to welcome asylum seekers and beneficiaries of international protection. Changing the paradigm around refugee protection may be the most productive way of ensuring solidarity. When political leaders and their ministries promote refugee protection as an opportunity for their states not a burden, the problematic practices will be easier to change[24].

[24] V. Türk, and M. Garlick, M. 'From burdens and responsibilities to opportunities: the comprehensive refugee response framework and a global compact on refugees' 28(4) *International Journal of Refugee Law* (2016) 656-678.

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The EU Accession to the Geneva Convention Relating to the Status of Refugees: Legal Feasibility and Added Value

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Abstract: The Stockholm Programme establishing the political priorities of the area of freedom, security and justice for the period 2010-2014 stated that the EU should seek accession to the 1951 Geneva Convention on the status of refugees and its 1967 Protocol. In spite of the political difficulties that the materialization of this recommendation, repeated in 2011, would encounter, this contribution analyzes the legal implications of a hypothetical accession of the Union to the cornerstone of the international regime on refugee protection, which simultaneously constitute the core of the EU asylum acquis by the direct reference found in art. 78.1 TFEU and art. 18 of the EU Charter of Fundamental Rights. For that purpose, this research firstly concentrates on analyzing the legal feasibility of the accession, both under EU law —focusing on the competence question, looking at its existence and also its nature with regard to Member States'powers—, and under international law —examining the terms of the Geneva Convention to identify the need for its revision or adjustment—. Secondly, the added value of the accession is assessed, particularly regarding the current and future role and place the Geneva Convention enjoys within the EU legal order.

Keywords: Geneva Convention on the status of refugees EU accession external competences international agreements - refugee protection ECJ jurisdiction

(A) INTRODUCTION

EU primary law accords to the 1951 Geneva Convention relating to the Status of Refugees[1] (hereinafter, the 'RC') a central place in the making and implementation of the common asylum policy, since art. 78 TFEU requires this policy to 'be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties'. The EU Charter of Fundamental Rights also ascertains, in art. 18, that 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union'. Following this obligation,[2] secondary law acts on asylum explicitly reaffirm that the RC constitutes the cornerstone of the Common European Asylum System (CEAS),[3] and

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1 UNTS S No. 2545, vol. 189, p. 137.

2 Recalled in the five-year programmes for the AFSJ adopted by the European Council: Tampere Conclusions, 15/16 October 1999, point 13; Hague Programme, OJ 2005 C 53/1, point 1.3; Stockholm Programme, OJ 2010 C 115/1, point 6.2.1. The Strategic Guidelines for JHA (European Council Conclusions, 26/27 June 2014) contain however no reference to the RC.

3 See, e.g., reference in recital 4 of the preamble to Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of

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to that effect the ECJ has recalled, in several occasions, that EU asylum acquis must be interpreted in conformity with the Convention.[4]

In December 2009, the Stockholm Programme recalled the importance of a full and inclusive application of the RC as a basis of the EU asylum acquis, and clearly stated that 'subject to a report from the Commission on the legal and practical consequences, the Union should seek accession to the Geneva Convention and its 1967 Protocol'.[5] Two years later, in October 2011, the Council adopted a declaration by the EU on the occasion of the 60th anniversary of the RC, in which it called, as it usually does, on all countries that have not yet done so to accede to the RC and the New York Protocol and on those which have made geographical limitations and other reservations to reconsider these.[6] That Declaration additionally highlighted the advice included in the Stockholm Programme regarding EU's own accession to the RC.

EU accession to the Geneva Convention may encounter significant legal obstacles and come up against important political difficulties, so important that this objective might be qualified as unfeasible, unrealistic or utopian. However, the truth is that there is an indication or recommendation to accede to this international convention, which has been made by the European Council, composed by the Heads of State and Government of the EU Member States, and the Council, entrusted with political decision-making power in the Union. The political relevance of the institutions who authored the advice therefore requires a legal analysis on the feasibility of that accession. At a time in which the EU is so enthusiastically showing its commitment to strengthen the international refugee protection regime by its contribution and adoption of the Global Compact on Refugees,[7] also demonstrating the increasing importance attached to soft law instruments in this global governance regime, it seems a good moment to revisit this topic and to determine whether the Union could be directly bound by the most relevant legally-binding international instrument in this field. To that effect, this contribution will firstly concentrate on analysing the legal feasibility of the accession, both under EU law —focusing on the competence question— and under international law —examining the terms of the RC for this purpose—. In a second part, the added value of the accession, particularly regarding the current and future role and place the RC enjoys within EU law, will be assessed.

(B) THE LEGAL FEASIBILITY OF THE EU ACCESSION TO THE REFUGEE CONVENTION

international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337/9.

4 See, among others, judgment of 2 March 2010, *Abdulla*, joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, EU:C:2010:105, paras. 51-53.

5 Point 6.2.1, p. 69. The Commission's 'Action Plan Implementing the Stockholm Programme'(COM (2010)171, 20.4.2010) fixed 2013 as deadline for submitting this report, which, to our knowledge, has not been adopted yet.

6 JHA Council, 'European Union Declaration on the 60th Anniversary of the 1951 Convention Relating to the Status of Refugees', 27-28 October 2011, p. 2.

7 Global Compact on Refugees, Report of UNHCR, Part II, A/73/12, affirmed by the UNGA in its resolution of 17 December 2018.

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(1) Under EU law: the competence question

Analysing the feasibility of EU accession to the RC under an EU law perspective must concentrate on the essential legal question of competences. Having the general capacity to conclude international agreements, we should determine whether the EU enjoys a specific external competence to ratify this Convention (a). In the affirmative, we will assess whether that competences is currently exclusive to the Union and thus would allow it to replace its Member States as parties to the RC, or shared with the treaty-making power of Member States (b).

(a) *The existence of an EU external competence on asylum*

According to art. 216.1 TFEU, the Union may conclude an international agreement when an explicit external competence has been conferred upon it by the Treaties, or where the conclusion of that agreement is necessary to achieve one of the objectives for which the Union has been attributed a corresponding internal competence.[8]

The Lisbon reform added a new legal basis in art. 78.2 (g) TFEU, by which the European Parliament and the Council shall adopt measures for a common European asylum system comprising 'partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection'. Some authors have interpreted this reference to cooperation with third countries as an attribution to the EU of an explicit external competence on asylum.[9] However, in my view, art. 78.2 TFEU specifically refers to an internal competence,[10] from which we could deduce an implied external competence, following the ECJ doctrine codified in art. 216.1 TFEU.[11] Moreover, the objective to be achieved by this legal basis is quite specific. Instead of a broad recognition of the external dimension of the EU asylum policy, this provision aims at facilitating cooperation with third countries 'in order to manage inflows of people applying for international protection'and it would therefore constitute the adequate legal basis for an EU act regulating some form of extraterritorial management of asylum

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[8] 'The Union may conclude an agreement with one or more third countries or international organisations *where the Treaties so provide* or *where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties*, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope'(emphasis added). The third ground of attribution referred to in this provision appears to be an incorrect codification of ERTA case-law, which relates to the exclusivity and thus the nature of the EU external competences, and not to their existence. For an in-depth analysis of the system of distribution of external competences, see, among others, P. Eeckout, *EU External Relations Law* (2nd ed., Oxford University Press, 2012), at 11-189. We have analyzed this system and its application to the migration domains in P. García Andrade, 'EU external competences in the field of migration: how to act externally when thinking internally', 55 CMLR (2018), 157-200.

[9] See, e.g., K. Hailbronner and D. Thym, *EU Immigration and Asylum Law. A Commentary* (2nd ed., Beck/Hart/Nomos, 2016), at 1040.

[10] In this sense, see G. De Baere, 'The basics of EU external relations law: An overview of the post-Lisbon constitutional framework for developing the external dimension of EU asylum and migration policy', in Maes, Foblets and De Bruycker (eds.), *External Dimension of European Migration Law and Policy* (Bruylant, 2011), at 168.

[11] It could even be argued that the terms employed in art. 78.2 (g) TFEU point at an objective, which has been transformed into an internal competence.

 DOI: 10.17103/sybil.23.11

seekers.[12] This provision cannot therefore be the basis for an EU external competence —neither explicit nor implied— to accede to the RC.

It is then necessary to determine whether we can infer from other Treaty provisions an implied external competence enabling the Union to accede to the RC. For this purpose, a clarification on the aims and scope of this international treaty is firstly required. The RC, as the centrepiece of the international legal framework of refugee protection, is a status and rights-based instrument.[13] It covers thus the definition of refugee and the legal status of those who qualify as refugees. Since a person is a refugee the moment she fulfills the refugee definition, refugee status being declaratory, asylum seekers pertain to the Convention categories of refugees 'present in the territory' or 'lawfully present'.[14] This means that the scope of the RC also extends to the rights and reception conditions granted to asylum seekers.

Given the material scope of the Geneva Convention as an instrument addressing the qualification to be a refugee, the needs of protection seekers and thus secondary rights conforming the status of refugees, the most correct legal basis in EU primary law for the EU accession to the RC would be, in my view, to derive an implied external competence from certain Treaty provisions on a common policy on asylum, more particularly art. 78.2 (a) and (f) TFEU. These provisions confer an internal competence to the Union to regulate 'a uniform status of asylum for nationals of third countries'and the 'standards concerning the conditions for the reception of applicants for asylum', respectively. Following the ECJ doctrine on implied external competences codified in art. 216.1 TFEU, the existence of an implicit external competence in a specific field requires that the conclusion of an international agreement by the Union facilitates the achievement of the objectives for which it has been attributed an internal competence[15]. It could be easily argued that acceding to the RC would facilitate the achievement by the EU of the objectives of these internal competences, which are 'offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*', as stated in art. 78.1 TFEU.

It seems important to note for this purpose that the RC does not contain procedural rules for determining who is a refugee. This means that, although EU secondary law on asylum procedures must of course be in compliance with the RC, most notably with the principle of *non-refoulment*, the scope of application of the Convention is not related to the EU internal competence, enshrined in art. 78.2 (d) TFEU,

[12] As Teitgen-Colly indicates, this provision 'confirms the persistent confusion between the requirements of asylum, which concern protection, and the requirements of management of migration flows, which concern their control and management': C. Tietgen-Colly, 'The European Union and aylum: an illusion of protection', 43 *CMLR* (2006) 1503-1566, at 1511.

[13] Introductory Note by the UNHCR to the Geneva Convention, 2010, p. 3.

[14] RC rights pertaining to refugees 'lawfully staying'are accessible only to refugees to who asylum has been granted in the EU: E. Tsourdi, 'EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?', in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill/Nijhoff, Leiden, 2016), at 271.

[15] Judgments of 31 March 1971, 22/70, Commission v. Council (ERTA), EU:C:1971:32, para 16; 14 July 1976, joined cases 3, 4 & 6/76, Kramer, EU:C:1976:114, paras. 20 and 30; Opinion 1/76, Laying-up Fund, EU:C:1977:63, para 3. See García Andrade, *supra* n. 8, at 161-162.

 DOI: 10.17103/sybil.23.11

to establish 'common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status'.

Finally, it could be adequate to make a comparison with the EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the ECHR), for which an explicit and specific external competence has been provided in art. 6.2 TEU.[16] This conferral has been operated by the Lisbon reform in response to the ECJ stating, in Opinion 2/94, that the Community was not competent to accede to the ECHR, as it lacked the power to legislate on human rights or to conclude international conventions in this field.[17] It could indeed be argued that, in the absence of an explicit provision similar to art. 6.2 TEU, the EU would not be allowed to accede to the RC in the current state of EU primary law, as this Convention is clearly an instrument of human rights protection. The situation would not be however the same. Contrary to a lack of a general normative competence to enact rules on the protection of human rights,[18] the Union is competent to establish a common policy on asylum according to art. 78 TFEU, and more particularly to legislate on the status of asylum, including thus the qualification for being a refugee and the content of rights associated to it.

(b) *The nature of EU external competences on asylum*

Once we have affirmed to the existence of an implied external competence, deduced from art. 78.2 (a) and (f) TFEU, which would allow the Union to accede to the RC, it is necessary to examine the nature of that competence and thus whether this power should be qualified as exclusive or shared with Member States.

Art. 4.2 (j) TFEU qualifies the AFSJ as a field of shared competence, therefore excluding an *a priori* exclusive external competence of the EU on asylum.[19] Nonetheless, does the Union enjoy an exclusive external competence based on the principle of pre-emption and grounded on preventing the affectation of existing EU common rules on asylum? Indeed, ERTA exclusivity, codified in art. 3.2 TFEU,[20] is founded on the principle that, where common rules have been adopted by the Union, Member States no longer have the power to undertake international obligations which may affect the uniform application of those common rules, having thus the Union the exclusive competence to assume those international commitments.

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16 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties'.

17 Opinion of 28 March 1996, 2/94, EU:C:1996:140, para. 27: 'No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field'. The flexibility clause of art. 352 TFEU was also ruled out by the Court (paras. 32-36).

18 Art. 6 TEU recalls twice that neither the EU Charter of Fundamental Rights nor the future EU accession to the ECHR would extend or affect the Union's competences as defined in the Treaties.

19 The Union has *a priori* exclusive competences in the policy fields listed in art. 3.1 TFEU.

20 To codify the complex case-law of the ECJ on external competences, art. 3.2 TFEU states that the Union shall be exclusively competent to conclude an international agreement 'when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'. The third scenario enshrines ERTA exclusivity. However, the first one is rather an indication of ERTA exclusivity, while the second refers to the ECJ doctrine of Opinion 1/76, based on the indispensable character of the EU external competence to achieve the objectives of one of its internal competences. For a detailed analysis, see García Andrade, *supra* n. 8, at 165 et seq.

 DOI: 10.17103/sybil.23.11

As the Court required in its Opinion 1/03, this finding derives from a 'comprehensive and detailed analysis'of the relationship between the potential envisaged agreement and existing Union rules in that field,[21] first comparing the areas covered by both types of rules, without it being necessary that they coincide fully.[22] On the contrary, it is sufficient that the area 'is already covered to a large extent by (Union) rules'.[23] The Court also highlighted that determining whether the EU enjoys an ERTA competence to conclude an international agreement must take into account not only the scope of the rules, but also their nature and content in order to ensure that the agreement is not able to undermine the uniform application of EU secondary law.[24] In that regard, 'the fact that both the Community rules and the international agreement lay down minimum standards may justify the conclusion that the Community rules are not affected, even if the Community rules and the provisions of the agreement cover the same area'.[25]

When analysing the level of harmonization achieved by Directive 2011/95, the 'Qualification Directive'(hereinafter QD),[26] and Directive 2013/33, the 'Reception Conditions Directive'(hereinafter RCD),[27] we have to firstly take a look back to the requirements established in EU primary law for the adoption of the instruments of the first phase of the asylum legislation package. Art. 63 TEC requested that all asylum measures to be adopted by EU institutions were to set 'minimum standards',[28] enjoining the EU legislature to leave sufficient margin of discretion to Member States in order to adopt more favourable standards. This requirement, as can be observed in Directive 2004/83[29] and Directive 2003/9,[30] which referred to 'minimum standards'even in their titles, 'indeed compromised the harmonization process from its inception'and 'paved the way for a 'race to the bottom'harmonization'.[31] In addition to the principle of 'minimum standards', the resulting directives were full of references to national law, optional clauses, exemptions, ambiguities, contradictions and other 'loophole techniques'.[32] The need for legislative reform

[21] Opinion 1/03, *Lugano Convention*, EU:C:2006:81, para. 133.

[22] *Ibid*, paras. 124-125.

[23] *Ibid*, para. 126; Opinion 2/91, *ILO*, EU:C:1993:106, paras. 24 25; Case C-467/98, *Open Skies*, EU:C:2002:625, para 82. This broad interpretation of the ERTA principle was confirmed in Case C-114/12, *Commission v. Council* (Broadcasting Rights), EU:C:2014:2151, Opinion 1/13, *Hague Convention*, paras. 72 73; Opinion 3/15, *Marrakesh Treaty*, EU:C:2017:114, para 107, and Opinion 2/15, *EU-Singapore FTA*, para 181.

[24] Opinion 1/03, para. 126.

[25] *Ibid*, para. 127.

[26] See note 3 *supra*.

[27] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96.

[28] Except for the rules on the allocation of responsibility among Member States to examining an asylum request (art. 63.1 (a) TEC).

[29] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.204, p. 12.

[30] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.2.2003, p. 18.

[31] V. Chetail, 'The Common European Asylum System: Bric-à-brac or System?', in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill/Nijhoff, Leiden, 2016), at 12.

[32] Teitgen-Colly, *supra* n. 12, at 1512-1513.

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of existing secondary law norms on asylum was clearly indispensable.[33] The adoption of the second phase of asylum instruments has benefitted from certain reforms operated by the Lisbon Treaty regarding the asylum competences of the EU: most importantly, the explicit and legally-binding objective of creating a '*common* European asylum system' in art. 78(2) TFEU;[34] the extension of the ordinary legislative procedure to this field; and the suppression of the 'minimum standards' requirement for EU legislation on asylum.[35] Under this new constitutional framework, the European Parliament and the Council adopted Directive 2011/95 and Directive 2013/33, in which some positive improvements can be acknowledged, representing quite a noticeable progress compared to previous legislation. However, the legislative reform has been quite modest and consisting in a reformulation and consolidation of the existing acquis rather than a real reform.[36] Even if Directives 2011/95 and 2013/33 advance in establishing common provisions, extending thus the level of harmonization,[37] the QD and the RCD still allow Member States to adopt or retain more favourable standards in national legislation[38], in so far as those standards are compatible with these Directives.[39] Consequently, although the requirement for minimum standards in asylum legislation of former art. 63 ECT has been suppressed by the Lisbon reform, its effects are still visible in EU secondary law.[40] Moreover, certain provisions of the QD and the RCD still contain optional clauses and leave margin of discretion to Member States.

Note to this effect that the 'minimum standards' characteristic of Union rules must be shared by the rules of the envisaged agreement for the purpose of excluding affectation in the sense of the ERTA

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33 See the assessment by the Commission of these first phase legislative instruments of the CEAS in its 'Policy Plan on Asylum: An Integrated Approach to Protection Across the EU', COM (2008) 360, 17 June 2008.

34 Emphasis added.

35 Art. 78 (2) TFUE refers to 'uniform' status of asylum and subsidiary protection, to a 'common' system of temporary protection and to 'common' procedures for the granting and withdrawing of asylum or subsidiary protection status. The standards concerning reception conditions for asylum or subsidiary protection applicants were not however qualified (simply 'standards'), but indeed the adjective 'minimal' was suppressed in that regard too.

36 Chetail, *supra* n. 31, at 27.

37 Tsourdi claims that the level of harmonization in Directive 2013/33 is higher than that of Directive 2003/9, but still contains exceptional clauses, vague notions allowing for Member States' discretion and internal contradictions: Tsourdi, *supra* n. 14, at 310. For similar views on the QD, see H. Battjes, 'Piecemeal Engineering: The Recast of the Rules on Qualification for International Protection', in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System. The New European Refugee Law* (Brill/Nijhoff, Leiden, 2016) 197-239, and S. Peers, V. Moreno Lax, M. Garlick and E. Guild, 'Qualification: Refugee Status and Subsidiary Protection', in S. Peers et al, *EU Immigration and Asylum Law* (Text and Commentary): Second Revised Edition. Volume 3: EU Asylum Law (Brill/Nihjoff, 2015) 65-210.

38 See art. 3 of the QD and art. 4 of the RCD.

39 As explicitly stated in the above-mentioned provisions. See judgment of 9 November 2010, *B and D*, C-57/09 and C-101/09, EU:C:2010:661, para. 115, in which the Court interpreted art. 3 QD in the sense that the power to adopt or retain more favourable national provisions must not overlook the need to maintain the credibility of the protection system provided for in the Directive in accordance with the RC. It must be recalled that art. 63, penultimate paragraph, TEC required the national provisions that Member States could maintain or introduce to be 'compatible with this Treaty and with international agreements'. On this question, see the arguments in H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers, 2006), at 202-203, and S. Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law* (4th ed., Oxford University Press, 2016), at 242.

40 It is true that the objective of establishing a '*common* European asylum system' and the suppression of the requirement for minimum standards in asylum legislation 'supports extensive legislative activities and argues for a restrictive reading of the clauses on national deviations that compromise uniformity': K. Hailbronner and D. Thym, *supra* n. 9, at 15.

 DOI: 10.17103/sybil.23.11

doctrine.[41] Since art. 5 of the RC allows its Parties to grant additional rights and benefits to refugees, we may interpret that the 'envisaged agreement'also leaves a margin of discretion to EU Member States,[42] confirming thus the exclusion of an ERTA exclusivity.

A further step in the analysis is however necessary, as the Court also required in its ERTA doctrine to take into account 'not only the current state of (Union) law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis'.[43] This means we will have to take into account the proposal to replace the QD with a regulation,[44] and the proposal to amend the RCD,[45] both adopted by the Commission in July 2016 as part of the third phase of harmonization of the EU asylum acquis. This criterion on the 'future and foreseeable developments'of Union law should however, in my view, be interpreted cautiously in order to balance the objective of protecting the uniformity of 'future'EU law with Member States'inaction in the international plane.[46] The impasse in the negotiations on the reform of the EU asylum acquis —especially concerning the Dublin Regulation and the Asylum Procedures Regulation proposals which are also part of the package— seems to reinforce this caution.

Finally, even if we could affirm to the exhaustive harmonization of Union rules in these fields,[47] EU Member States retain the sovereign power to examine an asylum request and the power to grant asylum in application of EU *common* rules. On the latter power, I do not think however it affects the determination of the nature of the Union external competence to adhere to the RC, as the Convention only endorses upon States Parties an obligation of *non-refoulment*, and not a right to asylum or duty on the part of States to admit refugees.[48] The territorial power of States to grant asylum – albeit no longer discretionary under EU law[49] - would not therefore be an obstacle to a future EU exclusive external competence to adhere to the

41 If only Union rules are minimal, the conclusion of the agreement by Member States would prevent the EU from enhancing internal harmonization in the future in a stricter way than the rules of the agreement: Opinion 2/91, para. 18; Opinion 1/03, paras. 123-127; *Broadcasting Rights*, para 91.

42 Although the original purpose of art. 5 RC was to safeguard the privileges of particular refugee classes existing at the time of the entry into force of the Convention, its terms are to be interpreted as an 'encouragement to States to legislate domestically beyond the standards of the Refugee Convention and, particularly, in its insistence that state parties continue to accord refugees all advantages that accrue to them by virtue of other international agreements': J. C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), at 108-109.

43 Opinion 1/03, para. 126.

44 Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM (2016) 466, 13 July 2016.

45 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM (2016) 465, 13 July 2016.

46 For a concrete example, see Case C-66/13, Green Network, EU:C:2014:2399, paras. 63 – 64.

47 For this view, see Hailbronner and Thym, *supra* n. 9, at 1046.

48 Among abundant literature, see Hathaway, *supra* n. 42, at 300-301; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd ed., Oxford University Press, 2007) at 362; M.-T. Gil-Bazo, 'Asylum as a General Principle of International Law', 27(1) *International Journal of Refugee Law* (2015) 3-28, at 9.

49 According to Gil-Bazo, the QD constitutes the first legally binding instrument of supranational character in Europe that imposes an obligation on states to grant asylum to persons who qualify as refugees: M.-T. Gil Bazo, 'Refugee status, subsidiary

 DOI: 10.17103/sybil.23.11

RC.[50] Nevertheless, on the former power, EU primary law still indicates that the examination of an asylum application pertains to the responsibility of Member States,[51] and this power is indeed covered by the RC. Consequently, if the level of harmonization of Union rules on asylum increases up to the point of making possible to qualify these as 'common rules', the Union would not be able to replace Member States as parties to the RC.

In case of accession, Member States would continue to be parties to the Convention in their own right. A declaration of competences would be nevertheless required to the Union in order to clarify to other parties to the RC the distribution of competences with regard to its Member States, and thus make the delimitation of international responsibility clearer. This conclusion means that the RC would have the status of a mixed agreement within the EU legal order, the implications of which will be considered in section C below.

In case political will favoured accession, it would be highly recommended to seek an opinion from the ECJ under its consultative competence enshrined in art. 218.11 TFEU, in order to ensure the compatibility of the accession with EU law.[52] *A priori*, the EU acquis on asylum should be compliant with the RC, as this is an explicit requirement of primary law. In that regard, apart from the contradictions or cases in which EU legislation may be at odds with the RC,[53] a point of conflict to arise could be Protocol 24 on asylum for nationals of Member States of the European Union (the so-called 'Aznar Protocol'). This Protocol to the EU Treaties is considered to be in contradiction to the RC, and more particularly to art. 1 and 3,[54] since being national of a Member State cannot be assimilated to any of the exclusion clauses foreseen in the former and the latter forbids discrimination on the basis of refugees'country of origin.[55] Some legal

protection, and the right to be granted asylum under EC law', UNHCR, *New Issues in Refugee*, Research Paper no. 136, 1-30. To this effect, see art. 13 of Directive 2011/95, which binds Member States to grant refugee status to third-country nationals or stateless persons who qualify as refugees in accordance with chapters II and III of the Directive: Gil-Bazo; Teitgen-Colly, *supra* n. 12, at 1339. On the obligation under art. 24 of the QD to issue a residence permit leading to a subjective claim of territorial protection, see S. Peers, V. Moreno Lax, M. Garlick and E. Guild, *supra* n. 37, at 116.

50 It could also be argued that the regulation on issues such as education, freedom of religion, freedom of association, regime of property rights or housing remains in the hands of Member States: see P. De Bruycker *et al*, *Setting up a Common European Asylum System*, European Parliament Study (2010), PE 425.622, at 439. However, both the RC and the QD require Member States to grant similar rights to nationals or to other third-country nationals in these fields, excluding thus the involvement of their power to regulate these material fields.

51 Art. 78.2 (e) TFEU refers to the 'criteria and mechanisms for determining which *Member State is responsible for considering an application for asylum* or subsidiary protection'. Emphasis added.

52 A possible argument against accession from a EU perspective would lie in a comparison to the EU accession to the ECHR, to which the ECJ objected because of the substantial change that ECHR accession would entail in the EU as a consequence of the supervision by the Strasbourg Court and the integration of ECHR provisions into the EU legal order (Opinion 2/94, para. 34). The fact that accession to the RC does not entail entering into another institutional system and that RC provisions are already integrated to a large extent into EU law, there would not be a 'substantial change'argument to confront: Battjes, *supra* n. 39, at note 61, p. 127.

53 See Battjes, *supra* n. 37 and n. 39; S. Peers, V. Moreno Lax, M. Garlick and E. Guild, *supra* n. 37.

54 Art. 42.1 RC forbids reservations to both articles.

55 See, among others, F. Julien-Laferrière, 'La compatibilité de la politique d'asile de l'Union européenne avec la Convention de Genève du 28 juillet 1951 relative au Statut des Réfugiés', in V. Chetail (dir.), *La Convention de Genève du 28 juillet 1951 relative au Statut des Réfugiés. 50 ans après: bilan et perspectives* (Bruylant, Bruxelles, 2001), at 262-264; J. McAdam, 'Regionalising International Refugee Law in the European Union: Democratic Revision or Revisionist Democracy?', 18

 DOI: 10.17103/sybil.23.11

scholars however argue that the cases contemplated in the Aznar Protocol, albeit containing a presumption for asylum requests by EU citizens to be manifestly unfounded, might be interpreted as not impairing access to examination procedures.[56] Notwithstanding, this incompatibility or contradiction already applies to EU Member States'commitments towards the RC, given that the Aznar Protocol has primary law value. On its impact on the accession issue, it has been argued that the ECJ could precisely find this incompatibility as an argument to deliver a negative opinion under art. 218.11 TFEU or the reason for third countries'opposition to EU accession, which could raise the need to look up for adjustments of EU primary law in this regard.[57]

(2) Under international law

Once the competence question under EU law has been clarified, it is time to address the feasibility of an EU accession to the RC under international law in order to determine whether there would be any obstacle to that accession from the perspective of the Convention itself and how to overcome it.

Firstly, the RC does not allow, at present, the accession by an international organisation. Art. 39.3 RC states that the Convention is only open to 'all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly'.[58] The same applies to the 1967 Protocol.[59] This means that a hypothetical EU accession to be realized would require amending these provisions, as it was done analogously when adjusting the ECHR for allowing the accession by the EU.[60]

Also, art. 38 RC confers settlement of disputes to the competence of the International Court of Justice, a jurisdiction before which the EU does not enjoy *ius standi*, neither to its contentious nor to its consultative competence.[61] Other States parties to the RC might be precisely interested on that advantage of EU accession in order to be able to initiate proceedings in which the Union takes part. However, suffice to note in this regard that the ICJ has not received to date any action related to the interpretation or application of the RC.

UCLA LawRw (2007). See also the criticism raised by UNHCR in *UNHCR's Position on the Proposal of the European Council concerning the Treatment of Asylum Applications from Citizens of European Union Member States*, 1 January 1997, available at https://www.refworld.org/docid/3ae6b31d2b.html

56 See, e.g., Battjes, *supra* n. 39; or G. Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff, 2000), at 536-537.

57 P. De Bruycker *et al*, *supra* n. 50, at 444.

58 Art. 39.2 RC to which a reference is made in art. 39.3 RC.

59 Art. V of the 1967 Protocol also provides that accession is open to all States Parties to the RC, any other UN Member State, any member of any of the specialized agencies or to which an invitation to accede may have been addressed by the UNGA.

60 See Protocol no. 14 to the ECHR (13 May 2004), which, in addition to amending the control system of the Convention, inserted a second paragraph in art. 59 stating that 'the European Union may accede to this Convention'.

61 According to art. 34.1 of the Statute of the International Court of Justice, 'only states may be parties in cases before the Court', while art. 65.1 in relation to art. 96 of the UN Charter allows the General Assembly, the Security Council or to other UN organs or specialized agencies authorized by the General Assembly to request an advisory opinion of the ICJ.

 DOI: 10.17103/sybil.23.11

From an institutional perspective, the EU would be bound, in case of accession, to cooperate with UNHCR on its duties, especially that of supervising the application of the RC, in accordance to art. 35 RC. This cooperation is already in place between the EU and UNHCR,[62] but the latter's influence might increase. Nevertheless, current rules would not allow the Union to become part of the Executive Committee of the UNHCR, which is in charge of advising the High Commissioner in the exercise of her functions, reviewing funds and programmes and authorizing the High Commissioner to appeal for funds, as well as approve budget targets. Although the Committee does not have law-making competence, its conclusions are indicative of the consent of state parties to the GC. According to the UNHCR Statute, the Committee is composed of 'representatives of States Members and States non-members of the United Nations', who are to be selected by the Economic and Social Council 'on the widest possible geographical basis from those States with a demonstrated interest in, and devotion to, the solution of the refugee problem'.[63] A revision of the UNHCR Statute or the revision of the Convention itself could arrange for EU participation in that body.[64] Currently the EU has observer status on the ExCom, without right to vote or to oppose prevailing consensus on decisions to be adopted by the Committee. Its full status would imply the need for coordination with Member States'positions, as the RC would correspond to a field of joint competences. If EU status in the Executive Committee could not be altered, the Union would be able to adopt a decision based on art. 218.9 TFEU determining its position regarding a specific decision of the Committee, position that Member States would have to present.[65]

The possibility and procedure to revise the RC is provided for in art. 45 RC, according to which 'any Contracting State may request revision of this Convention at any time by notification addressed to the Secretary-General of the United Nations'. A recommendation of the UNGA is required regarding the steps to be taken following that request.[66] Consequently, a revision procedure of the RC aimed at allowing for EU accession could indeed be opened by any EU Member State and could merely imply the introduction of a generic reference to international organisations or a specific reference to the EU in art. 39 RC. However, a reform of the Convention might not be 'commendable because there is a risk to reopen a debate about its substance which could at the end be undermined'.[67] For this reason and because the

[62] Declaration 17 to the Treaty of Amsterdam stated that consultations should be established with UNHCR and other international organisations in relation to asylum policy matters. UNHCR has a bureau in Brussels in charge of developing this cooperation relationship with EU institutions and aimed at influencing negotiations of EU policy and legislative proposals (see recent recommendations and comments in https://www.unhcr.org/working-with-the-european-institutions.html). In favour of reinforcing its role in the EU, see E. Guild and V. Moreno Lax, *Current challenges for international refugee law, with a focus on EU policies and EU co-operation with the UNHCR*, Study, European Parliament, PE 433.711, December 2013. On its relationship with the ECJ, the latter's *Rules of Procedure* do not allow for new third party interventions in a preliminary ruling, but only for those which were already parties to the national proceeding. For an assessment of the UNHCR intervention before the ECJ, see M. Garlick, 'International Protection in Court: The Asylum Jurisprudence of the Court of Justice of the EU and UNHCR', 34 *Refugee Survey Quarterly* (2015) 107-130.

[63] Art. 4, Statute of the Office of the UNHCR, General Assembly Resolution 428 (V) of 14 December 1950.

[64] On its possitive effects, see P. De Bruycker *et al*, *supra* n. 30, at 445.

[65] See judgment of 7 October 2014, OIV, C-399/12, EU:C:2014:2258.

[66] Art. 45.2 RC.

[67] P. De Bruycker *et al*, *supra* n. 30, at 59. On the reform of the RC, see, e.g., 'The Refugees Convention: why not scrap it?', Summary of discussion at the International Law Programme Discussion Group at Chatham House, October 2005.

 DOI: 10.17103/sybil.23.11

amendment process would be cumbersome, slow and not likely to be completed with success, adapting the RC for EU accession could be solved by drafting a protocol to the Geneva Convention simply for this purpose, as the one used to arrange for the accession of the EU to the ECHR as indicated above. This alternative would leave the text of the Convention intact, only focusing in the admission of the EU and thus preventing the opening of the Pandora box.[68]

Finally, attention should also be paid to the reservations the EU may make to the Convention at the time of accession,[69] and particularly to the preservation of Member States'reservations to the RC[70]. As it has been suggested, a systematic examination of Member States'reservations should be done in order to ensure compatibility between the scope of national and EU commitments to the RC under this joint competence, and to check maintenance of these reservations in case of jurisdiction retained by the Member States.[71]

Although some legal adjustments are of course needed, especially at the international level, we may conclude to the legal feasibility of the EU acceding to the Geneva Convention. The next necessary question to address is whether a hypothetical accession would provide for real added value both within the EU legal order and with regard to international law.

(C) ADDED VALUE OF THE EU ACCESSION: ROLE AND PLACE OF THE REFUGEE CONVENTION WITHIN EU LAW

As recalled in the introduction above, the RC occupies a central place in the designing and implementation of the common policy on asylum by virtue of the explicit reference made by EU primary law to the Convention itself.[72] Firstly, it was the Maastricht Treaty which requested asylum and other JHA matters to 'be dealt in compliance'with the RC under the intergovernmental form of cooperation of the third pillar;[73] later, the Amsterdam Treaty attributed to the EC the competence to adopt measures on asylum 'in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967';[74] and finally the Lisbon reform recalled this obligation of compliance for the 'common policy on asylum, subsidiary protection and temporary protection'.[75] This explicit obligation to build a common policy that respects the

68 P. De Bruycker *et al*, *supra* n. 30, at 437. Hailbronner and Thym also refer to the option of a unilateral declaration by the EU to commit itself formally on the international plane to adhere to the Geneva Convention (Hailbronner and Thym, *supra* n. 9, at 1046.

69 According to art. 42.1 RC, 'at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive'.

70 Most probably, Member States would insist on this preservation, as they have done regarding the EU accession to the ECHR. See art. 2 of Protocol no. 8 to the EU Treaties relating to art. 6.2 TEU.

71 P. De Bruycker *et al*, *supra* n. 30, at 439.

72 EU Treaties exclusively refer to two international treaties: the RC and the ECHR.

73 Art. K.2, Treaty of Maastricht (1992).

74 Art. 73 K, Treaty of Amsterdam (1997). This reference was only inserted in art. 63.1 TEC, and not regarding art. 63.2 TEC on the legal bases on temporary protection and balancing of efforts. On the implications of this limitation, see Battjes, *supra* n. 39, at 103-105.

75 Art. 63.1, Treaty of Lisbon (2007). This reference, now in art. 78.1 TFEU, ends with the limitation mentioned above, as the whole common policy on asylum must be in accordance with the RC and the 1967 Protocol.

 DOI: 10.17103/sybil.23.11

RC clearly turns the Convention into a 'central point of reference for the EU asylum acquis',[76] as well as a 'direct standard of decision'.[77] The fundamental role of the RC in the EU legal order would be even superior to that of the ECHR, which is formally rather a source of legal knowledge for identifying general principles of EU law according to art. 6 TEU. In opposition, the RC 'becomes a source of law by virtue of primary (Union) law references to it',[78] only, of course, in the context of EU asylum law.

The essential role of the RC as constituting the cornerstone of the international legal regime for the protection of refugees is replicated in the EU legal order as erecting itself as the core of the EU asylum acquis. This can formally be observed in secondary legislation, which contain direct references to the RC.[79] It is true that EU legislation might make multiple references to international instruments that the EU act in question must respect or conform with. Indeed, the obligations of Member States to respect their international commitments make necessary that EU legislation abide by those international treaties to which they are parties; otherwise, they would be placed under serious dilemmas on how to conform simultaneously to contradicting or incompatible obligations imposed by EU law, on the one hand, and international law, on the other. In those other cases however, the masters of the Treaties have not felt the need to include an explicit referral in EU primary law, as it is the case of art. 78 TFEU.

If we attempt to clarify the legal status the RC has at present in the EU legal order, it must be ascertained that all EU Member States are parties to the Convention. However, this does not mean that the Union has replaced or substitute for the Member States within the meaning of the succession criteria enshrined in ECJ case-law.[80] According to the Court's doctrine,[81] these criteria are the Member States'willingness to bind the EU to the international treaty and the acceptance of the EU by the other parties to the treaty. Whilst no indication can be found regarding the latter criterion, the willingness of Member States to bind the EU under the RC might be clear in light of the terms of art. 78 TFEU. Nevertheless, a complete transfer of powers to the EU regarding the scope of the RC has not been materialized, particularly in relation to the examination of asylum requests and thus the power to recognize a person as a refugee,[82] which shows how Member States are not willing to have the EU taking over their full responsibilities under international law in this field.

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76 Hailbronner and Thym, *supra* n. 9, at 1046.

77 R. Uerpmann, 'International Law as an Element of European Constitutional Law: International Supplementary Constitutions', in A. Von Bogdandy, *European integration: the new German scholarship*, Jean Monnet Working Paper 9/03 (2003), at 41.

78 *Ibid.*

79 To put only the QD as an example, it contains explicit references to the RC in recitals 3, 4, 14, 22, 23, 24, 29 and 33 of the preamble and in art. 2, 5, 9, 12, 14, 20 and 25. The Directive specifically states that 'standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention'(recital 23, preamble).

80 In this sense, see Hailbronner and Thym, *supra* n. 9, at 1046; Battjes, *supra* n. 39, at 79-80; P. De Bruycker et al, *supra* n. 50, p. 435.

81 See Judgments of 12 December 1972, *International Fruit Company and others*, joined cases 21/72 to 24/72, EU:C:1972:115, paras. 14-18; of 3 June 2008, *Intertanko and others*, C-308/06, EU:C:2008:312, paras. 42-49; and of 22 October 2009, *Bogiatzi*, C-301/08, EU:C:2009:649, paras. 24-33.

82 In this sense, see Battjes, *supra* n. 39, at 80.

DOI: 10.17103/sybil.23.11

Although the EU is not therefore bound by the RC under international law for not being a party itself to the Convention,[83] and since a succession to its Member States'obligations under it cannot be ascertained either, the EU has however committed itself to respect the Convention under EU law. This certainly prevents a mismatch between the obligations of Member States under Union law and public international law, the EU legislature being obliged to adopt secondary law measures in conformity with the RC and the ECJ being bound to respect the Convention in the interpretation of the EU asylum acquis.[84] In case of conflict between Union rules and the RC, precedence is to be given to the latter, which means that EU secondary legislation can be annulled for breaching the RC in violation of art. 78.1 TFEU.

All EU Member States have ratified the RC before the Treaty of Amsterdam of 1997 transferred powers to the EU on asylum, or before their accession to the EU, and thus the RC benefit from the protection of art. 351 TFEU.[85] The non-affectation of the rights and obligations arising for Member States from these prior agreements that art. 351 TFEU ensures would cover the RC.[86] Notwithstanding, the role of the RC in the EU legal order and the protection granted to it could be said to be much stronger through the referral made in art. 78 TFEU, according to which we could even affirm that the RC has the same value as EU primary law. Art. 78 TFEU is thus qualified as *lex specialis* to art. 351 TFEU as regards the legal effect of international refugee and human rights treaties.[87] Following that argument, Battjes considers that, since the RC binds all Member States and is not in opposition to but reinforced by EU primary law, the obligation of EU institutions not to impede performance by Member States of their obligations under international law[88] becomes especially prominent.[89] We may add that, as *lex specialis*, art. 78 TFEU suppresses the obligation of Member States under art. 351 TFEU to 'take all appropriate steps to eliminate the incompatibilities established' by adjusting or denouncing its international commitments.

Would EU accession entail the RC to acquire a new status within EU law? If the EU becomes a party to the RC in its own right, the Convention would be transformed into conventional law of the EU. More particularly, the RC would have the status of a mixed agreement within EU law, as a treaty concluded by

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[83] It could be however argued that the Union is bound under international law by those RC provisions that can be qualified as customary international law rules, such as the prohibition of *refoulement*. See judgment of 24 November 1992, Poulsen, C-286/90, EU:C:1992:453, paras. 9-10; judgment of 16 June 1998, *Racke*, C-162/96, EU:C:1998:293, paras. 45-46. In this sense, *Battjes*, *supra* n. 39, at 80-82.

[84] Hailbronner and Thym, *supra* n. 9, at 1029 and 1047.

[85] Art. 351 TFUE gives precedence over EU law to the rights and obligations arising from international agreements concluded 'before 1 January 1958 or, for acceding States, before the date of their accession'. However, it is understood that this protection applies from the moment in which the EU started to be competent on the field regulated under those agreements, that is, the entry into force of the Amsterdam Treaty (1 May 1999) with regard to asylum issues. See Battjes, *supra* n. 39, at 64-65.

[86] On art. 351 TFEU in general, see, among others, R. Schutze, 'EC Law and International Agreements of the Member States. An Ambivalent Relationship?', 9 *Cambridge Yearbook of European Law Studies* (2007), 337-440; J.-V. Louis, 'Les accords antérieures conclus par les États membres et le Droit Communautaire', in Louis and Dony, *Rélations Extériures. Commentaire J. Mégret*, vol. 12 (Éd. Université de Bruxelles, 2005), 201-211.

[87] S. Peers, 'Human Rights, Asylum and European Community Law', 24(2) *Refugee Survey Quarterly* (2004), at 29; Gil Bazo, *supra* n. 49, at 5.

[88] As affirmed in judgment of 14 October 1980, *Burgoa*, C-812/79, EU:C:1980:231, para. 9.

[89] Battjes, *supra* n. 39, at 68.

 DOI: 10.17103/sybil.23.11

both the Union and its Member States.[90] This would not alter the obligation by which EU legislation on asylum must abide by the RC, since EU secondary law is subordinated to those international conventions concluded by the Union and without prejudice to preserving the current drafting of art. 78 TFEU, which should not be altered because of accession.

Accession would certainly affect the jurisdiction of the ECJ with regard to the RC. In spite of the already high legal significance of its jurisprudence on the interpretation of the Convention at international level,[91] the ECJ lacks competence to interpret the RC as a whole. Although the Convention constitutes a direct source of decision in accordance with art. 78 TFEU and, for that reason, determines the validity of EU legislation on asylum,[92] the Court's jurisdiction to interpret the RC is not comprehensive, as underlined in *Qurbani*.[93] In its response to this preliminary reference, the Court recalled to have jurisdiction to interpret international agreements concluded by the EU, but not on those international agreements concluded between Member States and third countries,[94] the latter would only enter under the ECJ jurisdiction in case of succession.[95] As this is not the case, the Court refused its 'jurisdiction to interpret *directly* Article 31, or any other article, of that convention',[96] this finding not being called into question by references to the RC in art. 78 TFEU and art. 18 of the EU Charter.[97] The Court concludes not to hold an autonomous jurisdiction to interpret the RC, but only in conjunction with secondary Union law.[98] Consequently, the Court's competence will only extend to RC provisions, which have been reproduced by national law and by EU law —and that irrespective of the circumstances in which they are to apply and with the aim of forestalling future differences of interpretation— or to Convention provisions to which EU legislation makes a *renvoi*.[99]

The Court's jurisdiction would change with its status of agreement concluded by the EU, as no limitations would apply with regard to the kind of provisions that can be subject to its interpretation competence. The Court would be, after accession, competent to interpret the whole Convention as forming part of the EU legal order,[100] irrespective of the distribution of competences between the Union and its Member States regarding the content of the Convention. The ECJ has already clarified in its case-

90 On this issue, see P. García Andrade, 'EU external competences on migration: which role for mixed agreements?', in S. Carrera, J. Santos Vara and T. Strik (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Elgar, 2019) 39-56.

91 See E. Drywood, 'Who's in and who's out? The Court's emerging case law on the definition of a refugee', 51 *Common Market Law Review* (2014), 1093-1124, at 1095.

92 The integration of the RC into art. 78 TFEU makes the ECJ competent to also review in light of the RC those Member States'acts which apply or implement EU asylum law. In this sense, see Battjes, *supra* n. 39, at 98-99. An additional basis for this control comes from the incorporation of the RC in art. 18 of the EU Charther.

93 In this sense, see Hailbronner and Thym, *supra* n. 9, at 1047.

94 Judgment of 17 July 2014, case C-481/13, *Qurbani*, EU:C:2014:2101, para. 22.

95 *Ibid*, para. 23.

96 *Ibid*, emphasis added.

97 *Ibid*, para. 25.

98 Hailbronner and Thym, *supra* n. 9, at 26.

99 *Qurbani*, paras. 26-28.

100 Judgment of 30 April 1974, *Haegeman*, 181/73, EU:C:1974:41, para. 5.

DOI: 10.17103/sybil.23.11

law that, in addition to its jurisdiction to define the obligations which the Union has assumed under an international agreement, the Court may interpret those provisions of an international agreement which can apply both to situations falling within the scope of national law and to situations falling within Union Law, in order to forestall future differences of interpretation.[101] In that regard, the duty of close cooperation between EU institutions and Member States particularly applies when they are jointly parties to an international agreement.[102] That would be the situation of the RC in case of EU accession. If that accession materialized without making a declaration of competences, both the EU and its Member States would assume with regard to other States Parties the whole of international commitments that the Convention contains, since the distribution of competences EU-Member States cannot be opposed to third countries. Who is responsible for the infringement of a provision of the RC would therefore become an internal issue. For that purpose, the ECJ needs to be competent to interpret all the provisions of the Convention, even if some of these pertain to areas still in the hands of Member States. The extension of the ECJ jurisdiction over the whole provisions of the RC would consequently have relevant effects, especially in view of the increasing visibility the Court's position on the Convention has obtained in recent years at the international plane,[103] and thus the potential it has to influence the development of international refugee law.[104] The ECJ extension of jurisdiction may also increase normative coherence between the EU asylum acquis and international asylum law, ensuring thus greater consistency of the CEAS with the RC.

Additionally, we could put forward a legitimacy argument as an advantage of EU accession to the RC. On the one hand, it would increase the legal legitimacy of the EU legal order, which would be in an analogous situation to that of national legal orders of Member States. Although the RC lacks a specific international judicial body competent to address individual complaints, the ECJ will also see its legitimacy and authority on the interpretation and application of the Convention increased among EU Member States, even when they apply the Convention under national law. On the other hand, EU accession would lead to a clear extension of political legitimacy of the EU in the field of asylum, both *ad intra* with regard to its Member States, and especially *ad extra*, vis-à-vis third countries.[105] The EU will become a full partner in the eyes of third countries, receiving an international recognition of the responsibilities its Member States have entrusted to it on asylum, a field in which the Union's credibility as international actor is particularly weak after its management of the so-called the refugee crisis of 2015. As it has been argued

[101] Judgment of 16 June 1998, *Hermes*, C-53/96, EU:C:1998:292, paras. 32 and 33; judgment of 14 December 2000, *Dior*, C-300/98 and C-392/98, EU:C:2000:688, para. 35. See also judgment of 11 September 2007, *Merck*, C-431/05, EU:C:2007:496, paras. 29-38

[102] *Hermes*, para. 36. See our analysis in P. García Andrade, 'The Duty of Cooperation in the External Dimension of the EU Migration Policy', in S. Carrera, L. den Hertog, M. Panizzon and D. Kostakopoulou (eds.), *EU External Migration Policies in an Era of Global Mobilities: Intersecting Policy Universes* (Brill/Nijhoff, 2019), 299-325.

[103] Hailbronner and Thym also highlight the impact of ECJ judgments related to the RC on judicial practices worldwide (*supra* n. 9, at 1048). According to Drywood, 'no international court has developed a jurisprudence on the interpretation of the Geneva Convention with the legal significance of that which is currently emanating from the ECJ': Drywood, *supra* n. 87, at 1095.

[104] Drywood, *supra* n. 87, at 1121-1124; M. Garlick, supra n. 62, at 107.

[105] Uría applies these arguments to the EU accession to the ECHR: E. Uría, *La adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos* (Bosch, 2018).

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with regard to EU accession to ECHR, human rights —as the rights of refugees are— can only accomplish their mission and be credible if they can legitimize public actions that respect them and correct those that infringe them.[106] The legitimacy of the EU urging countries to ratify the RC or to reconsider their reservations would certainly improve too. In sum, EU accession to the RC would therefore signal to its partners that it attempts to build an efficient CEAS without compromising but ensuring and even reinforcing its objective of refugee protection.[107]

(D) CONCLUDING REMARKS

This contribution has come to verify the legal feasibility of the European Union acceding to the RC, the core of the international refugee protection regime, as well as the fundamental pillar of the EU asylum acquis. On the basis of EU law, an implied external competence of the EU to conclude the RC can be affirmed. That competence would be shared with the powers of Member States, as the areas covered by the RC — the qualification of a refugee and the status of rights afforded to refugees and asylum seekers - correspond to fields in which Union rules cannot be qualified as 'common'for the time being in the sense of ERTA exclusivity. A hypothetical accession by the EU to the RC would therefore preserve Member States as parties to the Convention, although their respective commitments under this international treaty would become intertwined. Under international law, the RC does not allow at present the accession by the EU or any other international organisation. Negotiating a protocol aimed at adapting the RC and the 1967 Protocol to EU accession would be the recommended way forward, as a revision of the Convention itself would open a debate about its substance and would not ensure a successful ending.

EU accession to the RC would not constitute a mere cosmetic improvement but would present real added value. Although the RC already enjoys a prominent role within the EU legal order by incorporation through primary law, a new status of the Convention as an international agreement concluded by the EU and its Member States would extend the ECJ's jurisdiction to interpret its provisions, increasing even further the legal significance of its jurisprudence for influencing international refugee law. The impact on the political legitimacy of the EU, particularly *ad extra*, is not negligible either. The possibility that third countries might view the EU as a reliable international actor on refugee protection and not just as the face of burden-shifting with regard to global refugee challenges would increase its international credibility and enable it to really honour the values and principles in which the EU constitutional framework is founded. For that purpose however, a reconsideration by the Union and its Member States of some of the current political and legislative elements of the European asylum policy is certainly imperative.

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[106] See D. Sarmiento, 'EU fundamental rights as a source of integration or disintegration?', Despite our Differences Blog, April 2016, available at https://despiteourdifferencesblog.wordpress.com/2016/04/10/eu-fundamental-rights-as-a-source-of-integration-or-disintegration/, and more particularly Uría, at 180-181.

[107] Note that this would not be against EU objectives. Although the CEAS had been originally created as a flanking measure of the abolition of internal border controls, the Lisbon treaty changed the objective to pursue by a common policy on asylum. The latter, as the common immigration policy, are no longer a spillover of the single market, but self-sufficient EU policies: Hailbronner and Thym, *supra* n. 9.

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If EU institutions and Member States consider that the legal feasibility of EU accession to the RC is however impaired by political impracticality, they should probably think twice before telling a jurist that this accession should be materialized.

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The Contribution of the EU to the Implementation of the Global Compacts: Legal Certainty for People on the Move as a Global Public Good

Carmen PÉREZ GONZÁLEZ*

> This multilateralism served a high purpose: to secure the freedoms of people everywhere (that is, people in the lands of the cooperation countries as *well as in other lands*) and to engage in a *common* (that is to say, *universal*) struggle.[1]

Abstract: This work aims to analyze the role of the EU and its Member States in implementing the UN Global Compacts from a specific approach: the theory of global public goods. In particular, it aims to explore the incentives EU and its Member States would have for agreeing on a European regime providing safe and legal pathways for migrants and people in need of international protection heading to the European territory. Although a variety of international instruments contain both the right to leave any country, including one's own country, and the right to seek international protection, up to now the International Community has failed in its attempt of providing legal certainty for people on the move. This article considers that a global public good approach would fuel the indispensable political consensus to do so.

Keywords: UN Global Compacts-security in migration- legal certainty people on the move people in need of international protection- global public goods- aggregate efforts- EU migration and asylum policy.

(A) INTRODUCTORY REMARKS

Few human phenomena have been more perceived as problematic, more open to political discussion and legal control, and more anxiously afraid that human mobility across borders. Although it is considered a major concern nowadays, international legal response is still disappointing. Establishing an international framework providing legal and safe migratory channels is widely considered as being one of the main challenges of our 21st century international community. At the same time, security in migration, which has been considered 'a priority belonging to the area of the protection of human rights, with regard to the connection with the universal right to security, which is rooted in human dignity'[2] has been identified as a key priority by international human rights monitoring bodies. Despite its importance, 'the issue remains poorly understood within (...) policy circles'.[3] It is notorious that, when facing the most important refugee

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1 S. Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (Oxford, Oxford University Press, 2007) at 198.

2 A. M. Kosińska and B. Mikołajczyk, 'Does the Right to Migration Security Already Exist? Considerations from the Perspective of the EU's Legal System', 21 *European Journal of Migration and Law* (2019) 83-116, at 84.

3 A. Betts, 'Introduction: Global Migration Governance', in A. Betts (ed), *Global Migration Governance* (OUP, Oxford, 2011) 1, at 3.

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crisis since World Word II, European States had failed to provide safe protection channels for those fleeing the brutal Syrian conflict. The absence of legal mechanisms for securing access to international protection procedures and regular labour status forces people on the move to resort to criminal networks and undertake a dangerous journey which often put their lives at risk.[4]

In a seemingly self-contradictory way, States have agreed on guarantying a set of rights related to individual's freedom of movement. Thus, from an international legal point of view, a range of international instruments contain both the right to leave any country, including one's own country,[5] and the right to seek international protection.[6] However, freedom of movement is limited, since those individuals don't have the right to decide their country of residence outside of the requirements imposed by national laws on a unilateral basis,[7] including those implementing the obligations contained in the 1951 Geneva Convention on the Status of Refugees[8] and its 1967 Protocol.[9] As a consequence of that, the international regime for human mobility and international protection is both fragmented and inadequate.[10] In this context, the United Nations (UN) Global Compacts represent the most recent attempt of the international community to provide coherence to the international governance of migratory flows.[11]

This work aims to analyse the role of the European Union (EU) and its Member States in implementing the UN Global Compacts from a specific approach: the theory of global public goods. In particular, it aims to explore the incentives EU and its Member States would have for agreeing on a

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4 According to the International Organization for Migration (IOM) project 'Missing migrants. Tracking deaths along migratory routes', a total of 1.159 deaths have been recorded in the Mediterranean in 2019. Data are available electronically at https://missingmigrants.iom.int/region/mediterranean, accessed 7 November 2019.

5 See art. 12 of the Universal Declaration of Human Rights (UDHR), GA Res. 217 A (adopted 10 December 1948); art. 12.1 and 2 of the International Covenant on Civil and Political Right (adopted 16 December 1966, entered into force 23 March 1976), art. 2.1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS No.005 (adopted 4 November 1950, entered into force 3 September 1953); art. 22.2 of the American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978); and art. 12.2 of the African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1985).

6 See art. 14.1 UDHR; art. 22.7 of the American Convention on Human Rights; art. 12.3 of the African Charter on Human and Peoples Rights; and art. 18 of the Charter of Fundamental Rights of the EU (OJ 2000 C364/1). It is very interesting the recent Inter-American Court of Human Rights (IACrtHR) Advisory Opinion on the institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights), OC-25/18 of 30 May 30 2018.

7 Although conditioned to the fulfilment of the obligations imposed by International Humans Rights Law (IHRL), International law assumes that States has the sovereign right to enact and implement migration and border security measures.

8 Adopted 28 July 1951, entered into force 22 April 1954.

9 Adopted by GA Res. 2198 (XXI) of 16 December 1966, entered into force 4 October 1967.

10 It has been said that '(...) no formal or coherent framework has been developed by the UN within which states' responses to international migration should be framed': E. Guild and S., 'Grant Migration Governance in the UN: What is the Global Compact and What does it mean?', *Queen Mary School of Law Legal Studies Research Paper No. 252/2017*, published on 10 January 2017.

11 The Global Compact for Safe, Orderly and Regular Migration (GCM) was adopted on 10 December 2018 at an Intergovernmental Conference held in Marrakech and endorsed by the UN General Assembly (UNGA) on 19 December 2018. The Global Compact on Refugees (GCR) was endorsed by the UNGA on 17 December 2018. Both are available electronically here.

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European well planned, consistent and rational regime providing safe and legal pathways for migrants[12] and people in need of international protection.[13] This perspective could help to overcome the political concerns about the consequences of an unequal distribution of efforts and burdens among Member States,[14] which are fuelling the arguments of extreme right-wing political parties in EU Member States and threating the continuity of the integration process.

This paper is organized as follows. It will first refer to the legal nature of the Global Compacts. I will outline how the Global Compacts underline the need to develop and facilitate mobility and legal admission channels for economic migrants and refugees/people in need of international protection (B). Second, I will analyse the role of the EU and its Member States in the implementation of the Global Compacts and the possibility of considering them an opportunity for a definitive paradigm shift in the way those actors are developing the EU Treaties guiding principles in the migration and asylum domains (C). A global public goods approach will be then considered (D). My conclusions will be drawn in the final section (E). Since a fundamental change in the underlying assumptions on this field is needed, I will maintain that the global public goods theory can help the relevant actors to take both rational and effective decisions.

(B) THE GLOBAL COMPACTS AS STANDARD SETTERS

(1) The Global Compacts are not legally binding: What does that imply?

The UN Global Compacts as are not legally binding, which it not an unintentional choice.[15]The Global Compacts express the political ambitions and will of UN Member States. They are human rights-driven and confirm the existing international human rights law and protection frameworks. As it has been said '(t)he most remarkable thing about the Global Compact for Safe, Orderly and Regular Migration (...) is that

[12] According to the International Organization for Migration a migrant is 'a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally-defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students'. This work will take into account only international migrants: those who move away across an international boundary. The above definition is available electronically at https://www.iom.int/who-is-a-migrant, accessed 7 November 2019.

[13] The IACrtHR understand international protection 'as the protection that a State offers to a foreign person because, in her or his country of nationality or habitual residence, that individual's human rights are threatened or violated and she or he is unable to obtain due protection there because it is not accessible, available and/or effective': see paragraph 37 of the IACrtHR Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, adopted on 19 August 2015.

[14] G. Noll, 'Prisoner's Dilemma in Fortress Europe: On the Prospects for Equitable Burden-Sharing in the European Union' 40 *German Yearbook of International Law* (1997) 405-437.

[15] S. Carrera, K. Lannoo, M. Stefan and L. Vosyliute, 'Some EU governments leaving the UN Global Compact on Migration: A contradiction in terms?', CEPS Policy Insights No. 2018/15, November 2018, available electronically at https://www.ceps.eu/ceps-publications/some-eu-governments-leaving-un-global-compact-migration-contradiction-terms/, accessed 7 November 2019. As the authors points out, 'this option allows for a wide degree of flexibility in the implementation phase, while at the same time providing financial support and the possibility for monitoring progress through periodic review' (at 3).

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it exists at all'.[16] In my opinion, the same can be said about the Global Compact for Refugees. Since they are not legally binding, the implementation process becomes crucial, at they contain 'political and moral commitments by participating States to pursue its aims'.[17]

The Global Compacts are *soft law* instruments[18] aimed to provide 'governance potential'[19] and constitute a cooperation framework among States. It goes without saying that not legally binding does not means without legal consequences. Both instruments materialize the political consensus of an important number of States about how international migration and refugee protection should be governed.[20] Proving that engaging this political consensus was not innocuous, a group of States decided not to participate in the adoption of the GCM and did not attend the International Conference held in Marrakech in December 2018. As known, some of them are EU Member States, which can in fact complicate the adoption of implementation measures at EU level.[21] By doing so, those States breached the deal reached in 'The European Consensus on Development' where an agreement was made on supporting the elaboration of the UN Global Compacts on Migration and Refugees.[22] At the end of the day, the coordination and unity showed during the discussion process could be merely apparent.[23]

(2) Do the Global Compacts aim to enhance legal certainty for people on the move/in need of international protection?

[16] K. Newland, 'The Global Compact for Safe, Orderly and Regular Migration: An Unlikely Achievement' 30 *International Journal of Refugee Law* (2018) 657-660, at 657.

[17] *Ibid.*, at 2.

[18] 'We use the shorthand term soft law to distinguish this broad class of deviations from hard law — and, at the other extreme, from purely political arrangements in which legalization is largely absent': K. W. Abbot and D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organizations* (2000) 421-456, at 422.

[19] M. Panizzon, 'Governance and the UN Global Compact on Migration: Just another Soft Law Cooperation Framework or a New Legal Regime governing International Migration?', *EJIL Talk!*, published on 4 March 2019, available electronically at https://www.ejiltalk.org/governance-and-the-un-global-compact-on-migration-just-another-soft-law-cooperation-framework-or-a-new-legal-regime-governing-international-migration/, accessed 7 November 2019.

[20] As Amato has affirmed '(c)onsensus —the inference we draw from the process of international communication about norms— is international law; what states believe to be law is law': G. Amato, 'On Consensus', 8 *Canadian Yearbook of International Law* (1970) 104-122, at 121.

[21] See on this question: M. Gatti, 'EU States' Exit from the Global Compact on Migration: A Breach of Loyalty', EU Immigration and Asylum Law and Policy, published on 14 December 2018.

[22] Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, OJ 2017 C 210/1.

[23] About the participation of the EU in the GCM see: P. Melin, 'The Global Compact for Migration: Lessons for the Unity of EU Representation', 21 *European Journal of Migration and Law* (2019) 194-214.

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Providing legal certainty[24] for people on the move can be considered a specific objective of the Global Compacts. The New York Declaration for Migrants and Refugees[25] intends to facilitate 'safe, orderly, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies' and 'the creation and expansion of safe, regular pathways for migration'[26] and 'to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries'[27]. Although two separate Global Compacts were finally adopted,[28] both instruments stress the need of greatly expanding the possibilities of making international displacements safer.

(a) *Legal certainty for migrants as a goal in the GCM*

The GCM is truly ambitious. It aims to cover all aspects of international migration.[29] Providing legal certainty can be considered a transversal objective in this regard.[30] Enhancing availability and flexibility of pathways for regular migration; addressing and reducing vulnerabilities in migration; strengthening certainty and predictability in migration procedures for appropriate screening, assessment and referral; and strengthening international cooperation and global partnerships for safe, orderly and regular migration, are specific objectives enshrined in the GCM.[31]

The UN High Commissioner for Human Rights has interpreted the safe and orderly conditions for migrations enshrined in the GCM and has understood that 'orderly migration governance (...) should ideally refer to migration measures (...) that provide predictability for migrants and States in order to guard against migration policy responses that are arbitrary or unlawful'. In the same sense, 'safety (...) would refer not just to physical security, but more broadly to the proliferation of an environment in which dignity and human rights are respected, protected and fulfilled'.[32]

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[24] It has been affirmed that the principle of legal certainty is 'the international basis of the rule of law': J. R. Maxeiner, 'Some realism about legal certainty in the globalization of the rule of law', 31 *Houston Journal of International Law* (2008) 27-46, at 30. It refers to the idea 'that the law must be sufficiently clear to provide those subject to legal norms with the means to regulate their own conduct and to protect against the arbitrary exercise of public power': Fenwick, M., and Wrbka, S., 'The shifting meaning of legal certainty', in M., and Wrbka, S. (eds.), *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (Springer, The Hague, 2016) at 1.

[25] GA Res. 71/1, 19 September 2016.

[26] Cfr. paragraph 8 e).

[27] *Ibid.*, at 77.

[28] Cathryn Costello suggests that, even if the Global Compacts 'assume certain categorical distinctions between refugees and migrants' they are 'more fluid they imagine'. She also highlights that 'migration control policies and practices often bear down particularly heavily on refugees and would-be refugees': C. Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?', 30 *International Journal of Refugee Law* (2018) 643-649, at 646.

[29] Guild and Grant, *supra* n. 10, at 6-7.

[30] F. Crépeau, 'Towards a Mobile and Diverse World: 'Facilitating Mobility' as a Central Objective of the Global Compact of Migration', 30 *International Journal of Refugee Law* (2018) 650-656.

[31] See Objectives no. 5, 7, 12 and 23 of the GCM.

[32] Report on the compendium of principles, good practices and policies on safe, orderly and regular migration in line with international human rights law, A/HRC/36/42, 5 October 2017.

(b) *Safety for refugees as a goal in the GCR*

The GCR focuses on responsibility sharing[33] and intends to provide a basis for predictable and equitable burden and joint liability among all UN Member States, together with other relevant stakeholders as appropriate, including regional organizations.[34] It also underlines the role of regional cooperation in comprehensive responses[35] and refers to resettlement programs and regional frameworks which may complement national laws in offering pathways to durable legal status or naturalization for refugees as valuable tools.[36]

(C) THE ROLE OF THE EU

Both the GCM and the GCM address important areas of EU migration and asylum policies, which constitute fundamental vectors within the Area of Freedom, Security and Justice. We can find in the Treaty on the Functioning of the EU (TFUE)[37] references to the adoption of measures regarding the conditions of entry and residence of third country nationals in the EU[38] and to partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.[39] Besides that, and according to article 78 of the TFEU, the European system should conform the 1951 Geneva Convention system. But it does not imply that the Common European Asylum System (CEAS) is the automatic translation of the obligations imposed by the Convention. Member States keep some competences, such as the one related to the possibility of asking for asylum at Embassies, the establishment of resettlement programs and the issuing of humanitarian visas.[40]

Despite these references, the EU and its Member States have developed and prioritized externalization policies and measures, they have tried to contain mobility and a 'fortress Europe' has been

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33 Named as 'one of the most significant gaps in the international refugee regime': A. Betts, 'The Global Compact on Refugees: Towards a Theory of Change?', 30 International Journal of Refugee Law (2018) 623-626, at 1. About refugees burden-sharing see: P. Schuck, 'Refugee Burden-Sharing: A Modest Proposal', 22 *Yale Law Journal of International Law* (1997) 243-297.

34 See paragraph 3 of the GCR.

35 *Ibid.*, at paragraph 28.

36 *Ibid.*, at paragraph 99.

37 OJ 2012 C 326/47.

38 *Cfr.* art. 79.2.a).

39 *Cfr.* art. 78.2. g).

40 In a judgment of 7 March 2017 (*X and X vs. État Belge*, Case C-638/16 PPU, ECLI:EU:C:2017:173), the European Court of Justice (ECJ) affirmed that Member States are not required, under EU law, to grant a humanitarian visas to persons who wish to enter their territory with a view to applying for asylum, but they remain free to do so on the basis of their national law. Again, a decision of the European Court of Human Rights (ECtHR) could impose obligations to States parties to the European Convention on Human Rights (ECHR) regarding this question. The case, very similar to the one decided by the ECJ in 2017, concerns a couple and their two children, all Syrian nationals, who were refused the short-stay visas for which they had applied to the Belgian embassy in Beirut with a view to seeking asylum in Belgium (*M.N. and Others vs. Belgium*, application no. 3599/18). The ECtHR will decide if the Belgian's authorities' refusal of the short-stay visas requested by a couple, Syrian nationals, and their two children, from the Belgian Embassy in Beirut was contrary to arts. 1, 3, 6 and 13 of the ECHR.

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firmly promoted[41]. As it has been said, regarding people in need of international protection, '(t)he academic literature has brought to light the role that EU cooperation on migration and asylum matters has played in the development of policy and legal instruments focusing on 'containment' of asylum seekers and refugees in countries of origin or transit'[42] and creating a 'continuum of precariousness'.[43] In general, these kind of measures and policies try to avoid international law obligations concerning *non-refoulement* and the legal and logistical problems associated with the return of those who don't have the right to stay according to international and national law. Some of these policies have been put into question by the case law of the ECtHR.[44]

In the particular case of the EU, as a result of the application of common rules, the whole territory is theoretically conceived as a single area or protection. Although this must include, according to EU law, that people in need of international protection must have access to fair and efficient international protection procedures, this common system has been built projecting its protecting scope to those who have reached the European territory. Besides that, existing EU legislation on legal migration does not really provide for a unified system governing entry into and legal residence in the Member States. Because of that, EU migration and asylum system has been described as 'a legal framework leading to limited safeguards and legal certainty for vulnerable migrants and significant adverse consequences for access to the EU by those who wish to claim international protection'.[45]

There seems to be a contradiction between the purposes established by the treaties and the way they have been put in practice. Those purposes include providing freedom, security and justice not only for those who are present in the EU, but also for those who flee from prosecution, violence or situations of human rights indiscriminate violations and seek international protection in the territory of the EU Member States. These values must be understood as interconnected. In this sense, I consider that freedom should be figured out not only as physical freedom of movement. It also would encompass freedom from legal uncertainty, which would include the freedom of migrants from being victims of human rights violations such as those inflicted by criminal smuggling and trafficking networks.[46] Preventing them from entry European territory has to be considered a way of circumvent the international obligations stemming

41 'A kind of schizophrenia seems to pervade Western responses to asylum seekers and refugees: great importance is attached to the principle of asylum but enormous efforts are made to ensure that refugees (and others with less pressing claims) never reach the territory of the State where they could receive its protection': M. J. Gibney, *The Ethics and Politics of Asylum. Liberal Democracy and the Response to Refugees* (Cambridge, Cambridge University Press, 2004), at 2.

42 S. Carrera and R. Cortinovis, 'The EU's Role in Implementing the Global Compact on Refugees', *CEPS Paper on Liberty and Security*, 2018-04, April 2019. About border and migration externalization policies see: A. Sánchez Legido, 'Externalization and outsourcing of migration controls vs. human rights', 37 *Revista Electrónica de Estudios Internacionales* (2019), 24 pp.

43 A. Neylon, 'Producing Precariousness: 'Safety Elsewhere' and the Removal of International Protection Status under EU Law', 21 *European Journal of Migration and Law* (2019) 1-25, at 11.

44 Recent and relevant cases are *Hirsi Jamaaa and others v. Italy*, ECHR (2012) Report of Judgments and Decisions 2012-II, and *N.D and N.T. v. Spain*, ECHR (2017) ECLI:CE:ECHR:2017:1003JUD000867515.

45 V. Mitsilegas, *The criminalization of migration in Europe. Challenges for human rights and the rule of law* (Springer, London, 2014), at 74.

46 C. Costello, The Human Rights of Migrants and Refugees in European Law (Oxford University Press, Oxford, 2016) at 29.

from the principle of *non-refoulement* and, subsequently, an infringement of a peremptory norm of general international law.[47] Also, the second value of the triad should be understood from a new angle: security should be understood in this context as 'human security'.[48]

(D) A GLOBAL PUBLIC GOOD THEORY APPROACH?

Migration governance is a matter of international cooperation. As Betts noted in 2011 '(a)s with other transboundary issue-areas, states have increasingly recognized that they are unable to address their concerns with migration in isolation but that forms of collaboration and coordination are necessary'.[49] As to the EU, I think we can affirm that its Member States have effectively cooperated in migration and refugees matters. Although the achievements are to some extent disappointing, an important set of binding rules have been adopted over the years. At least on paper, the EU has tried since 2005 to build a comprehensive policy covering not only border control and the fight against illegal migration, but also addressing the roots on forced migratory movements, enhancing legal opportunities for economic migrants and refugees and improving integration in host societies. These were the goals enshrined in the 'Global Approach to Migration and Mobility' adopted by the European Council in 2005 and incorporated to the Stockholm Programme.[50] The same objectives were proposed a decade later in the Valetta Summit on Migration held in November 2015.[51]

Despite the assumption of migration governance being a shared responsibility, the truth is that not much has been done outside the strengthening of security at borders and the externalization of migratory control. Besides that, EU Member States has not shown neither external solidarity -towards third countries and third country nationals-, nor internal. The fact that the mechanism contained in Council Directive 2001/55/EC of 20 July 2001[52] has never been applied is illustrative enough.[53]

Could the global public goods view help to change this tendency by providing a useful theoretical framework to analyse the question of the common implementation of the Global Compacts by the EU and its Member States in order to reduce fragmentation and refugees and migrants' vulnerability? This is the question I will address in this section. Three questions words would constitute the axes of analysis. First, I would try to define 'global public goods. Second, the reasons backing the need for closer cooperation in

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47 J. Allain, 'The jus cogens Nature of non-refoulement', 13 *International Journal of Refugee Law* (2001), 533-558.

48 'From a human security, perspective it is crucial to put into place legal protections for people on the move and to establish institutions and structures that can effectively enforce those protections': F. Vietti and T. Scribner, 'Human Insecurity: Understanding International Migration from a Human Security Perspective', 1 *Journal of Migration and Human Security* (2013) 17-31, at 26.

49 Betts, *Introduction...*, *supra* n. 3, at 307.

50 'The Stockholm Programme. An open and secure Europe serving and protecting citizens', OJ 2010 C 115/1.

51 The Action Plan and the Political Declaration adopted in Valetta are available here.

52 On minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12.

53 M. Ineli-Ciger, 'Time to Activate the Temporary Protection Directive. Why the Directive can Play a Key Role in Solving the Migration Crisis in Europe', 18 *European Journal of Migration and Law* (2016) 1-33.

 DOI: 10.17103/sybil.23.12

this field will be addressed. Finally, some examples of how this cooperation could be put into practice will be explained. Ultimately, a global public good approach was chosen in order to show that there are good reasons for supporting European deeper cooperation in this field.

(1) What is a global public good?

The term public good is generally understood to be defined by two characteristics: non-rivalry and non-excludability.[54] First, there is no rivalry between potential users of the good: one person/State/society can use it without diminishing its availability to others. This means that when the good is consumed, it doesn't reduce the amount available for others. Secondly, people/States/societies cannot be practically excluded from using the good. Thus, it is available to everyone, whether they contributed to producing it or not.

Although public goods have been conceived at national in character[55], global concerns (i.e. climate change adaptation, fighting against terrorism or non-proliferation of nuclear weapons) inspired an international approach to the concept. Thus, the above-mentioned characteristics have to be reframed from an international perspective. Some legal global public goods depend on the aggregate efforts of, at least, the most influential actors. [56] Reducing migration vulnerability through international legal cooperation can be considered an example of this kind of global public goods. It requires an aggregated effort intended to establish an incentive program aimed to make mobility safe for third country nationals.

Barrett warns about the problem of collective efforts. How to persuade States to do more if self-interest tells them it is time to stop (usually because the costs of acting are going up and could exceed the benefits if a little more is done)?[57] To solve this problem, a complete programme of incentives should be established.

(2) Why should States cooperate in this field?

A recent review of the literature on this topic found that a global public good approach can be useful when it comes to assess the implementation of the rules aiming to establish burden-sharing obligations under the CEAS.[58] In his analysis, Tim Hatton affirms that refugee protection can be considered a global public good if we take into account the benefit for society stemming from knowing that a humanitarian crisis has been properly addressed. At the same time, when one State provides safe haven for refugees and other

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54 I. Kaul, I. Grunberg and M. A. Stern, 'Defining Global Public Goods', in. I. Kaul, I. Grunberg and M. A. Stern (eds), *Global Public Goods. International Cooperation in the 21st century* (OUP, Oxford, 1999) 2, at 3.

55 *Ibid.*, at 9.

56 N. Krisch, 'The decay of consent: International Law in an age of public goods', 108 *The American Journal of International Law* (2014) 1-40, at 4. As this author recalls '(s)ingle-best-effort goods (...) can be provided by a single actor o group of actors', while 'weakest-link goods (...) requires action by all, including those less willing or able to do so'.

57 Barrett, *supra* n. 1, at 81-82.

58 See J. Fernández-Huertas Moraga, 'Can Market Mechanisms Solve the Refugee Crisis?' 244 IZA *World of Labour* (2016) 1-10. The author conceives quotas as first step in a three-step process that should include two other market mechanisms. Second would be a matching scheme letting refugees to specify both preferred and not desired destinations. Third step should be a compensations mechanism were obligations to provide protection to refugees and people in need or international protection could be bought and sold.

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individuals in need of international protection, residents of another countries (in our case, residents both in the rest of Member states and in third countries) would benefit from knowing that that people has found a safe place to be.[59]

In the same line, Eiko Thielemaan identifies protection of refugees as a public good. He highlights that when people in need of international protection find sanctuary, secondary movements of asylum seekers and subsequent border tensions are suppressed. Thus, he maintains that internal security can be considered a public good.[60] Despite the difficulties for agreeing on a common binding cooperative mechanism in this field,[61] these authors agree on the EU being the best placed international organization to do so. According to them, legal fragmentation arising from the unilateral determination of the conditions and requisites that have to be met to have access to protection/residence for migrants does not take into account the 'global social optimum' (understood here as the best possible solution to the problem of refugees) and can provoke that States assume refugees and people in need of international protection below that optimum.

In my view, this reasoning can be extended to other areas of cooperation regarding human mobility. In general, fragmentation and the lack of legal channels letting access to international protection mechanisms and legal residence for refugees and migrants turn into legal uncertainty for them. Too often, they have to 'trust' in smuggling networks for doing a journey that, because of the absence of precise and clear international obligations assumed by States, they cannot legally do.

Of course, this has adverse effects for people on the move, since they do not travel in adequate and decent conditions, and gives rise to gross violations of human rights. Smuggled and trafficked people, refugees and asylum seekers, or non-accompanied migrant children became more vulnerable. But it has also negative consequences for States, which put up with some adverse side effects in this scenario.

For these reasons, it is very likely that the establishment of a legal multilateral framework providing safe channels for migrants and people seeking international protection in Europe would generate positive externalities.

Since it would turn, for example, in better managed migration flows, States will better control the movements across borders. At the same time, it would facilitate a more efficient fight against organized

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59 T. J. Hatton, 'Setting Policy on Asylum: Has the EU Got it Right?' *124 IZA World of Labour* (2015), available electronically at https://wol.iza.org/articles/setting-policy-on-asylum-has-eu-got-it-right/long, accessed 7 November 2019.

60 E. Thielemann, 'Why Refugee Burden-Sharing Initiatives Fail: Public Goods, Free-Riding and Symbolic Solidarity in the EU', 56 *Journal of Common Market Studies* (2018) 63-82.

61 As known, following the migratory crisis that took place in 2015, the European Commission proposed to relocate 160.000 persons in need of international protection. The Commission also recommended a structured solidarity mechanism which could be triggered any time by the Commission to help any EU-Member facing a crisis situation. Although two Council Decisions followed the Commission's proposal -Council Decisions (EU) 2015/1523 of 14 September 2015 (OJ 2015 L 239/146) and (EU) 2015/1601 of 22 September 2015 (OJ 2015 L 248/80) establishing provisional measures in the area of international protection for the benefit of Italy and Greece- Member States did not assume the quotas framed at EU level. Some of them even try the annulment of this Decisions before the ECJ. Although the Court dismissed the actions, Hungary and the Slovak Republic -the Member States that brought the cases to Luxembourg- did not relocate the refugees they had been asked. In my view, this made clear the inability of the EU to have its decisions implemented and result in a serious drop of the credibility of the European Institutions for solving the refugee crisis (see the Judgment of the ECJ of 6 September 2017, joined cases C-643/15 and C-647/16, *Slovak Republic and Hungary v. Council of the European Union*, ECLI:EU:C:2017:631).

 DOI: 10.17103/sybil.23.12

crime (namely the smuggling and trafficking networks). In such case, cooperation is a rational choice.[62] Available data show that, until now, the international community, and the EU in particular, have failed in the objective of making migration and access to international protection safe for individuals. This failure has enhanced the role of mafias and criminal networks in the managing of migration flows. If an European legal framework offers every State's nationals the possibility of enjoying legal certainty when in the move, this will facilitate the achievement of objectives typically related to national and international security. I think we can agree on the idea that the absence of safe access channels to international protection and migration does not fit for the purpose of proving security, for both States and individuals. Only a more open system offering precise legal channels of entry to migrants and refugees could better fit this goal. It would also improve the credibility of the EU's human rights policy abroad and within its territory.

Once in force, this European regime would benefit to all participants European (and even non-European) States. All of them will enjoy improvements in the fight against organized criminality and border control. Besides that, it seems clear that consumption of the good does not reduce the amount available for consumption by others.

(3) How EU could implement UN Global Compacts in a consistent and effective way?

In his seminal work *Negotiation Asylum*,[63] Professor Noll proposes three groups of initiatives to address unequal burden-sharing. First, States could decide to share policies by harmonizing laws. Second, they can choose sharing money through sharing resources. A final option would be sharing physical burdens. That is, sharing people.

In the case of the EU, according to article 4 j) of the TFEU, the EU and its Member States share the legal competence on issues related to the Area of Freedom, Security and Justice. As a result, the EU has been working in making equal the distribution of refugees and people in need of international protection by harmonizing asylum policies and rules. Having a single area of protection and eliminating internal barriers should have resulted in all the Member States offering the same possibilities and appeal for refugees and people in need of international protection. If we assume that they will seek protection in those countries they consider more accessible of friendly, the harmonization of domestic laws was conceived to avoid this 'asylum-shopping' approach. In this sense, the Directives on asylum procedures,[64] qualification[65]

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[62] Again, the notion of human security emerges as valuable: '(...) the reassessment of security as encompassing broader notions of human security has helped foster a growing recognition of the close relationship between the security of states and the welfare of those living within them': F. Nicholson, 'Protection and empowerment: strategies to strengthen refugees' human security', in A. Edwards and C. Ferstman (eds), *Human Security and Non-Citizens* (Cambridge, Cambridge University Press, 2010) 82, at 92

[63] Gregor Noll (ed.), *Negotiating asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague, Brill/Nijhoff, 2000).

[64] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013 L 180/60.

[65] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337/9.

 DOI: 10.17103/sybil.23.12

and reception conditions[66] aim to offer third country nationals in seek of international protection a homogeneous and equivalent protection. Nevertheless, this goal has not been fully achieved. Different reasons have contributed to this failure. On the one hand, harmonization of refugee (and also migration) has been only partial. As said, in accordance with the shared natured of the competence, Member States keep the competence to legislate an important number of questions. On the other hand, even when a common regulation has been adopted, Member States are often allowed to apply more favourable or flexible conditions at national level. As a result, we count with a non-harmonized regime, where serious differences persist. Besides that, we have to take into account that when it comes to the regulation of human mobility, law is an instrument limited in scope. Even though a more flexible regime legal might favour or encourage mobility, there are other contributing factors. Economic and political trends can also constitute pull and push factors in this regard.[67]

When analysing the question of how could EU and its Member States facilitate access to international protection and safe migratory pathways for third country nationals who are outside the European territory, we have to distinguish between traditional pathways for people in need of international protection and those channels suitable for economic migrants or non-refugee third country nationals.

Regarding the first group of measures and mechanisms, humanitarian corridors,[68] humanitarian visas,[69] resettlement programs,[70] and private sponsorship programs[71] might be included as components of a European binding and permanent framework.

On the other hand, we must take into account that international mobility due to economic reasons falls outside agreed legal regimes on international protection. International law seems had assumed a fundamental difference between forced and chosen migration individual projects. Forced migration is conceived to be related to the flight of people in immediate need of protection. Since their lives are at risk, a prompt and effective answer is perceived as needed. Migration for economic reasons has not gained that level of empathy at international legal level. Thus, economic migration is perceived as chosen and accordingly not forced. For this reason, States tend to limit the entrance of economic migrants making it conditional to labor needs. Severe limitations are not perceived as unfair when it comes to let economic

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66 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 2013 L 180796.

67 Thielemann tell us about other pull factors such as existing migrant networks, geographic location, historic or language ties: Thielemann, *supra* n. 60, at 63.

68 'A humanitarian corridor is used to be defined as a type of temporary demilitarized zone intended to allow the safe transit of humanitarian aid in, and/or refugees out of a crisis region': P. Gois and J. Falchi, 'The third way. Humanitarian corridors in peacetime as a (local) civil society response to a EU's common failure', 25 *Rev. Interdiscip. Mobil. Hum.* (2017) 59-75, at 67.

69 See *supra*, n. 40. At the EU level, the European Parliament has leaded the political debate regarding the need of legislating in this area. See the Report 'Humanitarian visas: Europe added value assessment accompanying the European Parliament's own-initiative report' October 2019.

70 According to the United Nations High Commissioner for Refugees (UNHCR) resettlement programs imply the transfer of refugees and other individuals in need of international protection from an asylum country to another State (in our case, an EU Member State) that has agreed to admit them and ultimately grant them permanent settlement.

71 See B. 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) 32 pp.

migrants in the internal labor markets. Nevertheless, the truth is that economic migrants circumvent legal restrictions and get access to irregular work, which poses problems both to individuals in that situation and to host societies. The former is *per se* in a vulnerable situation.[72] At the same time, host countries found themselves deprived of the benefits of regular migration. Labor taxation and a softer integration challenge are only two examples in this regard.

Legal migration frameworks for highly qualified workers,[73] students and researchers,[74] family members,[75] long-term residents,[76] non EU-workers,[77] seasonal workers[78] and intra-corporate transferees,[79] have been established at EU level. Nevertheless, none of these instruments impose Member States the obligation of admitting in its territory a certain number of third country national workers. Accordingly, article 70.5 of the TFEU makes it crystal clear that the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, cannot be affected by an EU instrument.

The GCM proposes concrete mechanisms with the purpose of enhancing availability and flexibility of pathways for regular migration. This objective could be implementing through closer cooperation among EU Member States. Free movements regimes, visa liberalization or multiple-country visas and labour mobility cooperation frameworks are actions expressly mentioned in this regard. This could help to diminishing irregular movements towards Europe. As the European Commission highlighted in 2015 '(a) clear and well implemented framework for legal pathways to entrance in the EU (...) will reduce push factors towards irregular stay and entry, contributing to enhance security of European borders as well as safety of migratory flows'.[80]

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72 The Committee on the Protection of the Rights of All Migrant Workers and Member of their Families has highlighted in its General Comment No. 2 that irregular migrants 'generally live in fear of being reported to the immigration authorities by public service providers or other officials, or by private individuals, which limits their access to fundamental human rights, as well as their access to justice, and makes them more vulnerable to labour and other types of exploitation and abuse', General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, adopted on 28 August 2013, CMW/C/GC/2, parr. 2.

73 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L 155/17.

74 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ 2016 L 132/21.

75 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12.

76 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country national who are long-term residents, OJ 2003 L 16/44.

77 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343/1.

78 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 2014 L 94/375.

79 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ 2014 L 157/1.

80 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, COM (2015) 240 final, 13 May 2015. On the

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Nevertheless, the proposed advances require further transfer of competences to EU institutions. As Hatton points out, this is 'something likely to be seen as yet another threat to national sovereignty'[81]

(E) CONCLUSIONS: WHICH PLACE FOR INCENTIVES?

To a great extent, States still consider enacting laws with the purpose of controlling borders and irregular migration as 'the last bastion of sovereignty'.[82] In this paper, I have maintained that a global public goods approach would serve to motivate EU Member States to effectively cooperate in the implementation of the UN Global Compacts. Both instruments urge States of the International Community to assume an active role in migration governance and protection of refugees. Being a territory of destination for both migrants and people in need of international protection, the EU has a historical responsibility in promoting safety for both groups. For doing so, externalization practices have to be reverted. According to ECRE, these policies could 'directly undermine the success of the GCR'[83]. I think the same can be said about the GCM.

The recent European mismanaging of the refugee crisis has undermined the Organization's credibility. The Visegrad Group rejection of the quotas, even after the answer given to Hungary and the Slovak Republic regarding the legality of Council Decisions (EU) 2015/1523 of 14 September 2015 and (EU) 2015/1601 of 22 September 2015[84], has shown that coercive powers should be strengthened. Due to the fact the only the European Commission and Member States can take legal action before the ECJ under the infringement procedure against a State that fails to implement EU obligations, the possibility of bringing the cases before national courts adds a supplementary judicial mechanism aiming to monitor Member States.

In Spain, the administrative chamber of the Supreme Court decided in its judgment of 9 July 2018 [85] that the Spanish Government had partially failed to meet the obligations imposed by the above-mentioned Council Decisions (EU) 2015/1523 of 14 September 2015 and (EU) 2015/1601 of 22 September 2015. The applicant before the Supreme Court was the Non-Governmental Organization Stop Mare Nostrum. In its judgment, the Supreme Court affirmed that the Spanish State was obliged to continue the relocating processes even after the deadlines contained in the above-mentioned relocation decisions. Also, it maintained that the State cannot be released from its obligations arguing the complexity of the relocation process or the breach of their obligations by other Member States. Thus, it concluded that Spain should

links between regular and irregular migration see M. Barslund, M. Di Salvo and L. Ludolph, *Can regular replace irregular migration across the Mediterranean?' CEPS Project Report*, published on 27 June 2019, accessed 7 November 2019.

[81] Hatton, *supra* n. 59, at 8.

[82] C. Dauvergne, *Making People Illegal. What Globalization Means for Migration and Law* (Cambridge, Cambridge University Press, 2008) at 3.

[83] See ECRE, *Global Means Global: Europe and the Global Compact for Refugees. ECRE's Recommendations for the Implementation of the GCR in and by Europe*, published on 23 November 2018, accessed 7 November 2019.

[84] See *supra*, note 61.

[85] Supreme Court, STS 2546/2018, ECLI: ES:TS:2018:2546.

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keep on trying to comply with them. Despite the importance of this judgment,[86] it has to be mentioned that the obligations imposed by the Supreme Court to the State were finally revoked by the writ of the Supreme Court of 20 February 2019 due the material impossibility in relation to the execution of the above-mentioned obligations.[87]

Legal certainty for people on the move has been identified here as a common goal enshrined in both instruments. The establishment at EU level of a legal binding regime providing certainty to migrants and people in need of international protection constitutes a global public good that should be provided at EU level. Since the reinforcement of security-related migration policies has resulted not only in an exacerbation of smugglers and traffickers' activity, but also in the erosion of rights of migrants and people in need of international protection, that legal framework would be of benefit not only to third country nationals, but also to EU Member States and their citizens. Besides that, I consider that credibility in the future of the European integration project depends on it being provided.

[86] E. Jiménez Pineda, '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)', 22 *Spanish Yearbook of International Law* (2018) 439-450.

[87] Supreme Court, STS 2480/2019- ECLI:ES:TS:2019:2480.

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Harmonizing the Socioeconomic Integration Conditions for Asylum Seekers Through EU Multilevel Financial Coordination

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Abstract: This analysis examines if enhanced multilevel coordination of financial efforts can contribute to the Europeanization of conditions of integration for refugees, reducing the current lack of cohesion of an EU answer. The paper focuses on possible improvements in this scope through three EU instruments: the reform of the Common European Asylum System, the EU budgetary funds, and the European Semester.

Keywords: asylum seekers, European Union, fiscal policy, multilevel coordination.

(A) INTRODUCTION

The premise of the present paper is a lack of cohesion in the current response of the EU to the arrival of asylum claimants due to two reasons. On one hand, the inefficiency of the Dublin system[1] has led to an overflow of asylum seekers into the border-states and an unfair distribution of economic burden among the members of the EU.[2] On the other hand, the heterogeneity of social protection systems offered by member states implies divergent conditions for the socioeconomic integration of asylum seekers;[3] this variety of policies leads to 'asylum shopping', where the applicant for international protection seeks the most advantageous conditions.[4] The present paper is in agreement with previous studies that point out how solidarity, which according to Article 80 of the Treaty of Functioning of the European Union should govern the EU asylum policy, has failed in the present situation.[5]

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1 Council Regulation 604/2013, OJ 203 L180/56. See also: M. Di Filippo, 'The allocation of competence in asylum procedures under EU law: The need to take the Dublin bull by the horns', 59 *Revista de Derecho Comunitario Europeo* (2018) 41-95.

2 Comparative data by year and country can be observed in European Parliament data on refugees arriving to the EU; Communication from the Commission to the European Parliament and the Council: Progress report on the Implementation of the European Agenda on Migration, COM(2019) 126.

3 C. Dustman et al., 'On the economics and politics of refugee migration', CEPR, *CESifo*, Sciences Po, 2017, Economic Policy, July 2017, 2017.

4 K. Brenke, 'Distribution of refugees Very Uneven among EU Member States- Even When Accounting for Economic Strength and Total Population', 5 (39) *DIW Berlin*, German Institute for Economic Research (2015) 511-523.

5 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) 125-144 and M. Kmak, 'Between citizen and bogus asylum

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It is noteworthy that the diversity in the conditions provided by member states to refugees depends on their fiscal conditions with respect to their public spending. Integration policy costs are incurred parallel to the efforts that many national governments make to meet their budgetary balance objectives. In this regard, the International Monetary Fund calls attention to the fact that the economic impact of refugees' inflows differs by country according to the available social protection systems. These differences cause a lack of cohesion between member states and misgivings in a section of the public about the economic impact it can have on the social system that guarantees their well-being. Thus, the possible introduction of an additional European support tool to national governments to correct these imbalances has been analysed.

Further, we assess if enhanced multilevel coordination of financial efforts can contribute to the Europeanization of conditions of integration for refugees. We focus on possible improvements in this scope through three EU instruments: the reform of the Common European Asylum System (CEAS), the EU budgetary funds, and the European Semester.

(B) THE FAILURE OF THE COMMON EUROPEAN ASYLUM SYSTEM REFORM TO ACHIEVE A GREATER HOMOGENEITY OF NATIONAL RECEPTION CONDITIONS

As noted below, fiscal discipline poses a problem for public funds to respond to the economic challenges of integrating asylum seekers (such as the provision of social services and access to employment).[6] As pointed by Trauner[7], these constraints, which have become particularly strict after the 2008 crisis, have exacerbated the deficiencies of the CEAS such as the lack of comparability of the asylum standards of member states. On one hand, some governments find major difficulties to sustain the functioning of their asylum procedures. On the other hand, the weakness of reception conditions is a political choice for those states under fiscal pressure, when a government decides to spend more on issues of such as pensions rather than on receiving international protection claimants. Therefore, some states appeal to their fiscal difficulties to avoid a rise in the level of reception conditions. The non-achievement of the objective of ensuring similar living standards for refugees in all member states contained in the so-called Reception Conditions Directive is evident.[8]

Assuming the failure of the current system to achieve the objectives stated by the European Migration

seeker: management of migration in the EU through the technology of morality', Social Identities, 2015, No 4, 395-409; A. Mangas, 'Protección internacional y europea ante las afluencias masivas de refugiados' 75 *Economía Exterior* (2015-2016) 39-46 and S. Morgades-Gil, 'Forced Migration Management and the Right to Access to an Asylum Procedure in the Area of Freedom, Security and Justice: Human Rights Between Responsibility and Solidarity', 1 *Freedom, Security & Justice: European Legal Studies* (2017) 126-146.

6 H. Karger, 'The Bitter Pill: Austerity, Debt, and the Attack on Europe's Welfare States', 41 (2) Journal of Sociology & Social Welfare (2014) 33-53; W. Semmler, 'The Macroeconomics of Austerity in the European Union', 80 (3) Social research (2013) 883-914.

7 F. Trauner, 'Asylum policy: the EU's 'crises' and the looming policy regime failure', 38 (3) Journal of European Integration (2016) 311-325, at 312 (doi:10.1080/07036337.2016.1140756).

8 Directive 2013/33/UE, OJ 2013 L180/56.

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Agenda[9], we focus on the package to reform the CEAS, as a whole, presented by the European Commission in 2016, which is still pending.[10]The proposal for the reform of the Reception Conditions Directiven keeps the previously expressed aim of ensuring access of international protection claimants to living and social services standards. A remarkable novelty in this proposal is the reduction of the maximum time to gain access to the labor market to six months from the beginning of the international protection application. Despite this, the reform does not prevent asylum shopping as national governments can always offer better conditions than those required by the Directive. In fact, some of the most pertinent issues in achieving a harmonization of conditions are exceeding the scope of the EU legal framework; although the Directive seeks to guarantee similar reception conditions, the development of policies and the implementation of programs related to integration (health, education, participation in the labor market, etc.) are exempt from control.[12]

On the other hand, the Proposal for a Regulation to establish a stable resettlement framework in the European Union[13] does not provide for a mandatory distribution key according to the criteria for economic and social integration. Nor does this integration occur in the Proposal for a Regulation establishing the mechanisms for determining a member state responsible for examining an application for international protection.[14]This proposal maintains a corrective allocation mechanism in cases where that member state faces a disproportionate number of applications for international protection, which is modulated by the weight of the GDP and population of each country. There are no other requirements on the states capacity to receive refugees from the point of view of social policy or labour integration. In summary, the CEAS reform does not seem to contribute to the implementation of socioeconomic conditions of integration by national governments in a harmonized way.

(C) REBALANCING THE DIFFERENCES IN CONDITIONS THROUGH EUROPEAN FUNDS

In view of the cohesion deficit raised, we examine the potential improvement through the financial tools that correct the imbalances in the EU. The main instrument acting in this area has been the Asylum,

9 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration*, 13 May 2015, COM (2015) 240.

10 European Commission, *Communication from the Commission to the European Parliament, the Council. Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe*, 6 April 2016, COM (2016) 197 final.

11 European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down Standards for the Reception of Applicants for International Protection (Recast)*, 13 July 2016, COM (2016) 465 final.

12 D. Bräuninger, *Reform of the common European asylum system: A difficult undertaking*, (Deutsche Bank Research, Frankfurt am Main, 2018), at 8-10.

13 European Commission, Proposal for *Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council*, 13 July 2016, COM (2016) 468 final.

14 European Commission, *Proposal for a Regulation of the European Parliament and of the Council Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-country National or a Stateless Person (recast)*, 4 May 2016, COM (2016) 270 final.

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Migration and Integration Fund (AMIF) that has channelled the compensations that member states can obtain for resettled refugees as well as funding dedicated to the socioeconomic integration of asylum seekers.[15] It is important to note that the new Financial Framework 2021–2027 includes a new Asylum and Migration Fund (AMF)[16] in place of the AMIF. We call attention to the fact that the word 'integration' is not present in the new denomination, although financial support for this area is expected in its initial phase. In addition, the AMIF is designed to respond to reception needs in the short and medium term but is insufficient to respond to long-term measures of social integration; these must be supported through the deployment of other funds,[17] such as the European Social Fund (ESF), the Fund for European Aid to the Most Deprived (FEAD), and the European Regional Development Fund (ERDF)[18]. A new tool supporting the integration of refugees is foreseen for the 2021–2027 period: the European Social Fund+ (ESF+).[19]

Despite this proliferation of funds, none of them include any specific assignation for asylum seekers. This issue also prevents the assessment of the quantitative impact of all the aforementioned funds for the socioeconomic integration of people demanding international protection. The European Commission20 recognizes their positive contribution on actions related to inclusion, education, and access to the labor market for people from third countries. However, data on its impact are global or apply to migrants in general.[21]

Subsidiarity in social policy leaves the extent of the use of funds for this purpose in the hands of national governments with no obligation.[22] In addition, the indicated proliferation of funds generates the image of many possible resources, without clear mechanisms available to take advantage of synergies among them and avoid duplication or uncovered areas. In this sense, it is important to note that the European Commission urges governments to reinforce their integration policies and to use the European funds available for it; complementarity and synergies between national and European strategies are enhanced, but no enforcement for this purpose exists. The European Commission underlines that

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15 Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ 2013 L 150/57.

16 European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the Asylum and Migration Fund*, 12 June 2018, COM (2018) 471 final.

17 Eurofound, *Approaches to the labour market integration of refugees and asylum seekers, Publications Office of the European Union*, (Eurofound, Luxembourg, 2016).

18 European Commission, *Toolkit on the use of EU funds for the integration of people with a migrant background*, Directorate-General for Regional and Urban Policy Inclusive Growth, Urban and Territorial Development Unit 2018) at 11-12.

19 European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the European Social Fund Plus (ESF+)*, 30 May 2018, COM (2018) 382 final.

20 European Commission, *Communication from the Commission to the European Parliament, the Council, the Committee of the Regions Economic and Social Council, Action Plan on the integration of third country nationals*, 7 July 2016, COM (2016) 377 final.

21 European Commission, *Employment and Social developments in Europe 2016* (European Commission, Brussels, 2016) at 111.

22 Eurofound, *supra* n 17.

 DOI: 10.17103/sybil.23.13

member states should consider the multilevel governance approach at regional, national, and European levels.[23]

(D) THE EUROPEAN SEMESTER AS A TOOL TO HOMOGENIZE NATIONAL INTEGRATION POLICIES

With regard to the multilevel perspective, we evaluate how the coordination of national policies can be performed to achieve a better integration of asylum seekers. We find that, after the failure of the Open Method of Coordination to achieve social objectives[24], the European Semester procedure[25] is the key element called to carry out that multilevel coordination. Despite its initial function to reinforce the fiscal pillar of the new economic governance, it has progressively incorporated social objectives in the various stages of its procedure aiming to synchronize national policies.[26]

To assess the weight of refugees' integration in the European Semester mechanisms, we first examine the Annual Growth Surveys, as they are the basis for the endorsement of annual EU and national level priorities by the European Council and the European Commission. This analysis shows that the aforementioned integration of refugees is present among the key challenges faced by the EU. Thus, the European Commission highlights the budgetary impact of the exceptional inflow of refugees when provoking possible temporary deviations from the Stability and Growth Pact requirements. At the same time, it states that this phenomenon can have a positive economic impact on growth, provided the right policies to enhance the integration process (with special mention to removing obstacles to refugee's access to the labor market).[27] It is significant that, in the Annual Growth Survey 2018,28 this question is linked to social integration support (such as health childcare or housing) as a means that 'improves the host country's growth prospects and will enable the EU to capitalize on the potential of refugees and their families'. However, the most recent Annual Growth Survey (2019) points out that, while some member states took further measures to promote the integration of refugees into the labour market, systematic

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[23] European Commission, *Toolkit on the use of EU*, supra n. 18, at 11-12. European Commission, *European Structural and Investment Funds 'Guidance for Member States on the use of European Structural and Investment Funds in tackling educational and spatial segregation*, (published in 2014, accessed 20 October 2019). European Commission, European Structural and Investment Funds 'Guidance for Member States on the transition from institutional to community-based care (published in 2014, accessed in October 2019).

[24] H. Frazer, and E. Marlier, 'Strengthening social inclusion in the Europe 2020 strategy by learning from the past?', E. Marlier and D. Natali (eds.) with R. Vand dam, *Europe 2020: Towards a more social EU?*, (Brussels: PIE Peter Lang, Brussels, 2010).

[25] EU Regulation 1176/2011.

[26] J. Zeitlin and B. Vanhercke, 'Socializing the European Semester?', *Economic Governance and Social Policy Coordination in Europe 2020*, SIEPS, 7, 2014.

[27] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank Annual Growth Survey 2016 Strengthening the recovery and fostering convergence,* COM (2015) 690 final.

[28] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Annual Growth Survey 2018,* 22 November 2017, COM (2017) 690 final, at 10.

 DOI: 10.17103/sybil.23.13

approaches are lacking. [29]

Following the European Semester cycle, we examine the Country Specific Recommendations (CSRs) provided annually to national governments to achieve the priorities signalled. The initial examination of these recommendations reveals that the integration of refugees has little prominence among the objectives that are prioritized. Recommendations are too vague and refer to persons with migrant background, not to refugees in particular. Since the outset of the European Semester from 2011 to 2019, only 19 CSRs address this question (13 referring to employment, 5 to education and 1 to developing comprehensive social inclusion strategies). Only eight national governments receive CSRs in this scope (Austria, Belgium, Denmark, Finland, France, Netherlands, Luxembourg and Sweden). This fact contrasts with the importance and generalization of those recommendations related to fiscal discipline and is coherent with studies evidencing that social objectives are perceived as less important or less accessible to EU effective action.[30] While CSRs regarding fiscal policy contain numbered objectives, many other policy recommendations (here, we include those related to refugees' integration) do not present either numeric targets to be attained or sanctions in the case of non-achievement. Consequently, the answers given by states are also vague and the follow up of its observance presents important limitations.

(E) CONCLUSION

Through the analysis carried out, we have ratified the importance of EU fiscal constraints on national budgets in the lack of homogeneity of socioeconomic support for asylum seekers' integration. Moreover, this question is frequently used as an alibi, hiding a political choice for social policies that benefit nationals.

In our view, the proposals for the reform of the European Common Asylum System do not contribute to solving this deficiency, as social integration and public capacity for integration are almost missing. For its part, the diverse European funds that potentially contribute to this scope are not duly focused to this aim, with defined targets or assigned percentages. Newly, the use of these resources for these purposes depends on the national government's decision.

As a consequence, understanding that subsidiarity in social policy is defining the non-Europeanization of these conditions, we highlight the importance of multilevel financial coordination of policies in this area. We observe that the European Semester is underused, and we point out the potentiality of this instrument to coordinate national fiscal efforts in this domain. Notably, this includes the socioeconomic integration of refugees in the CSRs with precise targets and monitoring of national governments performance.

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[29] European Commission, *Draft Joint Employment Report from the Commission and the Council accompanying the Communication from the Commission on the Annual Growth Survey 2019*, 21 November 2018 COM (2018) 761 final, at 77-79.

[30] P. Claeys et al., *The European Dimension in the National Reform Programs and the Stability and Convergence Programs, Directorate-General for the Internal Policies of the Union* (European Parliament, Brussels, 2013); S. De Finance, *A 'traffic-light approach' to the implementation of the 2011 and 2012 Country Specific Recommendations (CSRs)*, (Directorate-General for the Internal Policies of the Union. European Parliament, Brussels, 2013); D. Gros and C. Alcidi, *Fiscal and macro-structural challenges and policy recommendations for the Euro Area and its Member States under the 2014 Semester Cycle* (Directorate General for Internal Policies. Economic Governance Support Unit, Brussels, 2014).

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'Impact on rights' as a form of extraterritorial jurisdiction: a new legal restriction on border controls through international cooperation

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Abstract: International cooperation with partner states in regions of origin and transit of migrants and refugees has become one of the main priorities for the EU member states' migration policies, including Spain. These practices take different forms: this contribution will look at the provision of funding, equipment, training, or assistance to other states to exert exit controls and intercept refugees. These practices have brought significant challenges for the existing protection mechanisms of human rights and refugee law. Among them, the identification of extraterritorial jurisdiction is highly problematic due to the lack of physical contact between the sponsoring state and the individuals concerned. The Human Rights Committee (HRC) in its General Comment 36 has provided a new basis for the establishment of the extraterritorial jurisdiction of the states that could be added to the current legal strategies to make sponsoring states responsible for cooperative deterrence practices. The aim of this contribution is analyze this this new basis of jurisdiction, under which the Covenant would be applicable to actions of states, whether within or outside their territories, which have a 'direct and reasonably foreseeable impact on the right to life.'

Keywords: Extraterritorial Jurisdiction Externalization of Border Controls Cooperative Deterrence General Comment 36.

(A) INTRODUCTION: CONTROLLING EUROPEAN BORDERS THROUGH INTERNATIONAL COOPERATION

International cooperation with partner states in regions of origin and transit of migrants and refugees has become one of the main priorities for the EU member states' migration policies. In the last few decades, these states have developed a broad range of initiatives which intend to transfer to third countries the execution of border control activities, with the ultimate goal of reducing the number of spontaneous arrivals to their own territories. Through this so-called new generation of cooperation-based *non-entrée* policies, EU states achieve the double objective of containing migratory movements in regions of origin and transit and avoiding any responsibility for the deterrence of refugees and persons entitled to international protection.[1] The EU-Turkey Joint Action Plan and Statement[2] and the Italy-Libya Memorandum of Understanding[3] are paradigmatic examples of this trend.

Since the beginning of the new century, Spain has led the movement toward developing cooperation agreements with third states. Indeed, Spain's conduct has been referred as a model of 'good practice' that

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1 T. Gammeltoft-Hansen and J.C. Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence', 53 *Columbia Journal of Transnational Law* (2015) 235-284, at 243.

2 EU-Turkey joint action plan, 15 October 2015, MEMO/15/5860; EU - Turkey Statement, 18 March 2016.

3 Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic, 2 February 2017.

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has inspired the EU's external approach to migration management.[4] Spain has signed migration agreements and MoUs with almost every origin and transit migration country in the Maghreb and West Africa. Morocco has been described as the 'best gendarme of the Spanish South border.'[5] Lately, Spain's efforts have been focused on Senegal and Mauritania.[6] Spanish practice takes different forms, including the donation of funds and equipment such as patrol boats, helicopters, computers, and communication systems;[7] the training of national officials and security forces on issues related to border controls;[8] the creation of networks of national satellite communication centers to coordinate interception of boats; and the provision of development cooperation funds.[9] This model of migration management has been considered a success, resulting in a dramatic drop of arrivals to Spanish shores, especially in the Canary Islands during the Cayucos crisis.[10]

Spanish and European authorities' enthusiasm regarding the success of Spanish migration policy contrasts with their ignorance regarding the consequences for the rights of migrants and refugees. We cannot ignore the high number of migrants who have lost their lives trying to reach Spanish soil. In September and October 2005, 11 immigrants were shot and killed by Moroccan gendarmes when they were crossing the fences in Ceuta and Melilla, incidents that caused the intervention of the European Commission.[11] There were further fatalities in 2006 and 2009 as a result of Moroccan security forces repelling border crossing attempts.[12] Indeed, it has been argued that there is a direct link between the strengthening of the use of force by the Moroccan security forces to combat fence climbing and the increase of Spanish funds to Moroccan border control.[13] A report by the Spanish CSIC and the UN Refugee Agency from January 2019 shows that 48% of the people traveling to Spain through Morocco were victims of abuses in Morocco (especially in the areas close to Ceuta and Melilla), including physical

4 El País, 'La UE sitúa a España como ejemplo de control de flujos migratorio', 24 April 2015.

5 Asociación Pro Derechos Humanos de Andalucía-APDHA, *Derechos Humanos en la Frontera Sur 2015* (APDHA, 2015), at 35.

6 C. González Enriquez, P. Lisa, A. Selin Okyay and A. Palm, 'Italian and Spanish approaches to external migration management in the Sahel: venues for cooperation and coherence', *Real Instituto Elcano Working Paper* 13/2018, at 17.

7 Some of them materialized through the concession of extraordinary subventions: Real Decreto 845/2006, de 7 de julio, por el que se regula la concesión de una subvención extraordinaria al Reino de Marruecos para la mejora del control de sus fronteras y lucha contra la emigración ilegal (BOE 162, 8 July 2006). Real Decreto nº 187/2007, de 9 de febrero, por el que se regula la concesión de una subvención extraordinaria a la República Islámica de Mauritania para la mejora del control de sus fronteras y la lucha contra la emigración illegal (BOE 39, 14 February 2007).

8 This is one of the aims of the BLUE SAHEL programme financed by EU.

9 The provision of Development Cooperation has been implemented through the 'Plan Africa'. The III Plan África was launched in 2019. One of its strategic aims is 'Orderly, safe and regular mobility'. Ministerio de Asuntos Exteriores, Unión Europea y Cooperación, *III Plan África. España y África: desafío y oportunidad* (Gobierno de España, 2019), at 63-67.

10 More than 30,000 migrants arrived in 2006 to the Canary Islands vs. 400 migrants in 2017. Ministerio del Interior, *Balance de la lucha contra la inmigración ilegal 2007* (Ministerio del Interior, 2008); Ministerio del Interior, *Inmigración irregular. Informe Quincenal. Datos acumulados del 1 de enero al 31 de diciembre de 2018* (Ministerio del Interior, 2018). Ministerio del Interior, 'Jorge Fernández Díaz ensalza la gran experiencia de España en la lucha contra la inmigración irregular que la sitúa a la vanguardia de la Unión Europea', Press Statement, 16 October 2013.

11 European Commission, *Visit to Ceuta and Melilla – Mission Report Technical mission to Morocco on ilegal immigration, 7th October – 11th October 2005*, MEMO/05/380, 19 October 2005, at 1 y 7.

12 ABC, 'Al menos 27 inmigrantes han fallecido desde 2005 tras los asaltos a la valla', 6 February 2014.

13 T. Spijkerboer, 'The Human Costs of Border Control', 9 *European Journal of Migration and Law* (2007), at 130 and 139.

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violence and being forcibly moved by authorities to areas in southern Morocco.[14]

In addition, the intensification of border controls by partner countries blocks the path of migrants and refugees to European territory and is one of the causes of the diversification of migration routes to Spain. The Strait of Gibraltar, as a migration route, has been displaced by massive border crossings over Ceuta and Melilla's fences and other much longer and more dangerous sea routes to the Canary Islands from the coasts of Senegal and Mauritania.[15] The diversification of the routes is one of the reasons for Spain's more recent cooperative efforts with the latter countries.[16]

These practices have brought significant challenges for the existing protection mechanisms of human rights and refugee law – to the point that some scholars refer to a 'crucial turning point' in the legal practice.[17] One of the most problematic legal consequences is the diffusion and denial of responsibility by the sponsoring states, as these practices avoid any physical contact with migrants and refugees.[18] Hence, the responsibility for migration control is shifted to countries outside the EU. According to the UN Special Rapporteur on the human rights of migrants, this shift is not accompanied by appropriate human rights guarantees since the emphasis is put in the strengthening of the capacity of third countries to stop irregular migrants exiting their territories rather than the ensuring of protection for the rights of the migrants through legitimate migration control processes.[19]

In addition to creating accountability gaps, from the perspective of human rights extraterritorial jurisdiction, these agreements fall outside the scope of the notion of jurisdiction as interpreted until now by human rights bodies and courts. Providing equipment, training, or economic assistance to partner states does not, in principle, amount to an exercise of *power, effective control, or authority over individuals*, making identification of the jurisdiction of the sponsoring states problematic. If jurisdiction is not established, the premise for the applicability of the main human rights treaties is not fulfilled. The main purpose of this article is to examine a new strategy for legal research in order to overcome the limitations of current models of extraterritorial jurisdiction: the notion of 'effect or impact on rights' incorporated by the Human Rights Committee (HRC) in its General Comment (GC) 36 on Article 6 of the ICCPR (right to life).[20] The HRC's newly expressed basis for the establishment of extraterritorial jurisdiction expands

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14 CSIC and UNHCR, *Refugees and Migrants arriving in Spain* (Gobierno de España, 2019), at 26–30.

15 European Commission, supra n. 11, at 4; T. Spijkerboer, supra n. 13, at 130.

16 P. García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in B. Ryan and V. Mitsilegas (eds), *Extraterritorial Immigration Control. Legal Challenges* (Martinus Nijhoff Publishers, 2010), at 319.

17 T. Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law', 20 *European Journal of Migration and Law* (2018) 373-395, at 375.

18 V. Moreno-Lax and M. Lemberg-Pedersen, 'Border-induced displacement: The ethical and legal implications of distance-creation through externalization', 56 *Questions of International Law* (2019) 5-33, at. 18. V. Moreno-Lax and M. Giuffré, 'The Raise of Consencual Containment: From 'Contactless Control' to 'Contactless responsibility' for Forced Migration Flows' in S. Juss (ed), *Research Handbook on International Refugee* Law (Edward Elgar, 2019) 82-108.

19 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, 24 April 2013, A/HRC/23/46, 59.

20 Adopted by the Committee at its 124th session (8 October – 2 November 2018), CCPR/C/GC/36.

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the spatial scope of the ICCPR as compared to the Committee's approach in its GC 31.[21]

Section B will examine the evolution of the meaning of extraterritorial jurisdiction in the work of the HRC, and section C will analyze the notion of 'impact on rights' as a new legal strategy to bring individuals under the jurisdiction of the EU states when they engage other countries in border control activities. The overall conclusion of this article (section D) is that 'impact on rights' is a newly emerging basis for the establishment of the extraterritorial jurisdiction of the states that could be added to the current legal strategies to make sponsoring states responsible for cooperative deterrence practices.

(B) EXTRATERRITORIAL JURISDICTION IN THE VIEW OF THE HUMAN RIGHTS COMMITTEE: FROM POWER OR EFFECTIVE CONTROL OVER INDIVIDUALS TO MERE 'IMPACT ON RIGHTS'

Jurisdiction determines the spatial scope of human rights treaties. A state party to the ECHR or the ICCPR must respect and ensure its rights and freedoms to 'everyone within their jurisdiction'[22] or 'all individuals within its territory and subject to its jurisdiction."[23] When a state exercises its jurisdiction, these main human rights treaties apply. As a general principle, jurisdiction is presumed to be exercised normally throughout the state's territory, but it is well established that human rights treaties are also applicable to extraterritorial activities of the states under certain circumstances.[24]

International courts have developed a significant body of jurisprudence on the extraterritorial application of human rights treaties in a variety of different situations, including the acts of diplomatic and consular agents in foreign territory,[25] military interventions and occupation,[26] the detention and custody of

[21] General Comment 31 on the nature of the general legal obligation imposed on States Parties to the Covenant, adopted on 29 March 2004, CCPR/C/21/Rev.1/Add.13 (GC 31), 10.

[22] Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on 4th November 1950, Art. 1.

[23] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, Art 2.1.

[24] J. Abriketa and M. Nagore Casas, 'Extraterritorial Application of Human Rights Treaties', *Oxford Bibliographies in International Law* (2016); K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff Publishers, 2013); M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Intersetia, 2009); J. A. González Vega, '¿Colmando los Espacios de «No Derecho» en el Convenio Europeo de Derechos Humanos? Su eficacia extraterritorial a la luz de la jurisprudencia', *XXIV Anuario Español de Derecho Internacional* (2008) 141-175; M. Milanovic, *Extraterritorial Application of Human Rights Treaties. Law, Principles and Policy* (Oxford, 2011); S. Morgades Gil, 'La aplicación extraterritorial del Convenio Europeo de Derechos Humanos y Libertades Fundamentales: El Concepto de Jurisdicción en Perspectiva Cosmopolita', in C. García Segura (dir.) *La Tensión Cosmopolita. Avances y Límites en la Institucionalización del Cosmopolitismo* (Tecnos, 2016) 158-159.

[25] *M. c. Dinamarca*, European Comission of Human Rights, decision on the admissibility, App. 17392/90, 14 October 1992.

[26] *Issa and others v. Turkey*, ECtHR, App. 31821/96, 19 October 2004; *Mansur Pad and Others v. Turkey*, ECtHR, App. 60167/00 (admissibility), 28 June 2007; *Isaak v. Turkey*, ECtHR, App. 44587/98, 3 June 2009; *Solomou c. Turkey*, ECtHR, App. 36832/97, 3 June 2008; *Al-Skeini and others v. UK*, ECtHR, App. 55721/07, 15 June 2011; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion of 9 July 2004.

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individuals abroad,[27] the interception of vessels on the high seas,[28] and international peace-keeping or peace-enforcement operations.[29] With the exception of a few cases, notably *Hirsi Jamaa*, there is little jurisprudence concerning the legal implications of the extraterritorial border control activities of states.[30] The Court that has contributed the most to the creation of this body of jurisprudence is the European Court of Human Rights, which has developed three different models of jurisdiction: the *territorial* model, based on the effective control over an area or territory; the *personal* model, based on the exercise of state agent authority and control over individuals; and a mixed model, based on the exercise of *public powers* abroad.[31] Throughout its multiple decisions, it has described extraterritorial jurisdiction as exerting 'effective control,' 'effective overall control,' 'decisive influence,' a 'high level of dependency or integration,' and 'state agent authority and control.' This variety in terminology has provoked strong criticism from scholars who believe that ECtHR's sentences suffer from 'rampant casuistry and conceptual chaos.'[32]

Conversely, the interpretation of the meaning of *jurisdiction* in art. 2(1) of the ICCPR has not undergone major changes since the HRC's early decisions on individual communications as compared to the European Court of Human Rights. An explanation could be that the efforts of the Committee have been focused more on the clarification of the particular wording of the jurisdictional clause than on the meaning of jurisdiction. According to art. 2(1) ICCPR, each state party undertakes 'to respect and to ensure to all individuals *within its territory and subject to its jurisdiction*' the rights recognized in the Covenant. The main debate concerning the ICCPR's spatial application has been the conjunctive or disjunctive reading of this clause, that is, whether both *territory* and *submission to jurisdiction* are requirements that have to be jointly appreciated for the application of the ICCPR or the occurrence of one of them is enough (either the presence of the individuals in the territory of the state or the exercise of jurisdiction by the state over individuals regardless of where they are located).

Certain states, such as the United States and Israel, have consistently opposed the extraterritorial

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[27] *Sergio Euben López Burgos v. Uruguay*, HRC, Com. R12/52 (A/36/40), 29 July 1981 (*López Burgos*); *Lilian Celiberti de Casariego v. Uruguay*, HRC, Com. 56/1979, CCPR/C/13/D/56/1979, 29 July 1981 (*Celiberti de Casariego*); General Comment No. 35, Article 9 (Liberty and security of person), CCPR/C/GC/35, 16 December 2014, par. 63; *Illich Sánchez Ramirez v. France*, European Commission of Human Rights, App. 28780/95 (admissibility), 24 June 1996; *Hasçu and others v. Moldova and Russia*, ECtHR, App. 48787/99, 7 May 2004; *Öcalan v. Turkey*, ECtHR, App. 46221/99, 22 April 2003; *Ivantoc and others v. Moldova and Russia*, ECtHR, App. 23687/05,18 October 2011; *Al-Jedda v. UK*, ECtHR, app. 27021/08, 15 June 2011; *Hassan v. UK*, ECtHR, App. 29750/09, 25 June 2014; *Al-Saadoon and Mufdhi v. UK*, ECtHR, App. 61498/082, 2 February 2010.

[28] *Viron Vhavara and others v. Italy and Albania*, ECtHR, App. 52207/99 (admissibility), 11 January 2001; *Medvedyev and others v. France, ECtHR, 4app.* 3394/03, 3 February 2010; *Hirsi Jamaa and others v. Italy, ECtHR, App.* 27765/09, 19 January 2012.

[29] GC 31, 10.

[30] *Hirsi Jamaa, supra n.* 28. It should be also mentioned *N.D. and N.T. vs. Spain*, ECtHR, Apps. 8675/15 and 8697/15, 3 October 2017 and *J.H.A. v. Spain*, Committee Against Torture, CAT/C/41/D323/2007, 21 November 2008.

[31] The ECtHR explains these bases for extraterritorial jurisdiction in *Al-Skeini and Others v. United Kingdom*, App. 55721/07, 15 June 2011, 130 – 142.

[32] M. Milanovic, supra n. 24, at. 4.

 DOI: 10.17103/sybil.23.14

application of the ICCPR, but the general opinion of the commentators[33] and the Committee itself is that Art. 2(1) should be read disjunctively. Initially, the Committee based this interpretation on the need to avoid a double standard of legality depending on the location (territorial or extraterritorial) of the state's activities.[34] It would be unconscionable, in the words of the Committee, to interpret Art. 2(1) in a sense that allows states 'to perpetrate violations of the Covenant in foreign territory, which violations it could not perpetrate on its own territory.'[35] In 2004, the HRC confirmed this view in its GC 31 on the nature of the general legal obligation imposed on states parties to the Covenant. According to the GC, states parties are required by art. 2(1) to respect and to ensure the Covenant rights 'to all persons who may be within their territory *and* to all persons subject to their jurisdiction,' that is, to individuals 'within the *power or effective control* of the State Party' even if not situated within its territory.[36] Hence, the Committee upheld a disjunctive reading of ICCPR's jurisdictional clause.

Since this clarification, the Committee has not elaborated much on the specific meaning of jurisdiction. Two main ideas can be drawn from the HRC's interpretation. First, jurisdiction is a *de facto* concept. It is equivalent to the exercise by the state of *power of effective control over individuals*. It is irrelevant whether the power or effective control was obtained lawfully or unlawfully by the state. The question is whether there was an exercise of actual power or control by the state, 'regardless of the circumstances in which such control was obtained.'[37] Second, the HRC has mainly conceived of jurisdiction in its *personal* dimension, as a relationship between the state and the individuals concerned. Jurisdiction does not refer to the location of the person affected by the activity of the state but rather to the 'relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred.'[38] In sum, so far, the HRC has mainly developed the personal model of extraterritorial jurisdiction, so that the ICCPR is applicable to all persons within the territory or the state and, extraterritorially, to all persons subject to the state's jurisdiction. This model is clearly embraced in GC 31 and in individual communications regarding cases of arrest and abduction of individuals carried out by state agents in foreign territory[39] or the refusal to issue passports to nationals residing abroad.[40] In addition, the HRC has also conceived of jurisdiction territorially in cases of military occupation, notably with regard to Israel's occupation of the Palestinian territories. In those cases, the HRC declared the

33 K. Da Costa, supra n., at 15–92; M. Gondek, supra n. 24, at 231–247; N. Rodley, 'The Extraterritorial Reach and Applicability in Armed Conflict of the International Covenant on Civil and Political Rights: A Rejoinder to Dennis and Surena', 5 *E.H.R.L.R.* (2009) 628–636; D. McGoldrick, 'Extraterritorial Application of the International Covenant on Civil and Political Rights' in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Intersetia, 2004) 41-72.

34 *Lopez Burgos*, 12.3; R. Wilde, 'Legal black hole? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' 26 *Michigan Journal of International Law* (2005) 739-806, at 797.

35 *Lopez Burgos*, 10. See Cristian Tomuschat's individual opinion in *Lopez Burgos*, 7-8.

36 GC 31, 10.

37 Ibid. K. Da Costa, supra n. 24, at 56. M. Milanovic, supra n. 24, at 41.

38 *Lopez Burgos*, 12.2. The HRC refers to the meaning of jurisdiction in art. 1 of the Optional Protocol, regarding the competence of the Committee to examine individual communications. On the interpretation of this clause, see D. McGoldrick, supra n. 33, at 48-49.

39 *López Burgos* and *Celiberti de Casariego*.

40 Da Costa analyses these cases in detail in K. Da Costa, supra n. 24, at 45-49.

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Covenant to be applicable to *areas* subjected to the effective control of the state.[41]

In GC 36, the HRC advances its interpretation of ICCPR's jurisdictional clause. First, in paragraph 63, the HRC includes both personal and territorial models of jurisdiction. The Covenant is applicable to 'all *persons* over whose enjoyment of the right to life it [the state] exercises power or effective control.' Additionally, states have to respect and protect the lives of individuals 'located in *places that are under their effective control*, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant.' Second, and more remarkable, the Committee specifies that power or effective control over persons extends to 'persons located outside any territory effectively controlled by the State whose right to life is nonetheless *affected by its military or other activities in a direct and reasonably foreseeable manner*.' Here, the HRC introduces, for the first time, the notion of *effect or impact on rights* as a new ground for the extraterritorial application of the ICCPR.

Before addressing the rationale behind this new approach to the concept of jurisdiction, it is worth reviewing the drafting process of the GC. It was initiated in 2015 during the 114th session of the Committee. The document proposed then for discussion did not include any reference to the notion of impact.[42] This wording was incorporated in a subsequent draft of the Comment submitted in 2017 (120th session) to the comments of stakeholders, including member states, NGOs, and academics. This draft referred to 'persons located outside any territory effectively controlled by the State who are nonetheless *impacted* by its military or other activities in a *direct, significant, and foreseeable manner*.'[43] The definitive version was approved on 30 October 2018 (124th session) with some amendments: the deletion of the word *significant* and the addition of the adjective *reasonably*. Moreover, in the edited version of the draft, published in September 2019, the word 'impacted' in paragraph 63 was substituted by 'affected.' Following these modifications, the final text of paragraph 63 reads as follows:

> 'In light of article 2 (1) of the Covenant, a State party has an obligation to respect and ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises *power or effective control*. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless *affected by its military or other activities in a direct and reasonably foreseeable manner*.'

The question is whether the Committee is developing a new model of extraterritorial jurisdiction where the power or control is exercised neither over territories nor persons but over *rights*, specifically the right to life. It could be argued that the 'impact on rights approach' closely resembles the personal model and could be considered an expansion of it since it is difficult to separate individuals from their inherent rights. As currently interpreted, the personal model is clearly established when there is physical control over individuals, e.g., in cases of extraterritorial detentions, but it also covers situations in which there is no

41 Concluding Observations on Second Report by Israel, DDPR/C/78/ISR, 21 August 2003, 11.

42 Draft general comment No. 36, Article 6: Right to life, prepared by Yuval Shany and Nigel Rodley, Rapporteurs, CCPR/C/GC/R.36/Rev.2, 2 September 2015, 62.

43 General comment No. 36 on article 6 of the ICCPR, on the right to life, adopted on first Reading during the 120th session, Revised draft prepared by the Rapporteur, 66.

 DOI: 10.17103/sybil.23.14

physical contact with the individuals affected by state actions. For example, the ECtHR has held that the state had exercised jurisdiction over individuals who were passing by car through a checkpoint (*Jaloud v. The Netherlands*)[44] and over individuals who were fired at from helicopters (*Pad and Others v. Turkey*).[45] In these cases, although the jurisdiction over individuals had no physical basis, the state was operating abroad, through its agents. Nevertheless, it seems in GC 36 that the HRC intends to cover other situations where the activity of the state takes place within its own territory, but it produces extraterritorial effects. The paradigmatic cases concern targeted killings using drones and foreign surveillance programs. The Committee in its General Observations on the USA and the UK has subjected both practices to review, respectively.[46] Regarding the former, which undoubtedly affect the right to life, the HRC declared art. 6 ICCPR to be fully applicable to any use of armed drones by the USA in extraterritorial counterterrorism operations.[47]

In the words of one of the rapporteurs of the GC, Yuval Shany, GC 36 suggests that 'there would be additional situations covered by the Covenant, where state activity in its territory or outside the territory has direct and reasonably foreseeable impact on the ability of individuals to enjoy their right to life,' which is consistent with the interpretation of jurisdiction in GC 31 and intends to 'avoid the protection gaps that a narrower approach entails, without imposing on States unreasonable and unforeseen obligations.'[48]

The same reasoning could be applicable to other situations where there is no contact between the state and the individuals whose rights are affected. This is the case with cooperative deterrence migration practices. As currently interpreted by human rights courts and bodies, the personal model of jurisdiction is hardly applicable to such practices because it requires physical contact or, at least, the presence of state agents abroad. This proposal will be analysed in the following section.

(C) EFFECT OR IMPACT ON RIGHTS: A NEW LEGAL STRATEGY TO ADDRESS COOPERATIVE MIGRATION CONTROLS

HRC's GC 36 refers to the protection of asylum seekers and refugees in various provisions where it recognizes their special vulnerability.[49] It also sets forth an extensive concept of the obligation not to extradite, deport, or transfer that is broader than the scope of the principle of *non-refoulement* under international refugee law and which includes the protection of aliens not entitled to refugee status.[50] In

44 *Jaloud v. The Netherlands*, App. 47708/08, 20 November 2014, 152.

45 *Mansur Pad and Others against Turkey* (Decision on admissibility), App. 60167/00, 28 June 2007, 54.

46 Concluding observations on the fourth periodic report of the United States of America CCPR/C/USA/CO/4, 23 April 2014, 9. Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland, 17 August 2015, CCPR/C/GBR/CO/7, 24.

47 Concluding Observations USA (2014), 9.

48 R. Goodman, C. Heyns and Y. Shany 'Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36', 4 February 2019. On the consistency with HRC's previous practice, see also D. Mogster, 'Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR', *EJiltalk*, 27 November 2018.

49 GC 36, 23.

50 GC 36, 31, and 55.

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addition, it establishes the obligation of states parties to respect and protect the lives of all individuals located on marine vessels or aircrafts registered by them, regardless of the exercise of authority and control by the flag state over the persons onboard, and of those individuals who find themselves in a situation of distress at sea, according to international obligations on rescue at sea.[51] However, the major contribution of the GC to the protection of refugees and migrants is the expansion of the concept of extraterritorial jurisdiction which can also arise from the development of military or other activities *affecting* 'in a direct and reasonably foreseeable manner' the rights of persons located outside any territory effectively controlled by the state.

As previously mentioned, the personal model of extraterritorial jurisdiction as currently interpreted allows for the scrutiny of most externalized border control practices under the framework of human rights treaties. Jurisdiction of the state is established whenever it exercises power of effective control over persons, which is the case in interceptions of refugees and migrants on the high seas, pushbacks, shiprider agreements, the deployment of immigration control officers in foreign countries, visa requirements, and carrier sanctions.

However, the identification of extraterritorial jurisdiction is problematic in cooperative deterrence measures due to the lack of physical contact between the sponsoring state and the individuals concerned. It is difficult to argue that providing funding, equipment, training, or assistance to other states suffices to determine the jurisdiction of the sponsoring state over the refugees and migrants subject to border controls. It is thanks to the sponsoring state that border controls are implemented; however, as a matter of principle, the jurisdictional link is established between the individuals and the partner state.

Scholars have formulated different legal strategies to declare the responsibility of the sponsoring states: the notion of jurisdiction as 'decisive influence' developed by the ECtHR,[52] the determination of responsibility for aiding or assisting another state's wrongful acts based on art. 16 of the Articles on Responsibility of States for International Wrongful Acts,[53] and the extraterritorial effects jurisdiction approach.[54] What is contended here is that another avenue would be the notion of 'impact on rights' as a new basis for extraterritorial human rights jurisdiction.

This is not the first time the HRC has used the expression 'to affect or impact on rights.' In its concluding observations on the Second Report by Israel, the HRC declared the Covenant to be applicable in the occupied territories for all conduct of Israel's authorities or agents that *affected the enjoyment of rights* enshrined in the Covenant.[55] The HRC did not elaborate on the conditions legally required for an action to affect or impact individuals' human rights, but it did provide some examples of activities affecting rights, such as the detention of individuals, targeted killings, and the demolition of properties belonging to families of suspected terrorists. However, the factual context of these activities is dissimilar from the

51 GC 36, 63. A general analysis on GC 36 is developed by S. Joseph, 'Extending the Right to Life Under the International Covenant on Civil and Political Rights: General Comment 36', 19 *Human Rights Law Review* (2019), 347-368.

52 V. Moreno-Lax and M. Giuffré, supra n. 18, at 23-24.

53 T. Gammeltoft-Hansen and J.C. Hathaway, supra n. 1, at 276-282. V. Moreno-Lax and M. Giuffré, supra n. 18, at 19-21.

54 T. Gammeltoft-Hansen, supra n. 17, at 381-385.

55 CCPR/C/78/ISR, 11.

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actions analyzed in this article since it is undeniable that the Israeli agents had control over the occupied territories and the persons whose rights were affected.

Under the 'impact approach,' any action or omission[56] that might affect the rights of individuals located abroad equates to the exercise of jurisdiction over them. The type of activities capable of affecting rights is formulated in GC 36 in very broad terms: 'military and other activities.' Hence, providing funds, equipment, training, or assistance should be understood among them since these activities restrict refugees' rights to leave their countries, their access to protection, and *non-refoulement*. A similar view was embraced by the ECtHR in the cases concerning Transnistria region, where the Court declared Russia's jurisdiction over the territory controlled by the Moldavian Republic of Transnistria based on the 'military, economic, financial and political support given to it by the Russian Federation,'[57] and in the cases concerning the Nagorno-Karabakh region.[58]

In the words of the Committee, the impact on rights has to be 'direct' and 'reasonably foreseeable.' The requirement of direct impact is consistent with the idea that the exercise of power or authority by the state has to be direct but needs not be based on physical control. In *Isaak*, *Solomou*, and *Andreou*, the ECtHR held that Turkey had exercised jurisdiction over persons located outside areas controlled by it because Turkey's acts, through its agents, were the 'direct and immediate cause' of their injuries.[59] In *Jaloud*, the ECtHR established the Netherlands' jurisdiction over the death of an individual who was a passenger in a vehicle that was fired upon while it was passing through a checkpoint.[60] Hence, state's jurisdiction is engaged if they provide funding, equipment, training, or assistance to other states to perform border controls, even if there is not physical contact with the migrants or refugees, since these activities *directly* affect their rights regardless of where they are.

The HRC does not provide a relevant test for establishing when states' actions are likely to affect rights in a 'reasonably foreseeable manner.' It should be understood that the HRC is excluding the application of the ICCPR in cases of non-predictable impacts on rights, but the terms are still rather vague. Individual cases concerning actions conducted within the territory of the state but having effects abroad provide further elaboration. In *Munaf*, the Committee declared that a state party might be responsible for extraterritorial violations of the Covenant conducted by other states if there is a '*link in the casual chain* that would make possible violations in another jurisdiction' so that 'the risk of an extraterritorial violation

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56 Omissions should also be included, i.e., the omission of the obligation to rescue vessels in distress at sea. See V. Moreno-Lax and M. Lemberg-Pedersen, supra n. 18, at 30.

57 *Hasca and Others v. Moldova and Russia*, App. 48787/99, 7 May 2004, 392; *Ivantoc and Others v. Moldova and Russia*, App 23687/05, 18 October 2011, 118; *Catan and others v. Moldova and Russia*, Apps. 43370/04, 8252/05 and 18454/06, 5 September 2012, 122

58 In *Chiragov* the Court established Armenia's jurisdiction over the NKR due to its military, political, financial and other support given to it, *Chiragov and Others v. Armenia*, App. 13216/05, 22 January 2015, at. 186. See M. Nagore, 'Presencia militar y jurisdicción extraterritorial: la dilución del concepto de 'control efectivo sobre el territorio' en los casos de Nagorno-Karabakh ante el TEDH', 43 *Revista General de Derecho Europeo* (2017) 272–296.

59 *Isaak v. Turkey*, App. No. 44587/98 (Admissibility), 21; *Solomou v. Turkey*, App. 36832/97, 3 June 2008, 48–51; *Andreou v. Turkey*, App. 45653/99, 6 October 2009, 25.

60 *Jaloud*, supra n. 44, 152.

must be a necessary and foreseeable consequence and must be judged on the *knowledge* the State party had at the time.'[61] This interpretation is consistent with the approach of the Committee in cases of deportation or expulsion of individuals to other states where it is likely that they would face death penalty. According to the Committee, if a state party deports a person in circumstances that result in a real risk that his or her rights under the Covenant will be violated in another jurisdiction, 'that State party itself may be in violation of the Covenant.'[62] This applies to cooperative deterrence activities which constitute the primary cause of the implementation by partner states of exit controls and the interception of refugees and migrants. It is thanks to sponsoring state's funding and assistance that controls or interceptions are possible so that the link in the casual chain is established. Sponsoring states are undoubtedly aware of the risk of extraterritorial violations of the rights of refugees that are a consequence of their actions.

The HRC has also required the fulfillment of this test concerning the positive obligations of states to protect individuals from the activities undertaken by other states, international organizations, and corporate entities operating in their territory or subject to their jurisdiction but 'having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory.'[63] This provision has been developed by the HRC mostly with regard to extraterritorial actions of companies. In *Yassin et al v. Canada*, the HRC established the duty of states to ensure that the Covenant's rights 'are not impaired by extraterritorial activities conducted by enterprises under their jurisdiction.'[64] This approach was also stated in its concluding observations on the periodic reports of Canada,[65] Germany,[66] and Korea.[67] In sum, states have the responsibility to protect individuals from acts affecting their rights carried out by other actors, including other states, whether they take place extraterritorially or within the states' territories but having extraterritorial effects.

Finally, we should note the reaction of states to this expansion of ICCPR's spatial scope. Indeed, some states have already opposed to this concept in their comments to one of the provisional drafts of the GC. Austria suggested adherence to the case law of the ECtHR (authority and control through its agents operating abroad), Norway contended that it is the person who has to be within the power and/or effective control of the state, but not the right to life, and the Netherlands suggested going back to the interpretation of the Committee in GC 31. The strongest opposition has come from France, which has been the only state that has submitted comments after the final adoption of the GC. In its view, the definition of extraterritoriality is too vast, contrary to the terms and the spirit of the Covenant, and a source of legal insecurity.[68]

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61 *Mohammad Munaf v. Romania*, Communication 1539/2006, views adopted on 30 July 2009, 14.2

62 A.R.J. v. Australia Communication No. 692/1996, views adopted on 28 July 1997, 6.9.

63 GC 36, 22.

64 *Yassin et al. v. Canada*, CCPR/C/120/D/2285/2013, 6.5

65 Concluding observations on the sixth periodic report of Canada, CCPR/C/CAN/CO/6, 6.

66 Concluding observations on the sixth periodic report of Germany, CCPR/C/DEU/CO/6, 16.

67 Concluding observations on the fourth periodic report of the Republic of Korea, CCPR/C/KOR/CO/4, 10.

68 Germany, Canada, and the USA also opposed to the wording of the General Comment' draft. All the comments submitted by the States are available here.

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(D) CONCLUSION

GC36 has extended the spatial scope of the right to life beyond HRC's own prior jurisprudence. It provides a new basis of jurisdiction — the 'effect or impact on rights' — that is likely to be added to current legal strategies to force EU states' cooperative migration deterrence practices to comply with human rights obligations. The 'impact on rights approach' can fill gaps in the personal model of jurisdiction since it is much more flexible than the exercise of 'power or effective control' over individuals. Under this new basis of jurisdiction, the Covenant would be applicable to actions of states, whether within or outside their territories, which have a 'direct and reasonably foreseeable impact on the right to life.' This article has tried to address some legal questions concerning these terms, but further clarification from the Committee would be desirable. In sum, this is still an emerging concept in international law, but it could be a powerful tool to restrict the current trend of states using international cooperation to contain migrant and refugee movements.

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In the Name of Solidarity and Human Values: Rescue Operations at High Seas by NGOs vs. the International Legal Order

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Abstract: Rescue Operations by NGOs in Central Mediterranean are presently at stake. International Rules on the Law of the Sea (namely, UNCLOS) and IMO's Conventions on the matter are confident on the powers of the States to conduct —or survey— such operations, and State's public services have been conceived to develop such activities, but not owing special consideration to human rights questions behind. Then, rescue activities by NGOs are viewed with suspicion by States, and, usually, many legal obstacles hamper them. Insofar as present International regulation does not offer a clear answer, the proactive work by International Civil Society Actors in this domain and their pressure shows a new trend that presumably could be assumed in the future by States, reconciling Human Values and Legal Rules.

Keywords: Law of the Sea- High Seas- Rescue Operations- Migration flows- Human Rights

(A) THE INCREASING ROLE OF CIVIL SOCIETY ON MIGRATORY ISSUES: THE INVOLVEMENT OF NGOS IN SEA RESCUE OPERATIONS

Civil society was conceived originally in the context of liberal thinking – the anglo-american lockean tradition- as the citizens ensemble and the expression of the realm of citizens' liberty vis à vis the State, although the continental *hegelian* tradition gives a new dimension (*bürgerliche Gessellschaft*) to the concept, narrowly linking it —in fact, merging it- with the State[1]. Nowadays, however, the heterogeneity and complexity of actors involved, contributes to giving a totally new picture of the so-called civil society, insofar -as A. Appadurai said- this is just an image to describe:

> 'Social forms without the predatory mobility of capital that is not subject to regulations nor the predatory stability of many States. These social forms have scarcely been named by the current social sciences, and even when they are named, they are often forgotten of their dynamic qualities. Therefore, terms like 'international civil society' do not capture the mobility and malleability of those creative forms of social life that are localized transit points for the mobile global forms of civic and civil life'.[2]

Also, in this way, aware of the antagonistic meanings aroused by the figure, civil society has been better characterized as a 'sociological concept' that 'speaks of the liberation of social forces' and of 'their

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1 On the *hegelian* conception, See E. Olivas, 'The Hegel Theory of the Civil Society: The first contemporary critic of the liberal conception of the society, from the reading of the 'Principles of the Philosophy of the Right'', 33 *Nómadas* (2012).

2 A. Appadurai, 'Globalization and the Research Imagination', 160 *International Social Sciences Journal* (1999), at 238.

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interactions with the State sphere'.[3] Such blurred characterizations do not prevent its increasing role in public affairs, specially through their most relevant exponents, the NGOs.

In fact, civil society —and NGOs as their main actors— now shape the social basis of democratic States and reflects the permanent needs of individuals as members of the community in the pursuit, establishing and follow up of norms and values which should govern their behaviour on mutual coexistence and in their relations with democratic institutions[4], and, undoubtedly, nowadays, protection of refugees and migrants is now one of the most striking examples of the prominent role exerted by NGOs at international and domestic level[5].

Even in Spain, where civil society is less developed than in other western States, activities run by NGOs in the migratory field have been increasing over the last years[6]. The *Spanish Red Cross*, *CEAR*, *SOS racismo*, *ACCEM* or the *Jesuit Network on Migrations* are now relevant actors in the tasks related to the definition and implementation of migration policies both at national and regional level. Suffice it to mention the advice given by these organizations on migratory matters, and the assistance deployed -under the direction of central Government -namely, during the so called 'Syrian Refugees' Crisis in 2015.[7]

More precisely, in recent years activities deployed by NGOs have been extended to cover rescue operations at sea, as a way to provide protection for the so-called 'sea's refugees'.[8] In this sense, organizations such as the Catalonian *Proactiva Open Arms* or the Basque *Asociación Salvamento Marítimo Humanitario* are good examples of this new field. Moreover, the supposed 'criminalization' of their activities by Government authorities induced some of them to launch several cooperation projects as a way to enhance their activities in the Mediterranean[9].

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3 L. Pérez-Prat, *Sociedad civil y derecho internacional* (Tirant, Valencia, 2004), at. 27.

4 D. Bondía García, 'Garantías Sociales y Efectividad de los Derechos Civiles y Políticos frente a Medidas Regresivas en materia de Derechos Económicos, Sociales y Culturales: Una Perspectiva Española', in J. Bonet Pérez, R.A. Alija Fernández (eds), *La Exigibilidad de los Derechos Económicos, Sociales y Culturales en la Sociedad Internacional del Siglo XXI: Una Aproximación Jurídica desde el Derecho Internacional* (Marcial Pons, Madrid, 2016), at 193.

5 M. Abad Castelos, 'Las aportaciones de las organizaciones de la sociedad civil al Derecho internacional en un escenario en mutación', in J. Martín Pérez de Nanclares (ed.), *Estados y organizaciones internacionales ante las nuevas crisis globales* (Iustel, Madrid, 2010), at 166.

6 Certainly, there is precise date when significant sea rescue operations by NGOs started: it was at a time when EU funded operation *Mare Nostrum* was superseded by *Triton Frontex*-led operation in 2016 (K. Santer, 'Governing the Central Mediterranean through Indirect Rule: Tracing the Effects of the Recognition of Joint Rescue Coordination Centre Tripoli', 21 *European Journal of Migration and Law* (2019), at 146). However, the presumed non humanitarian aims of actual Frontex operations are refuted by S. Marinai, 'The interception and rescue at sea of asylum seekers in the light of the new EU legal framework', 33 *RDCE* (2016), 901-939.

7 On this subject see our contribution '*Crisis, What Crisis?* Some Views from Spain on the Recent Refugee Crisis in Europe', in *Verfassungsblog*, 21 September 2015).

8 Expression coined by the Special Rapporteur (UN) on the human rights of migrants, 25 February 2008, Doc. A/HRC/7/12. However, from a legal point of view such 'expressionistic' term is useless, as was the term 'boat people' employed during the Vietnam war.

9 On the 'humanitarian alliance' created by the NGOs Mediterranea (Italy), Sea-Watch (Germany) and *Proactiva* Open Arms (Spain), see 'Tres ONG se unen para rescatar inmigrantes en el Mediterráneo y denunciar 'la barbarie' de los Estados', RTVE, 23 November 2018. On other cooperation projects in progress see here.

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(B) THE INTERNATIONAL RULES GOVERNING MARINE OPERATIONS: A 'STATE ORIENTED' APPROACH

As has previously mentioned the International Law relating to marine activities is a *State-oriented sector*.[10] The most relevant rules -contained in the United Nations Convention on the Law of the Sea (hereinafter, UNCLOS)- are conceived by States and directed -almost exclusively- to them. In fact, as it was sustained by the *Cour d'Appel* of Rennes in the cases *Transarctic* and *Fast Independence,* UNCLOS' subjects are the States, not individuals.[11]

Even in the case of activities related to rescue operations -regulated by the International Maritime Organization (hereinafter, IMO) Conventions- the exclusive role is in the hands of the States. The definition of Marine areas of operation and the means at their disposal are attributed exclusively to the States.[12] Then, in Spain -as in other countries (e.g. Italy)- activities concerning rescue operations are a monopoly of the State, through the *Sociedad de Salvamento y Seguridad Marítima* (SASEMAR), an autonomous agency created by the Spain's Ministry of Infrastructures (*Fomento*).[13]

Certainly, the criteria governing the deployment and operation of such agencies have been defined by taking into account ordinary marine activities (commercial, fishing and even pleasure navigation). Issues related to human rights were initially clearly lacked such regulation, insofar as these rescue activities were conducted in an 'trouble-free' manner. In fact, the problems were mainly detected at an economic level, insofar as the rescue missions must be paid (taxes) by rescued people as a public service given by the State.[14]

In fact, as has been rightly stated, it is clear that a 'human dimension' is presently absent in the international marine legal regime, and 'undoubtedly more analysis is needed' about how the Law of the Sea and Human rights Law should intertwine and 'how gaps and ambiguities within existing legal regimes should be resolved'.[15]

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[10] See J. Abrisketa Uriarte, 'El derecho del mar y los derechos humanos', in G.A. Oanta (ed.), *El derecho del mar y las personas vulnerables* (J.M. Bosch, Barcelona, 2018), at 31.

[11] Judgments 27 September and 23 October 2007, cit. in P. Gautier, 'Applicabilité Directe et Droit de la Mer', in R. Casado Raigón and G. Cataldi (eds.), *L'Évolution et l'État Actuel de Droit International de la Mer: Mélanges de Droit de la Mer Offerts à Daniel Vignes* (Bruylant, Brussels, 2009), at 388. However, those decisions were annulled by the *Cour de Cassation* for procedural reasons (see Judgments 5 May 2009, 07-87.362 and 07-87931.

[12] See below, D).

[13] Art 263.b), Royal Legislative Decree 2/2011, 5 September, issuing the Consolidated Text of Law on State Ports and Merchant Marine (TRLPEMM), *Spain's Official Gazzette, BOE*, no. 253, 20 October 2011. According to SASEMAR sources since the summer 2018 -when there were reinforced through a special planning- there are now 55 ships (rapid boats, Salvamar and Guardamar) operating at rescue missions in the Canary Islands, the strait of Gibraltar and Alboran sea, with 840 members. The rescue operations are monitored by the Integrated System of Foreign Surveyance (SIVE) located at Sacratif Cape (Granada). (Informations provided by the Home Ministry (Interior) to MPs Pérez López and Rojas García (PP) in autumn 2018).

[14] The payments concern not the lifes but the vessels saved.

[15] N. Klein, 'Maritime Security', in D.R. Rothwell, A.G. Oude Elferink, K.N. Scott, and T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford UP, Oxford, 2017), at 396. In fact, the perverse connection between security and migration in EU policies is harshly denounced by J. De Lucas, 'Falacias y medias verdades en la política europea de refugiados', in J. Soroeta (dir.), 17 *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* (Aranzadi, Pamplona, 2017), at 107.

(c) THE HIGH SEAS LEGAL REGIME: QUESTIONS ON JURISDICTION

It is well known that high seas is an area outside the power of States. The older *Grotian* category of *Mare Liberum*—now superseded by its characterization as a 'Global Common'—has been conceived as an area where human activities can be conducted freely, but with the special *caveat* of its linkage with a certain State.[16]

Also, the 'Law of the Flag' is an essential precondition to develop any activity at high seas, insofar as, in the absence of such a relation, States (in fact, through warships, and, exceptionally, through other State vessels) are authorized to detain, inspect and, eventually, seize vessels and passengers therein, and divert them to their own ports.[17]

But on the other hand, actions in the high seas towards foreign vessels are prohibited unless such vessels are under the conditions of the so called 'hot pursuit' regime or are suspect of acts of piracy, slavery and illegal broadcasting. Neither drug trafficking nor migrant smuggling are included; hence, in those cases, any action by a public foreign vessel must be previously authorized by the State of the flag[18], or, exceptionally, by the UN Security Council.[19]

Anyway, the high seas are not 'a no-Law zone', as recalled by the ECHR in their *Medvedyev* decision in 2010[20]. In fact, the application of legal rules to any event developed therein are based precisely on the 'Law of the Flag' principle, according to which the legal order of the State of the flag must be applied to the people on board the ship, regardless of their nationality or condition (e.g. stowaways). And also, according to Safety of Life at Sea (SOLAS) Convention (Chapter V, Rule 7)[21], and the Search and Rescue (SAR)

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[16] A good example is provided by the Principalty of Sealand (really, a family settled in an old British platform dating from the Second World War), placed originally at high seas -and now inside the British marine areas- whose existence lies only in the 'large tolerance' of UK Government.

[17] In fact, one of the reasons behind the treatment of pirates as *hostis humani generis* (ennemies of mankind)-and the right of every State to prosecute and punish such activities lies in the fact of the 'unflagged' character of their ships; the 'Jolly Roger' (the pirate flag) not being connected with any State, and linked with the predatory activities developed. See Z. Bohrer, 'Jolly Roger (Pirate Flag)', in J. Hohmann, D. Joyce (eds.), *International Law Objects* (Oxford UP, Oxford, 2018), at 259.

[18] Through a single permission or by a treaty (bilateral or multilateral) general habilitation (e.g. Council of Europe convention on seizing drug smuggler vessels). In fact, even the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, done at New York in 15 November 2000 (2241 *UNTS* 507) recalls the same rule (art. 8, paras. 2 and 4), the only exception being the case when 'A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law' (art. 8, para. 7).

[19] There has been three times were, under exceptional circumstances, United Nations Security Council (thereinafter, SC) has adopted special measures suspending UNCLOS provisions related to the competences of Coastal States (Somalian territorial waters, S/RES/1816 (2008), paras. 7 and 9, and Flag States (Mediterranean Sea, S/RES/240 (2015), paras. 7 and 8, and S/RES/2292 (2016), paras. 3 and 4). In the last cases, the SC authorized under certain conditions the inspection of foreign flagged vessels on the high seas and their subsequent seizure when suspicious of migrant smuggling and illicit transfer of arms to Libya. (On this subject, see E. Papastavridis, 'EUNAVFOR MED Operation Sophia and the question of jurisdiction over transnational organized crime at sea', 30 *QIL, Zoom-in* (2016), 19-34).

[20] ECHR Judgment 29 March 2010, *Medvedyev and others v. France* (GCh), application no. 3394/03, (ECLI:CE:ECHR:2010:0329JUD000339403) on drug smuggling. On migrants, see further.

[21] 1974 International Convention for the Safety of Life at Sea (SOLAS Convention), 1184 UNTS 278.

 DOI: 10.17103/sybil.23.15

Convention (Chapter 1.2.3)[22], such obligations cover indisputably the specific case of illegal immigrants when they are rescued.[23]

In this sense, as was recalled in 2012, by the same Court in the case of *Hirsi Jama v. Italy* against the alleged limitations by Italian authorities about the State power over its vessels on the high seas when the rescue of immigrants was encouraged but at the same time excluded them from guarantees in the field of human rights protection[24], given the unequivocal nature of the international law on this matter, the Court said:

> 'by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognize, in cases concerning acts carried out on board vessels flying a State's flag, in the same way as registered aircraft, cases of extraterritorial exercise of the jurisdiction of that State. Where there is control over another, this is de jure control exercised by the State in question over the individuals concerned'[25].

(D) RESCUE OPERATIONS AT HIGH SEAS: LEGAL PROBLEMS

Rescue operations at sea have been regulated by the Law at sea, since their inception. Nowadays, in those cases, according to UNCLOS, every state must require the captain of a ship flying its flag to 'render assistance to any person found at sea in danger of being lost' and 'to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance[26]. Following such idea, in a more accurate way, SOLAS Convention provides:

> 'Distress situations: obligations and procedures
>
> 1 The master of a ship at sea which is in a position to be able to provide assistance, on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization to inform the appropriate search and rescue service accordingly.

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[22] 1979 International Convention on Maritime Search and Rescue (SAR Convention), 1405 UNTS 119.

[23] I. Lirola Delgado, 'España y la lucha contra el tráfico ilícito de inmigrantes por mar', in J. Pueyo Losa, J.J. Urbina (eds.), *La cooperación internacional en la ordenación de los mares y océanos* (Iustel, Madrid, 2009), at. 425. Notwithstanding the fact, that the Protocol on illegal migration is silent about the application of such provisions (*ibid.*).

[24] See arguments of Italian Government in *Hirsi Jamaa v. Italy* (GCh), Application no. 27765/09, Judgment ECtHR (Great Chamber) 23 February 2012, para. 63 (ECLI:ECHR:2012:0223JUD002776509).

[25] *Ibid.*, para. 77. On this case, *per omnia*, see J.A. Carrillo Salcedo, 'Reflexiones a la luz de la Sentencia del Tribunal Europeo de Derechos Humanos en el caso *Hirsi Jamaa y otros contra Italia* (Sentencia de 23 de febrero de 2012). Derechos de los inmigrantes en situación irregular en España', 32 *Teoría y Realidad Constitucional* (2013), 285-291.

[26] Art. 98 (1) UNCLOS. See also the relevant provisions at the SAR Convention, Chapter 1, para. 1.3.2, and Chapter 2, para. 2.1.10. Those provisions entail a positive obligation of flag states to adopt domestic legislation that imposes penalties on shipmasters who ignore or fail to provide assistance; however, many states have failed to do so and enforcement often remains difficult (T.E. Aalberts, T. Gammeltoft-Hansen, 'Sovereignty at Sea: The law and politics of saving lives in mare liberum', 17 (4) *Journal of International Relations and Development* (2014), at 431.

1-1 Contracting Governments shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ships' intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea. The Contracting Government responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such co-ordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases the relevant Contracting Governments shall arrange for such disembarkation to be effected as soon as reasonably practicable.

2 The master of a ship in distress or the search and rescue service concerned, after consultation, so far as may be possible, with the masters of ships which answer the distress alert, has the right to requisition one or more of those ships as the master of the ship in distress or the search and rescue service considers best able to render assistance, and it shall be the duty of the master or masters of the ship or ships requisitioned to comply with the requisition by continuing to proceed with all speed to the assistance of persons in distress.

3 Masters of ships shall be released from the obligation imposed by paragraph 1 on learning that their ships have not been requisitioned and that one or more other ships have been requisitioned and are complying with the requisition. This decision shall, if possible, be communicated to the other requisitioned ships and to the search and rescue service.

4 The master of a ship shall be released from the obligation imposed by paragraph 1 and, if his ship has been requisitioned, from the obligation imposed by paragraph 2 on being informed by the persons in distress or by the search and rescue service or by the master of another ship which has reached such persons that assistance is no longer necessary.

5 The provisions of this regulation do not prejudice the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, signed at Brussels on 23 September 1910, particularly the obligation to render assistance imposed by article 11 of that Convention.

6 Masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship'.[27]

However, in those cases the problems lie in the fact that a general control over such rescue activities on the high seas is practically impossible, then, that is the reason for the 'compartmentalization' of rescue operations according to the IMO Regulations, without overlooking the coordination between interested States to proceed with rescue missions.

Then, according to the existing Law, high seas are divided between States to develop the activities within maritime rescue: the Search and Rescue (SAR) zones[28]. Normally, such regions are linked with neighbor States, but there are few exceptions[29]. In the case of the Mediterranean Sea the SAR zones are as shown below (fig. 1).

[27] Regulation 33. See also Chapter V, Regulations 7.1, 10(a).

[28] Established under the SAR Convention, Annex, Chapter 1, 1.3.4 and Chapter 2, 2.1.3-2.1.9.

[29] As in the case of Western Sahara whose waters are a SAR zone under Spanish responsibility -not Moroccan- insofar as the area is until now a non-self-governing territory, under de jure administration by Spain. (On this question see, C. Ruiz Miguel, 'Las obligaciones legales de España como potencia administradora del Sahara Occidental', 26 *AEDI* (2010), 303-331).

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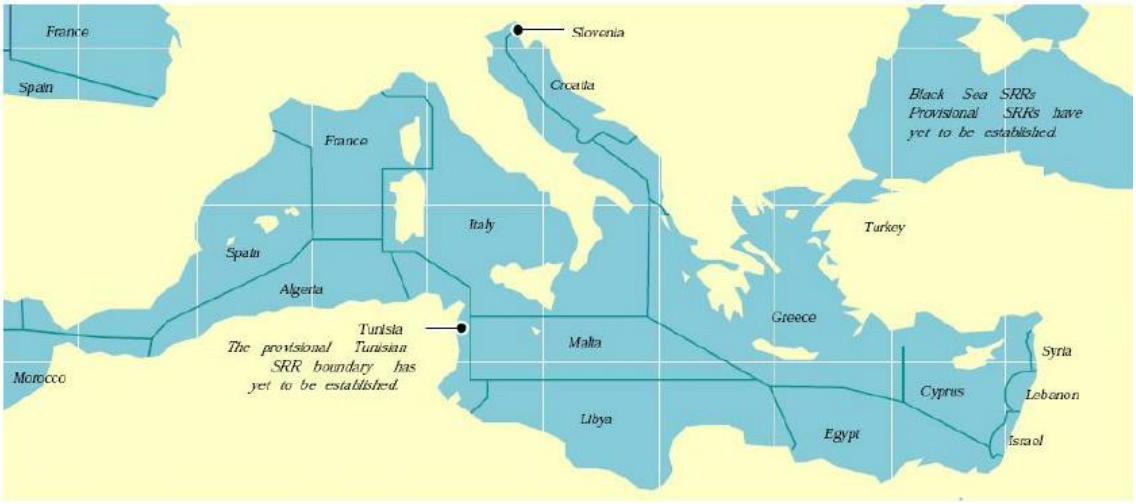

SAR marine zones in Mediterranean (fig. 1)[30]

In those situations, it concerns the State responsible for its SAR to deploy the activities related to rescue operations, usually through their public services. Despite this, the rules concerning disembark of rescued people are not clearly established. In fact, nowadays only a sparse soft law – mainly 'created' by the IMO[31]- regulates this issue: this is the case for the 'place of safety' where people rescued must be delivered.

The term referred to in regulation 13.2, Chapter 1, of the SAR Convention is not defined in any international convention. However, according to the IMO Guidelines on the Treatment of Persons Rescued at Sea it means a place where the life of a person rescued at sea is not endangered anymore and his/her basic human needs are met. In a place of safety, a rescue operation is considered to be terminated and from this place further arrangements regarding transportation/delivery to the final destination of a person rescued at sea can be made[32]. This is also the case for the IMO's Principles Relating to the Administrative Procedures for Disembarking Persons Rescued at Sea[33], when principle 3 states:

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[30] Figure extracted from Aalberts, Gammeltoft-Hansen, 'Sovereignty at Sea: The law and politics of saving lives...', *supra* n.26, at 451.

[31] In fact, as has been rightly stated, IMO uses soft law as one of their main tools in the long and winding process of law-making in the law of the sea sector (T. Fajardo del Castillo, 'Soft Law and the Law of the Sea: Its Presence in the UNCLOS', in J.M. Sobrino Heredia (ed.), *The Contribution of the United Nations Convention on the Law of the Sea to Good Governance of The Oceans and Seas* (Editoriale Scientifica, Naples, 2014), at 69). In spite of this, there are also studies on this matter issued by the UNHCR, although not mandatory for States; e.g. see Office of the United Nations High Commissioner for Refugees, *General legal considerations: search-and-rescue operations involving refugees and migrants at sea*, November 2017.

[32] Resolution MSC.167(78) adopted on 20 May 2004. According to such guidelines, the conduction to a safe place under the responsibility of the Government of SAR Region where people were rescued releases the captain of any accountancy (Cf. para. 2.5).

[33] Adopted by the IMOs Facilitation Committee, FAL.3/Circ.194, 22 January 2009. On the subject see J. Coppens, E. Sommers, 'Towards New Rules on Disembarkation of Persons Rescued at Sea?', 25 *The International Journal of Marine and Coastal Law* (2010), at 379. A detailed analysis of these 'rules' on M. Ratcovich, 'The Concept of 'Place of Safety': Yet Another Self-Contained Maritime Rule or a Sustainable Solution to the Ever-Controversial Question of Where to Disembark Migrants Rescued at Sea?', 33 *Australian Yearbook of International Law* (2015), 81-129.

 DOI: 10.17103/sybil.23.13

> 'If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued'.[34]

However, even the attempts -promoted by the IMO in 2010- to conclude a MOU on ways to provide for coordination between Mediterranean coastal States on such issues failed[35]. Then, problems surrounding disembark of migrants in a safe place are far to be solved.[36]

Anyway, in the case of 'failed States'—such as Libya now—the observance of such duties concerning marine rescue seems at present to be very difficult[37]. Here lies the question to be discussed, because the failure of such States to deploy a rescue operation could be interpreted as a gap to be fulfilled by everyone: in the case of merchant vessels there is a clear obligation, as we have previously said. In fact, although not well publicized, commercial shipping is currently engaged in such operations. Then, according to the International Chamber of Shipping more than 1,000 commercial vessels participated in rescue operations of about 50,000 migrants.[38] This phenomenon, however, is particularly problematic. In fact, as has been rightly put:

> 'Such conduct, certainly very proper from the humanitarian perspective, has many consequences for vessels and what is of the most importance their crews. Enumerating only the main consequences for the shipping industry, one could say: delays and changes of course; late deliveries of cargo; deterioration of perishable cargo; consumption of additional bunker fuel; breach of contracts; violation of insurance contracts and many others. From the perspective of seafarers: the participation in dangerous rescue operations; delays resulting in prolonged work; life-threatening diseases; chaos resulting in safety and security accidents, etc. Seafarers' families cannot be also forgotten in this context. Quite often they are neglected in the discussion about maritime issues, but their lives, well-being, financial and emotional stability (and therefore their human rights) are heavily dependent on the situation on board of the vessels where their spouses, siblings, children or parents work. Therefore, there is a direct impact of maritime

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34 Italics added.

35 See N. Klein, 'A Maritime Security Framework of the Legal Dimensions of Irregular Migration at Sea', in V. Moreno-Lax, E. Papastravridis (eds.), *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach*, (Brill/Nihoff, Dordrecht, 2016), at 46, and T. Scovazzi, 'The Particular Problems of Migrants and Asylum Seekers Arriving by Sea', in L. Westra, J. Satvinder, T. Scovazzi (eds.), *Towards a Refugee Oriented Right of Asylum* (Routledge, London-New York, 2016), at 215. For a deeper insight into this failed initiative, see M. Di Filippo, 'Irregular Migration and Safeguard of Life at Sea. International Rules and Recent Developmens in the Mediterranean Sea', in A. Del Vecchio (ed.), International law of the sea: current trends and controversial issues (Eleven International Publishing, The Hague, 2014), at 1.

36 J. Juste Ruiz, 'International Migration Law: Between Crisis and Renewal', 33 *AEDI* (2019), at 540, n. 6 (in Spanish with English summary). Moreover, it takes into account the views on T. Scovazzi on such issues (Cf. T. Scovazzi, 'Il respingimento di un drama umano collettivo e le sue conseguenze', in A. Antoniucci, I. Papanicolopulu, T. Scovazzi (eds.), *L'immigrazione irregolare via mare nella giurisprudenza italiana e nell'esperienza europea*, (Giapichelli, Torino, 2016), at. 66).

37 The Home Minister of the Italian Government, Mr. Gentiloni signed on February 2017 a MOU with the Libyan Government internationally recognized (National Libyan Agrement), providing for the Italian funding of Libyan regions more affected by irregular migration, and instructing frontier patrols and coastguards, and imposing on such authorities the duty to reinforce the control over land and marine frontiers and better conditions on foreigners internment camps (See A. Cocchini, 'Migrants smuggling and Operation Sophia: Could the Responsibility to Protect return to Libya?', 35 *REEI* (2018), at 9; A. Palm, 'The Italy-Libya Memorandum of Understanding: The baseline of a policy approach aimed at closing all doors to Europe?', *EU Immigration and Asylum Law and Policy Blog*, 2 October 2017. As you can presume, at present, insofar as the Libyan civil war persists, the effectivity of this agreement is equal to zero.

38 B. Stepien, 'A Tale of Non-State Actors and Human Rights at Sea: Maritime Migration Crisis and Commercial Vessels' Obligations', 18 *Anuario Mexicano de Derecho Internacional* (2018), 35-64.

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migration on seafarers, commercial vessels and the whole shipping industry, being the forefront of the migration crisis'.[39]

The risks involved in such situations are ever growing. Just, suffice it to remember the recent incident last March in the 'El Hiblu 1' cargo, where a mutiny erupted on board, when the captain decided the disembark at a Libyan port, which was obviously not suitable for migrants.[40]

(E) RESCUE OPERATIONS BY NGOS: SOME CASES

And, in the case of NGOs? Such a possibility is neither accepted in principle by the States[41], nor by FRONTEX[42]. Suffice it to mention some examples -Spain was involved in many of them- showing how these activities are commonly perceived by the States, with a mixture of reticence and hostility.

The first example is provided by the incident of *Professional Emergency Aid* (2017), an NGO whose members were arrested in Greece under the charges of 'migrant smuggling', although they were finally released by the Greek authorities[43].

The second was the preemptive seizure of *Open Arms* ship by Italian authorities in Catania in March 2018[44].

The third, the disembark of ship *Aquarius* in the port of Valencia in June 2018 —an overpublicized operation by the Spanish Government dictated for political ends— followed by other events, finally leading it to a halt in their rescue operations[45]. However, the gesture by the Spanish government was presented as an accomplishment of an international duty for humanitarian reasons[46].

The fourth was the denial by the maritime authority (*Capitanía marítima*) of Barcelona of the ship *Open Arms* to sail in the Mediterranean to resume its rescue operations in January 2019[47].

The fifth involves the Dutch Government, through the new policy imposed recently by its Ministry of Infrastructure and Water Management which blocks the feasibility of NGOs operating ships under the Dutch flag. It argues 'safety reasons' to restrain such operations[48].

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[39] *Ibid*, at 40-41.

[40] See Sea-Watch communiqué, 'Not piracy; but self-defense against deadly European border policy', 28 March 2019.

[41] On the conflict, from an Italian perspective see E. Bottini, 'Immigration Illégale et Secours en Mer: Analyse d'un conflit juridique', 15 *Annuaire du Droit de la Mer* (2010), 248-261. A more recent and general approach is provided in M.A. Acosta Sánchez, 'Inmigración marítima en el Mediterráneo. Las iniciativas de la UE y la protección de los Derechos Humanos', in J. Soroeta (dir.), 17 *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián*, (Aranzadi, Pamplona, 2017), 23-60.

[42] On its position see European Border and Coast Guard Agency, *Risk Analysis for 2017*, 2017, at. 33. On statements by former authorities responsible on those issues see A. Sánchez Legido, A., '¿Héroes o villanos? Las ONG de rescate y las políticas europeas de lucha contra la inmigración irregular: (a propósito del caso *Open Arms*)', 46 *RGDE* (2018), at 13-14, n. 14.

[43] NGO volunteers were detained near the island of Lesbos on 15 January 2016, but the Greek judge accorded their release in May 2018 (cfr. El País, 7 May 2018).

[44] On this incident and the circumstances surrounding it see Sánchez Legido, '¿Héroes o villanos? Las ONG de rescate...', *supra* n. 41, at 10-15.

[45] See more information here.

[46] See Spain's Prime Minister communiqué, 11 July 2018.

[47] See Amnesty International communiqué, 18 January 2019.

[48] See 'Dutch government blocks Sea-Watch 3 and other NGO ships with a new policy, citing concerns for 'safety,' while people are left to drown', 2 April 2019. The NGO Sea Watch replied: 'We cannot be held accountable for the current state of inhumane standoffs at sea. Instead, this situation is a damning indictment of certain European states who are abusing their

At the same time, the refusal of coastal States to accept the disembark of migrants rescued by NGOs has significatively increased after the accession of a new Government in Italy in 2018, and Malta following it[49]. Even, the Italian Government expressed their intention to proceed against the NGOs involved in these incidents [50], and threatening to take retaliation measures against supposedly tolerant European governments[51]. At the same time, in June, the recognition of the Joint Rescue Coordination Centre (JRCC) for the Libyan Coast Guard by the IMO -then formalizing the Libyan SRR- provided a legal basis 'to expel civil rescue NGO boats from the zone'[52].

Finally, we must take into account the recent incidents -just the past summer- when the ship *Open Arms*, again, and *Aita Mari*, were involved on rescue operations, initially disapproved by the Spanish Government, that lead to exceptional measures of disembark finally assumed by Spain[53].

Further reactions by NGOs affected by these measures include judicial actions at both domestic and international level (ECHR), still in progress[54], but what will be the result of such judicial proceedings?[55]

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powers. In any next rescue, another long standoff may be likely, but still unacceptable. Blocking us for 'safety' concerns in a standoff is a fundamentally illogical argument when the alternative is that people are left to drown', says Bayer. Keeping shipwrecked people at sea for prolonged periods of time is in violation of international law and therefore will never be the responsibility of Sea-Watch or any vessel rendering assistance to a distress case. It is the legal obligation of maritime rescue coordination authorities to provide a safe port without delay (Ibid.). According to the recent Spanish practice, conceived in similar terms, vessels trying to develop such tasks must abide the limits of individuals embarked provided by the shipping certificates and would not be covered by the exception contained in Chapter V of the SOLAS Convention. The Spanish authorities also remembered that rescue activities developed by those vessels in foreign SAR areas could be an interference in public rescue services of the States concerned (Information provided to the author by the Spain's Ministry of Infrastructures, 29 April 2019).

49 On these questions see a deep analysis in V. Moreno-Lax, D. Ghezelbash, N. Klein 'Between life, security and rights: Framing the interdiction of 'boat migrants' in the Central Mediterranean and Australia' 32 *Leiden JIL* (2019), at 722-726.

50 'Italy vows to sue NGO over migrant rescue boat', 27 January 2019.

51 'The Government of the Italian Republic invites the Government of the Kingdom of the Netherlands to urgently prepare what is necessary to organize the transfer into Dutch territory of the 47 migrants', a note issued on 26 January 2019 by the Italian Interior Ministry said. Further, he twitted 'If the Dutch government is not able to control vessels, which carry its country's flag there's a serious problem: The flag should be withdrawn immediately!' (ibid.). The reply by the Dutch Ministry rejected the request, with the Dutch Justice and Security Ministry saying it would 'not take part in ad hoc measures for disembarkation'. The Dutch government also said it was not responsible for the boat, claiming the vessel acted 'on its own initiative ... It was up to the captain of Sea Watch 3 to find a nearby port to disembark the 47 migrants he had on board'.

52 K. Santer, 'Governing the Central Mediterranean through Indirect Rule: Tracing the Effects of the Recognition of Joint Rescue Coordination Centre Tripoli', 21 *European Journal of Migration and Law* (2019), at 142. The author speaks of 'a technocratic decision', unable to cut the constant violations of human rights by Libyan Coast Guards (Ibid, at 165).

53 On those incidents see J. Abrisketa Uriarte, 'Rescates en el mar y puertos seguros', *El Correo Español*, Bilbao, 5 September 2019 (supplied by the author).

54 See the suit by the victims of mistreatment by Lybian authorities before the ECHR in 2018 against Italy, supported by Seawatch. Also, the same NGO filed on January 2019 a suit against Italy before ECHR asking for interim measures concerning migrants retained in a ship near the Italian coast. In the case of Spain, measures were taken by maritime authorities restricting rescue operations by the ships *Open Arms* and *Aita Mari* (see Dispatch 10 June 2019 and Resolution of Dispatch of 9 October 2019, respectively). *Aita Mari* suited against such a restriction before the maritime authorities (petition 23 November 2019). Documents gently provided by J. Abrisketa Uriarte to the author.

55 Judicial actions through domestic courts and human rights organs are undoubtedly the best way to improve the duties of the States concerned. On this subject see I. Papanicolopulu, 'The duty to rescue at sea, in peacetime and in war: A general overview', 98 *International Review of the Red Cross* (2016), at 512-513.

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In fact, the question remains about the lawfulness of the different measures adopted by concerned States. According to some authors such issues cannot be solved through the rules yet in force, specially EU Law[56]. Against this approach, for V. Moreno-Lax and others, the answer lies in the fact that UNCLOS and IMO's rules are not rightly applied, insofar as they do 'not create any new sovereign powers in favour of coastal States, but rather 'area[s] of responsibility' to be overseen in good faith to preserve the safety of human life at sea'[57], clearly breached when the States assume a 'closed ports policy' or try to restrict rescue operations by NGOs.[58]

From our point of view, at present a clear assessment cannot be offered, because facts and rules -as showed- give us a blurred picture, where *humanrightism* runs deep among the views expressed by some authors[59]. Anyway, as Professor T. Treves -former Judge of ITLOS- said some years ago 'it is clear that human rights concerns are now inextricably intertwined with the concerns of the Law of the Sea'. Then, prospects of change can be induced from the developments described, and probably the proactive role of NGOs engaged in rescue activities could pave the way to an alternative scheme of rescue operations yet in force, putting their role in the future as a complementary tool for the States activities on these issues[60].

(F) BY WAY OF CONCLUSION: BETWEEN HUMANITARIAN IMPERATIVES AND THE PRESENT LEGAL ORDER

[56] P. García Andrade, 'El Derecho del Mar frente al fenómeno migratorio: ¿Insuficiencia normativa o deficiente aplicación?', in J.M. Sobrino Heredia (ed.), *The Contribution of the United Nations Convention on the Law of the Sea to Good Governance of the Oceans and Seas* (Editoriale Scientifica, Naples, 2014), at 341; Sánchez Legido, '¿Héroes o villanos? Las ONG de rescate...', *supra* n. 42, at 24-25. In the same line, as has been putted, the existent gap could be solved through a clear definition of the issue of responsibility and the consequences of failed rescue scenarios by inactive SAR States, e.g. referring a question on 'distress' to the ITLOS, the EUCJ or the ECHR (E. Koka, D. Veshi, 'Irregular Migration by Sea: Interception and Rescue Interventions in Light of International Law and the EU Sea Borders Regulation', 21 *European Journal of Migration and Law* (2019), 26-32).

[57] T. Treves, 'Human Rights and the Law of the Sea', 28 *Berkeley Journal of International Law* (2010), at 13-14.

[58] Moreno-Lax, Ghezelbash, Klein, 'Between life, security and rights...', *supra* n. 48, at 729. There is no room here to discuss the relevance of the proposals submitted by those authors, mainly concerning the essential role to be played by the principle of systemic integration in their contribution (Ibid., at 716-717). Just a caveat about their controversial use on treaty interpretation (on these issues see P. Andrés Sáenz de Santa María, 'El principio de integración sistémica y la unidad del Derecho Internacional' in A. J. Rodrigo, C. García (eds.), *Unidad y pluralismo en el derecho internacional público y en la comunidad internacional* (Tecnos, Madrid, 2011), at 374; R.N. Gardiner, 'The Vienna Convention Rules on Treaty Interpretation', in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford UP, Oxford, 2012), at 500, and our contribution 'The War of the Worlds: Reality vs. Legal Formalism or the Power of Interpretation (on the EUCJ ruling of 27 February 2018, Western Sahara Campaign UK, C-266/16)', 60 *REDI* (2018), at 341-342).

[59] On this way e.g. S. Trevisanut, 'Is there a right to be rescued at sea? A constructive view', 4 *QUIL Zoom-in* (2014), at 14-15. However, very recently the Human Rights Committee took an approach on the question very similar (Cf. General comment no. 36, Article 6: right to life, adopted by the Committee at its 124th session (8 October – 2 November 2018), CCPR/C/GC/36, 3 September 2019, at 13, para 63). On the concept of *humanrightism*, a neologism coined by Professor A. Pellet suggesting the influence of *pia desiderata* concerning human rights on Lawyers, see A. Pellet, 'La mise en oeuvre des normes relatives aux droits de l'homme' in CEDIN (H. Thierry and E. Decaux, eds.), *Droit international et droits de l'homme - La pratique juridique française dans le domaine de la protection internationale des droits de l'homme*, (Montchrestien, Paris, 1990), at 126; id., "Human rightism' and international law', United Nations, Gilberto Amado Memorial Lecture, 18 July 2000.

[60] See D. Irrera, 'Non-governmental Search and Rescue Operations in the Mediterranean: Challenge or Opportunity for the EU?', 24 *European Foreign Affairs Review* (2019), 265-286.

More than a century ago, in 1892, a resolution adopted at its Geneva session by the Institut de Droit International (IDI) on the 'Règles internationales sur l'admission et l'expulsion des étrangers' states in its preamble:

> 'Considérant que, pour chaque Etat, le droit d'admettre ou de ne pas admettre des étrangers sur son territoire, ou de ne les y admettre que conditionnellement, ou de les en expulser, est une conséquence logique et nécessaire de sa souveraineté et de son indépendance'[61]

However, the content of sovereignty is contingent upon normative developments in international society. In fact, thirty years later, the concept of 'domestic jurisdiction' (*domaine reservé*), which entails such an idea was characterized in an evolutive manner by the Permanent Court of International Justice (PCIJ), when in 1923 it stated in the *Nationality Decrees in Tunis and Morocco* case:

> 'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.'[62]

But, when, in 2005 we were trying to draw some conclusions about the (a)legal international regime on migrations we were compelled to say that:

> 'the international legal system reveals, even now, a harshly ultraliberal character towards the migratory phenomenon, then, especially reticent to limit the States' freedom of action'.[63]

It remains to be seen how deep the changes produced at normative level have been in the past 15 years, but it seems that solidarity is not yet among the principles that drive migratory policies in Western States. Even between EU member States the solidarity principle, although proclaimed in the Treaty of the European Union (TEU) is not abided by them, specially concerning migratory issues, as has been showed during the so called 'Syrian refugees' crisis' of 2015[64]. Despite this, recently, E. Guild has said:

> 'The international human rights responsibilities of states when exercising their state sovereign entitlement to control their borders and the movement of persons across them includes an obligation to desist from applying measures which result in unsafe, disorderly and irregular movement. The New York Declaration affirms that 'States have rights and responsibilities to manage and control their borders' (para 24). That rights come with responsibilities is a generally accepted principle of law. States' right to control their borders is accompanied by the responsibility to ensure respect for the human rights of those crossing them: migrants...'.[65]

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[61] IDI, Session de Genève. As for foreign ships and their access to Coastal States' ports the sovereign right of States was remembered by the ICJ in his Judgment of 27 June 1986 in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, at 101, paras. 213-214.

[62] *Cfr. Nationality Decrees in Tunis and Morocco (Britain v. France)*, PCIJ, Series B, No. 4, 1923, at 24.

[63] J.A. González Vega, 'En torno a los otros europeos: Derecho Internacional y Derecho Europeo ante la inmigración', in A. Hidalgo Tuñón, R. García Fernández (eds.), *Ética, pluralismo y flujos migratorios* (Eikasia, Oviedo, 2005), at 104-105 (translation by the autor).

[64] On the weak impact of solidarity principle in the development of this crisis, see our contribution 'Myths and Mystifications: The European Union and International Protection (on the 'refugees' crisis')', 56 *RDCE* (2017), at 49-53 (in Spanish with English abstract).

[65] E. Guild, 'The UN's Search for a Global Compact on Safe, Orderly and Regular Migration', at 2.

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But, are such restrictions on sovereignty really assumed by States? When Guild speaks about the constraints on States' autonomy, she refers to a Compact that has been expressly deprived of legal content. The 'commitments' adopted by States assembled in Marrakech in December 2018 were clearly qualified as mere political engagements[66]. Then, such ideas are still 'in progress' in the mind of States, and that is the reason for the proactive work in the hands of civil society, and their heralds, the NGOs.

As a conclusion, I would like to quote a sound reflection expressed recently that links the developments described with other issues previously discussed: 'The efforts of the European Union towards a rigid migration control through third country cooperation in that sense can be read as attempts not only to avoid legal responsibilities but also to avoid encounters that would 'embarrass' the European public. The remarkable opinion delivered by Advocate General Paolo Mengozzi to the European Court of Justice in February 2017 may be read through this lens as responding to Europe's imaginary encounter. The opinion ends with the image that Mann's book begins with the picture of the body of Aylan Kurdi washed ashore on the Turkish coast, which stirred the conscience of people worldwide. Relating to it, Mengozzi writes: 'It is commendable and salutary to be outraged. In the present case, the Court nevertheless has the opportunity to go further, ... by enshrining the legal access route to international protection. ... Make no mistake: it is not because emotion dictates this, but because EU law demands it'. [67] But, as the author finally points out, even if the Court did not follow its Advocate General 'this does not end reflections about the rights of encounter and law's demands.'[68]

Then, at this point we are...

[66] In a further publication the same author expects that the future decision on the current dispute of the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) before the ICJ, could introduce a new treatment of such issues derived from the Migration Compact (See E. Guild, 'The UN Global Compact for Safe, Orderly and Regular Migration: What Place for Human Rights?', 30 *International Journal of Refugee Law* (2018), at 663).

[67] D. Schmalz, 'Book Reviews: Itamar Mann. Humanity at Sea: Maritime Migration and the Foundations of International Law' 28 *EJIL* (2017), at 652-653 (Italics added). Referring to the Opinion of AG P. Mengozzi in the case *X.X. v. État Belge*, C-638/16 PPU, delivered on 7 February 2017, ECLI:EU:C:2017:93, para. 175.

[68] Schmalz, *Ibid.* (Italics added). It is well known that the Judgment of 8 March 2017, *X.X. v. État Belge*, C-638/16 PPU, ECLI:EU:C:2017:173, denied the suggestion of P. Mengozzi. On this ruling see B. Delzangles, A. Louvaris, 'Visas humanitaires et Charte des droits fondamentaux: la confrontation n'a pas eu lieu', *Journal de Droit Européen* (2017), 170-176; M. Ovadek, 'Le champ d'application de la Charte des droits fondamentaux de l'Union Européenne et les États membres: la malédiction du critère matériel', *id. loc. cit.*, 388-390, A. Sánchez Legido, 'El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el visado humanitario europeo', 57 *RDCE* (2017), 433-472.

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The Reform of the Dublin III Regulation: How to Build or Not to Build Further Enforcing Mechanisms

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Abstract: The European Commission's proposal for the reform of the Common European Asylum System was presented in 2016 as a package deal. Of all the contentious legal instruments to be reformed, the most complex is the proposal for the Dublin IV Regulation. This article particularly seeks to identify the changes that illustrate the reactions of the European Commission and the Parliament as regards the mechanisms to enforce the Dublin system. On the one hand, some of the measures mark a shift from the human rights concept of refugee protection to an emphasis on security and punitive measures. On the other hand, it contends that some provisions of the Dublin IV proposal provide minimal persuading effects for States and asylum seekers. The robust conditions imposed on the 'beneficiaries' erode whatever the system is supposed to provide, either compliance with human rights standards or its proper implementation.

Keywords: Common European Asylum System - Dublin III Regulation- secondary movements – CEAS reform

(A) INTRODUCTION

The Treaty of Lisbon, which entered into force on 1st December 2009, transformed the measures on asylum from establishing a form of harmonization based on *minimum standards* into creating a harmonization based on a *common system.*[1] This Common European Asylum System (CEAS) includes a similar status of asylum and subsidiary protection in every Member State; criteria and mechanisms for determining which Member State is responsible for considering an application; common procedures for the granting and withdrawal of international protection; standards concerning reception conditions; and a common system of temporary protection.

The principle of solidarity and fair sharing of responsibility, including any financial solidarity between Member States, is also explicitly provided by the Treaty of Lisbon.[2] In addition, the Treaty significantly alters the decision-making procedure on asylum matters by introducing co-decision as the standard procedure. Furthermore, the arrangements for judicial oversight by the Court of Justice of the European Union (CJEU) have been improved significantly. Preliminary rulings may now be sought by any court in a Member State, rather than just national courts of final instance, as was previously the case.

The 'second stage' of the CEAS (2008-2013) was completed based on these grounds. Except for the recast Qualification Directive, which entered into force in January 2012, the other recast legislative acts

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1 European Commission, *Green Paper on the future Common European Asylum System*, 6 June 2007, COM (2007) 301 final.

2 Arts. 25, 27, 31, 37, 78 and 80 TFUE.

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entered into force between July 2013 and January 2014. This meant that the transposition of the asylum Directives in Member States' legislation in mid-July 2015 occurred at the peak of the migration crisis.[3] Coinciding in time, in view of the migratory pressure, the European Commission presented a comprehensive European Agenda on Migration, which proposed several measures to address this pressure[4]. A year later, the Commission tabled seven legislative proposals for the reform of the CEAS in two packages published on 4 May[5] and 13 July 2016[6] respectively.

Of all the contentious legal instruments to be reformed, the most complex is the proposal for Dublin IV Regulation. This article aims in particular to identify the changes that illustrate the reaction of the European Commission and the Parliament as regards the mechanisms to enforce the Dublin system. On the one hand, some of the measures contained in the Dublin IV proposal mark a shift from the human rights concept of refugee protection to an emphasis on security and punitive measures. On the other hand, it contends that some provisions of the Dublin IV proposal provide minimal persuasive effects for States and asylum seekers. The robust conditions imposed on the 'beneficiaries' erode whatever the system is supposed to provide, either compliance with human rights standards or its implementation. Following this introduction, Section B defines the *rationale* of the Dublin IV Regulation, which is in between two apparently colliding extremes. At one extreme, the compliance with human rights standards and becoming a pull factor for the EU on the other extreme. Section C expands upon the analysis of the specific measures envisaged in Dublin IV. Finally, Section D addresses the conclusions that the reform needs a more realistic approach, based on a stronger European Agency on Asylum and less bias towards the interests of States.

(B) EFFECTIVENESS OF THE DUBLIN SYSTEM AS A GENERAL AIM

The reform proposal for the Dublin Regulation III appears to prioritize two objectives: the *enforcement of allocation rules* and the *prevention of secondary movements within the EU*.[7] The rules on allocation of asylum seekers would be accompanied by a *corrective allocation system*. The Member State carrying out the transfer to the Member State of allocation would be entitled to receive a lump sum of 500 € for each person transferred. The European Union Agency for Asylum would be responsible for the establishment

3 Factsheets of the European Union, 2019, http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.2.2.pdf (accessed 20 November 2019).

4 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, 13 May 2015, COM (2015) 240 final.

5 COM (2016) 270 final, 4 May 2016 (Proposal for a Regulation to reform the Dublin system); COM (2016) 272, 4 May 2016 (Proposal for a Regulation to amend Eurodac); COM (2016) 271 final, 4 May 2016 (Proposal for a Regulation to establish an EU Asylum Agency which is to replace the European Asylum Support Office (EASO)).

6 COM (2016) 467 final, 13 July 2016 (Proposal for a new Regulation to replace the Asylum Procedures Directive); COM (2016) 466 final, 13 July 2016 (Proposal for a new Regulation to replace the Qualification Directive) and COM (2016) 495 final, 13 July 2016 (Proposed targeted modifications of the Reception Conditions Directive); and COM (2016) 468 final, 13 July 2016 (Proposal for a Union Resettlement Framework).

7 COM (2016) 270 final, *supra* n.5.

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and technical maintenance of the system for allocation of asylum seekers.[8] The fact that in each case only one contracting state is responsible for processing the asylum application is seen as beneficial for both the Member States and the applicants because it would avoid refugees in orbit and abuses of the system by the so called 'asylum-shoppers'.

However, this may conflict with the systemic deficiencies in the asylum systems of some Member States and with the circumstances that put the person who has been granted international protection in a situation of extreme material poverty, as declared by the European Court of Human Rights and the Court of Justice of the European Union.[9] If some internal systems are considered by the European courts as violating human rights standards, the allocating State could be found in violation of the law as a result of transferring an applicant to a place where the authorities cannot handle his/her application.

The introduction of a Qualification Regulation and an Asylum Procedures Regulation would lead to a set of rules which may achieve further harmonization. The effect of this would be that asylum seekers would be able to rely directly on the Dublin IV Regulation. However, the transformation of the Directives into Regulations entails that some of the EU Member States would be compelled to lower their standards on human rights protection, while harmonization should lie with the correct implementation of EU legislation currently in force. As a result, the enhancement of the quality of international protection, the asylum procedures and the reception conditions in all EU Member States, would be influenced mostly by the views of those Member States which are currently unwilling or unable to meet the agreed standards.[10] Every study, report and assessment on the implementation of the Dublin system highlights that the underlying principles of the Dublin Regulation III need to be *revised in order to grant better protection for refugees.*[11] The proposal for an 'objective assessment of the asylum capacity of each Member State', made by De Bruycker and Tsourdi seems an appropriate way for allowing to distinguish between the 'inability to comply' with obligations and 'unwillingness to comply' with them[12]. Paradoxically however, harmonization would result in a *pull factor* from the Commission's view. In between these two extremes, achieving a standard level of protection or becoming a pull factor, the EU will have to find a middle course.

(C) ENFORCEMENT OF THE DUBLIN IV REGULATION THROUGH THREE SPECIFIC MEASURES

(1) Pre-Dublin procedures for asylum applications by persons from 'safe countries of asylum', 'safe third countries' or 'safe countries of origin'

8 *Ibid.*, at 98.

9 *M.S.S. v. Belgium and Greece*, Application no. 30696/09, European Court of Human Rights, 21 January 2011; CJEU, judgement of 6 June 2013, *M.A. and Others v. Secretary of State for the Home Department*, C-648/11, ECLI: EU:C:2013:336 and CJEU, judgement of 19 March 2019, *Jawo v. Germany*, ECLI:EU:C:2019:218.

10 Meijers Committe, 'CM 1805 Note on the proposal for the Procedures Regulation and Dublin Regulation', *Comments*, published on 21st March 2018, accessed 12 October 2019.

11 ECRE and AIDA, *The implementation of the Dublin III Regulation in 2018*, published on March 2019, accessed 4 October 2019.

12 Ph. De Bruycker, and E. Tsourdi, E., 'In search of fairness in responsibility sharing', 51 *Forced Migration Review* (2016), 64-65.

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One of the major issues of the proposal for the Dublin IV Regulation, established in its Article 3, is to introduce a pre-procedure for asylum applications made by persons coming from 'safe countries of asylum', 'safe third countries' or 'safe countries of origin'. Countries of first entry would be required to conduct admissibility and merit-related assessments before applying the Dublin IV Regulation. The Member State where an application is first lodged would have to verify the admissibility of the claim in relation to the 'first country of asylum' and 'safe third country', and would examine in an accelerated procedure application made by applicants coming from a 'safe country of origin' designated on the EU list, as well as applicants presenting security concerns (Article 3)[13].

The establishment of an EU common list of safe countries of origin was originally dealt with in a Commission proposal presented in September 2015.[14] However, after the trialogue started, in January 2017, the Maltese Presidency together with the European Parliament decided to freeze the process and continue discussions within the framework of the proposal for an Asylum Procedure Regulation[15]. The designation of 'safe countries' has significant political and legal implications as well as crucial effects on the rights and guaranties available to asylum seekers[16]. All of these consequences are transferred to the Member States of first entry according to the Dublin IV proposal.

The automatic application of the concepts of *first country of asylum*, *safe third country*, and *safe country of origin* and the non-defined legal concept of 'security concern' may lead to discriminatory situations based on nationality and on the routes taken by the asylum seekers. In the case of the *safe country of origin* and applicants constituting security concerns, procedural safeguards could be undermined due to the brevity of the time scale, or they could be transformed into non-individual processes of these applications for international protection, prohibited by Directive 2013/32 on common procedures for granting and withdrawing international protection.[17]

The European Parliament, based on the Wikström Report, suggested some amendments to Article 3 of the Dublin IV Regulation and presented a different text on accelerated procedures restricted to two situations: 'if the applicant is for serious reasons considered to be a danger to the national security or public order of the Member State, or if the applicant has previously been forcibly expelled under national law either from the determining Member State or from another Member State, for serious reasons of public security of public order'[18].

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13 COM (2016) 270 final, *supra* n. 5, Recital 17, Art. 3 (3) and at 15.

14 COM (2015) 452.

15 COM (2016) 467 final.

16 AIDA, '"Safe countries of origin" a safe concept?', *Legal Briefing No. 3*, September 2015.

17 CEAR, *Hacia dónde va el nuevo sistema europeo común de asilo: retos, amenazas y propuestas* (CEAR, Madrid, 2017) at 8.

18 European Parliament, *A Report on the proposal for a regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Cecilia Wikström, A8-0345/2017, 6 November 2017 (hereinafter Wikström Report), Article 3 (a), at 151.

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The application of Article 3 may lead to two different interpretations: that a Member State, when it has indications that an applicant for asylum has travelled through another Member State, is conducting an admissibility procedure; or that the pre-Dublin procedure implies, in view of the parallel introduction of the obligation to apply for asylum in the Member State of first arrival, an additional administrative burden for Member States at the external borders.

In fact, the Dublin process itself is already a pre-procedure to an asylum procedure. Dublin IV adds another layer and extends rather than shortens the asylum procedures. The Member States having the largest numbers of first applications would solely be responsible for such pre-procedures. They will not only be responsible for the assessment of the application, but also for the risk of sending persons into life or freedom threatening conditions after examining their route rather than their protection claim is too high.[19] Consequently, it is dubious that the pre-Dublin procedure would be applied by Member States as they would be much more interested in evading the responsibility in any additional procedures; and determining within a two-month deadline if they are responsible for the assessment of the applications imposed in Dublin IV.

(2) Sanctions against secondary movements

Secondary movements occur when refugees or asylum-seekers move from the country in which they first arrived to another one to seek protection or for permanent resettlement. Different factors influence such movements and the decision to settle in a particular country. As the European Commission declared:

> 'The Common European Asylum System is also characterized by differing treatment of asylum seekers, including in terms of the length of asylum procedures or reception conditions across Member States, a situation which in turn encourages secondary movements.'[20]

Not only the human rights situation in specific States, but also the choices of integration for the asylum seeker determine the tendency of secondary movements. In 2007 the Commission stated that 'ensuring a high level of harmonization with regard to reception conditions of asylum seekers is crucial if secondary movements are to be avoided'.[21] As long as there is not further approximation of national asylum procedures, legal standards, and reception conditions, asylum seekers will seek protection in the most favorable state. The case of Greece is the clearest example of the difficulties of harmonizing standards. The Commission recognized that 'a very difficult humanitarian situation [...] is [...] developing on the ground'.[22] Furthermore, it addressed a recommendation to the Hellenic Republic on the urgent measures to be taken

19 Caritas Europa et al., *Comments on the Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member States responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM (2016) 270 final*, (October 2016) at 5.

20 European Commission, *Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197 final, 6 April 2016.

21 European Commission, *Green Paper, supra* n.1 at 4 and 11.

22 European Commission, *First report on relocation and resettlement*, COM (2016) 165 final, 16 March 2016, at 2.

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by Greece in view of the resumption of transfers under the Dublin regulation.[23] The issue underlying these contrasting messages was the urgent need to harmonize standards.

Entry and transit requirements in the countries concerned; material resources; family or other social networks; economic prospects; the presence of migrant communities; or even the human smugglers who facilitate travel and impose concrete destinations are some of the several circumstances which determine asylum-seekers' decision to 'choose' their destination.[24] In this context, if the asylum seeker were given an opportunity to justify the reasons for applying for at one particular destination or other, it would make the system more comprehensible and efficient.

The problematic character of secondary movements is justified principally in two ways: on the one hand, they generate refugees in orbit or `asylum shoppers`, meaning that they shift from one country to another without having their asylum claim assessed; on the other hand, they put pressure on host countries, including their reception capacities, asylum systems, and the perception of security in different societies. They can even create law enforcement concerns. When countries have more difficulties in managing their asylum systems, the response by restrictive and deterrent measures is accentuated, such as by erecting fences, increased border controls, visa requirements, prolonged detention and deportation.

Due to the above-mentioned reasons, the main objective Dublin IV Regulation's is to prevent secondary movements.[25] It obliges States to follow accelerated procedures in these cases. That is to say, it presumes a connection between secondary movements and an asylum seeker's claim.[26]. However, a secondary movement is not related to the applicant's well-founded fear of persecution or real risk of serious harm in his or her country of origin or habitual residence. As a consequence, secondary movements should under no circumstances impact on the assessment of a person's international protection needs nor the type of procedural safeguards provided.[27]

As is generally known, the CEAS is designed in a way that an asylum-seeker's application is to be examined in only one State of the whole Dublin territory (the 32 States subject to the Dublin rules). The responsibility should only be undertaken by one State (one chance only) for each application. On these grounds, the Dublin Regulation III reinforces the presumption that Member States are equal. Its preamble establishes in its third consideration that 'Member States, all respecting the principle of non-

[23] European Commission, *Recommendation of 10 February 2016 addressed to the Hellenic Republic on the urgent measures to be taken by Greece in view of the resumption of transfers under Regulation (EU) 604/2013*, C (2016) 871 final, OJ 2016 L38/9. For a critique see ECRE, *Comments on the European Commission Recommendation relating to the reinstatement of Dublin transfers to Greece C (2016) 871*, published February 2016, accessed 10 November 2019.

[24] European Parliamentary Research Service, 'Secondary movements of asylum-seekers in the EU asylum system', *Briefing*, October 2017 and Meijers Committee, *CM 1614 Comments on the proposals for a Qualification Regulation (COM (2016) 466 final, Procedures Regulation (COM (2016) 467 final), and a revised Reception Conditions Directive (COM (2016) 465 final*, 2016.

[25] COM (2016) 270 final, *supra* n. 5, at 3-4.

[26] According to the text proposed by the Commission: 'If an applicant does not comply with the obligation set out in Article 4 (1), the Member State responsible in accordance with this Regulation shall examine the application in an accelerated procedure, in accordance with Article 31 (8) of Directive 2013/32/EU', in COM (2016) 270 *supra* n 5, at Art. 5 (1). The European Parliament proposed to delete this text, in European Parliament, Wikström Report, *supra* n. 16.

[27] ECRE, *Comments on the Commission Proposal for a Dublin IV Regulation COM (2016) 270*, October 2016, at 22.

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refoulement, are considered as safe countries for third country nationals'. If the way the asylum seeker was treated and the resolution of his/her application was coherent among Member States, then the results of the processes would be more or less comparable regardless of the Member State in which the application was lodged. However, after twenty years, and in the third stage of the CEAS, the differences among the recognition rates are still remarkable.[28]

Furthermore, the interest of the Dublin IV Proposal in discouraging secondary movements is reflected in measures which include far-reaching *sanctions* for secondary movements. The difference between the Commission's and the Parliament's focus as regards the ruling of secondary movements is that the Commission is reactive in the sense of penalizing the movement already realized and the Parliament appears to be proactive in dissuading asylum seekers not to move to a second Member State. Evidence of the punitive procedural consequences can be found in the following Commission's proposals:

(a) It introduces the aim of sanctions against asylum seekers and refugees who engage in irregular secondary movements;[29]

(b) It requires a mandatory examination on an open asylum application under an accelerated procedure if an applicant does not comply with the obligation to make the application in the Member State of first entry;[30]

(c) It announces the treatment of further representations following a discontinued application as a subsequent application;[31]

(d) It excludes the applicant's right to appeal the negative first instance decision taken by the responsible Member State.[32]

The punitive approach to secondary movements of asylum seekers was also envisaged by the European Commission on the Recast Reception Conditions Directive.[33] The secondary movements would imply the exclusion from general material reception conditions. According to the Commission's proposal, the exclusion would be imposed as of the moment of notification of the transit decision. The Parliament proposed the deletion of this provision.

The guarantees of Article 31 of the 1951 Refugee Convention – to protect refugees from the imposition of criminal penalties – are only contemplated in the Dublin IV proposal as regards to the detention of applicants. Non-penalization of irregular entry of refugees should be explicitly and broadly enshrined in the Dublin IV proposal. Secondary movements are provoked by the failure of certain Member States to respect EU standards and the imbalances derived from this fact. As stated by Maiani, 'if there are to be any priorities in the EU Asylum Policy, precedence should be given to redressing failing standards rather than

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[28] The highest recognition rates were in Switzerland (90%) and Ireland (86%) and the lowest recognition rates were for decisions issued in Czech Republic (11%) and Poland (14%), in EASO, *Annual Report on the Situation of Asylum in the European Union 2018*, (2019) at 37. For an analysis on this, see Guild, E., *Interrogating Europe's Borders: Reflections from an Academic Career*, (Radboud Universiteit, 2019) at 19.

[29] COM (2016) 270 *supra* n. 3, Recital 22.

[30] Arts. 3 (1) and 20 (3).

[31] Art. 20 (4).

[32] Art. 20 (5).

[33] COM (2016) 495 final.

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to repressing secondary movements' and he added that 'this might be a more effective way to attain the latter objective'.[34]

(3) Shortening procedural time limits

The Dublin IV proposal generally aims to streamline the application of the Dublin system through an overall reduction of time-limits for completing the procedure. Firstly, expiry of deadlines will no longer result in a shift of responsibility between Member States, with the exception of the deadline for replying to take charge requests.[35] Precisely, the suggested deadlines are the following: one month instead of three for issuing a 'take charge request',[36] and the request shall be sent within two weeks instead of two months in case of a Eurodac or VIS hit data recorded[37]; two weeks for making a 'take back' notification after receiving the Eurodac hit, which does not require a reply[38]; one week from the acceptance of the 'take charge' request or from the 'take back' notification for taking a transfer decision;[39] and four weeks to carry out a transfer.[40]

The Dublin IV proposal is therefore likely to repeat the perverse effects of its first version, the Dublin Convention of 1990. In its evaluation of the Dublin Convention in 2001, the Commission explained that the absence of consequences attached to deadlines led to several negative situations; eventually transfers not being carried out; and the detriment of asylum seekers' access to protection. In order to avoid leaving asylum seekers uncertain about the outcome of their application for an excessive period of time, deadlines had to be applied.[41] However, an excessive reduction of deadlines as proposed in Dublin IV, might misplace expectations and fail to oblige States to apply the Regulation or encourage asylum seekers to adhere to it.

(D) CONCLUSION: RIGHTS BASED COMPLIANCE

To sum up, the Dublin IV proposal introduces certain grounds of inadmissibility to be assessed by the Member States of first entry as well as the application of accelerated procedures which contradict the spirit contained in the very same Dublin IV proposal. It exacerbates distribution of inequalities as it imposes additional responsibilities upon external border countries for processing asylum applications failing under 'first country of asylum', 'safe third country', 'safe country of origin' and security grounds. Furthermore,

34 F. Maiani, 'The Reform of the Dublin III Regulation', *Study by the Directorate General for Internal Policies, Policy Department C for the Committee for Civil Liberties, Justice and Homme Affairs,* (2016) at 36.

35 COM (2016) 270 final, at 16.

36 Art. 24.

37 Art. 24.

38 Art. 26.

39 Art. 30 (1).

40 Art. 30 (1).

41 European Commission, *Evaluation of the Dublin Convention*, SEC (2001) 756, 13 June 2001, 9-11. For a recent discussion, see C. Hruschka, 'Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission', *EU Migration Blog*, published on 17 May 2016, accessed 5 November 2019.

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through the proposed accelerated procedure, it would not be possible to take into consideration the asylum seeker's family relations, which are however reinforced in the proposal.[42]

In contrast to the adoption of new, general and strong measures unlikely to be fulfilled, a preferable way of reforming Dublin III Regulation would be to advocate for the enhancement of compliance with the existing overall mechanism on reception conditions. Whatever one's opinion of the Dublin III Regulation is, it is a fact that this instrument is the most human rights centered version in the 'Dublin history'. The consequences of irregular secondary movements for applicants, such as the mandatory use of the accelerated procedure or the withdrawal of reception conditions, risk violating fundamental rights and imposes massive involuntary transfers which could never be executed.

The focus on implementing and enforcing harmonized reception conditions would be more realistic than reforming Dublin III Regulation. The core problem of Dublin III is the national differences among Member States on the one hand, and the State interest-oriented approach on the other. A stronger European Union Asylum Agency, with resources for coordinating and gathering information from the Member States, seems to be a more realistic approach than the one resting on States decisions in the application of Dublin. The reality of the situation merits consideration.

[42] ECRE, *Comments on the Commission Proposal...*, *supra* n 27 at 3.

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Humanitarian Visas and Discretionary Choices in the EU: Policies on Visas and on International Protection

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Abstract: In its current form, the European area of Freedom, Security and Justice lacks safe entry channels for asylum seekers facing persecution or serious inhuman or degrading treatments in their countries of origin. Leaving aside the experiences of organizing a limited number of admissions based on resettlement, the EU and its member states have instead developed normative, operational and physical obstacles in order to prevent the entry and the admission of foreigners into their territories. This paper examines the extent to which in this context it would be possible to consider that member states have a legal duty to issue humanitarian visas to asylum seekers presenting themselves before their consulates or embassies in transit countries and applying to obtain a visa. This will be assessed taking into account how the Court of Justice has interpreted the margin of discretion of the states in other areas of international protection policy.

Keywords: Humanitarian Visas Margin of discretion Asylum seekers Entry into the EU.

(A) INTRODUCTION

Since the entry into force of the Treaty of Amsterdam and the initial steps of the Tampere Programme, the security component of the European area of Freedom, Security and Justice has been developed as regards migrants and controls at the external borders in order to prevent the entry of unexpected influxes of foreigners. Some provisions have been introduced in immigration policy in order to facilitate the entry or the residence of third country nationals, and mainly to satisfy European economic interests; and the policy on international protection contains norms that attempt to coordinate and harmonize the asylum policy of states as regards refugees and asylum seekers present in the area of freedom of movement. Leaving aside the recent and limited experiences concerning resettlement, the EU and its member states have not developed operational or normative tools for creating safe entry channels for asylum seekers and refugees forced to flee from their countries of origin, where they face persecution or serious threats of suffering from inhuman or degrading treatments. They have instead developed a number of obstacles of a legal (codes on borders controls; on visas, etc.), operational (Frontex), and physical (walls and fences at the most vulnerable borders) nature to prevent the spontaneous entry of foreigners, which act as impediments to asylum seekers and refugees attaining a safe place in Europe in order to apply for international

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protection.[1] Over the last 20 years, the EU has built up an intangible fortress, with many hurdles to be overcome by foreigners wishing to migrate to Europe, in order to make it impenetrable for the asylum seekers who risk their lives every day trying to cross the Mediterranean.[2]

This paper is aimed at analyzing the extent to which in this context it would it be possible to consider that member states have a legal duty to issue humanitarian visas to asylum seekers presenting themselves at their consulates or embassies in transit countries and applying for a visa in circumstances where returning to their country of origin is impossible. The margin of discretion of states in this area will be assessed, taking into account how the Court of Justice has interpreted the margin of discretion of the states in other areas of the international protection policy, such as the clauses that allow member states to take charge of applicants for international protection on humanitarian or other grounds in the Dublin system (humanitarian and sovereignty clauses). We will endeavour to answer the following question: if a common norm on humanitarian visas is adopted at the EU level (as a revision of the *Schengen Visa Code* or as a separate norm), what will the margin of discretion of member states be in applying EU law?

(1) Some data

According to the information available at the *Missing Migrants Project*, hosted by the International Organization on Migrations, the Mediterranean is the region in the world where most immigrants die trying to reach a safe European country:[3] Around 20,000 deaths have been recorded since 2014. The majority of refugees and people in search of protection arrive in the EU illegally or through illegal channels. In a number of countries, including Spain, consulates and embassies receive a small proportion of people in need of protection that apply to the Spanish authorities for a safe transfer to Spanish territory in order to formally present an international protection application.[4] It does not matter if they ask for a humanitarian visa or to obtain asylum, because the operational procedure will usually be the same in case

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1 Elspeth Guild, 'The Border abroad-Visas and Border Controls', in Kees Groenendijk, Elspeth Guild, Paul Minderhoud (eds.), *In Search of Europe's Borders* (Kluwer, The Haghe, 2002) 87-104; and Elspeth Guild, *Interrogating Europe's Borders: Reflections from an Academic Career*, Farewell speech delivered on Friday 6 September 2019 (Radboud University, Nijmegen).

2 Jef Huysmans, 'The European Union and the Securitization of Migration', 38 *Journal of Common Market Studies* (2000-5) 751-777, at 753. *Vide* also Lorenzo Gabrielli, 'Securitization of migration and Human rights: Frictions at the Southern EU Borders and Beyond', 16-2, *Urban People*, 2014, pp. 311-322; and Nuria Arenas Hidalgo, 'Flujos masivos de población y Seguridad. La crisis de personas en el Mediterráneo', 36 *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades* (2016) 339-372, at 352.

3 OIM: Missing Migrants. Tracking deaths along migratory routes.

4 Between 2012 and 2016, 1.334 individuals applied for asylum at consulates in Spain, according to the Ministerio del Interior, Oficina de Asilo y Refugio (OAR), *Asilo en cifras 2016*, table 7. The statistical report published by the Ministry of Interior in September 2019, with data for 2017 (371 applications in embassies) and 2018 (371 applications in embassies), reported that applications in embassies were for family extensions of the international protection of a family member: OAR, *Asilo en cifras 2018*, tables 5-6. Out of a total of 371 applications submitted in embassies in 2018, 169 were presented in Syria, and 39 in Somalia. Taking into account that according to the former Asylum Law in force until 2009, embassies and consulates were considered *suitable places* for presenting an application for international protection, and that the Asylum Law currently in force does not prohibit reception of these applications, it is possible to guess that even if most are based on family reunification, a number could be applications for international protection of refugees or people in need of protection. More information available here.

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of success, and consist of transferring these people to the territory of the state where they will be able to begin a procedure that is able to determine their status. This procedure is nowadays completely managed by internal agents which apply domestic non-harmonised rules, leaving considerable margin of discretion to the authorities of the states.

(2) Starting point

The main starting point of this paper is that EU Law and policies on Borders and Visas do not address expressly the situation of refugees. Some safeguard clauses are included in the main norms, but they do not mean that safe entry channels for asylum seekers and refugees are foreseen. The EU law on asylum and international protection has not yet seriously addressed the two main gaps in the international regime on asylum, which are access to protection and instruments of solidarity among the members of the International Community. The European countries are therefore bound by the principle of *non-refoulement*, which prevents them from sending back anyone who is risking persecution or serious threats to their life or human rights. The key issue is the scope of application of *non-refoulement* and determination of the situations in which asylum seekers and refugees are under the jurisdiction of a state bound by this principle. Article 3 of the Schengen borders code states that:

> 'This Regulation shall apply to any person crossing the internal or external borders of Member states, without prejudice to: (a) the rights of persons enjoying the right of free movement under Union law; (b) the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*'[5]

Article 14, paragraph 1, of the same regulation establishes that:

> 'A third-country national who does not fulfill all the entry conditions laid down in article 6(1) and does not belong to the categories of persons referred to in article 6(5) shall be refused entry to the territories of the Member states. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas'.[6]

These precautionary provisions do not encompass a right of entry for refugees or asylum seekers. Articles 3, paragraph 3.b), and 14, paragraph 1, of the Schengen Borders Code (SBC) only clarify that any possible right of asylum seekers or refugees to entry or admission into a EU country would prevail over the SBC provisions. To date, any International Law provision establishes a right to entry into a country for individuals who do not possess the nationality of that country, even if they are refugees and asylum seekers, and even if they arrive directly from their country of origin. Nevertheless, the *non-refoulement* principle has been interpreted to mean that it encompasses a preventive protection, involving refugees or people in need of protection benefiting from a right of entry if a refusal would directly and unavoidably lead them to

5 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ 23.3.2016 L 77/1–52.

6 Ibid.

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treatments contrary to their human rights.[7] This logical interpretation has not been translated into formal express rules, and leaves room for states to interpret the threshold of the serious risk of violations of human rights in cases where no decision to grant entry is made.

(B) HUMANITARIAN VISAS... IN EU LAW?

A humanitarian visa is usually considered a safe entry channel to safe countries. As a *visa*, it can be considered an instrument that facilitates entry into the country whose authorities have issued it; as it has been issued for *humanitarian* reasons, it is also a tool that acts as a waiver on compliance with the other requirements to entry in a EU country stipulated in the Schengen Borders Code (sufficient resources; object and purpose of the stay, etc.). Neither ordinary visas nor humanitarian visas certify a right of entry. Nevertheless, for refugees who have been able to flee from and leave their country of origin, humanitarian visas act as a permit of entry because of the application of the principle of *non-refoulement* and of the Geneva Convention on the Status of Refugees (which establishes a declaratory procedure). Humanitarian visas can also be used in cases of people that have not left their country of origin (and cannot be considered refugees) for medical or other reasons.

(1) Schengen Visa Code

Looking at the Schengen Visa Code (SVC), it is possible to consider that humanitarian visas are already provided for in EU Law. Article 25 of the Code contains provisions on visas with Limited Territorial Validity (LTV) issued by states, which are valid as a document for entering and staying in their territory while excluding the rest of the Schengen area. The wording of the relevant paragraphs of the article leaves the issue open to question of whether states have a duty to issue a visa of LTV in some cases on 'humanitarian grounds':

> '1. A visa with limited territorial validity shall be issued exceptionally, in the following cases:
>
> (a) when the member state concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations,
>
> (i) to derogate from the principle that the entry conditions laid down in article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled(...)'.[8]

(2) Humanitarian Visas for refugees as beyond EU Law

The Court of Justice of the European Union (CJEU) has stated that despite the wording of article 25 of the SVC, the issue of humanitarian visas by states is not an act of application of EU Law if the applicants

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[7] On this preventive aspect of the principle of *non-refoulement*, see Fernando Mariño Menéndez, 'El concepto de refugiado en un contexto de Derecho internacional general', XXXV-2 *REDI* (1983), 337-369, at 364. See also Jean-Yves Carlier, 'Droit d'asile et des Réfugiés: De la protection aux droits', 332 *Rec. des C.* (2007) 321.

[8] Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ 15.9.2009 L 243/1-58.

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are refugees (they have been able to leave their country of origin and apply for a humanitarian visa in an embassy in a country of transit); or people in need of protection if they are covered by the personal scope of application of the Common European Asylum System (CEAS). The two main arguments of the Court are: Firstly, that as the aim of the applicants is to present an application for international protection in the territory of the EU country, they are in fact applying for asylum and not to obtain a short-term Schengen Visa. Because they are applying for asylum, they are seeking to remain in the EU for a longer period of time. Second, the Court argues that the CEAS has a sphere of spatial application which only covers the territory of the member states, and has no extraterritorial application.[9]

This reasoning of the Court is consistent with (a) the underlying aim of the Area of Freedom, Security and Justice (AFS&J), i.e. to prevent third country nationals from entering and circulating in the Schengen area, except in cases where a right of entry is expressly provided; and (b) the strategies for contention of influxes and the *non-entry* principle, which is in tension with the right to leave, enshrined in the international legal standards. The Court of Justice has preferred to apply an interpretation that takes into account the final intention of applicants for a humanitarian visa, which is to obtain protection at the end of an asylum procedure. Nevertheless, this approach is hardly consistent with the wording of article 25 of the SVC, and clearly diminishes the *effet utile* of this article.

According to the Advocate General of the case, M. Paolo Mengozzi, the margin of discretion for member states was inherent in the interpretation of the term 'international obligations' in article 25 of the Code, and in which specific factual circumstances were able to trigger responsibility as regards these international 'obligations'.[10] It was possible to guess that these obligations would at least cover the *non-refoulement* principle.

The alternative taken by the Court was in contrast with previous judgements, which concluded that the application of articles of a regulation containing discretionary clauses had to be considered as an 'application of EU Law'.[11] To apply EU Law or otherwise has consequences when member states have to decide whether to issue a humanitarian visa. If states are not applying EU Law, they are not bound by the Charter of Fundamental Rights of the EU and their margin of discretion is not framed by EU standards on Human rights, values and principles. In that respect, it is important to assess how the CJEU has framed the areas of discretion of member states in Visa Policy and in the CEAS.

(C) MARGIN OF DISCRETION OF STATES IN ASYLUM AND VISA POLICIES

If the interpretative option of the Court was that article 25 of the SVC was applicable as EU Law to refugees applying for a humanitarian visas, there would be two resulting possibilities: first, the provision on the SVC could have been interpreted as encompassing an obligation of Member states to issue a humanitarian visa in order to fulfil international obligations, such as *non-refoulement* in any cases of *prima*

9 Judgment of 7 March 2017 (CJEU, GC), *X. and X. versus Belgium*, C-638/16 PPU, ECLI:EU:C:2017:173.

10 Conclusions of AG Paolo Mengozzi of 7 February 2017, *X. and X. versus Belgium*, C-638/16 PPU, ECLI:EU:C:2017:93.

11 Judgment of 21 December 2011 (CJEU, GC), *N.S. and M.E.*, C-411/10 and C-493/10, ECLI:EU:C:2011:865, paragraph 68.

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facie refugees or people in need of protection. Second, it would have been possible to consider that a margin of discretion existed when assessing the specific situations that trigger the international obligations of states. The framework for assessing the margin of discretion of states is the Charter of Fundamental Rights of the EU when they are applying EU Law.[12] According to its provisions, if the grounds for asking for international protection (persecution or HR violations) is one of the rights enshrined in the ECHR (to be free from torture, inhuman or degrading treatment, etc.) the scope of the protection should be extraterritorial, according to the scope of the European Convention of Human Rights (ECHR), i.e. depending on the exercise of jurisdiction (territorial or extraterritorial -based on an *effective control*).

If the states have a margin of discretion when applying EU Law, the framework for this discretion is the European standards of protection of Human rights. In addition, the Court of Justice will exercise centralised control based on the Charter. If they do not apply EU Law, the framework of discretion is the same, but the Charter will not be a parameter of control, and nor would the Court of Justice have competences to exercise control over the accuracy of the decisions taken by states.

(1) Margin of discretion of states when they apply EU Law

(a) *Margin of discretion of states in the Visa policy*

The Court of Justice of the EU interpreted the grounds for denying a visa in a restrictive manner in the ***Kouskaki*** case. It considered that although states have a 'wide discretion' in examining the facts and interpreting these grounds, the only grounds for denying a visa were stipulated in the EU norm in a *numerus clausus* list. This was favorable for legal certainty, the protection of individuals and their legitimate expectations as regards EU Regulation.[13]

(b) *Margin of discretion of states in the CEAS*

In general, when there is a margin of discretion in the CEAS, the interpretation of the limits of this discretion by the CJEU has been favourable to the rights of asylum seekers, usually because these limits are provided by the standards of the protection of human rights. Three kinds of situations have been addressed by the CJEU: (i) cases presenting a risk of a violation of the right to be free from suffering torture or inhuman treatments; (ii) cases presenting a risk of violation of other rights of vulnerable people; and (iii) cases where no discretion was present in the decision process.

In the cases of *N.S and M.E.* (2011) and *C.K.* (2017) [i], the CJEU considered that the *sovereignty clause* had to be interpreted in line with the European standards for the protection of human rights, and that a Dublin transfer to EU countries should be avoided if a real risk of asylum seekers being submitted to

[12] Article 52 paragraph 3 of the Charter states that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human rights and Fundamental Freedoms, *the meaning and scope* of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection' (italics added for emphasis).

[13] Judgment of 19 December 2013 (CJEU, GC), ***Rahmanian Koushkaki*** C-84/12, ECLI:EU:C:2013:862, paragraphs 58-60

 DOI: 10.17103/sybil.23.17

inhuman or degrading treatments in the destination country, according to article 4 of the Charter of Fundamental Rights of the EU.[14] More recently, in the cases of *Jawo* and *Ibrahim* (2019) the CJEU has extended this exception to transfer based on a real risk of inhuman treatment to applicants who have in fact already been granted international protection in a member state.[15]

In the cases of *K.* (2012) and *M.A.* (2013) [ii], the CJEU addressed the margin of discretion of states in cases where other rights of vulnerable persons were at risk. First, in a case of dependency, the Court ruled that the *humanitarian clause* should be interpreted in line with the right to the family unit. According to the Court, the sentence 'Member states shall normally keep or bring together (...)' in article 17 of the *Dublin II* Regulation[16] meant that they had the obligation to keep or bring together dependent members of the family, and avoid transferring them in accordance with the other criteria of responsibility, except in cases where exceptional situations arose. Second, in *M.A.* the Court decided that the special vulnerability of children meant that they should not be transferred if they were physically present in a country where they had presented an application for asylum.[17]

The third kind of situations that the Court of Justice has had to address is whether a risk of violation of Human rights entails an exception to the application of the criteria of the norm, in cases where the norm does not include a margin of discretion. In the *Jafari* case (2017), the Court decided that states did not have any margin of discretion in their responsibility to control their borders, even in large scale influxes, and that the standards of protection of human rights could not be used to frame or to modulate application of the rules.[18]

(c) *Proposals for reducing the margin of discretion of states in the CEAS*

Since its beginnings, the EU policy on asylum has aimed to prevent the secondary movement of asylum seekers and of refugees across the internal borders in the Schengen area, in order to keep security risks under control. As the existence of different levels of protection in the Member states is the source of secondary movements, the reduction of the margin of discretion of states is considered necessary to

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[14] Judgment of 21 December 2011 (CJEU, GS), *N.S. and M.E.*, C-411/10 and C-493/10, ECLI:EU:C:2011:865; judgment of 16 February 2017, *C. K., H. F., A. S. and Republika Slovenija*, C-578/16 PPU, ECLI:EU:C:2017:127.

[15] Judgment of 19 March 2019, (CJEU) *Abubacar Jawo*, C-163/17, ECLI:EU:C:2019:218; judgment of 19 March 2019 (CJEU), *Bashar Ibrahim and others*, C-297/17; C-318/17; C-319/17 and C-438/17, ECLI:EU:C:2019:219. About the application of the article 4 of the Charter, the existence of the risk because of the transfer, or later, during the procedure in the responsible member state, or after the outcome of the procedure due to the level of protection, is not relevant.

[16] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member states by a third-country national, OJ 25.2.2003 L 50/1-10.

[17] Judgment of 6 November 2012 (CJEU), *K v Bundesasylamt*, C-245/11, ECLI:EU:C:2012:685; judgment of 6 June 2013 (CJUE), *M.A. and others*, C-648/11, ECLI:EU:C:2013367. On these issues, see Sílvia Morgades-Gil, "The discretion of States in the European Dublin *III* system for determining responsibility for examining applications for asylum: What remains of the sovereignty and humanitarian clauses after the interpretations of the European Court of Human Rights and the Court of Justice of the European Union?", 27-3 *International Journal of Refugee Law* (2015) 433-456.

[18] Judgment of 26 July 2017 (CJEU), *Khadija Jafari, Zaineb Jafari y Bundesamt für Fremdenwesen und Asyl*, C-646/16, ECLI:EU:C:2017:586.

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reduce differences between states and incentives for people in need of protection to move.[19] The Commission has proposed reducing the margin of discretion of states with this in mind, in a number of provisions in the Dublin Regulation: first, the sovereignty clause will no longer be based on *sovereignty* or discretionary will, but instead on extended-family grounds, and may only be used before the determination of the responsible member state;[20] second, the humanitarian clause is reduced in the sense that it does not expressly cover cultural considerations, and may only be used before the determination of the responsible member state;[21] and, third, Member states will be obliged to apply a *pre*-Dublin procedure, according to which they will have to consider an international application inadmissible if there is a first asylum country or a safe third country for the applicant, and examine asylum applications in an accelerated procedure if the applicant has the nationality of a safe country of origin, or is a threat to national security or public order.[22]

(2) Margin of discretion when states do not apply EU Law, but domestic norms

When states are not applying EU Law, the framework in which their margin of discretion is exercised is International Law. Article 33 of the Geneva Convention on the status of refugees (1951) prohibits *refoulement in any manner whatsoever* (*en modo alguno, de quelque manière que ce soit*). Any connecting factor (factual situation; extraterritorial exercise of authority; *effective control*...) between the refugee and the state should be sufficient to trigger the obligation to not return the individual who is attempting to enter to the territory or to enter a member of the Convention.[23] Where applicable, the *non-refoulement* principle entails a provisory protection before the non-admission or the removal in a *de facto* situation of presence under the authority of a state party in the Convention.

If the *non-refoulement* principle is interpreted in connection with the protection of the right to be free from torture or inhuman or degrading treatments enshrined in the European Convention of Human Rights (article 3), its scope of application will cover extraterritorial activities of agents of the states that involve an *effective control*.[24] In a pending case, the Grand Chamber of the European Court of Human Rights will have to decide if this doctrine on the extraterritorial application of the Convention is applicable to applications for humanitarian visas in consulates or embassies abroad.[25] Meanwhile, some internal courts have resolved similar cases in favor of the obligation of states to issue a humanitarian visa with LTV

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19 Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member states by a third-country national or a stateless person (recast), COM/2016/0270 final, p. 12.

20 Ibid., p.53 (Article 19.1 in the proposal).

21 Ibid., p.54 (Article 19.2 in the proposal).

22 Ibid., p.43 (Article 33 in the proposal).

23 James Crawford, Patricia Hyndman, 'Three Heresies in the Application of the Refugee Convention', 1-2 *IJRL*, (1989) 176-177.

24 Although this has been developed over the years, the *Hirsi Jamaa* judgement is a leading case on this doctrine: Judgment of 23 February 2012, *Hirsi Jamaa versus Italy*, ECHR (2012), nº 27765/09, ECLI:CE:ECHR:2012:0223JUD002776509.

25 *M. N. and others v. Belgium*, pending judgment ECHR-GC, nº 3599/18.

 DOI: 10.17103/sybil.23.17

in cases where *non-refoulement* is at stake.[26] This situation highlights the inconsistency of the EU's policies: 'The EU cannot wish to achieve common border control and a common asylum policy on the one hand, while giving to Member states such a wide margin of appreciation that they are dispensed from the duty to give reasons to their decisions to reject a humanitarian visa application, on the other hand'.[27]

(D) PROPOSALS FOR A NEW APPROACH TO VISA POLICY: SCHENGEN VISAS AND HUMANITARIAN VISAS

The EU has finally adopted a double approach as regards visa policy: first, the reform of the Schengen Visa Code; and second, the possibility of creating a European Humanitarian Visa. The reform of the Schengen Visa Code was envisaged by the European Commission in 2014 [COM(2014)164 final] taking into account the evaluation of the implementation of the Code that entered into force in April 2010 'with the aim of enhancing travel to the EU through visa policy facilitations (thereby to contributing to tourism, trade, growth and employment in the EU) and to harmonising implementation of the common rules'.[28] The negotiations did not progress due to the differences in the positions of the European Parliament and the Council, and finally, also taking into account the new migratory and security challenges, the Commission decided to withdraw its proposal and to replace it with a new proposal that finally led to the approval of Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019, amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code).[29]

The European Parliament tried to include some provisions in this revision process of the Code to facilitate safe legal entry channels to the EU Member states for asylum seekers and individuals in need of protection. However, both the Commission and the Council rejected the amendments of the European Parliament to that end because they considered that they went beyond the scope of 'short stay visas' in the regulation. The European Parliament has therefore decided to take a second approach with a Resolution

[26] Decision of 21 February 2019, Tribunale ordinario di Roma. In this case, the judge ordered the Italian Ministry of Foreign Affairs and International Cooperation to issue a visa on humanitarian grounds according to article 25 of Regulation (EC) No. 810/2009 (Visa Code). This was not a case of *non-refoulement*, but a case where the 'humanitarian grounds' were based on the special vulnerability of an injured child injured whose mother was legally resident in Italy.

[27] Jean-Yves Carlier '[The X. and X. case: Humanitarian visas and the genuine enjoyment of the substance of the rights, towards a middle way?]', *EU Immigration and Asylum Law and Policy*, 27 February 2017.

[28] COM(2018) 252 final, Section 1.

[29] OJ 12.7.2019, L 188/25-54. The reform includes harmonised rules on multiple entry visas; the extension of the maximum period for submitting an application prior to travel to six months; the possibility of issuing single entry visas directly at the EU external borders under certain conditions; new visa fees; the possibility of lodging an application at the consulate of the Member State (MS) of the intended visit; the consulate of the MS of first entry; or any MS consulate present in the country; and a new link between visa policy and a readmission and return policy that puts pressure on third countries that do not cooperate in the readmission of third country nationals illegally staying in the EU. This will lead to discrimination on nationality for individuals that is hardly compatible with International law. On this subject, see: Elspeth GUILD, '[Amending the Visa Code: Collective Punishment of Visa Nationals?]', *EU Immigration and Asylum Law and Policy*, 10 May 2019. On the discriminatory effect of the policy on visas, in general, see Maarten den Heijer, 'Visas and Non-discrimination', 20 *EJML* (2018) 470-489.

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adopted in 11 December 2018 on a Proposal to the Commission for the adoption of a separate legal act for a 'Regulation establishing a European Humanitarian Visa'.[30]

According to this European Parliament resolution, Member states could issue European Humanitarian Visas (EHV) in embassies or consulates for the sole purpose of making an application for International Protection in the territory of the Member states issuing the visa ('the decision should remain the sole competence of MS').[31] According to the European Parliament, the EHV will neither entail a European obligation for states, nor a subjective right for refugees or asylum seekers. Like other kinds of visas, the EHV would enable individuals to enter the territory of the member state issuing the Visa for the sole purpose of making an application for International Protection in that member state. The EHV would be intended to complement existing national entry procedures as resettlement or spontaneous applications under International refugee law. The personal scope of the measure would include third country nationals:

(a) who must be in possession of a visa when crossing the external borders (with the exclusion of family members if they have otherwise a right to family reunification in a *timely* manner);
(b) whose claims of exposure to risk of persecution are manifestly well founded (the assessment is a *prima facie* basis, without a full status determination procedures: 'the assessment is an assessment of the visa application and not an external processing of an asylum application'[32]);
(c) who are not already involved in a resettlement process; and
(d) who pass a security screening in the relevant national and EU databases.

(E) FINAL THOUGHTS

Refugees and other people in need of protection do not have an expressly recognised right to enter the EU. Under International Law, this right can be considered as implicit and deriving from the combination of the *right to leave* (enshrined in the Universal Declaration on Human rights or in the Covenant on Civil and Political Rights); *non-refoulement;* and the extraterritorial application of the Human rights in case of *effective control* (at least in the European legal framework). Notwithstanding that right, member states would still have some discretion in assessing whether factual circumstances activate their international obligations.

With the Resolution approved in December 2018, the European Parliament has shown its commitment to refugees' rights and has addressed human security concerns. The issuing of European Humanitarian Visas would reduce the states' margin of discretion after the judgment of the CJEU in the

[30] European Parliament Resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)). P8_TA-PROV(2018)0494.

[31] Ibid., paragraph 3.

[32] Report with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), Rapporteur Juan Fernando López Aguilar, A8-0000/2018, 4 December 2018, p. 13/16.

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M&V case.[33] Nevertheless: (a) the EHV may possibly favour an 'efficient management of migration flows' (article 79 TFEU) at the expense of devaluating the rights of asylum seekers to a fair procedure with sufficient guarantees (the EHV will be issued after a preliminary assessment of the claim of International Protection); (b) the EHV will foster the externalisation of the border control; (c) the EHV will risk leading to an implicit 'criminalisation' of spontaneous arrivals as in other non-European countries; and (d) as a special kind of visa with limited territorial validity regulated outside the Schengen Visa Code, the EHV will undermine the consistency of the EU visa policy.

There are grounds for considering whether a separate legal act to expressly and formally introduce European Humanitarian Visas is a realistic option. From the outset, it appears that if a new regulation establishing the EHV is finally adopted, the coherence of the EU Visa policy will be undermined with a short visa regulated outside the so-called Schengen Visa *Code*.[34] Finally, the establishment of the EHV without a relocation mechanism risks driving the system towards failure, because for people in need of protection, it will always be easier to accede to the embassies or consulates of some states rather than others due to reasons on the ground.[35]

[33] It shows quite a timid approach to the major problem of access to international protection in the EU. To assess the three different possible approaches in the EU Law framework, see Violeta Moreno-Lax 'Annex I. The Added Value of EU Legislation on Humanitarian Visas- Legal Aspects' in the Study of the European Parliamentary Research Service *Humanitarian Visas. European Added Value Assessment accompanying the European Parliament's legislative own-initiative report* (Rapporteur: Juan Fernando López Aguilar), 2018, PE 621.823, 23-124.

[34] It would be intended to facilitate admission into a Member state to formalise an asylum application; only this latter application will provide grounds for the legal stay in the EU for more than three months.

[35] The Report makes a confession on this issue, when the rapporteur decides not to propose a relocation mechanism 'to avoid the system becoming overly complicated'. Report with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), A8-0000/2018, 4 December 2018, p. 13/16.

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Transforming the European Asylum Support Office into the European Union Agency for Asylum

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Abstract: From May to July 2016, the European Commission put forward a wide-ranging European Asylum package, which included the establishment of a European Union Agency for Asylum with the aim of ensuring that Member States get more operational assistance in processing asylum applications. This article analyzes the key operational novelties that the proposed transformation of the European Asylum Support Office into the European Union Agency for Asylum will bring.

Keywords: European Asylum Support Office, EASO, European Union Agency for Asylum, EU agencies.

(A) INTRODUCTION

In 2009, the European Commission proposed the creation of the European Asylum Support Office (EASO)[1] and in May 2010 Regulation No 439/2010, establishing EASO, was introduced. In June 2011, the Office was officially inaugurated in Malta, where its seat is located,[2] with the mission of strengthening mutual trust and the operational cooperation between the competent national asylum authorities in order to 'increase convergence and ensure ongoing quality of Member States' decision-making procedures'.[3] That is, EASO was designed to assist the Member States in coherently applying the existing asylum acquis and guaranteeing the effective implementation of all the legislative and operational measures. However, the agency was not delegated 'direct or indirect powers in relation to the taking of decisions (...) on individual applications for international protection'.[4] The relationship between the Member States and EASO is one of mutual dependency. EASO's operational assistance may enhance the capacity of the Member States to effectively implement the European asylum framework, provided that they contribute sufficient human and material resources that allow the agency to fully develop its operational goals and

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1 Proposal for a Regulation of the European Parliament and of the Council establishing a European Asylum Support Office, COM (2009) 66 final, 18.02.2009.

2 Seat Agreement Between the Government of Malta and the European Asylum Support Office, 24.05.2011.

3 Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L-132, recital 5.

4 *Ibid.*, recital 14.

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conduct its activities. The actual impact of EASO thus depends on 'the Member States' willingness to use the possibilities it offers and, on their commitment, to engage in such collaboration'.[5]

Due to the unprecedented wave of asylum applications since 2015 as a consequence of the so-called 'refugee crisis', the national asylum and reception systems were overburdened, increasingly requesting the assistance of EASO on the ground.[6] From May to July 2016, the European Commission put forward a wide-ranging European asylum package, which included the establishment of a European Union Agency for Asylum (EUAA).[7] Subsequently, President Juncker announced in his speech on the 2018 State of the Union made on 12 September, the Commission's intention to 'further develop the European Asylum Agency to make sure that Member States get more European support in processing asylum seekers in line with the Geneva Convention'.[8] On the same day, the Commission, welcoming the agreement concluded by the legislators, released an amended proposal containing only targeted amendments reinforcing the operational tasks of the EUAA.[9]

While the Council and the European Parliament reached a partial agreement on 28 June 2017 on twelve chapters of the Regulation on the future EUAA with the exception of Chapter 1 ('The European Union Agency for Asylum'), Chapter 3 ('Country information and guidance'), Chapter 5 ('Monitoring'), and Chapter 9 ('Organization of the Agency'),[10] 'an overall agreement will only be possible once the linkages with the other legislative proposals in the Common European Asylum System (CEAS) package have been resolved'.[11] The final adoption of the new EUAA Regulation will not take place until the whole asylum package is finalized.

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5 Commission, 'Enhanced intra-EU solidarity in the field of asylum: An EU agenda for better responsibility-sharing and more mutual trust', COM (2011) 835 final, 02.12.2011, 3.

6 Commission, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe', COM(2016) 197 final, 06.04.2016, 12. See, E. Guild, et. al., 'Rethinking asylum distribution in the EU: Shall we start with the facts?', *CEPS Commentary*, 17.06.2016, 1-9.

7 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010', COM (2016) 271 final, 04.05.2016.

8 Commission, 'State of the Union 2018 the Hour of European Sovereignty', 12.09.2018.

9 Amended proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM (2018) 633 final, 12.09.2018.

10 Council, 'Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 – State of play and guidance for further work', doc. 10555/17, 27.06.2017. Public access was requested to the Council to the note of 4 December 2017 from the Presidency to the Permanent on the European Union Agency for Asylum (doc. 14985/17) but such access was denied since 'the note gives details of the on-going discussion and identifies sensitive issues that need to be addressed before the Council can reach an agreement. Release to the public of the information contained in this document would affect the negotiating process and diminish the chances of the Council reaching an agreement as it may put delegations under additional pressure of stakeholders'. In this regard see, Appendix A: 'public access to documents'.

11 Council Press Release, 'EU Agency for Asylum: Presidency and European Parliament reach a broad political agreement', 431/17, 29.06.2017. See, Council, 'Reform of the Common European Asylum System and Resettlement', doc. 15057/1/17, 06.12.2017, 6. For instance, the cross-references between the future Dublin Regulation and the EUAA are constant. Specifically, article 49 Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016) 270 final, 04.05.2016) states that 'the European Union Agency for Asylum shall set up and facilitate the activities of a network of the competent authorities referred to in Article 47(1), with a view to enhancing practical cooperation and information sharing on all matters related to the application of this Regulation, including the development of practical tools and guidance'.

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Hence, this article analyzes the key operational novelties tabled in both 2016 and 2018 European Commission proposals, and critically assesses what changes they will bring about to EASO's current mandate in comparison with the mandate of the European Border and Coast Guard (EBCG) following Regulation 2016/1624 of 14 September 2016.[12]

(B) THE EUAA'S MONITORING ROLE

While the EUAA is not mandated to set out a comprehensive strategy of asylum, the agency should guide the Member States on the situation in third countries of origin and 'ensure greater convergence and address disparities in the assessment of applications for international protection'.[13] The EUAA will 'develop a common analysis on the situation in specific countries of origin and guidance notes to assist Member States in the assessment of relevant applications' (article 10(1) partial agreement on the EUAA). Importantly, as soon as the EUAA's Management Board endorses the guidance notes, the Member States should take them into account when examining applications for international protection, without prejudice to their competence for deciding on individual applications (article 10 (2a) partial agreement on the EUAA).

The new monitoring role of the EUAA will also indirectly contribute to shape a common strategy of asylum in the European Union (EU). A key difference between EASO and the future EUAA will be its monitoring role in order to guarantee that the national authorities are sufficiently prepared to manage exceptional and sudden pressure in their asylum system. Should the EUAA's information analysis raise serious concerns regarding the functioning or preparedness of a Member State's asylum or reception systems, the agency, on its own initiative or at the request of the European Commission, may initiate a monitoring exercise (article 14(2) partial agreement EUAA).

The Member State concerned will receive the findings of the monitoring exercise and the draft recommendations of the EUAA's Executive Director on the basis of which it should provide for comments. Taking Member State's comments into account, the EUAA's Management Board will, by a decision of two-thirds of its members, adopt those recommendations (article 14(3a) partial agreement EUAA). As with the EBCG's vulnerability assessments (article 13 Regulation 2016/1624), the future EUAA will be conferred a recommendatory power in order to put forward measures to be adopted by the national authorities. Nevertheless, Member States will still maintain indirect control of the EUAA's

[12] Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard, OJ L-251. In this regard see, P. De Bruycker, 'The European Border and Coast Guard: A New Model Built on an Old Logic', *European Papers* 1(2) (2016), 559-569 [doi: 10.15166/2499-8249/53]; D. Fernández-Rojo, 'Reglamento 2016/1624: de FRONTEX a la Guardia Europea de Fronteras y Costas', *Revista General de Derecho Europeo* 41 (2017) 223-251; S. Carrera, et. al., 'A European Border and Coast Guard: What's in a Name?', *CEPS Paper in Liberty and Security in Europe*, 88 (2016) 1-22; J. Santos Vara, 'La transformación de FRONTEX en la Agencia Europea de la Guardia de Fronteras y Costas: ¿hacia una centralización en la gestión de las fronteras?', *Revista de Derecho Comunitario Europeo* 59 (2018) 143-186 [doi: https://doi.org/10.18042/cepc/rdce.59.04].

[13] Commission, Proposal for a on the European Union Agency for Asylum, COM (2016) 271 final, 04.05.2016, 7.

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recommendations through the enhanced majority that is required in the Management Board.[14]

Whereas the Commission did not initially propose that the EUAA's Executive Director should be able to appoint experts from the staff of the agency to be deployed as liaison officers in Member States, the provisional text agreed on 28 June 2017 indicates that liaison officers 'shall foster cooperation and dialogue between the Agency and the Member States' authorities responsible for asylum and immigration and other relevant services' (article 14a(3) partial agreement EUAA). Like the EBCG's liaison officers, they will facilitate the monitoring role of the agency by reporting regularly to the Executive Director on the situation of asylum in the Member States and their capacity to manage their asylum and reception systems effectively (article 14a (3) partial agreement EUAA).

The EUAA will thus be in charge of monitoring 'the operational and technical application of the CEAS in order to prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems' (article 13(1) partial agreement EUAA). With this aim, the agency will namely assess the national procedures for international protection, staff available and reception conditions (i.e. infrastructure, equipment or financial resources) on the basis of the information provided by the Member State concerned and by relevant intergovernmental organizations or bodies, as well as by means of analysis on the situation of asylum and on-site visits that the agency may undertake (article 13 (3) and (4) partial agreement EUAA). This new monitoring task of the EUAA could ultimately contribute to the effective and harmonized implementation of the CEAS by the Member States.[15]

(C) THE EUAA'S EXPANDED OPERATIONAL MANDATE AND COMPETENCE TO INTERVENE

The EUAA will be in charge of organizing and coordinating the appropriate operational support at the request of the Member States or upon the initiative of the agency in cases where the national asylum and reception systems are subject to exceptional pressure. The operational role of the EUAA will specifically consist in: 1) assisting Member States in receiving and registering applications for international protection; 2) facilitating the examination of applications for international protection; 3) advising, assisting or coordinating the set up or the provision of reception facilities by the Member States; 4) forming part of the migration management support teams at hotspot areas; 5) supporting Member States in identifying applicants in need of special procedural guarantees, applicants with special reception needs, or other persons in a vulnerable situation, as well as in referring those persons to the competent national authorities

[14] See, L. Tsourdi, 'Monitoring and Steering through FRONTEX and EASO 2.0: The Rise of a New Model of AFSJ agencies?', *EU Immigration and Asylum Law and Policy Blog*, 29.01.2018; A. Ripoll Servent, 'A new form of delegation in EU asylum: Agencies as proxies of strong regulators', *Journal of Common Market Studies* 56(1) (2018) 83-100.

[15] See, UNHCR, 'Comments on the European Commission proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum – COM (2016) 271', December 2016, 13-14 and ECRE, 'Comments on the Commission Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 COM(2016) 271', July 2016, 11-14.

for appropriate assistance; and 6) deploying ASTs and technical equipment (article 16(2) partial agreement EUAA).

Following the lead of the EBCG's Rapid Reaction Pool, an asylum reserve pool of a minimum of 500 persons should be made available by the Member States for their immediate deployment and should assist those national authorities subject to extraordinary migratory pressure (article 19A (6) partial agreement EUAA). As article 25 Regulation 2016/1624 on the EBCG provides, the EUAA's Executive Director may suspend or terminate the deployment of the Asylum Support Teams (AST) if the conditions to carry out the operational and technical measures are no longer fulfilled, the operational plan is not respected, or serious breaches of fundamental rights exist (article 19(5) partial agreement EUAA).

Since the future EUAA will deploy experts from its own staff to form part of the AST, with the goal of reducing the dependence of the agency on the technical equipment of the Member States, the EUAA may also deploy its own equipment to the host Member State insofar as this may complement equipment already made available by the host Member State or other EU agencies (article 23(1) partial agreement EUAA). It remains to be seen whether the future agency will be allocated sufficient resources to purchase, lease, or effectively manage its own equipment.

Moreover, the future Regulation on the EUAA details the functions of the agency in the recently established hotspots.[16] Upon the request of a Member State facing an exceptional and sudden migratory pressure, the EUAA's Executive Director should draw up a comprehensive reinforcement package consisting of various activities coordinated by the relevant Union agencies, and deploy AST as part of migration management support teams (article 21(1) partial agreement EUAA). In 2018, the European Commission proposed to further expand, upon the request of a concerned Member State, the scope for the use of the migration management support teams to any situation and not necessarily limited to circumstances of extraordinary migratory pressure.

Another important novelty that the EUAA will bring is the possibility of making an emergency intervention. According to the European Commission's proposal, the EUAA may make an emergency intervention if the functioning of the CEAS is jeopardized due to: the insufficient action of a Member State in addressing the disproportionate pressure on the asylum and reception systems in such State (article 22(1) partial agreement EUAA), the refusal of the competent national authorities to request or accept assistance from the EUAA (article 22(1) partial agreement EUAA), or the unwillingness of a Member State to comply with the Commission's recommendations to implement an action plan intended to address serious shortcomings identified during a monitoring assessment (article 14(3a) partial agreement EUAA).

[16] See, F. Casolari, 'The EU's hotspot approach to managing the migration crisis: a blind spot for international responsibility?', *The Italian Yearbook of International Law Online* 25(1) (2016) 109-134; D. Fernández-Rojo, 'Los hotspots: expansión de las tareas operativas y cooperación multilateral de las agencias europeas Frontex, Easo y Europol', *Revista de Derecho Comunitario Europeo* 61 (2018) 1013-1056, [DOI: https://doi.org/10.18042/cepc/rdce.61.06]; S. Horii, 'Accountability, Dependency, and EU Agencies: The Hotspot Approach in the Refugee Crisis', *Refugee Survey Quarterly* (2018) 1-27, [DOI: https://doi.org/10.1093/rsq/hdy005].

As was the case with the adoption of the EBCG, some Member States expressed their opposition to indirectly bestowing 'intervention powers' upon the future EUAA.[17]

The procedure set out in article 19(1) Regulation 2016/1624 of the EBCG, regarding situations at the external borders requiring an intervention, will to a more limited extent, be replicated for the EUAA. While the proposal for a Regulation on the EUAA originally stated that the Commission would be the EU institution in charge of adopting a decision by means of an implementing act to support the Member State concerned, the EUAA's provisional text states that the Council shall be the authority responsible for adopting such an implementing act. Three days after the Council adopts its implementing act, the EUAA's Executive Director should draw up an Operational Plan and determine the details of the practical implementation of the Council decision (article 22(2) partial agreement EUAA). Subsequently, the Member State concerned will have three days to reach an agreement with the Executive Director on the Operational Plan and should immediately cooperate with the agency to facilitate the practical execution of the measures put forward (article 22(4) partial agreement EUAA). The future Regulation of the EUAA does not include a similar provision like article 19(10) Regulation 2016/1624, which indicates that if a Member State neither executes the decision adopted by the Council, nor agrees with the EBCG's Director Operational Plan within 30 days, the European Commission may authorize the re-establishment of border controls in the Schengen area.

(D) THE EUAA'S ROLE IN EXAMINING ASYLUM APPLICATIONS

Another novelty in comparison to the EASO will be the involvement of the EUAA in the examination of international protection applications. Several provisions of the EUAA mention that the agency will assist or facilitate the Member States in examining the applications of international protection submitted to their asylum systems. Alongside the operational and technical assistance that the EUAA should provide to Member States upon their request, the agency will facilitate the examination of applications for international protection (article 16(2)(b) partial agreement EUAA) submitted to the competent national authorities. In this regard, the AST 'should support Member States with operational and technical measures, including (...) by knowledge of the handling and management of asylum cases, as well as by assisting national authorities competent for the examination of applications for international protection and by assisting with relocation or transfer of applicants or beneficiaries of international protection' (recital 16 partial agreement EUAA).

The European Commission's proposal tabled on September 2018 mainly centers on expanding the EUAA's role in the administrative procedure for international protection. Specifically, the new article 16a

[17] Senate of the Parliament of the Czech Republic, 10th Term 515th Resolution of the Senate Delivered on the 27th session held on 24th August 2016 on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010 and Opinion of the Foreign and European Union Affairs Committee of the Senate of the Republic of Poland on the Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum repealing Regulation (EU) No 439/2010 COM(2016)271 adopted at the meeting of 28 September 2016.

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states that the EUAA's AST should, among other measures, identify any needs for special procedural guarantees, carry out the admissibility and substantive interview, assess the evidence, and prepare decisions on applications for international protection. This means that, upon the request of a Member State, the future EUAA will be able to draft decisions on asylum applications. However, the text of the Regulation highlights that the decisions on individual applications for asylum remain the Member States' sole responsibility (article 16a). In addition, recital 46 of the 2018Commission proposal repeats that 'the competence to take decisions by Member States' asylum authorities on individual applications for international protection remains with Member States'. Hence, the Commission, both in 2016 and 2018, clearly establishes that the future EUAA cannot be conferred decision-making powers. The question to be answered is whether the EUAA will be able to jointly process applications for international protection, and if it cannot, to what extent the agency may support the processing of asylum applications.

In 2013, the Commission adopted a study in which the concept of 'joint processing' was defined as 'an arrangement under which all asylum claims within the EU are processed jointly by an EU authority assuming responsibility for both preparation and decision on all cases, as well as subsequent distribution of recognized beneficiaries of international protection and return of those not in need of protection'.[18] This study tabled four options that progressively move from supporting the Member States in processing asylum applications through an agency such as EASO/EUAA, to designing a centralized EU authority with decision-making powers and responsible for all asylum processing.

Currently, the Member States remain exclusively competent to adopt decisions concerning the admissibility and applications for international protection. The next level of European integration would entail the introduction of a mechanism of joint processing in situations where a Member State is subject to an extraordinary number of asylum applications. Joint processing teams of EASO would be deployed and make recommendations on asylum cases to the requesting Member State, which would continue to have exclusive decision-making powers.

The AST of EASO deployed in the Greek hotspots are in practice already adopting recommendations on the admissibility of the international protection applications. The Greek Asylum Service's officials when adopting a decision in fact largely accept these recommendations.[19] Precisely, the future EUAA, upon the request of a concerned Member State, will formally be conferred the power to facilitate the examination of applications for international protection. Actually, the envisaged EEUA Regulation

[18] Commission, 'Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU', 13.02.2013 at 114.

[19] Greece Refugee Rights Initiative, 'EASO's Operation on the Greek Hotspots An overlooked consequence of the EU-Turkey Deal', March 2018; European Center for Constitutional and Human Rights, 'EASO's influence on inadmissibility decisions exceeds the agency's competence and disregards fundamental rights', April 2017; E. Tsourdi, 'Bottom-up salvation?: from practical cooperation towards joint implementation through the European Asylum Support Office', *European Papers* 1 (2016) 997-1031, [doi: 10.15166/2499-8249/115].

provides a legal basis to the practice that the EASO has already developed in Greece as acknowledged by the European Ombudsman in its decision on a complaint about EASO's role in that Member State.[20]

However, the future EUAA will be far from deciding, in first instance and in appeal, every asylum application within the EU. Instead, the European Commission has opted to reinforce the operational tasks of EASO and maintain the Member States as the exclusive decision-making authorities. Centralizing the asylum decision-making process would ensure a full harmonization of the national procedures and foster a consistent evaluation of protection needs. Nevertheless, this option demands a 'major institutional transformation' and 'substantial resources'[21] that can only be envisioned in the long-term.[22]

Moreover, there are doubts as to whether article 78(2) Treaty on the Functioning of the EU (TFEU) is a sufficient legal basis for conferring the power to exclusively adopt binding decisions on all asylum claims to a EU authority. Pursuant article 78(2) TFEU, the EU shall ensure: '(...) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status'. On the one hand, E. Tsourdi believes a EU-level processing scenario, in which decisions would be made entirely by a EU authority instead of the Member States, to be legally impossible under article 78(2)(e) TFEU, 'which envisages that 'a Member State' is ultimately responsible for the examination of an application'.[23] On the other hand, the 2013 Commission's study on the feasibility of joint processing of asylum applications in the EU considered that article 78(2) TFEU, read together with articles 78(1) and 80 TFEU, represent an adequate legal basis and open up the possibility for a completely harmonized, EU-based approach for the joint processing of asylum applications within the EU.[24]

(E) CONCLUSION

In spite of the pretentious character of the new name of EASO, its original core mission remains unchanged. The Member States do not see their enforcement, decision-making, and coercive prerogatives as limited, since this agency's operational powers have only been strengthened and provided with a novel supervisory and monitoring role to ensure the effective functioning of the CEAS. That is, although the European Commission keeps referring to a fully-fledged agency for asylum matters in the EU, the future EUAA will neither be conferred decision-making powers regarding asylum applications, nor executive or enforcement tasks on the ground. The future EUAA will rather be given an assisting role in the examination of applications of international protection by Member States. The EUAA will be far from processing and deciding asylum applications made in the EU. Instead, the future Regulation on the EUAA

[20] European Ombudsman, 'Decision in case 735/2017/MDC on the European Asylum Support Office's' (EASO) involvement in the decision-making process concerning admissibility of applications for international protection submitted in the Greek Hotspots, in particular shortcomings in admissibility interviews', 03.07.2018.

[21] Commission, 'Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe', COM(2016) 197 final, 06.04.2016, 9.

[22] Commission, 'A European Agenda on Migration', COM (2015) 240 final, 13.5.2015.

[23] Tsourdi, *supra* n. 19, at 1012.

[24] Commission, 'Study on the Feasibility and legal and practical implications of establishing a mechanism for the joint processing of asylum applications on the territory of the EU', 13.02.2013, 75.

opts for reinforcing the operational tasks of the agency and maintaining the Member States as the exclusive decision-making authorities.

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Cooperation Between the European Union and Libya about Migration and Asylum: The Eventual Creation of Disembarkation Platforms

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Abstract: During the so-called migration crisis, Libya has become a key partner for the European Union. From the 2015 European Agenda on Migration to the Memorandum of Understanding between Italy and Libya, several declarations and financial instruments have followed one another, focusing mainly on the need to improve Libyan infrastructures that manage migration within their land and maritime borders. However, the failure of relocation and resettlement measures, the growing lack of solidarity among the Member States of the EU and the terrible perception for Europe of the loss of innocent lives at its external borders, renews the approach of possible political solutions that include the creation of enclaves in third states where migrants rescued at sea are disembarked. The aim of our paper is to analyse the June 2018 proposal for the creation of agreements with third states for the disembarkation of rescued migrants in the Mediterranean, and to highlight the legal issues arising from the delocalization of border control in a territory like Libya.

Keywords: Disembarkation arrangements, deterritorialization, European Union and Libya cooperation, extraterritorialization, externalization.

(A) INTRODUCTION

The gradual transfer of migration control policy to third countries during the so-called refugee crisis has been the progressive tendency of the European Union (EU) with the consequence, whether intended or not, of avoiding possible responsibility in matters of asylum law and refugee law. However, this reinforcement of cooperation bonds involves countries with questionable standards of compliance with human rights obligations and refugee law, such as Libya. Indeed, despite the lack of a legally binding partnership framework between the EU and Libya[1], this third country has become a significant partner for the EU. Thus, it has benefited from numerous EU political and financial instruments[2].

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[1] Libya has always remained on the sidelines of formal entry into European initiatives for international cooperation with Mediterranean countries. Hence, there is no conventional partnership framework between the EU and Libya, and Libya has not joined the European Neighbourhood Policy either. Libya only participates as an observer in the so-called 'Barcelona Process' and in most of the Conferences of Ministers of Foreign Affairs and meetings of the Euro-Mediterranean Committee. J. Ferrer Lloret, 'La Unión Europea ante la crisis libia, ¿derecho internacional, democracia y derechos humanos en las relaciones euromediterráneas?' 41 *Revista de Derecho Comunitario Europeo* (2012) 16, at 18.

[2] The main policy instruments include the Commission's Joint Communication , «Migration on the Central Mediterranean route Managing flows, saving lives» of 25 January 2017 and the «Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route» of 3 February 2017. Both documents place particular emphasis on the successive training, equipment and support programmes for the Libyan Border Guard, and the exchange of information on both sides of the Mediterranean. The financial assistance currently being provided by the EU to Libya comes mainly from two instruments: the European Neighbourhood Instrument (ENI) and the Instrument

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The unsuccessful relocation and resettlement measures, the increased lack of solidarity between the Member States and the negative image for Europe caused by the loss of innocent lives at its borders, renews the idea of possible political solutions including the creation of spots in third countries where migrants rescued at sea[3] would be disembarked. These potential solutions are considered as a further example of operational and financial efforts to prevent people from leaving countries of origin and transit and from getting into European territory.

The aim of our work is therefore to analyse the 2018 EU's proposal to create agreements with third countries for the disembarkation in the latter of people rescued in the Mediterranean and then address the main legal issues raised by the outsourcing of border control to a territory like Libya.

(B) THE IMPLEMENTATION OF THIRD-COUNTRY DISEMBARKATION ARRANGEMENTS

The summer of 2018 was a controversial period where countries such as Italy or Malta refused to allow undocumented migrants rescued by NGOs to disembark in their ports. In this context, an informal meeting was held on 24 June 2018[4] among a small group of Heads of Government of the Member States[5], convened by the then President of the European Commission, Jean-Claude Juncker. Following this meeting, the European Commission published on 24 June a follow-up document on the 'legal and practical feasibility of disembarkation options'[6], in where possible scenarios for disembarkation in the territory of a third state were explored.

It is not established in any of the cases whether the EU would work or deploy officers in these third states, as only the United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) would be in charge of ensuring that people in need of international protection could benefit from resettlement programs in the EU. It also recognizes that EU legislation would not need to be amended beyond resettlement commitments, so that the guarantees set out in the

Contributing to Stability and Peace (IcSP). However, the financial instrument specifically developed to tackle the issue of irregular migration and displaced people in Africa is the EU Emergency Trust Fund (EUTF), born on the basis of the European Migration Agenda and launched with the Valletta Summit on immigration in November 2015.

3 Proposals to *relocate* the asylum procedure itself or the procedure for identifying people in need of international protection from those who are not, is not new in any case. In 2003, the British Government already proposed this outsourcing mechanism, which would be carried out through the creation of 'regional protection areas' and 'transit processing centres' in third transit countries close to the countries of origin. Despite the EU-wide rejection at that time, several Ministers from other Member States, such as Germany in 2003, or more recently Denmark and Austria in 2018, have begun to propose similar positions to outsourcing the examination of applications for international protection. However, the difference today is that it is the EU institutions themselves that have relaunched the debate on the extraterritorialization of the asylum procedure.

4 European Commission Information Note: Informal working meeting on migration and asylum issues Brussels, 22 June 2018.

5 Including representatives of the Governments of Spain, Greece, France and Germany, among others. See more information here.

6 European Commission, 'The legal and practical feasibility of disembarkation options'. Follow-up to the informal working meeting, 24.06.2018.

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Requirements[7] and Procedure Directives[8] would not apply, although identification and registration actions are being implemented[9]. A third option was also considered, whereby all irregular immigrants arriving in Europe, whether they are seeking asylum in the EU or not, would be sent directly to the territory of the third State to apply for asylum from there (extraterritorialization of the asylum procedure). However, the European Commission in the same document rejects this option for violating the principle of non-refoulment, EU and international law.

It was the European Council under the Austrian Presidency which, in its conclusions of 28 June 2018[10], invited the Council and the Commission to examine the concept of 'regional disembarkation platforms', to be implemented in 'close cooperation with the relevant third countries, as well as UNHCR and IOM'. In addition to changing the word 'agreements' to 'platforms', it does not delimit the third States with which cooperation to this end would be undertaken, nor under what legal framework. The only expressed idea—which could evoke a possible extraterritorialization of the procedure, not of the asylum's *stricto sensu*, but of the identification of immigrants— is that 'such platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull-factor'.

This European Commission document of 24 July 2018 consists of a compromise, without any legally binding value, to implement, as far as possible, the creation of regional agreements for the disembarkation of people rescued in maritime operations[11]. To this end, two general objectives are established: first, the compliance with international law and the principle of *non-refoulement* in debarkations, which must take place in a safe port; and, secondly, joint responsibility between all the actors involved and in cooperation with the UNHCR and IOM[12] regarding the post-disembarkation process.

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7 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. (*OJ L 337, 20.12.2011*, p. 9–26).

8 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. *(OJ L 180, 29.6.2013*, p. 60–95).

9 S. Marinai, 'Extraterritorial Processing of Asylum Claims: Is it a Viable Option?', 12 *Diritti Umani e Diritto Internazionale* (2018), 3, p. 487. [ISSN: 1971-7105]

10 European Council, conclusions adopted at the European Council meeting Brussels, 28 June 2018. *(EUCO 9/18)*.

11 Note the change back to the concept of 'agreement' and not 'platform', which differs from the previous proposal of the European Council.

12 It was precisely on the day after the European Council Conclusions that IOM and UNHCR published a joint proposal for a 'regional cooperation agreement to ensure predictable disembarkation and subsequent processing of persons rescued at sea'. The fact that this document was made public one day later is significant, as it denotes the interest of both International Organisations to distance themselves from the concept of 'disembarkation platforms', pointed out by the European Council and from the purely externalizing vision (ECRE, 2018: 7). This document goes beyond the simple externalization of the identification and asylum procedure, and refers to the need to establish a 'common approach' among all countries on both sides of the Mediterranean, with the main objective of ' implementing a responsible and predictable disembarkation mechanism, in the EU or in other states, that prioritises human rights and safetyness' of rescued people, in the light of international law, refugee law and the principle of *non-refoulement*. It does not establish a particular solution, nor does it set out mandates or responsibilities for any particular state, but it does specify the main provisions and stages that must be observed in future formalised agreements between the states involved.

 DOI: 10.17103/sybil.23.19

According to the Commission, potential third-country partners should include those States with existing cooperation agreements, taking into account the political, legal and security situation, as well as the extent of respect for human rights. The EU would provide 'political, operational and financial support to establish regional disembarkation agreements in cooperation with third countries, UNHCR and IOM'. Besides, it only expressly states its commitment to cover:

- the costs of disembarkation and the subsequent procedure, especially in the areas of 'equipment, training and other ways to increase the capacities' of the competent authorities for controlling the external borders of third countries,
- financing reception centres so that they can have appropriate conditions that respect human rights standards, and
- support in the identification of vulnerabilities, referrals, case processing, Refugee Status Determination.

No specific actions or responsibilities on behalf of the EU or any of the EU Member States' officials are considered. Therefore, it is assumed that disembarked people are under the responsibility of the third State in which the disembarkation takes place. Consequently, both the reception and identification procedure would be carried out under the third State's law, just with the operational assistance of UNHCR and IOM, and the financial support of the EU. When establishing the necessary steps to be followed for the disembarkation, the Commission points out that, firstly, the place of disembarkation must be predetermined so that, secondly, these rescued people would be brought to the reception facilities as quickly as possible. It can, therefore, be understood that possible disembarkation platforms differ physically from the centre in which migrants are to be registered, identified and assisted[13].

As far as people in need of international protection are concerned, there is no prospect of any extraterritorial asylum application process existing or likely to exist in respect of any EU Member State (competent in any case in matters of asylum law). In this non-paper, the EU pronounces itself most clearly when it comes to avoiding the existence of 'call effects'. In the paragraph dedicated to potential refugees, it is expressly states that:

> 'it should be ensured and clearly communicated that resettlement possibilities will not be available to all disembarked persons in need of international protection. Resettlement should remain only one of the possible solutions for such cases, and not limited to Europe.'

In other words, it can be inferred from this analysis that the EU is committed to continuing strengthening financial cooperation to improve the capacities of African transit States. The main objectives would be the effective control of their external borders and facilitate the possible and legally disembarkation there, instead of providing a legal and humanitarian European response to migration from the territory of third States

[13] Intentionally or not, the current President of the Spanish Government, Pedro Sánchez, in one of his speeches at the Congress, placed special emphasis on the fact that European Union law would be fully applied in these disembarkation centres. RTVE, 'Pedro Sánchez: las plataformas europeas para desembarco de migrantes propuestas por Macron, una respuesta 'solidaria'', 27.06.2018.

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(C) MAIN LEGAL ISSUES ON THE ESTABLISHMENT OF DISEMBARKATION ARRANGEMENTS IN THIRD STATES: THE CASE OF LIBYA

The EU has clearly strengthened its operational and financial cooperation with Libya on migration control outside the EU's external borders. For this reason, it is relevant to consider the International and European legal implications of the potential creation of disembarkation platforms in Libya.

(1) Deterritorialization: externalization and extraterritorialization

Before addressing other issues, the policy of cooperation described must be conceptually clarified. To this end, we may refer to the distinction made by Del Valle Gálvez between three concepts: deterritorialization, externalization, and extraterritorialization[14]. If we bear in mind that the legal connection between the EU Member States and Libya's practice of migration control is blurred depending on the deterrence measure used, establishing a specific legal conceptual framework could provide arguments for determining the possible jurisdiction and responsibility of the EU and its Member States in matters of human and refugee rights.

Given the growing confusion of terms and the variety of designations used to describe the notion of transferring border control functions to the territory of third countries, Del Valle Gálvez considers the concept of deterritorialization to refer to the idea of 'locating outside European territory certain border control functions and migration policies to be carried out by other States or by the State itself'[15]. Within this concept, the author establishes a double distinction: externalization, including those situations in which it is the third state which '... carries out certain border control and migration policy functions [...] as a direct or indirect consequence of agreements with the EU or with EU Member States, or with Programmes and Action Plans agreed with the European Union or its states'[16]; and extraterritorialization, by which agents or public personnel from the EU Member States would be displaced for the exercise of public functions of migratory control, 'in such a way that there would be direct or indirect exercise of state jurisdiction, applying EU Law or the internal law of a Member State' outside their borders[17].

It is therefore necessary to examine the real intention of the EU with regard to the establishment of arrangements or platforms in third countries, since in the event that it constitutes an element of European ownership, or is managed under its authorities, it would be seen as a way of extraterritorializing migration control, which would trigger new concerns regarding the jurisdiction and application of EU human rights obligations.

(2) Lawfulness of possible disembarkation platforms in Libya

14 A. Del Valle Gálvez, 'Refugiados y crisis migratorias: fronteras y desterritorialidad en las puertas de Europa', in S. Ripol Carulla (coord), *Jornadas sobre Derecho, Inmigración y Empresa, Colegio Notarial de Cataluña* (Marcial Pons Ediciones Jurídicas y Sociales, Madrid, 2019), p. 108.

15 *Ibid,* p. 20.

16 *Ibid,* p. 22.

17 *Ibid,* p. 22.

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Most of the legal problems raised by the creation of disembarkation platforms and/or agreements in/with third countries are caused by the lack of accuracy of the European institutions' documents. This is so because the proposal does not recognizthe the true intention of the EU and its Member States as promoters of the initiative: whether to build this type of structures whose ownership belongs to the EU or one of its Member States -*extraterritorialization*-; or, on the other hand, whether only to finance its creation, with ownership remaining in the third State where it is created -*externalization*-. This distinction is essential in order to know who is responsible for guaranteeing the obligations relating to the international protection of those who are rescued and disembarked.

In 2010, for post-disembarkation aspects relating to the extraterritorial procedure for asylum applications, UNHCR drafted a policy guidelines document for the extraterritorial processing of international protection[18], considering how to proceed in situations where the disembarkations were carried out in a State other than the State of the nationality of the vessel's flag. The most relevant to our study are two:

> '(1) Third state processing model: whereby the application for international protection is processed and decided by a State other than the State of the nationality of the vessel. The third State must be a State party of the 1951 Geneva Convention for the Protection of Refugees and must also have a solid national asylum system to ensure the observance of their human rights. In this case, there would be a transfer of responsibility for international protection from the rescuing State to the State of disembarkation.
>
> (2) Out of country model: The State of the vessel, that intercepts migrants, is responsible for the asylum procedure of those who request it, but it is carried out in the territory of a third State (the State where the disembarkation takes place).'

The development of the EU's strategy to create third-country disembarkation arrangements, previously analysed, may suggest some similarities with the models already studied by UNHCR.

(a) *European-owned debarkation platforms and reception centres (extraterritorialization)*

In the case of a legally binding international treaty between the EU or its Member States and a third State[19] for the establishment of disembarkation centres in the latter, this treaty must comply with the provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT)[20]. Therefore, it cannot go against certain norms of human rights protection[21], considered of *ius cogens* (Art. 53 VCLT), nor should it violate the

[18] UN High Commissioner for Refugees (UNHCR), *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010.

[19] This kind of cooperation is possible under the legal framework provided by Art. 78(II)(g) and (d) of the Treaty on the Functioning of the EU.

[20] Vienna Convention on the law of treaties. Concluded at Vienna on 23 May 1969 (U.N.T.S., vol. 1155)

[21] Such as the prohibition of violence (art. 2. IV of the United Nations Charter); prohibition of genocide and crimes against humanity (art. 3 of the Geneva Conventions of 1949); right to life (art. 6 of the International Covenant on Civil and Political Rights - ICCPR); prohibition of racial discrimination (art. 7 and 9 of the ICCPR); and the prohibition of slavery and torture (art. 7 and 8 of the ICCPR),

 DOI: 10.17103/sybil.23.19

principle of *non refoulement*[22] since this 'constitutes an obligation of international customary law, created by the practice of States and crystallized through this Declaration'[23] and the Geneva Convention on Refugee Law'[24].

This case would be similar to the 'out of country model' analysed by UNHCR in 2010, where the EU would be in charge of the reception procedure and asylum applications in the third State. The problem, in this case, would lie in the exercise of asylum sovereignty within these European-owned establishments. This is so because the EU does not currently have the competence to initiate or carry out asylum procedures on its own, but depends, in any case, on the exercise of Member States' competence over the right to asylum. The EU could only support Member States in a financial and operational basis to carry out such procedures for the admission of asylum applications following their national legislation[25]. Thus, it must be enshrined in an international treaty to that purpose for a Member State to be able to exercise its sovereignty in the area of asylum as well as to develop its own system of international protection in the territory of a third State.

Therefore, if the asylum procedure remains a national institution, although it is harmonised by the Directives of the Common European Asylum System (CEAS), would the CEAS itself be applied extraterritorially on those disembarkation stages, namely the Procedural and Qualification Directives? The most plausible conclusion is negative, as the CEAS is a territorial institution. This acquis communautaire in the field of asylum, as Abrisketa Uriarte states

> 'was expressly conceived with a purely territorial vocation, since all the directives and regulations contained therein allude to the rules of procedure and reception *within* the Member States for granting or withdrawing international protection'[26].

In fact, Art. 3 of the Procedural Directive itself explicitly excludes applications submitted to the consular or diplomatic representations of the Member States from its scope. However, since it is a Member State that has responsibility for the asylum procedure, it is the national legal framework of that European State that would apply, even if it is harmonized by the CEAS. It could be understood, therefore, that European law applies, through Directive 2011/95/EU on requirements, which could be applied extraterritorially[27], and consequently the application of the EU Charter of Fundamental Rights would also be extraterritorialized.

If migrants intercepted at sea are immediately returned to the platform without a prior procedure of identification and study of the individual circumstances, we might also be in a case of collective expulsion,

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[22] A. Künnecke, 'Legal Challenges and the practicability of disembarkation centres for illegal migrants outside the EU'. *Real Instituto Elcano* (2019), ARI 53/2019, p. 2.

[23] The author refers to the 1967 Declaration on Territorial Asylum, UNGA Res. 2312 (XXII), 14 December 1967.

[24] G. Fernández Arribas, *Asilo y refugio en la Unión Europea*, Comares, Granada, 2007, p. 13.

[25] A. Künnecke, *Legal Challenges...* supra n. 20, p. 4.

[26] Translation is ours. J. Abrisketa Uriarte, 'La dimensión externa del derecho de la Unión Europea en materia de refugio y asilo: un examen desde la perspectiva del *non-refoulement*'. *Revista de Derecho Comunitario Europeo*, 2017, 56, p. 145. doi: *https://doi.org/10.18042/cepc/rdce.56.04*

[27] European Council on Refugees and Exiles (ECRE) (2018). Asylum at the European Council 2018: Outsourcing or Reform? Policy paper n. 4, p. 10.

explicitly prohibited by Protocol 4 of the European Convention on Human Rights (ECHR). This would be applicable because a European element, such as the rescue ship or the platform itself, would be involved, despite being outside EU territory. Furthermore, in the case of Libya, the conditions in which the country is immersed make the return to this territory an automatic breach of the principle of *non-refoulement* because of the risk of inhuman or degrading treatment. In this respect, there is also no provision for the possibility of a legal remedy, nor to which EU State or entities could the persons concerned be directed to do so. Besides there being no legal remedy and, in the hypothetical event that the asylum application is rejected, it would also be necessary to conclude readmission agreements with third countries, since the consequence would be, otherwise, that migrants would be trapped in countries as is the case in Libya, bearing in mind the systematic violation of human rights there.

The European-owned platform could not be argued to be considered a 'safe country', since disembarkation centre in a non-safe third country is not a 'country' in the strict sense of the term, because it does not meet any legal requirement to be considered a State[28]. And the jurisdiction that a Member State could exercise in these centres —this being understood as the inherent competencies of state sovereignty— would also not be understood as a spatial projection of this State[29]. In other words, if these disembarkation platforms were to be set up in Libyan territory, as it is the hypothesis of our study, the principle of *non-refoulement* would never cease to be breached in the event that people rescued by European vessels in the Libyan territorial sea or on the high seas were to be transferred there.

It would be this type of delocalisation that would allow us to argue a possible causal link between the European element present in the territory of the third State with the violation of an obligation of human rights or the right of refugees, to which the issuing State, which in this case we understand to be the EU or one of its Member States, is obliged, in order to determine the scope of its jurisdiction and, therefore, its possible international responsibility. In this case, the EU would be exercising a public authority activity such as managing people who are disembarked on these platforms in Libya.

The same would apply to the operational cooperation that the EU has deployed in Libya through the EUBAM Libya Mission or Operation EUNAVFOR Med. If there is any breach of an international human rights obligation by an actor in such operations, there could be less doubt about the attribution of international responsibility to the EU. Therefore, any human rights violations under its jurisdiction would be attributable to the EU, as reflected in the Draft Articles on Responsibility of International Organizations adopted by the International Law Commission in 2011 (arts. 6 to 9 'Attribution of conduct to an international organization').

(b) *Third State-owned disembarkation platforms and reception centres*

Throughout the development of the proposal for the creation of disembarkation agreements or platforms in third countries, the Commission, in its various published documents, has always referred to the fact that

[28] A. Künnecke, *Legal Challenges...* supra n. 20, p. 7

[29] A. Sánchez Legido, '¿Héroes o villanos? las ONG de rescate y las políticas europeas de lucha contra la inmigración irregular: (a propósito del caso Open Arms)', 46 *Revista General de Derecho Europeo* (2018), p. 28.

 DOI: 10.17103/sybil.23.19

the Union would only bear the costs of disembarkation and of equipping and strengthening the authorities and reception centres of the State with which the agreement is established, so that conditions improve in a way that does not infringe human rights. In fact, even this same institution refused to outsource the asylum or return process to a third State[30]. This leads to the idea that the EU's purpose is not so much to establish the asylum procedure there, with the consequent establishment of legal channels for transferring those who are recognized as asylum seekers to European territory in a legal and safe manner. We should note that the Commission's non-paper, studied above, expressly states that resettlement is not available to all people in need of protection, and there is no guarantee that it will only take place on EU territory.

This situation is similar to the 'third state processing model' scenario contained in the UNHCR's 2010 extraterritorial protection policy proposal, in which the third state itself would be responsible for the post-disembarkation procedure. The problem comes when no North African State has an asylum system that fully guarantees the international protection of refugees and asylum-seekers. For example, in the case of Libya, there is no asylum procedure similar to that harmonized in the EU through the CEAS, as it does not even provide for its own national asylum system, it fails to fulfill the few regional obligations in the area of refugee law and it does not guarantee the non-violation of human rights because of the precarious situation of its institutions.

Concerning this indirect cooperation in general, it is true that the EU and Libya do not have a specific agreement stating that Libya will strengthen its border controls and manage migratory flows under EU control or at the expense of the EU. However, the financial instruments that the EU has mobilized during the refugee crisis towards Libya are precisely aimed at creating a Libyan Border Guard that is capable of patrolling independently in its territorial water, and preventing immigrants and asylum seekers from crossing into the Mediterranean with the aim of reaching European territory.

There is no doubt that a comprehensive rescue mission is necessary for the Mediterranean sea, but Libya, under continuous blackmail by violent militias and armed groups, needs stability before the beginning any kind of cooperation in relation to the rescue of migrants and refugees[31]. In these cases, it would be difficult to establish a jurisdictional link between the Union's financial and technical cooperation and Libya's violation of fundamental rights on its territory.

(D) CONCLUDING REMARKS

1. Not only may Libya not be considered a safe third country[32], it is not even a safe country of origin. Today it is a State from which migrants themselves want to flee. The EU's constant cooperation with Libya

[30] European Commission, 'The legal and practical feasibility of disembarkation options'. Follow-up to the informal working meeting, 24.06.2018. *op. cit.*, p. 9.

[31] M. Giuffre, 'From Turkey to Libya: The EU migration partnership from bad to worse'. *Eurojus* (2017), 4 (1), p. 7.

[32] Within EU law, safe country clauses are contained in Directive 2013/32/EU on common procedures for granting or withdrawing international protection (OJ L 180, 29.6.2013, p. 60–93). A safe third country is defined as a third State in which the applicant will not be threatened because of race, religion, nationality, membership of a particular social group or political opinion; there is no risk of serious harm; the principle of non-refoulement is respected; and there is the possibility of applying for some mechanism of international protection (Art. 38). With regard to the concept of safe country of origin, established in

 DOI: 10.17103/sybil.23.19

and the substantial financial efforts directed at the neighbouring country lead one to believe that the Union is not pursuing an externalization of the asylum procedure on Libyan territory per se, but is trying to get Libya to develop its own effective border management and control system, as well as the internal asylum infrastructure. Thus, it is Libya that should protect potential refugees, and could then be regarded as a safe third country. This support is motivated by the expectation of having fewer asylum seekers arriving in the EU or even by the possibility of sending them back to Libya[33].

2. The proposals for the creation of disembarkation platforms or agreements in third countries born, this time, inside the EU institutions, have raised numerous concerns and uncertainties in the field of international law and EU law regarding the exercise of sovereignty and control of such enclaves located outside the territory of the Union. The vagueness of the provisions of the various communications and decisions studied, coupled with rhetoric that seeks to avoid at all costs the assumption of responsibilities for international protection, leads us to the conclusion that the EU's intention is not to copy the models of extraterritorial asylum procedures promoted by countries such as Australia or the United States. On the contrary, it would be erected as yet another measure of financial cooperation, in addition to those already developed by instruments such as the EUTF for Africa. Libya, being the North African country that receives the most financial and operational support from both the EU and Italy, justifies the study of a possible agreement that would even entail an attempt to disembark people rescued at sea, despite the fact that the Foreign Minister of the Libyan Government has stressed that Tripoli opposes the EU plan for the establishment of centres for migrants outside the borders of the Community bloc[34].

3. Having studied the greater or lesser implication of the jurisdiction of the EU or its Member States outside European territory, it can be stated that, in the event that a European national procedure is extraterritorialized in a country such as Libya, there would be a connection that would admit the application of the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR) for non-compliance with its provisions. However, the problem lies in the fact that there is no such element of jurisdiction outside the Union, but that the EU merely finances activities that are to be carried out by third States, either by creating processing mechanisms within the territory of the third State, or by patrolling in its territorial sea or in the High Sea. In these cases, there are imaginative solutions by which certain responsibility could be attributed for aid and assistance, or direction and control[35], which must, in

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Art. 36, it is said that a country may be considered as safe country of origin for an applicant, always after an individual examination of the application, if the applicant is a national of that country or, if being stateless had his habitual residence in that country, and has not been able to prove the existence of persecution in accordance with the legislation. If the applicant cannot prove individual persecution in his country of origin, it would lead the Member State to reject the application not because it is inadmissible (as in the previous case) but because it is unfounded.

33 P. García Andrade; I. Martín; S. Mananashvili, *EU cooperation with third countries in the field of migration*. Bruselas: Parlamento Europeo, 2015. PE 536.469, p. 42.

34 *Europa Press*, 19-10-2018. «Libia rechaza el plan de la UE para establecer centros para migrantes fuera de las fronteras del bloque».

35 In these cases, reference is made to Arts. 16 and 17 of the Draft Articles on International Responsibility of States, drafted by the International Law Commission in 2001, which establish State responsibility in relation to the act of another State in cases where the first State aids or assists or carries out directing and controlling acts towards another State in the commission of an

 DOI: 10.17103/sybil.23.19

any case, be fundamental and decisive for the third State that commits the internationally wrongful act. The application of the Charter and the jurisdiction of the EU Court of Justice has even been proposed, simply through direct or indirect financial cooperation[36].

4. The EU should reconsider its strategy and focus even more on the protection of human rights. To do this, it requires solidarity between all Member States, something that is getting further and further away when the spectre of xenophobia continues to haunt Europe. The EU has the means to create safe pathways by which to bring those in need of protection to EU territory but lacks the political will to do so. That is the reason why African and Middle Eastern countries themselves are still the ones that receive the largest number of refugees and migrants, despite being much less developed and having less capacity than those of the Union itself. The situation deteriorates when those partners, who become necessary co-operators of the EU in the management of immigration, fail to comply with the standards for the protection of human rights and cause the lives of migrants and asylum seekers to be a real nightmare. Although we are aware of the legal challenge of establishing a link between the EU's cooperation policy and the possibility of international responsibility for persistent human rights violations in Libya, the options explored in our work can help us to elucidate the extent to which the EU is consistent with its development cooperation policy and its own values.

internationally wrongful act provided that it 'does so with knowledge of the circumstances of the act' and if such an act would also be considered internationally wrongful if committed by the State providing aid or assistance.

[36] Authors such as Carrera and Cortinovis define the concept of 'portable responsibility' as a functional approach to the applicability of EU fundamental rights in cases where migration control is extraterritorialized. This would imply that the EU Charter of Fundamental Rights would apply in any situation that refers to the Union 'without the criterion of territoriality being decisive', Carrera, S. y Cortinovis, R. (2019). Search and rescue, disembarkation and relocation arrangements in the Mediterranean. Sailing Away from Responsibility?' *CEPS paper in Liberty and Security in Europe,* n. 2019-10, June 2019, p. 10. See also: Moreno-Lax, V. and Costello, C. (2014). 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model', in S. Peers, T. Harvey, J. Kenner and A. Ward (eds.), Commentary on the EU Charter of Fundamental Rights, Oxford: Hart Publishing, pp. 1657-1683. Specifically, both authors affirm that whenever a Member State or EU authorities cooperate with a third State or its institutions, directly or indirectly, their responsibility must be assessed in the light of the fundamental rights of the EU, where the right of asylum of art. 18 of the Charter would apply. For this responsibility to arise, it is sufficient to provide financial or technical assistance to a third State, whose cooperation results a violation of human rights. As the EU Charter of Fundamental Rights applies, it could be held accountable before the EU Court of Justice itself (Carrera, S. y Cortinovis, R. *Search and rescue, disembarkation... ibid.* p. 10).

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The Expansion of State Authority Over the Neighbouring States Through Informal Migration Controls: The Case of Hungary's Control over Serbia

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Abstract: Our preliminary fieldwork shows that there is large scale agreement between the migration and border authorities of Hungary and Serbia on the names of asylum seekers before they are allowed into to the Hungarian transit zones and apply for international protection in Hungary. The list, proposed by the Serbian Commissariat for Refugees (SCR) and approved by the Hungarian border authorities, is communicated through the use of community leaders from the Serbian reception centre. Hungary's motive behind keeping its cooperation with Serbia informal is to conceal the existence of cooperation between both states and to avoid legal challenges in the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). Therefore, the paper argues that the informalisation of migration management constitutes a significant challenge for the authority of the *Geneva Convention Relating to the Status of Refugees 1951* (hereinafter referred as the Refugee Convention). The paper further argues that Hungary's informal cooperation with Serbia is a form of expansion of the Hungarian state authority under the principle of extraterritorial jurisdiction of a state. Therefore, despite informal nature of Hungary's migration cooperation with Serbia, the responsibility for violations of asylum seekers rights in Serbia and their exclusion from international protection continues to engage Hungary for the reason of having effective control on the migration management in Serbia.

Keywords: Asylum Seekers, Exclusion, Informalisation of Migration, International protection, State responsibility, wrongful Act.

(A) INTRODUCTION

The principle of non-refoulement enshrined in Article 33 of the Refugee Convention has not been expressly recognised in the European Union (EU) treaty law. In the EU law, the principle of non-refoulement has been recognised through the judgement of the ECtHR in the case of *Hirsi Jamaa and Others v. Italy*.[1] The ECtHR construed Article 3 of the ECHR to include a prohibition on returning asylum seekers to territories where their lives and freedom could be threatened on account of race, religion, nationality, or membership of a particular social group. The Court held that Italy could not evade its responsibility arising from Article 3 of the ECHR by relying on the obligations arising from the bilateral agreement with Libya even if there was an express provision for the return of irregular migrants. In the EU Law, prohibition on returning asylum seekers to inhuman and degrading treatment is recognised under Article 4 of the *Charter of the Fundamental Rights of the European Union 2001* (CFREU).

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[1] ECtHR, *Hirsi Jamaa and Others v Italy*, Application no. 27765/09, European Court of Human Rights, 23 February 2012.

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To break free from the obligations arising from the EU and international human rights law, the EU Frontier Member States facing exceptional irregular arrivals leaned towards extraterritorial migration and asylum controls. To this end, the frontier Member States used development assistance, trade incentives and other returns to export their agendas of the securitisation of migration to third countries.[2] Thereof, the expansion of state authority through bilateral externalisation agreements became the most preferred security approach of the EU frontier Member States. These externalisation agreements are widely available, but their practices are more challenging to determine. There are yet also informal practices that are built around such existing agreements — or sometimes in the absence of agreements.[3] These informal migration controls not only undermine human security but also weaken the significance of the Refugee Convention and the EU Law. This makes us a question how come an EU Member State, which has made a solemn declaration to respect the Union laws and the human rights derived therein, can cause grave human rights violation extraterritorially?

Our paper looks at migration management in Hungary and Serbia to reflect on how Hungary expands its state authority beyond its territorial limits to exercise control over the management of asylum in Serbia. During our field visits to Szeged and other small towns at Hungary – Serbia border, as well as the Vojvodina province of Northern Serbia, we came across extensive involvement of Hungary in the management of irregular migration in Serbia. Hungary exercises informal control over the management of refugee camps in Serbia and informally imposes a profile of people to gain access to the Hungarian transit zones from Serbia and therefore seek asylum in Hungary. Given the informal nature of Hungary's cooperation with Serbia, the paper examines two interrelated questions; i.e. how does a state informally expand its authority over the neighbouring state to restrict irregular migration, and what is the future of international refugee protection given the informalisation of the securitisation of migration. The paper is divided into two parts. Part one analyses Hungarian practices of exercising state authority over neighbouring Serbia and to what extent Hungary can succeed in avoiding accountability for human rights violation using informal security mechanism. Part two examines the future of multilateral treaties of refugee protection considering the expansion of state authority through bilateral treaties.

(B) MIGRATION MANAGEMENT AT THE HUNGARIAN TRANSIT ZONES

Existing scholarship shows Hungary's ever-increasing emphasis on the securitisation of migration to control irregular arrivals in the country.[4] Hungary's increased emphasis on the securitisation of migration

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[2] A. Knoll and P. Veron, 'Migration and the next Long-Term Budget: Key Choices for External Action', *Ecdpm discussion paper* No 230, p. 4, accessed 12 November 2019.

[3] For example, Memorandum of Understanding on Cooperation in the Fields of Development, the Fight against Illegal Immigration, Human Trafficking and Fuel Smuggling and on Reinforcing the Security of Borders between the State of Libya and the Italian Republic (entered into force 2 February 2017).

[4] C. Cantat, 'Governing Migrants and Refugees in Hungary: Politics of Spectacle, Negligence and Solidarity in a Securitising State' in S. Hinger and R. Schweitzer (eds), *Politics of (Dis)Integration*, Springer International Publishing (2019) 183-199; D. Gyollai and A. Amatrudo, 'Controlling Irregular Migration: International Human Rights Standards and the Hungarian Legal Framework', 16(4) *European Journal of Criminology* (2019) 432-451 [doi:10.1177/1477370818772776]; B. Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation', 17(6) *German Law Journal*,

is linked to the unprecedented arrival of asylum seekers, along with the latest wave of irregular arrivals in the EU.[5] 2015 was the year of the refugee crisis for the EU as nearly 1.2 million asylum seekers arrived in the EU.[6] Out of these 1.2 million first time asylum applicants, nearly 174,400 asylum seekers applied for asylum in Hungary alone, second highest after Germany which received 441,800 asylum seekers.[7] Following these arrivals, the Hungarian populist government of Viktor Orbán started a massive anti-migration campaign and held the EU responsible for endangering security and identity of the Hungarian as well as European people.[8] The Orbán's government constructed irregular migration as a foreign invasion on its border and consequently took series of security measures to restrict irregular arrivals from entering in the country, in disregard of the obligations arising from the EU Law.[9]

Since 2015, the Hungarian government has repeatedly amended law *LXXX on Asylum 2007* to provide effective mechanisms to restrict irregular arrivals in the country. The Government Decree promulgated in 2015 has expanded the list of safe third country of origin (STCO) and safe third country (STC) to exclude asylum seekers originating or transiting from the US States that do not have death plenty, the Member States of the EU, the Member States of the European Economic Area, the EU candidate states, Switzerland, Bosnia-Herzegovina, Kosovo, Canada, Australia, and New Zealand.[10] Among the EU candidate states, initially, Turkey was not on the list of STCs, but later it was also included in the list.[11]

Additionally, by the end of 2015, Hungary built a barbed-wire fence on the Serbian and Croatian borders to stop cross border infiltration.[12] Along with the border fences, Hungary has established two transit zones which are on the Hungarian soil but open towards Serbia. Theses Transit zones consist of a series of containers covered by wire fence all round and guarded by the Hungarian armed forces. Every day, limited numbers of asylum seekers are admitted in the transit zone to process their asylum applications. Practically asylum seekers admitted in the transit zones remain detained in the transit zones for an indefinite period. Those admitted in the transit zones have the only option of leaving towards Serbia with consequences of their asylum application being terminated. Following the establishment of the transit zone, during the first three quarters of 2016, Hungary admitted only 20-30 asylum seekers on a daily quota basis, to register their asylum claims. The daily quota dropped from 20-30 to; 10 by the end of 2016, 5

(2016) 1033-1081, accessed 13 November 2019; J.W. Scott, 'Hungarian Border Politics as an Anti-Politics of the European Union', *Geopolitics* (2018) 1-20 [doi:10.1080/14650045.2018.1548438]; C. Thorleifsson, 'Disposable Strangers: Far-Right Securitisation of Forced Migration in Hungary', 25(3) *Social Anthropology*, (2017) 318-334 [doi:10.1111/1469-8676.12420].

5 Thorleifsson, *supra* n. 4, at 318.

6 M. Ceccorulli, 'Back to Schengen: The Collective Securitisation of the EU Free-Border Area', 42(2) *West European Politics* (2019) 302-332, at 302 [doi:10.1080/01402382.2018.1510196]; E. Quinn, 'The Refugee and Migrant Crisis: Europe's Challenge', 105(419) *Studies: An Irish Quarterly Review* (2016) 275-285, at 277.

7 Quinn, *supra* n. 6, at 277 and 278.

8 Cantat, *supra* n. 4, at 186 and 187.

9 *Ibid.*

10 Hungary: *Government Decree 191/2015 (VII.21) on national designation of safe countries of origin and safe third countries,* (adopted 21 July 2015, entered into force 1 April 2016), § 1 and 2.

11 European Council on Refugees and Exiles (ECRE), 'Country Report: Hungary', (2018) 1-133, at 17 and 18 (accessed 7 November 2019).

12 *Ibid.,* at 17.

in 2017, and 1 in 2018.[13] The daily quota system has forced hundreds of asylum seekers, including Syrians, to wait on the Serbian side in the open air without any food provisions. Consequently, asylum seekers started to move towards Croatia to seek asylum there.

Despite the alarming report of the United Nations Working Group on Arbitrary Detention categorising Hungary's policy of holding asylum seekers in the transit zones, a deprivation of liberty under international law;[14] the judgement of the Grand Chamber shows that the Court has granted Hungary a wide margin of appreciation of its right to control borders. However, despite this little relive, the infringement proceedings initiated by the EC, the judgement of the ECtHR holding Hungary responsible for violation of Art 3 of the ECHR, and flagrant criticism of international organisations has forced Hungary to look for other ways. Considering the stance of the ECtHR in the cases of *Hirsi and Jamma v Italy* and *Ilias and Ahmed v Hungary*, Hungary intended to adopt such security practices, the responsibility for which could not be attributed to Hungary. Therefore, Hungary externalised its securitisation policy through bilateral cooperation with neighbouring Serbia to informally control irregular arrivals extraterritorially.

Accordingly, Hungary adopted a policy of selective admission in the transit zones, to avoid the contradiction of the EU and international law. To pursue the policy of selective admission in the transit zones, Hungary needed the cooperation of Serbia. However, any formal bilateral cooperation with Serbia was likely to bring more human rights challenges against Hungary for the reason of having effective control migration management in Serbia.[15] Therefore, Hungary opted to exercise informal control over irregular arrivals at the Hungarian transit zones through informal cooperation with Serbia. Accordingly, Hungary's securitisation policy transformed to a whole new level of informalisation.

(C) INFORMALISATION OF MIGRATION CONTROL AT HUNGARY-SERBIA BORDER

Since autumn 2016, the SCR has stopped asylum seekers from approaching the Hungarian transit zones to claim protection. The SCR started to accommodate asylum seekers in temporary reception centres under the management of the Commissariat.[16] Asylum seekers entering the temporary reception centres are asked whether they want to enter the Serbian or the Hungarian asylum system. Those wishing to enter Hungary are placed on the waiting list prepared by the SCR.[17] The list is handed over to community leaders, chosen by the Serbian commissariat from the reception centre. The community leaders communicate the list to Hungarian authorities at the transit centres.[18] Since the start of the above process, only community leaders are allowed to stay in the pre-transit zones. At the Röszke transit zone, community leaders are

13 *Ibid.*

14 European Council on Refugees and Exiles, *supra* n. 11, at 23.

15 ECtHR, *Alskeni and others v the UK*, Application no. 55721/07, 7 July 2011, para 136.

16 D. Gyollai, 'Hungary - Country Report: Legal and Policy Framework of Migration Governance', (2018) 1-77, at 31(accessed 10 November 2019).

17 European Council on Refugees and Exiles, 'Country Report: Hungary', *supra* n. 11, at 18.

18 *Ibid.*

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accommodated in a heated tent, while at the Tompa transit zone, community leaders reside in an abandoned duty-free shop.[19] The Hungarian authorities provide food to the community leaders.

There are no permanent community leaders because of a short stay of asylum seekers in the reception centres. The SCR chooses community leader randomly from the asylum seekers entering in the reception centres.[20] Once the Hungarian authorities receive the list from the community leader, they review the list and decide on the names of people to be admitted in the transit zones. The revised list is handed back to the community leader, who then communicates the list to the SCR. Once the Serbian Commissariat receives the approved list from the Hungarian authorities, the Commissariat informs the people accepted for admission in the transit zones.[21] Those approved for admission in Hungarian transit zones are brought to the pre-transit zone a day before their admission. During the entire process, there is no direct communication between the Hungarian and Serbian authorities.[22]

Since March 2018, Hungary has stopped admitting asylum seekers from the Serbian reception centres, except the Subotica reception centre. The Subotica reception centre has the capacity of accommodating a maximum of 60 people at a time.[23] According to the SCR, the criteria for acceptance in the Subotica reception centre are the time of arrival and the extent of vulnerability. Therefore, the numbers of asylum seekers wishing to enter in the Subotica reception centres has increased while the centre's capacity to accommodate asylum seekers remains limited. Therefore, significant malpractices have been taking place to admit asylum seekers in the reception centre. During our visit to the centre, we noticed significant similarities between the profiles of the asylum seekers in the centre and the Hungarian recognition profile. We noticed that Afghan families formed the majority of asylum seekers accepted in the centre. It was also surprising that despite the amendment in the Asylum Act, which provided ground for the Hungarian authorities to declare an asylum application inadmissible for the reason of staying or travelling through Serbia,[24] asylum seekers were still eager to enter the Subotica reception centre for admission in the Hungarian transit zones.

According to the staff members of the SCR at the Subotica reception centre, most of the asylum seekers staying at the centre see Hungary as a transit state for the onward journey towards Western European states. Therefore, they negotiate with the Hungarian police for their admission in the Hungarian transit zones.[25] The profiles of the asylum seekers accepted in Subotica reception centre, and the practice of asylum seekers' negotiation with the Hungarian police raised our concern about the presence of malpractices at the Hungarian-Serbian transit route. When we inquired different asylum seekers at the reception centre and staff member of the SCR, we came to know that some asylum seekers

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19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 U. Korkut and D. Gyollai, 'A Visit to Hungarian-Serbian Border to See the Subotica Reception Centre for Refugees' *RESPOND*, Published on 22 December 2018, accessed 29 October 2019.

24 Hungary: *Act LXXX on Asylum* (adopted on 5 July 2007, entered into force 1 January 2008) Art. 51(4).

25 Undisclosed interview with employees of the Serbian Commissariat for Refugees at Subotica Reception Centre, June 2018.

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paid 1000 euros to move their names on the top of the list for admission in the Hungarian transit zones. Further, the Hungarian police officials were more likely to negotiate with asylum seekers who want to transit through Hungary and willing to pay. We also heard the story of a single father accompanying a child, who paid 3000 Euros for admission in Hungary and within a week he managed to reach Germany.[26] Hence, Hungary's informal border security practices, in addition to extraordinary human rights abuses, are also corrupting the asylum system of the EU and Serbia. This situation has created a new smuggling network in the backyard of the EU.

(D) ATTRIBUTING RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS THROUGH INFORMAL CONTROL

Asylum seekers' access to international protection based on the list violates Article 6(4) of the Asylum Procedures Directive (APD).[27] The Article reads as the Member States shall ensure that a person, who has made an application for international protection, has an effective opportunity to lodge it as soon as possible.[28] The practice of accepting asylum application only at the border transit zones, through the list profiling asylum seekers in the Serbian Subotica reception centre is against the Common Standards of the APD. Article 43(1) of the APD allows the Member States to establish transit zones at the external borders.[29] However, Hungary only allows asylum applications to be submitted within such transit zones where access is granted to a limited number of people after a prolonged delay.[30] Additionally, access to international protection based on the list violates Article 21 of the CFREU and Article 14 of the ECHR.[31] The Articles prohibit discrimination based on any ground such as sex, race, colour, ethnic or social origin, religion, or nationality.

Furthermore, limited access to international protection at the Hungarian transit zones also undermines the right to apply for asylum guaranteed under Article 18 of the *CFREU*.[32] The United Nations High Commissioner for Refugees (UNHCR) has reported massive push backs from Serbia.[33] According to UNHCR, asylum seekers entering Serbia are briefly deprived of their liberty, searched, and threatened, often with the use of force, to go back to North Macedonia.[34] Therefore, asylum seekers exclusion from Hungary is highly likely to cause indirect refoulement of asylum seekers, prohibited under

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[26] *Ibid.*

[27] Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withholding international protection,* (OJ L. 180/60, 29.6.2013, p. 60-95).

[28] *Ibid.*, Art. 6(4).

[29] *Ibid.*, Art. 43(1).

[30] European Commission, *Migration and Asylum: Commission Takes Further Steps in Infringement Procedures against Hungary (accessed 27 October 2019).*

[31] Council of the European Union, *Charter of the Fundamental Rights of the European Union,* 26 October 2012, 2012/C 326/02, Art. 21; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms,* as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Art. 14.

[32] Council of the European Union, *Charter of the Fundamental Rights of the European Union, supra* n. 31, Art. 18.

[33] European Council on Refugees and Exiles (ECRE), 'Country Report: Serbia', 1-82, at 16 (accessed 29 October 2019).

[34] *Ibid.*

 DOI: 10.17103/sybil.23.20

Article 33 of the Refugee Convention,[35] Article 4 of the CFREU,[36] and Article 3 of ECHR[37]. However, it remains unclear as to what extent Hungary could be held responsible for informal exclusionary practices.

By restricting irregular arrivals at the Hungarian transit zones through informal security cooperation with Serbia, Hungary has tried to establish that it no longer detains asylum seekers in the transit zones. Additionally, by approving the list, Hungary authorises access to transit zones to only those asylum seekers, who are highly likely to be recognised as refugees. Therefore, Hungary no longer expels asylum seekers from its transit zones as well. Accordingly, with the assistance of the SCR, Hungary has ensured that there are no more human rights challenges for arbitrary detention, inhuman and degrading treatment, and refoulement of asylum seekers. Therefore, this secret cooperation has helped Hungary to dissolve grounds of infringement proceeding triggered by the EC against Hungary.[38] To attribute responsibility to Hungary for extraterritorial violation of human rights, we must establish Hungary's effective control of on the migration management in Serbia, particularly at the Subotica reception centre. Therefore, we have to see to what extent a state can be held responsible for the acts of another state. Nevertheless, before attributing responsibility to Hungary of the acts of the SCR, we have to establish the existence of effective control of Hungary on the migration management in Serbia. In the present case, since communication between both states is done through the community leaders; therefore, we have to determine to what extent both cooperating states can be held responsible for the acts of the community leaders.

According to International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts 2001* (ARSIWA), a contracting state is responsible for extraterritorial violations of human rights, when a state directs and controls another state in the commission of an internationally wrongful act.[39] Therefore, to hold Hungry responsible, it must be established that Hungary enjoys effective control over migration management at the Subotica reception centre. In the case of Hungary-Serbia cooperation, smooth running of operations regarding the preparation of the list by the SCR and the tacit approval of the list by the Hungarian authorities shows that actions of both states are alien for a common outcome. Therefore, the conduct of the community leaders is of the utmost importance here. Article 8 of the ARSIWA states that the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is acting on the instruction of, under the direction or control of, that state in carrying out the conduct.[40]

In the present case, there exists a special factual relationship between the conduct of the community leaders and the collaborating states. By handing over the list of asylum seekers proposed for admission in the Hungarian transit zones, the Serbian Commissariat passes explicit instruction of delivering the list to the Hungarian authorities at the transit zones. Similarly, after examination of the proposed list, handing

35 UN General Assembly, *Convention Relating to the Status of Refugees* (adopted on 28 July 1951, entered into force 22 April 1954), UNTS, vol. 189, p. 137, Art. 33.

36 Council of the European Union, *Charter of the Fundamental Rights of the European Union, supra* n. 31, Art 4.

37 Council of the European Union, *Charter of the Fundamental Rights of the European Union, supra* n. 31, Art. 3.

38 Undisclosed interviews with human rights activists in Belgrade, June 2018.

39 International Law Commission, *Articles on Responsibility of the States for Internationally Wrongful Acts* November 2001, Supplement No 10 (A/56/10), chp. IV.E.1, Art. 17.

40 *Ibid.*, Art. 8.

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over the approved list by the Hungarian authority for delivery to the SCR shows that the conduct of the community leaders has a specific factual relationship with the authorities of both states. Hence, the role of the community leaders correlates to the acts of volunteers, missionaries, or agents working without official capacity commissioned to carry outs specific tasks domestically or overseas. International law wildly attributes responsibility to the state for the conduct of its agents if there exists a specific factual relationship of the agent with the state concerned.[41]

By providing accommodation and food to the community leaders in the transit zones during their stay at the transit zones to perform the service of communicating the list, Hungary had a factual relationship with the community leaders, which entitle Hungary to control the conduct of the community leaders. In the case of *Cyprus v. Turkey*, the Commission on Human Right, the former body of the ECtHR held that Turkey had effective control on the conduct of private individuals, who violated the rights of Greek and Turkish Cypriots in Northern Cyprus.[42] The Commission relied on the principle of connivance to attribute responsibility to Turkey for extraterritorial human rights violation at the hands of private parties. State responsibility for the acts of its agents, missionaries, or volunteers has also been recognised in international law in the case of Lehigh Valley, where Germany was held to have effective control on the sabotage activities carried out by private parties in the United States of America.[43]

Furthermore, according to Article 16 of DARSWA 2001, there could be situations where a state voluntarily or for some other reasons, aids or assists another state by facilitating the commission of a wrongful act.[44] In such a situation, the assistance of the assisting state is not to be confused with the responsibility of the acting state; the assisting state will be responsible for its part of the internationally wrongful act.[45] Hence, by applying the rule of connivance and considering both states factual control over the conduct of the community leaders, it could be induced that there exists formal cooperation between both states. Thus, it could be argued that Hungary enjoys effective control over the management of the Subotica reception centre and control of irregular migration in Serbia. Therefore, Hungary could be held responsible for violation of Articles 3, 14 of the ECHR, Article 4 of the Protocol 4 of the ECHR, and Article 4, 18, 19 and 21 of the CFREU.

(E) AUTHORITY OF THE EU LAW IN THE PRESENCE OF INFORMAL BILATERAL COOPERATION

The idea of unified Europe as a peace project to overcome nationalist forces in the continent and bring peace and prosperity for people of the continent is considered to be the founding narrative of the EU.[46]

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41 *Ibid.* S. Fleming, 'Moral Agents and Legal Persons: The Ethics and the Law of State Responsibility' 9(3) *International Theory* (2017) 466-489, at 466 and 467 [doi: 10.1017/S1752971917000100]; A.F. Lang, 'Crime and Punishment: Holding States Accountable' 21(2) *Ethics and international affairs* (2007) 239-257, at, 239 [doi:10.1111/j.1747-7093.2007.00072].

42 ECtHR, *Cyprus v Turkey,* Application no. 25781/94, 10 May 2001.

43 *Lehigh Vally Railroad Company and Others (United States) v Germany,* 16 October 1930 VOLUME VIII pp. 84-101.

44 ARSIWA, Art.16.

45 *Ibid.*

46 I. Horga and M. Brie, 'European Identity the Context of Wider Europe' in D. Pantea (ed), *The Image of the Others in the European Intercultural Dialogue* (LAP LAMBERT Academic Publishing 2017) 293-311, at 294.

However, due to the unprecedented arrival of asylum seekers, Europe has seen a rapid rise in support of nationalist parties, which are critical of the EU addressing the migration crisis inadequately.[47] Intensified fears about the increasing numbers of refugees and asylum seekers in the European states have increased the vote bank of the populist parties. These parties have been harbouring anti-migration sentiments by depicting existential threat to national security and identity. At the same time, these nationalist parties are also critical of the EU for undermining the Member States´ sovereignty and capacity of governing their societies effectively.[48]

The rhetoric of the nationalist parties in the frontier Member States facing immense irregular arrivals has worked so well that the nationalist parties have managed to form governments in Hungary, Italy, and Poland. The Hungarian government of the Fidesz nationalist party sees the EU and its common standards established under the Common European Asylum System (CEAS) the main cause of the problem. The CEAS provides a set of Directives and a Regulation, providing common standards to be implemented by the Member States while dealing with asylum applications of third-country nationals. However, instead of following the CEAS, the practice of some of the Eastern European Member States to implement national measures has become an integration problem for the EU for non-compliance of the EU Law.[49]

The literature on the securitisation of migration in the Mediterranean shows that the EU, itself, supports informalisation of securitisation of migration by allowing the Member States to disregard the Union's fundamental values of human dignity, the rule of law, solidarity, and equality, with regard to asylum seekers.[50] The EU-Turkey Migration Statement is the example of informalisation of migration, where the EU hide behind the individual capacity of the Heads of Member States to conceal the involvement of the Council of the EU to hide legally binding nature of the agreement with Turkey.[51] This Act of the EU severely undermined the significance of the EU Law by providing a window for informal securitisation measures to bypass the Union's human rights standards and accountability in both supranational European Courts. This informal approach of the EU has also been replicated by Italy, with the support of the EU, to shift the responsibility of migration management to Libya's Government of National Accord (GNA).[52]

Above discussion shows that the authority and significance of the ECHR, CFREU, and founding treaties of the EU has been seriously undermined the EU institutions itself. The EU's only problem with Hungary is that Hungary has opted for outright control of migration in clear contrast of the EU Law; while,

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47 K. Archick, 'The European Union: Current Challenges and Future Prospects', *Congressional Research Services* (2016) 1-27, at 5 and 6 (accessed 5 November 2019).

48 *Ibid.* T. A. Borzel, ' From EU Governance of Crisis to Crisis of EU Governance: Regulatory Failure, Redistributive Conflict and Eurosceptic Publics', 54(s1) *Journal of Common Market Studies* (2016) 8-31, at 9 [doi: 10111/jcms.12431].

49 Borzel, *supra* n. 48, at 22.

50 M. Mancin, 'Italy's New Migration Control Policy: Stemming the Flow of Migration from Libya without Regard for Their Human Rights', 27(1) *The Italian Yearbook of International Law* (2018) 259-281, at 263 [doi: 10.1163/22116133-02701015]; L.B. Adam, ' The EU -Turkey Deal One Year On: A Delicate Balancing Act', 52(4) *International Spectator* (2017) 44-58, at 44 [doi: 10.1080/03932729.2017.1370569 44].

51 CJEU, judgement of 28 February 2018, *NF, NG, NM v. European Council,* T-192/16, T-193/16, T-257/16, ECLI:EU:T:2017:128.

52 Mancin, *supra* n. 50, at 265.

the EU prefers it to be done through technical approaches to avoid the impression of undermining the EU Law. In either case, the authority and significance of the EU Law have been severely compromised. In the Hungarian case, even if Hungary reverts to the EU practices, informalisation of migration will continue to have severe implications for the EU Law. However, at the same time, the implications of informalisation are not limited to refugees and asylum seekers; the fact that the EU Law can be subjugated creates severe concerns about the integration of the EU as more and more Member States will look for informal practices to bypass the EU Law.

(F) CONCLUSION

Control of irregular migration and asylum through informal migration cooperation with third countries has become the contemporary practice of expanding state authority in the EU. The informalisation of migration and asylum cooperation allows Hungary to pursue its securitisation agenda in Serbia without attracting responsibility, for asylum seekers exclusion from international protection for the reason of cooperating with Serbia. Hungary's policy of restricting asylum seekers access to the Hungarian transit zones, with the informal assistance of Serbia, is the extreme form of informalisation as the authorities of both states communicate through private persons. This policy of Hungary undermines the authority of the EU and international law. However, under the EU and international law, both Hungary and Serbia have effective control on community leader's activity of communicating between the authorities of both states. Therefore, a link establishing cooperation between both states can found by exploring international jurisprudence on the state's responsibility for the acts of a private person. Under the principle of extraterritorial jurisdiction for the acts of a private person, agent, or missionary Hungary attracts the responsible for asylum seekers exclusion from international protection for the reason of controlling, directing, and approving the activities of the SCR. Therefore, the process of informalisation can only be stopped if both the CJEU and the ECtHR are willing to play a proactive role by expanding their jurisdiction to informal activities of the Member States beyond the territorial limits of the EU; otherwise, the prospects of the supremacy of the EU and international treaty law look really diminish.

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Material and Immaterial Walls in Contemporary International Law: consequences on human rights, fundamental freedoms, security and the environment. An Introduction to the Forum.

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The recent trend of building up border walls and fences or of establishing immaterial frontiers to prevent third countries' nationals from entering countries or to make this possibility harder. This trend has acquired a particular importance and meaning in places such as many European countries or the USA, but also in different areas in Asia or Africa. However, the recourse to these obstacles, be them material or immaterial ones, has put some important International Law concepts and cornerstone categories at risk, weakening international refugee law norms but also distorting some basic concepts of the law of the sea in the case of Europe, the access to water in the Americas or, more in general, international human rights law all over the world. But also border walls and fences are deeply harming the environment, causing great potential harm to animal species.

While sociologists, anthropologists and political scientists have developed in-depth analysis on the issue, International Law has barely paid attention to this renovated phenomenon beyond classical studies pointing to the border wall on Palestinian territory or the USA-Mexico fence. The absence of any legal reflection on these problems implies, on the one hand, ignoring nowadays a new trend in understanding International Law. On the other hand, a unilateral point of view considers only security reasons which might run counter International Law hardcore values and concepts, strengthening a more regressive view of it as a cosmopolitan legal order.

The contributions included in this Forum of the *Spanish Yearbook of International Law* try to address and discuss such a reflection. They are part of the outreach of the research project "Walls in Contemporary International Law: Consequences for international security, human dignity and sustainability" (DER2015-65846R, DIRMUR), funded by the Spanish Ministry of Economy and Competitiveness (MINECO). The following contributions correspond to the papers submitted to the scientific committee of the international workshop held at Castilla-La Mancha University, Cuenca Campus, on the 30th and 31st of May, 2019, jointly organized by the Spanish Society of International Law (AEPDIRI), through the Jean Monnet Project "Globalizing the Union's Debate: Internal and External

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Leadership in an Era of Challenges (EUGLOBAL; Project Ref. 599757-EPP-1-2018-1-ES-EPPJMO-PROJECT) and the aforementioned research group. All the contributions have been subject to a double blind peer-review system in order to set the programme for the said international workshop.

Professor Ana Salinas is the Project manager of DIRMUR, being also members of it: Prof. Antonio Fernández Tomás, Prof. Angel Sánchez Legido and senior lecturers Juan Miguel Ortega Terol, Vanesa Ballesteros Moya and Carmen Martinez Carmena, from University of Castilla-La Mancha; Prof. Rosario Huesa Vinaixa and senior lecturers Joan David Janer Torrens, Margalida Capellà i Roig, Valentina Milano and Pau de Vilchez Morales, from University of Balearic Islands; and senior lecturers Oscar Abalde, Nicolás Alonso Moredas, Mª Dolores Bollo Arocena, Iñigo Iruretagoiena and Juan Soroeta, from the University of the Basque Country.

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Security and border walls/fences in contemporary International Law

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Abstract: The fortification of state borders with walls and the but use of law-making power and the adjudicating power of domestic courts to prevent the movement of persons in particular those in need of protection and mainly on grounds of national security are increasingly common in contemporary international society. This new trend is sending a troubling message to the international community about what is permitted with regard to third countries and which human rights are protected and to what extent, if at all. For states, border walls reinforce a unilateral view of international relations and international law. For people, they presage a dramatic decline in human rights protection standards. In all cases, this trend ignores the values of international law.

Keywords: border wall border fences immigration law human rights criminalisation US-Mexico wall Israeli wall - ECtHR

(A) INTRODUCTION

The construction of walls or fortified fences between neighbouring states to delimit and even more clearly separate their respective territories has become an increasingly popular and widespread practice amongst states in the last two decades. However, although the topic has been studied in a variety of disciplines, ranging from sociology[1] and anthropology[2] to history[3], economics[4]and political science,[5]it has not yet been practically examined from an international law perspective.

Walls and fences alter not only the relations between the states on either side of them, but also several essential flows (of goods, services, people, ideas, cultures, etc.) that, under normal circumstances, take place between them. As an intrusive material reality in international relations the existence of which affects the ontology and physiology of contemporary international society and relations in it, they are *per se* a material element that warrants consideration and, where applicable, legal regulation beyond the domestic legal system of the state that builds them. These walls may be built solely on territory clearly belonging to one

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1 See W. Brown, *Walled States, Waning Sovereignty* (MIT Press Books, 2014).

2 See P. Gulasekaram, 'Subnational Immigration Regulation and the Pursuit of Cultural Cohesion', 77 *University of Cincinnati Law Review* (2008-2009), available here.

3 See M. Baud and W. Van Schendel, 'Towards a Comparative History of Borderlands', 8 *Journal of World History* (1997) 211-242 [doi: https://doi.org/10.1353/jwh.2005.0061].

4 See M. Sur, 'Through Metal Fences: Material Mobility and the Politics of Transnationality at Borders', 8 *Mobilities* (2013-1)70-89 [https://doi.org/10.1080/17450101.2012.747778].

5 See T. Kuran, 'Availability Cascades and Risk Regulation', University of Chicago Public Law and Legal Theory Working Paper No. 181 (2007), available here.

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state or on a territory disputed by two or more states; they may be "porous" walls, walls with ports of entry enabling only controlled movement through checkpoints once certain administrative requirements have been met, or entirely hermetic walls. In all cases, by definition, they serve to separate when not outright isolate. Moreover, given their markedly territorial nature in the context of "deterritorialization" entailed by globalization, they are destined to spark disputes and conflicts.

The numbers support this concern. On average, there were 6,000 kilometres of walled borders around the world in the first decade of the new millennium, equal to more than half the Earth's diameter. Additionally, more than 80% of those walls were built after 1989, a watershed year precisely because it was the year the Berlin Wall fell.[6] In the years since, and despite the predictions that the world would gradually become increasingly border-free, some of the countries often described as the world's oldest democracies have contributed decisively to the number of security "barriers", erecting them along their political borders. This raises the question of why, nearly thirty years after the fall of the Berlin Wall, these historical and, in theory, exemplary democracies are engaging in the mass construction of walls to separate themselves from their neighbours across the border.

In addition to these physical walls, the number of intangible walls is also on the rise, i.e. incorporeal barriers that nevertheless have the same effects as physical walls, particularly with regard to the movement of people and, quite especially, of vulnerable groups and individuals who, seeking protection, must leave their homes, crossing land or sea borders.

The truth is that these tangible and intangible barriers exist and are mushrooming across the current international geographical, political and legal landscape. Furthermore, in the case of the tangible barriers, not only has their physical existence yet to be clearly established and regulated in the international legal order, it also patently influences at least two essential areas thereof: security, both national and international, insofar as it is the main argument prompting states to build and expand these barriers;[7] and

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[6] See, for example, the walls separating Pakistan and Afghanistan (2007); Iran and Pakistan (2007); Uzbekistan and Kyrgyzstan (2009); Myanmar and Bangladesh (2009); Egypt and Gaza (2009); Israel and Egypt (2010); Iraq and Syria (2010); Greece and Turkey (2011); and Azerbaijan and Armenia (2011); as well as the walls between Israel/Lebanon (2000), Uzbekistan/Afghanistan (2001), and Turkmenistan/Uzbekistan (2001); the sadly famous Israeli wall enclosing the Palestinian territories (2002); the wall separating India and Bangladesh (2002); the wall between China and North Korea (2003); the fortified fence separating Botswana from Zimbabwe (2003); the far from peaceful fortified security fence between the two nuclear powers of India and Pakistan (2003); the wall separating and isolating Saudi Arabia from Yemen (2003); the wall between India and Myanmar (2004); the wall constructed between Thailand and Malaysia (2004); the wall built by Kuwait to defend itself against Iraq (2004) after the Iraqi aggression in 1991; the fence separating Brunei from Malaysia (2005); the wall built between the United Arab Emirates and Oman (2005); or the three extremely important wall initiatives under construction since 2006 consisting of the wall between Mexico and the US, the wall separating and isolating Saudi Arabia from Iraq (in fact, it seals the entire Saudi perimeter), and the wall separating Uzbekistan from Kazakhstan, although in truth the former has decided to wall itself in and isolate itself from all its neighbours, not just Kazakhstan. All of that is in addition to such flagrant historical situations as the "Green Line" dividing Cyprus (1974); the wall built by South Africa to seal its border with Mozambique (1975); the wall built by Morocco with the Western Sahara (1980); or the Ceuta and Melilla walls (1998, overhauled in 2007).

[7] See, amongst others, the following walls: Saudi Arabia-Iraq; Brunei-Thailand; Brunei-Malaysia; India-Pakistan; North Ireland-Belfast; Israel-Palestine; and Kuwait-Iraq. With regard to this last example, see: A. Alderson, 'Iraq and Its Borders', 153 *The RUSI Journal* (2008-2)18-22 [doi: https://doi.org/10.1080/03071840802103181]; and S. Oluic, 'Iraq's Porous Frontiers, Internal Struggles and Fragile Statehood', 4 *Journal of Applied Security Research* (2009-3) 279-290 [doi: https://doi.org/10.1080/19361610902930063].

personal dignity and respect for human rights and fundamental freedoms, which are curtailed by these walls, when not openly ignored or denied, and, thus, victims of their proliferation. Indeed, the physical presence of these walls affects three basic concepts of contemporary international law: the concept of security; the concept of border; and the concept of jurisdiction.

This article will not address the concept of security, as it has been widely examined elsewhere in the Spanish literature.[8] Nevertheless, it is worth recalling that current security threats are widely considered to stem from transnational realities that can only be effectively addressed through inter-state cooperation, as evidenced by the fights against organized crime, international terrorism, the criminal use of new technologies or environmental threats. It is thus surprising that states use the concept of security precisely to pursue unilateral actions and establish obstacles to international cooperation. In this regard, the names given to some of the legal instruments that states have adopted are telling, as they stress the idea of security as the grounds for establishing tangible or intangible barriers.[9]

Regarding the concept of border, this article will simply make two brief clarifications in relation to the issue at hand. First, there is an insistence on conceiving of borders as a place for confrontation rather than cooperation and correlation. Second, states are pushing their borders beyond their land territory. Hence, in its effort to cope with the massive flows of people in the Mediterranean, the EU has sought to establish "early interception" mechanisms, thereby redefining its external borders.[10] Likewise, in the executive orders of 2017, the US government established jurisdiction by US authorities over areas up to 100 miles deep along the outer face of the wall separating the US and Mexico.[11] In so doing, it encroached on the adjacent state's land territory and maritime zones, affecting its jurisdiction over them. It moreover unilaterally established obligations for third states with regard to any migrants who might reach their territory, creating what has come to be called a "borderland" rather than a borderline.

Jurisdiction is the underlying idea conditioning the effects of walls on states and people. It also underlies both the state-centric (C) and anthropocentric (D) views of walls. This paper will examine both aspects, following an analysis of the material reality of these walls (B).

(B) WALLS AND FENCES: THE SUDDEN IRRUPTION OF MATERIALIZED BORDERS

8 For further information on all points, see C. García and A.J. Rodrigo (eds.), *La seguridad comprometida. Nuevos desafíos, amenazas y conflictos armados* (Tecnos, Madrid, 2008).

9 See, amongst others Regulation (EU) No 1052/2013 of the European Parliament and of the Council of 22 October 2013 (Eurosur) (OJ L 295, 6 November 2013, p. 11-26), or the two executive orders issued by Trump upon taking office on 25 January 2017, namely, the *Executive Order on Border Security and Immigration Enforcement Improvements* and the *Executive Order Enhancing Public Safety in the Interior of the United States*, both of which cited the security of the United States.

10 As noted by A. del Valle Gálvez, who spoke in this case of "pre-border" ("prefonterizo") control. See A. del Valle Gálvez, 'Los refugiados, las fronteras exteriores y la evolución del concepto de frontera internacional (editorial)', 33 *REDE* (September-December 2016) 759-777, available here.

11 See AILA/American Immigration Council, 'Summary and Analysis of Executive Order "Border Security and Immigration Enforcement Improvements', 25 January 2017, AILA Doc. No. 17012505, at 6. In the same regard, see J. M. Heyman, 'Constructing a Virtual Wall: Race and Citizenship in U.S.-Mexico Border Policing', 50 (3) *Journal of the Southwest* (Autumn 2008) 305-334 [doi: https://doi.org/10.1353/jsw.2008.0010].

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Traditionally, the construction of walls reflected the aspirations of city-states, kingdoms, nations, empires or modern states to consolidate and stabilize their respective territories. They were thus a means of isolation and defence in intrinsically violent societies in which war and the right of conquest were legal and, because of that possibility of acquiring territory, borders were mobile.

However, the global nature of today's international society, its obligatory peaceful co-existence, and the globalization undergone in recent decades would seem to run contrary to this growing trend of building border walls, let alone of doing so in violation of international law.[12] It is thus both surprising and troubling that, whilst at the time of the demolition of the Berlin Wall, the most ideological wall of them all, there were 19 walls between states, today there are almost 90. Furthermore, whilst that wall was intended to keep people in,[13] those being built today are basically intended to do the opposite, i.e. to keep people out.[14] And this wall-building trend spans the whole planet. Similar examples can be found on all continents, which seem to be immersed in a genuine process of being "parcelled up". This is in addition to the existence of internal walls in some states, built to further consolidate economic and social inequality.[15]

Although the states building these barriers cite a variety of reasons, one in particular stands out, or, perhaps, encapsulates all the others in a single idée-force or snapshot: the defence of national security, which justifies not only the extraterritorial application of purely domestic laws beyond the borders of the state in question, but also even an abusive use of that state's jurisdiction. If fortification was once important in terms of defence, such devices do little to nothing to address today's security threats. These new architectural barriers are actually an attempt to restrict and control the movement of people, goods and, to a lesser extent, information or even the spread of disease between states.[16]

Modern state borders were, until recently, abstract, intangible lines that marked the boundaries of state jurisdiction in a statist and merely competence-based international law dynamic[17] that today is understood to have been surpassed.[18] Insofar as the study of borders was synonymous with the analysis of the lines separating states' sovereign territories, it basically focused on their demarcation, i.e. on geography. However, the materialization of borders in the form of walls, security fences, etc. calls for a global

[12] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion of 9 July 2004, ICJ Reports (2004), para. 121.

[13] See the ECtHR judgment of 22 March 2001 in the case *Streletz, Kessler and Krenz v. Germany*, Applications Nos. 34044/96, 35532/97 and 44801/98, para. 69.

[14] See USA Secure Fence Act of 2006 (H.R.6061 — 109th Congress (2005-2006)).

[15] These are the so-called "muros de la desigualdad" ("walls of inequality") that can be found, amongst other places, in Lima, where they are used to isolate the "condominios" (blocks of flats) where the wealthy live from the most impoverished neighbourhoods; Rio de Janeiro, where they are intended to isolate the "favelas"; and Posadas, on the border between Argentina and Paraguay, where they are used for the same purpose.

[16] That was the reason initially cited to justify the construction of the wall between Botswana and Zimbabwe, i.e. to block the entry of FMD-infected cattle.

[17] See K. Raustiala, 'The Geography of Justice', 73 *Fordham Law Review* (2005), 2501 *et seq.*, available here.

[18] See W. M. Reissman, 'The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment', General Course on Public International Law, 351 *RCADI* (2010) 1-381, in particular, Chapter II [doi: https://doi.org/10.1163/9789004236165].

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understanding of an entire process rather than just a material element.[19] That process can only be understood through a multidisciplinary analysis (geographical, sociological, political, historical, psychological, geostrategic and environmental),[20] because, as a process, it is dynamic rather than static,[21] which makes these walls questioned, controversial or disputed areas.[22]

The border is dynamic not only because people and goods cross it, but also because it itself, as well as the legal system regulating its existence and/or use, is subject to all sorts of contingencies.[23] This dynamic nature likewise affects the wall or fence that "symbolizes" it. That is why borders and, therefore, walls cannot be understood statically in terms of inclusion and/or exclusion, but rather must be understood dynamically in terms of movement. Consequently, it is necessary to analyse and understand them outside the binary logic of "inside/outside", which, furthermore, can vary depending on a variety of factors, such as people who cross them illegally, the legal regulation of crossings, etc. This means that borders are unlikely to be one hundred per cent successful at keeping people in or out against their will; hence, the idea that what truly matters when it comes to organizing international society is not borders themselves, but movement across them.[24]

Nevertheless, the consequences of border walls go much further, giving rise to a series of perverse effects: a) the toughening up of national policies to control the flow of people, whether migrants or people in need of international protection, with the ensuing increase in mixed flows; b) the use of increasingly deterrent devices on fences and walls, when not devices that are manifestly contrary to people's physical integrity; c) the diversion of the routes[25]that migrants follow towards other more dangerous ones, resulting in a verified increase in human-trafficking mafias; and d) breaching by states of their obligations with regard to asylum, refugees and the protection of human rights or the so-called minimum standard of treatment. This latter consequence is in addition to the breach of cooperation and good neighbour agreements and other international commitments, as well as, in the case of some European states, the breach of commitments undertaken in legally binding instruments concluded by the European institutions and even the questioning of respect for the EU's own values and principles.[26]

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19 See C. Rumford, 'Seeing Like a Border', in C. Johnson *et al.*(eds.), *Interventions on Rethinking "the Border" in Border Studies*, 30 *Political Geography* (2011-2) 61-69 [doi: http://dx.doi.org/10.1016/j.polgeo.2011.01.002].

20 See D. Newman, 'On Borders and Power: A Theoretical Framework', 18 *Journal of Borderland Studies* (2003-1) 13-25 [doi: https://doi.org/10.1080/08865655.2003.9695598].

21 T. Nail, *Theory of the Border* (Oxford University Press, 2016) at 5-6; R. T. Ford, 'Law and Borders', 64 *Alabama Law Review* (2012-1) 123-139, available here.

22 *Ibid.*, at 6.

23 N. Vaughan-Williams, *Border Politics: The Limits of Sovereign Power* (Edinburgh University Press, 2009), at 1.

24 See Newman, *supra* n. 20, at 15.

25 See Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, 2010, OEA/Ser.L/V/II, Doc. 78/10, 30 December 2010. On this issue in Europe, see: A. Brouwer and J. Kumin, 'Interception and Asylum: When Migration Control and Human Rights Collide', 21 (4) *Refuge: Canada's Journal on Refugees* (2003) 6-24, available here; A. Siani, 'Interception Practices in Europe and Their Implications', 21 (4) *Refuge: Canada's Journal on Refugees* (2003) 25-34; and T. Spijkerboer, 'The Human Costs of Border Control', 9 *European Journal of Migration and Law* (2007) 121-139 [doi: https://doi.org/10.1163/138836407X179337].

26 In this regard, see the letter sent by Hungarian Prime Minister Viktor Orbán to the President of the European Commission, requesting EU funding for the fence that Hungary built on its border with Serbia on the understanding that the

Insofar as they do not simply indicate a state's territorial boundaries — in accordance with the more classical definition of the concept of border[27] — these walls become dynamic elements of social division.[28] In separating two entities — not just two territories — they create an intermediate place with its own significance, one that lacks, for the time being, international regulation, i.e. the wall or fence itself.[29] In this sense, the border can be perceived as a place of continuation or a place of separation and regression, depending on the legal landscape that frames it.[30] However, fences and walls restrict or even abruptly eliminate any possibility of continuation or idea of union, amongst other things, because they can be completely devoid of ports of entry or, on the contrary, offer only checkpoints as the sole possible ports of entry or continuation between the neighbouring territories.

The ultimate reason prompting states to choose this fortified response is not easily identifiable. However, a state's decision to fortify its borders can be seen, *de facto*, to yield a certain political return for the government that makes it.[31] Furthermore, to the extent that it prevents social and cultural miscegenation and further closes off a population group united by a series of historical, social, cultural, legal and economic ties, it reinforces a discriminatory national sentiment, a negative view of non-nationals, who can be considered a threat.[32]

In most cases, "security" narratives are used to justify the construction of walls. However, in deciding to build them, governments have sought not only to erect a defensive barrier against threats from the outside world, but also to define who belongs to their respective state. They do this by encouraging citizens to create and internalize those barriers in an attempt to create a stable and homogeneous population within a perfectly defined territory, thereby legitimizing exclusionary practices. The governments of the states that act this way publicly stress to their citizens that these barriers are essential tools to protect the

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fence serves EU interests in general by keeping the EU free of illegal immigrants, considered to be dangerous and undesirable. (See *El País*, 'Hungría pide a la UE que pagueparte de la valla que levantó para frenar a los inmigrantes', 1 September 2017.) The request was considered scandalous and accordingly denied by the EU. However, it was also accompanied by the passage of a law in the Hungarian Parliament allowing the systematic detention of any person in Hungary without a residence permit, regardless of whether they might need international protection (see *El País*, 'Hungría detendrá sistemáticamente a todos los inmigrantes que entren sin papeles', 7 March 2017), as it would not be able to approve their application. This entailed a serious risk of breach of Art. 2 TEU, prompting the European Parliament to vote, in September 2018, to trigger the Art. 7 TEU sanctions procedure against this Member State. The Commission responded in April 2019 with a communication on the EU and the Rule of Law. There were also serious suspicions of mistreatment, by the Hungarian authorities, of the people forming part of the massive flows that, in 2015, were displaced to Central Europe as a result of the resurgence of the armed conflict in Syria, creating a genuine humanitarian emergency.

27 According to the Oxford Dictionary "A line separating two countries, administrative divisions, or other areas".

28 See T. Nail, *Theory...*, *supra* n. 21, at 2; D. Hernández Joseph, 'Política migratoria y de control fronterizo de Estados Unidos hacia México y Centroamérica', VI (8) *Revista Enfoques* (2008) 193-214, available here; and J. McFadyen, 'Weighing the Pros and Cons of U.S.-Mexico Border Barrier: Immigration Issue Affects Economy, Human Lives and Message to the World', available here.

29 See M. Paz, 'The Law of Walls', 28 *The European Journal of International Law* (2017-2), at 602 [doi: https://doi.org/10.1093/ejil/chx026].

30 That is, whether the border being crossed lies within the EU's Area of Freedom, Security and Justice, or the geographical context of a regional organization with some sort of agreement on matters of free movement, or between states not bound by any commitment in this regard.

31 The electoral victories of Donald Trump in the US or, more recently, Kurz in Austria can be interpreted in this regard.

32 See P. Gulasekaram, 'Why a wall?', 2 *UC Irvine Law Review* (2012) 147-192, at 158, available here.

ideals and freedoms that define the modern democratic state. However, the exclusion and violence exercised by these same states often undermine the ideals these measures are intended to protect and defend. The most dangerous aspect is not the wall's physical existence, but the racism it fuels between the peoples on either side, the permanent invitation it constitutes to deny the other's existence or attack it. As has been argued elsewhere, the enemy behind a wall is a "faceless enemy" who deserves to be destroyed; an enemy with a visible face is a human who deserves respect.[33] On the other hand, without a walled construction, the border, as a social and legal construct, lacks emotional force. Compared to the complexity for the population of understanding government provisions regulating entry and stays in the country, the construction of a wall is easy to interpret and understand and conveys the message of an omnipresent state protecting against an external threat.[34]

The field of international relations has offered a Freudian explanation for the proliferation of these walls in general, and of some virtually impossible constructions in particular, such as the border between Mexico and the US. According to this explanation, these megalomaniacal constructions are simply intended to symbolize, where applicable — especially in times of crisis — the power of the sovereign, to reaffirm a sovereignty that has been relativized and, in some ways, diminished in current international society through massive and unequivocal constructions that exalt the power of the government that builds them.[35] However, walls themselves, as a new reality imposed on the relations between states, can be analysed from a dual point of view: a state-centric perspective and an anthropocentric one, i.e. one focused on walls' effects on individuals. In the former case, the debate will centre on territoriality; in the latter, on the protection of human rights. Amongst all the possible examples, this article will primarily focus on the wall between Mexico and the US,[36] whilst also making some references to the cases of India, Israel and the EU.

(C) THE "STATE-CENTRIC" VIEW OF WALLS: THE PREDOMINANCE OF NATIONAL SECURITY

The idea that a wall is the best solution to any threat of insurgency has been common throughout history. Given the additional risks potentially posed by globalization in this regard, security-related reasons have featured prominently in justifications for the proliferation of walls or fences. This argument is based on

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33 See in this regard M. Dear, *Why Walls Won't Work: Repairing the US-Mexico Divide* (Oxford University Press, 2013).

34 See Gulasekaram, *supra* n.32, at 163.

35 See D. Dorsey and M. Díaz-Barriga, 'Beyond Surveillance and Moonscapes: An Alternative Imaginary of the U.S.-Mexico Border Wall', 26 (2) *Visual Anthropology Review* (2010), 128-135 [doi: https://doi.org/10.1111/j.1548-7458.2010.01073.x].

36 The only wall established by law, first under the Secure Fence Act (2006), and now under Executive Order 13767 of 25 January 2017 (Federal Register, Vol. 82, No. 18, Monday, 30 January 2017). Section 2 (e) defines the wall as "a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier", in accordance with Section 3 of the Border Security and Immigration Executive Order. Construction began on it during the presidency of Bill Clinton and has been enthusiastically resumed under the Trump administration as one of the flagship initiatives of his presidency. Nevertheless, its construction and funding have been steeped in controversy, as each mile of wall has an approximate cost of 16 million dollars. See Cato Journal, 'Illegal Immigration Outcomes on the U.S. Southern Border'; and S. Pierce, 'Immigration-Related Policy Changes in the First Two Years of the Trump Administration', *Migration Policy Institute* (2019), at 1, available here. In the same vein, see *USA Today*, 'President Trump's executive actions: The complete list so far'.

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the understanding that the greatest threat to security is the existence of porous borders separating unstable, problematic, less developed, etc., states. [37]

In the 1990s, India, traditionally considered the largest democracy in Asia, was the first state to resort to the construction of a wall. This decision was compounded by the fact that the wall was built along a controversial borderline not accepted in its entirety by neighbouring Pakistan, in relation to the disputed region of Kashmir, whose inclusion in India it rejects. The fence is secured with an exclusion zone that, at some points, spans up to 50 kilometres. This zone is reinforced with mines — despite the international ban on using them — and monitored by drones, in addition to being equipped with other high-tech instruments, making it an important friction point between two nuclear powers. It is expected to reach a final length of around 3,300 kilometres.[38]

India argues that the fence is an effective means of defence against threats to its security from Pakistan, in particular in the separatist areas of Punjab and Rajasthan, and it has completed more than 2,900 kilometres so far. It has used the same argument to seal its separation from Bangladesh, with whom it shares the fifth longest border in the world, which, until just a few years ago, had been only loosely controlled. The existence of that barrier leaves 100,000 people in a no-man's land devoid of basic services. However, although the figures are hard to verify, between 10 and 20 million Bangladeshis are illegally in India. Whilst this situation may not, at least, detract from the security-based argument, it does seem to highlight the feebleness of the border's fortification in terms of strengthening India's security.

Thus, it has been argued that the fence separating India and Bangladesh shapes and is shaped by two feelings: that which holds that Islamist terrorism in India is a terrorism imported from Bangladesh; and that which understands that effective control of the border with this state is crucial to combating it. This combination results in prejudices that condition the assessment of the fence and subliminally convey the message that: a) the fence isolates these Bangladeshis because they are violent, pre-modern and irrationalism contrast to the civilized world of India; and b) India is the first line of defence in the fight against radical and terrorist Islamism, the frontline in the struggle against international terrorism.[39] Both messages encourage the population to "close ranks" and come together against a common external enemy. Israel began to build its wall to delimit or, rather, isolate the Palestinian territory in 2002, during the second Intifada, despite the lack of any previous agreement with the Palestinian National Authority. Some 80% of the built wall lies in the West Bank, winding through territory considered Palestinian and, therefore, not subject to annexation through its inclusion on the Israeli side of the wall. The Israeli wall or "security fence"

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[37] See P. Staniland, 'Defeating Transnational Insurgencies: The Best Offense Is a Good Fence', 29 *The Washington Quarterly* (2005-1) 21-40 [doi: https://doi.org/10.1162/0163660053774839698].

[38] See M. Sur, 'Through Metal Fences: Material Mobility and the Politics of Transnationality at Borders', 8 *Mobility* (2013-1) 70-89 [https://doi.org/10.1080/17450101.2012.747778].

[39] See D. McDuie-Ra, 'Tribals, migrants and insurgents: security and insecurity along the India-Bangladesh border', 24 *Global Change, Peace & Security* (2012-1)165-182, in particular, at 171 [https://doi.org/10.1080/14781158.2012.641286]. On other separation walls on the Indian subcontinent, see J. D. Greenberg, 'Divided Lands, Phantom Limbs: Partition in the Indian Subcontinent, Palestine, China, and Korea', 57 *Journal of International Affairs* (2004-2) 7-27, available here.

 DOI:10.17103/sybil.23.22

is twice as high as the former Berlin Wall and, once finished,[40] will be thirty times as long. It also includes territories beyond the Green Line established as the international border prior to the Six-Day War of 1967. It was argued that it would stop the Palestinian terrorist attacks that threatened the very existence of the state of Israel, which certainly were taking place. However, as has been noted elsewhere,[41] given how crucial the Israeli government claims that the wall is to Israel's existence as a state, the country's arguments regarding this specific rationale in the run-up to the advisory opinion rendered by the International Court of Justice in 2004 were surprisingly brief.

In any case, the lack of practical effects resulting from the ICJ's emphatic advisory opinion, despite the many violations of various international obligations that the barrier entails, has been widely acknowledged and discussed in the international law literature. The Israeli Supreme Court has even refuted the opinion to a certain extent and approved the barrier's permanence — barring a few slight changes in its path in very specific areas — without those breaches having elicited any response from the international community.[42]

But the most important thing is that the "security" reasons used to justify its construction do not hold up today and have only served to deepen the threat against the Israeli population, not necessarily from the Palestinian population — although that, too, as the wall's construction has made the occupation of the Palestinian territories, the forced submission of their people and a growing discontent and instability in the West Bank more visible — but because it serves as a pretext for any jihadist movement wishing to embrace the Palestinian cause for its own purposes.[43] It also seriously contributes to the radicalization of an impoverished, neglected and desperate Palestinian population made more sensitive and permeable to non-peaceful appeals or initiatives.

This supposed justification is even clearer in the case of the US-Mexico border wall. Since the passage by the US Congress of the 2006 Secure Fence Act,[44] with bipartisan support from Republicans

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[40] The wall has not yet been completed in some small areas due to the presence of obstacles, such as the two Salesian monasteries in the city of Beit Jala.

[41] See D. Bondía García, 'Sí, señoras y señores, sí, Israel tiene argumentos...', in R. Escudero Alday, *Los derechos a la sombra del muro. Un castigo más para el pueblo palestino* (Catarata, Madrid, 2004), at 98.

[42] The ICJ's advisory opinion concerning the wall built by Israel has been widely examined in the internationalist literature and a detailed discussion of the matter would go beyond the scope of this paper. For more information on all aspects, see: A. Badía Martí, 'La opinión consultiva de la Corte Internacional de Justicia sobre las consecuencias jurídicas de la construcción de un muro en el territorio palestino ocupado de 9 de Julio de 2004', 9 *Revista Electrónica de Estudios Internacionales* (2005) 1-23, available here; R. Escudero Alday (ed.), *Los Derechos a la Sombra del Muro. Un castigo más para el pueblo palestino* (Catarata, 2006); L. Scobbie, 'Regarding/Disregarding: The Judicial Rhetoric of President Barak and the International Court of Justice's Wall Advisory Opinion', 5 *Chinese Journal of International Law* (2006-2) 269-300 [doi: https://doi.org/10.1093/chinesejil/jml021]; A. M. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?', 18 *European Journal of International Law* (2007-1) 1-35 [doi: https://doi.org/10.1093/ejil/chm001]; and M. Burgis, 'Discourses of Division: Law, Politics and the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', 7 *Chinese Journal of International Law* (2008-1) 33-63 [https://doi.org/10.1093/chinesejil/jmm046].

[43] The Palestinian cause has often been invoked by terrorists who supposedly support it, as well as by members of Daesh in recent terrorist attacks carried out on European soil, including two of the London attacks and one of the attacks carried out in Paris.

[44] Available at https://www.govtrack.us/congress/bills/109/hr6061.

 DOI:10.17103/sybil.23.22

and Democrats, 1,080 kilometres of mixed barrier consisting of concrete, barbed wire, patrolled roads, fences and high-tech "smart border" areas monitored by sophisticated equipment such as unmanned aircraft have been completed. Originally devised by Bill Clinton, it became another of the George W. Bush administration's key initiatives to secure the country against the terrorist threat in the wake of the sad attacks of 11 September 2001.[45]

As powerful as the arguments concerning the "war on terrorism" and the Bush doctrine of "preventive war", aimed at destroying the foreign enemy and strengthening domestic security in order to prevent individuals from countries deemed wild and uncivilized from entering the country, are, they do not, in themselves, explain the construction of these barriers. They do, however, strongly contribute to describing and defining neighbouring peoples as inhuman and undeserving of the modern human rights guaranteed by democracies, thereby transforming the respective walls into the boundaries of the modern world, beyond whose borders lies only chaos.

The truth is that the strictly "security"-based conception of that border following the 2001 attacks has proven wrong in at least three ways. First, the wall's construction has not reduced migratory pressure from the south, as evidenced by its inability to prevent the entry of migrants from Mexico.[46] On the contrary, a 2008 Congressional Research Service report expressly stated, "There is considerable evidence that the flow of illegal immigration has adapted to this enforcement posture and has shifted to more remote areas of the Arizona desert."[47] Second, the application of this prevailing view of security and the terrorist threat to border control has reduced the control of other very important forms of transnational organized crime,

[45] For background on this initiative, see D. Gilman, 'Obstructing Human Rights: The Texas-Mexico Border Wall. The Working Group on Human Rights and the Border Wall, Background and Context', June 2008.

[46] See Gulasekaram, *Why a wall...*, *supra* n. 32, at 156.

[47] See *CRS Report for Congress. Border Security: Barriers Along the U.S. International Border*, updated 13 May 2008, at 1, available here. The US Accountability Office later made the same assertion, noting that the wall had been breached 3,363 times and that it has not yet found any way to determine whether the fence was helping to halt illegal immigration. Reported in T. Nail, 'The Crossroads of Power: Michael Foucault and the US/Mexico Border Wall', 15 *Foucault Studies* (February 2013) 110-128, at 116 [doi: https://doi.org/10.22439/fs.v0i15.3993]. For the full report, see US Government Accountability Office, 'Technology Deployment Delays Persist and the Impact of Border Fencing Has Not Been Assessed' (2009).

 DOI:10.17103/sybil.23.22

as has repeatedly been made clear.[48] Finally, third, it has had a tremendous impact in terms of human rights violations,[49] as will be discussed in the following section.

The "Border Security and Immigration Enforcement Improvements" executive order issued by President Trump at the start of his term of office seeks to implement an even stronger vision of the "insecurity" involved in allowing people to flow across that border. Based on the idea that people who enter US territory illegally "present a significant threat to national security and public safety", its main purpose is "to detain individuals on mere suspicion of violating the law, including immigration law", to which end it criminalizes, purely and simply, undeclared immigration.[50]

The Trump Administration has taken a series of additional steps that clearly affect the exercise of sovereignty by some states. First, not only does it exercise US jurisdiction over an adjacent foreign territory up to 100 miles deep, it has also identified and cut all kinds of aid, assistance and cooperation funding to cities deemed uncooperative in the fight against illegal immigration ("sanctuary cities").[51] Second, it has

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[48] In fact, it has been argued that the dramatic change the US implemented in the management of its migration policy following the 2001 attacks with regard to management of the border with Mexico has encouraged the border's militarization in favour of security rather than the fight against illegal immigration and forms of organized crime such as drug trafficking. See A. M. Bustamante, 'The Impact of Post-9/11 US Policy on the California-Baja California Border Region', 28 *Journal of Borderland Studies* (2013-3)307-320 [doi: https://doi.org/10.1080/08865655.2012.751729]; and D. Shirk, 'Law enforcement and security challenges in the U.S.-Mexican border region', 18 *Journal of Borderland Studies* (2003-2) 1-24 [doi: https://doi.org/10.1080/08865655.2003.9695604]. With regard to the exorbitant cost of the wall's construction and the diversion of resources for this purpose and, therefore, the weakening of the fight against other criminal phenomena, see D. Kerwin, 'From IIRIRA to Trump: Connecting the Dots of the Current US Immigration Policy Crisis', 6 (3) *Journal on Migration and Human Security* (2018) 192-204 [doi: https://doi.org/10.1177/2331502418786718]. The government's failure to demonstrate that the existence of the physical wall prevents the entry of potential terrorists, who, in any case, did not enter by land but by air in 2001 and are more likely to cross the border with Canada, which is much less heavily monitored, than the border with Mexico, has likewise been underscored. See Gilman, *supra* n. 45, at 8-9.

[49] In this regard, see D. Gilman, 'Seeking Breaches in the Wall: An International Human Rights Law Challenge to the Texas-Mexico Border Wall', 46 *Texas International Law Journal* (2011) 257-293; Amnistía Internacional: 'Enfrentando Muros. Violaciones de los derechos de los solicitantes de asilo en Estados Unidos y México', 2017; and Harvard Immigration and Refugee Clinical Program, 'The Impact of President Trump's Executive Orders on Asylum Seekers', Harvard Law School. Similarly, the fact that the border fence encroaches on and owned by indigenous peoples, causing harm to them and to their right to move freely and hindering the normal functioning of family ties, has been denounced before the Inter-American Commission on Human Rights. However, that body could only take note of this fact, as the US is not a party to the American Convention on Human Rights and, consequently, the Inter-American Court has no adjudicatory power over it. See 'IACHR Expresses Concern over Executive Orders on Immigration and Refugees in the United States', available here.

[50] See American Immigration Council, *Summary and Analysis...*, *supra* n.11; and *The New York Times*, 'Trump's Immigration Order Expands the Definition of "Criminal"', 26 January 2017, despite the fact that, according to the figures offered by the Migration Policy Institute, a nonpartisan think tank, of the 11 million undocumented immigrants in the country, only 820,000 have a criminal record and the number of entries across the southern border has declined dramatically (Cato Journal, 'Illegal Immigration Outcomes on the U.S. Southern Border'; CBP Border Security Report, Fiscal Year 2017, 5 December 2017, Homeland Security Department). In any case, according to the Trump administration, the aim would be to protect US workers and taxpayers (see Testimony of Ronald D. Vitiello, Acting Deputy Commissioner U.S. Customs and Border Protection before the U.S. House of Representatives, Committee on Homeland Security, Subcommittee on Border and Maritime Security, on 'Stopping the Daily Border Caravan: Time to Build a Policy Wall', 22 May 2018, Washington D.C.; and Testimony of Carla Provost, Acting Chief, U.S. Border Patrol, U.S. Customs and Border Protection, U.S. Department of Homeland Security, before the U.S. Senate Committee on the Judiciary, on 'The MS-13 Problem: Investigating Gang Membership, Its Nexus to Illegal Immigration, and Federal Efforts to End the Threat', 21 June 2017, Washington D.C.).

[51] See S. Pierce, *supra* n. 36, at 6.

 DOI:10.17103/sybil.23.22

unilaterally determined that the bordering countries of Mexico and Canada must keep within their territories and under control any migrants seeking to apply for asylum or any other type of protection whilst their claims are being summarily studied.[52] This list has recently been expanded to include Guatemala, as a country of origin and, especially, transit for immigrants, following threats and the exertion of enormous pressure on that country.[53] Third, it has dramatically cut — when not outright eliminated — economic aid to the Central American countries from which most of the immigrants trying to cross into the US come, accusing them of not cooperating enough to prevent these people from leaving their countries of origin.[54] And, fourth, in addition to imposing the so-called "seven-country ban" (affecting seven Muslim-majority countries, a measure reminiscent of the discriminatory practice of profiling), whereby it automatically denies visas to nationals of the seven countries included in the ban, the administration has increasingly pressured at least 23 countries to accept the return and repatriation of their nationals from the US.[55]

As for the EU, the images evoked thus far of walls built in the Americas, Africa or Asia on the grounds of a national situation of extreme peril due to potential, imminent or consummated terrorist attacks, the actions of insurgent groups, or proximity to other states embroiled in any kind of armed conflict would have seemed remote had the armed conflict in Syria not spilled out into its neighbouring countries and, especially, Europe. The more or less apathetic attitude of European states as a whole — with the honourable exceptions of a few that have been victims of major terrorist attacks since 11 September — and of the EU itself might have continued for some time more had it not been for the existence of an armed conflict set off in Europe's immediate external surroundings. The mutation of the failed Syrian Arab Spring into an armed conflict, coupled with the rise of terrorist groups with unprecedented territorial control, resulted in a mass outflow of people in search of protection. They were joined by those seeking better living conditions in Europe, resulting in mixed flows on a scale not seen on the continent since World War II and which have been a boon to human trafficking mafias.

The hegemony of the defence of security and the national interest above all other considerations became especially visible in Europe when the phenomenon of foreign combatant terrorists emerged on the Old Continent. Until then, the predominant concern had been migration control. The emergence of this new facet of the terrorist phenomenon and its irruption into Europe underscored the vulnerability of the European population. The Syrian conflict and the escalation of terrorism in Europe became the justification for reducing protection, although the cases in which someone meriting international protection has actually helped to commit any of the attacks occurring on European soil since 2014 have, to

52 See Section 7 of the Executive Order under the heading "Return to Territory".

53 See *El País,* 'Guatemala cede a las amenazas de Donald Trump y acepta recibir más refugiados', 27 July 2019. This agreement, which the two administrations negotiated in secret, exacerbates the situation in Guatemala, which is neither a safe third country for asylum seekers nor a government capable of successfully managing huge numbers of immigrants. See *The Washington Post,* 'Guatemala's migrant pact with the U.S. threatens to unleash a political crises', 27 July 2019.

54 See *El País,* 'Trump ordena cortar la ayuda exterior a Centroamérica como protesta por la migración de familias', 31 March 2019.

55 See S. Pierce, *supra* n. 36, at 8-9.

 DOI:10.17103/sybil.23.22

date, been scarce.[56] However, the number of people trying to reach the safety of Europe by land, sea or air has skyrocketed, despite the dramatic number of victims,[57] showing that, as in the previous case, the construction of walls of any kind has not proven to be an especially useful remedy. In contrast, the toughening of controls, i.e. the intangible barriers, has caused the preferred migration routes to Europe to shift to more hostile territories of departure and much more dangerous migration routes controlled by mafias and violent groups.[58]

The provisions specifically designed to fight this scourge at the European level[59] have not met with excessive enthusiasm from the European states, which are reluctant to embrace them.[60] However, the mechanisms they provide for to combat those supposed security risks do not include border closures, let alone border fortification, but rather more efficient forms of preventive cooperation.

In any case, the state-centric vision of walls inevitably leads to a new reflection concerning the concept of jurisdiction, closely linked to the concept of sovereignty, insofar as the currently prevailing concept of sovereignty as a progressively restricted state attribute leads to the conception of jurisdiction not only as a state "regulatory power", but also a state "regulatory and adjudicating duty", i.e. a range of circumstances owed not only to other states but also to private parties. This idea is best known in the context of criminal law obligations, as recalled elsewhere, and also in the context of obligations to protect human rights,[61] in particular, the rights to due process and redress and to counter any denial of justice, as will be seen below.

(D) THE "ANTHROPOCENTRIC" VIEW OF WALLS: THE EXERCISE OF JURISDICTION OVER PEOPLE AND RESPECT FOR HUMAN RIGHTS

[56] They would include the cases of Salmon Abedi, the perpetrator of the Manchester Arena bombing on 22 May 2017, a Libyan refugee; the Moroccan man who stabbed several women in August 2017 in Turku, Finland; the Palestinian refugee who attacked several people in a supermarket in Hamburg on 27 July 2017; or the Iraqi refugee behind the attack on the London Underground in September 2017.

[57] The IOM's statistics on people who have disappeared or lost their lives trying to reach Europe are harrowing, reaching more than 2,700 people in 2017 alone.

[58] See Spijkerboer, *supra* n. 25, 134-136. In the same regard and in relation to migration to the US, see Amnistía Internacional, *supra* n. 49, at 7.

[59] See, in particular, the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, CETS No. 217. Thus, to continue the negotiation of the Riga Protocol and open it to ratification by the EU as well, which had already signalled its willingness to sign it on behalf of the 28 Member States, the UK demanded that it include an opt-out clause, as ratification of the Additional Protocol entailed ratification of the Convention on Prevention itself, and the UK did not wish to ratify either. Spain is the only European state to be condemned by its own courts for lack of diligence in complying with the processing of asylum applications submitted by people fleeing in the midst of the Mediterranean crisis. Spain failed to fulfil this obligation, including in relation to those applications enforceable under the established community quota. Specifically, the Spanish Supreme Court concluded that Spain had not met its obligations to process refugee applications according to the quota imposed by the EU in July 2018. See Supreme Court judgment 1168/2018, of 9 July 2018.

[60] To date, only the following countries have ratified the Protocol: Albania, Bosnia-Herzegovina, the Czech Republic, Denmark, France, Slovakia, Hungary, Italy, Latvia, Lithuania, Monaco, Montenegro, Portugal, the Republic of Moldova, Sweden and Turkey.

[61] See A. Mills, 'Rethinking Jurisdiction in International Law', 84 (1) *BYIL* (2014) 187-230 [doi: https://doi.org/10.1093/bybil/bru003].

Walls thus fulfil a dual purpose: to delimit the territory and reinforce the border, on the one hand, and to prevent the entry of non-nationals, such as immigrants or people seeking protection, on the other. In accordance with this dual conception, walls can give rise to discrepancies regarding territorial delimitation between states and its more or less legal nature, which is not a minor issue. However, just as walls close off a portion of territory as a manifestation of the physical space in which a state exercises its sovereignty and jurisdiction, they also divide population groups both inside and outside of them.

The flipside of this understanding of walls from an exclusively state-centric perspective, focusing on states' territoriality and sovereignty, is the impact that walls have on individuals. The contrast here is clear: whilst in contemporary international law, borders, once established, are static, from an anthropocentric perspective, walls affect groups of people who are, by definition, mobile, making them an evolving element rather than a static one. The mere presence of a separation wall or fence between states violates this mobility and organizes it in a certain way. Additionally, this presence serves to organize population groups according to criteria decided by the state, and even to impose a certain "discipline" on groups of people deemed problematic by systematizing their mobility.[62]

Of the various actions border states can carry out in relation to people, the exercise of jurisdiction beyond the border, wall or fence in question, and its impact on the enjoyment of rights, especially fundamental rights and freedoms, when the holders of those rights are individuals who are not part of the state's intramural population, are not nationals of the state and are trying to exercise their right of movement (immigrants) or seeking protection as a result of persecution by their own state (refugees and/or asylum seekers), seem especially important.

Because, even though the two aforementioned cases — migrants and asylum-seekers/refugees — are radically different, the two groups merge when they move, leading to a certain osmosis in terms of the protection of human rights. Faced with the arrival of a mixed flow, states thus have the obligation to, at least, allow each incoming person to seek to prove his or her need for protection, over which, as the territorial state, they will then have decision-making power. When those waves of people become massive as a result of major natural or human disasters, systematic violence within a state, or, especially, long and intense conflicts, states tend to reject this type of inflow, using physical walls and also the restrictive interpretation and application of existing regulations or creation of new ones to stop the waves. In this situation, in light of the virtually non-existent protection of the fundamental rights of undocumented workers,[63] international law offers a solid protection device to refugees and asylum-seekers, so all members of such groups of displaced peoples will seek to claim this benefit. International case law concerns two different phenomena: on the one hand, walls *per se*; on the other, the exercise of jurisdiction by states over the people trying to enter their territory.

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[62] See P. Pallister-Wilkins, 'Bridging the Division: Middle Eastern Walls and Fences and the Spatial Governance of Problem Populations', 20 *Geopolitics* (2015)438-459, at 439 [https://doi.org/10.1080/14650045.2015.1005287]; T. Nail, *supra* n. 21, at 119-120.

[63] In this regard, see J. Ramji-Nogales, 'Freedom of Movement of Undocumented Migrants', 51 *Texas International Law Journal* (2016)1-17.

 DOI:10.17103/sybil.23.22

Regarding the former, as seen above, the international courts have specifically ruled on the need for walls to follow internationally accepted border delimitations. They have not questioned the existence of controls as long as they respect those boundaries;[64] otherwise, they have declared them illegal.[65]

However, even when walls do adhere to internationally accepted borders, the ECtHR has recalled the need to respect and preserve human life above and beyond any potential claim to protect the border at all costs.[66] This could, over time, lead an international jurisdiction, in particular, the ECtHR, to rule on the compatibility of certain mechanisms, elements or security systems (electrification, concertina wire, etc.) used in the construction of walls with human rights, given that they could be especially harmful and, where applicable, could be considered contrary to the life and physical integrity of the people trying to get past them. In other words, it could lead an international court to rule on the legality of how a border wall or fence is materially constructed, in addition to the legality of the boundary it marks.[67]

With regard to the latter, as far as the exercise of jurisdiction by a state and its potential impact on the fundamental rights of the people trying to cross its borders are concerned, the procedural protection mechanisms established at the international level — in particular, the competent international jurisdictions with regard to human rights — are not always ideally positioned to make this decision. This has proven true with regard to the right to asylum, which is expressly recognized in the American Convention on Human Rights[68] but only implicitly recognized under the European Convention on Human Rights through a broad consolidated interpretation by the ECtHR of Article 3 thereof, whereby a person protected by the ECHR — i.e. a person under the jurisdiction of a State Party to it — cannot be returned to another country if there is a risk that he or she might be punished or subjected to cruel, inhuman or degrading treatment.[69]

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64 See the case *Streletz, Kessler and Krantz v. Germany*, *supra* n. 13, para. 71, in which the ECtHR upheld the legality of the Berlin Wall, built along the border agreed by the four powers, holding that "the aim of the Berlin Wall was to protect the border between the two German States at all costs in order to preserve the GRD's existence, which was threatened by the massive exodus of its own population".

65 In this regard, the ICJ unambiguously affirmed that the mere construction of the security fence on occupied Palestinian territory violated international law because it had been erected "to create a fait accompli on the ground that could well become permanent, in which case ... it would be tantamount to the fact of annexation". See Advisory Opinion, *supra* n.12, para. 121. On this aspect, see Y. Blank, 'Legalizing the Barrier: The Legality and Materiality of the Israel/Palestine Separation Barrier', 46 *Texas International Law Journal* (2011) 309-343, available here.

66 In accordance with the terms used by the ECtHR, the aim of protecting a state's border must be limited and, especially, must respect the need to protect human security such that the border protection does not have an indiscriminate effect or "a categorical nature to annihilate border violators ... and protect the border at all costs". See the case *Streletz, Kessler and Krenz v. Germany*, *supra* n.13, paras. 72-73.

67 In the same vein, see M. Paz, *supra* n. 29, at 605.

68 In accordance with Arts. 22.7 and 22.8, whereby: "7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes. 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions. 9. The collective expulsion of aliens is prohibited."

69 This was the means used by the ECtHR to rule on the asylum applications, in addition to Art. 4 of Protocol No. 4, pursuant to which, "Collective expulsion of aliens is prohibited."

 DOI:10.17103/sybil.23.22

In this regard, the ECtHR should be praised for its sensible and progressively broader interpretation of the protection offered under Article 3. That expansion, and, therefore, the overcoming of that intangible barrier, was accomplished, first, by expanding the protection offered to include non-nationals subject to a state's jurisdiction who cannot be returned to their country of origin due to the risk that they will be tortured or subjected to cruel, inhuman or degrading treatment or punishment, not just in accordance with the five criteria of persecution set forth in the Geneva Convention relating to the Status of Refugees race, religion, nationality, membership of a particular social group or political opinion but also in proven cases of clear socio-economic deprivation or the existence of a widespread situation of violence in the state of origin or transit, as in the case of the asylum seekers crowded at the Greek border.[70]

Another way in which this intangible barrier has been overcome is through a progressively more open interpretation of the principle of non-refoulement, which the ECtHR initially interpreted as a negative obligation not to expel and, later, transformed into a positive obligation for states to protect, further understanding that they should study the asylum application with due diligence, i.e. with due care and within a sufficiently short period of time, especially given the situation of hardship suffered by the applicant, who is entirely in the hands of the state, thus requiring the latter to provide adequate sustenance and shelter.[71]

The ECtHR has also extended its jurisdiction beyond the strict territory of the States Parties, considering itself competent to rule on the violation of any of the Convention's provisions by any of the contracting parties, even if the violation has occurred outside the physical territory thereof, i.e. beyond the walls or borders of the state in question, as long as it affects an individual who is subject to its jurisdiction. In this regard, the ECtHR has found this jurisdiction to exist whenever the state's authorities exercise effective control over that individual, whether on land or at sea, especially in boarding operations and operations to return individuals aboard boats intercepted by authorities in order to prevent them from reaching the state's territory, where they would be entitled to apply for asylum, ruling in this case that there is no physical place beyond the protection of human rights.[72] Thus, the ECtHR ultimately clearly condemned so-called "hot returns" precisely in a situation involving an assault on one of these fortifications

[70] So the ECtHR noted in its judgment in the case *N. A. v. United Kingdom*, Application No. 25904/07, of 6 August 2008, stating, in paragraph 115, that "the Court will not discount the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention". And so it affirmed shortly thereafter in the case *MSS v. Greece and Belgium*, Application No. 30696/09, of 21 January 2011, when it held that "acute financial deprivation" or a situation in which the asylum seeker "is wholly dependent on State support" and is "in a situation of serious deprivation or incompatible with human dignity" would fall within the scope of Art. 3 ECHR and, therefore, warrant protection.

[71] The ECtHR thus held, "The Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself ... living in the street ... without any means of provide for his essential needs". See *MSS v. Greece and Belgium*, *supra* n.70, para. 115.

[72] Thus, in the Hirsi Jamaa case, the Court found that jurisdiction is exercised in accordance with Art. 1 ECHR by a State Party: "whenever the State through its agents operating outside its territory exercises control and authority over an individual, and thus jurisdiction". See the case *Hirsi Jamaa v. Italy and Others*, Application No. 27765/09, of 23 February 2012, paras. 59-60. In the same regard, see the cases *Georgia v. Russia (I)*, Application No. 13255/07, judgment of 3 July 2014; *Sharifi and Others v. Italy and Greece*, Application No. 16643/09, judgment of 21 October 2014; and *Khlaifia and Others v. Italy*, Application No. 16483/12, judgment of 15 December 2016.

 DOI:10.17103/sybil.23.22

the Melilla fence — by two men from two African countries, one of which was clearly unstable and plagued by a situation of widespread violence. The two men were apprehended by the Spanish authorities and returned immediately, without being given an opportunity to identify themselves and apply for asylum as they had wished.[73]

Notwithstanding the above considerations, the protection offered in the European system remains, in any case, precarious, as this right is not explicitly enshrined in the ECHR, but rather is a jurisprudential construction that the ECtHR has gradually — although not always peacefully — imposed on states. In a certain sense, this puts its very existence and jurisdiction at risk, given that, in case of persistent disagreement, a State Party could choose to denounce the ECHR and abandon this protection system.[74]

That is precisely why it has been argued that the presence of walls and fortifications may largely be due, today and in future, to an overly broad protection of migrants by the international human rights protection mechanisms and systems. According to this argument, given that the exercise of jurisdiction over a person implies his or her presence in a state's territory, using walls to prevent that presence is a legitimate and valid goal for states to prevent the entry of the non-national population resident outside its borders. This drift by international bodies — considered excessively protectionist of human rights — would thus encourage the construction of such walls in Europe, which would explain what has happened in the EU in recent years.[75]

Not only does such an assertion seem overly categorical, it also perverts the debate. First, the construction of walls in the world predates the existence of humanitarian crises such as those that Europe has been experiencing since 2011, which were undoubtedly the trigger for the construction of border fences in various European states.[76] Second, the origin of this case law favouring a broad interpretation of

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73 See the case *N.D. and N.T. v. Spain*, Applications Nos. 8675/15 and 8697/15, of 3 October 2017, in which the Court found that the fact that the men, upon descent from the wall, were under the physical control of the agents of Spanish authority entailed an act of exercise of jurisdiction by Spain, without going into whether the fence was or was not in Spanish territory, and that the immediate return of the applicants without their prior identification and without allowing them to submit an asylum request constituted a collective expulsion of aliens as prohibited under Art. 4 of Additional Protocol No. 4 to the ECHR.

74 See, in this regard, the statement made by British Prime Minister David Cameron on the subject on at least two different occasions as a result of the ECtHR's various rulings against the UK involving the extraterritorial application of certain ECHR provisions, in particular, Art. 3, and the possibility of expelling aliens considered to pose a threat to national security: *Daily Mail*, 3 June 2015 ("Our plans set out in our manifesto do not involve us leaving the European Convention on Human Rights. But if we can't achieve what we need … when we've got these foreign criminals committing offence after offence and we can't send them home because of their right to a family life that needs to change. I rule out absolutely nothing in getting that done").

75 See M. Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls', 34 *Berkeley Journal of International Law* (2016-1) 1-43; and M. Paz, 'The Law of Walls', 28 *European Journal of International Law* (2017-2) 601-624, who notes that "To foster an honest conversation about absorption capacity, the third necessary step to effect change is to remove human rights courts and quasi-judicial bodies from their central role and make the process much more overtly political" (at 624).

76 See, for example, the so-called Edirne wall (Turkey), the primary barrier for Syrians who cannot afford the journey to the island of Kos and try to reach Macedonia on foot. Built in 2013 and costing 3 million euros, it was funded by the EU. With a total length of 12.5 kilometres, it mainly affects Syrians, Afghans, Iraqis and Palestinians. See also the walls in the cities of Lesovo and Kraynovo, separating Bulgaria and Turkey, which span a total length of 120 kilometres, whose construction was also funded by the EU amid the humanitarian crisis in the Mediterranean. These walls led to a significant increase in the maritime exodus, as the sea became virtually the only way to reach Europe from Turkey. The separation fence between Serbia and Hungary, likewise a consequence of the closure of the aforementioned paths and affecting those arriving from southern Macedonia and

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the concept of jurisdiction for the purposes of the protection afforded under the ECHR also predates and is unrelated to the situation that has prompted this response by European states in favour of fortification.[77] Third, insofar as it is an extremely serious circumstance obliging states to tenaciously defend their national security where necessary, with walls or fences and one that has firmly taken root in them, the terrorist threat refers to the emergence of a new and different form of terrorism. It refers to the emergence of a terrorist movement with hitherto unknown profiles, territorial control and power (Daesh) and equally radically different means of perpetrating its attacks, particularly with the rise of foreign terrorist fighters. It moreover has to do with the similarly unprecedented success rate of the Islamist terrorist attacks accomplished by this new terrorism using those new means of perpetrating attacks. And, fourth, some states not only try to keep these people off their soil, but also intervene by establishing obligations in the territory of third states, as will be seen below.

Finally, it should be recalled that the declaration of a state of emergency also constitutes an intangible border, set up against these massive population displacements towards Europe of which the European states are so wary. It requires invoking Article 15 ECHR and temporarily repealing the Convention's application in accordance with a provision that all the sovereign states' legal systems include in their respective law, allowing them to declare a state of emergency in the case of an imminent threat to their very existence as a state.[78] Even though Article 3 is non-derogable, even in case of a state of emergency, the invocation of this circumstance by States Parties in relation to security nevertheless creates another indirect barrier to the protection of displaced peoples.

As for the walls built outside Europe and their impact on the rights of persons, the winding, irregular and intrusive path of Israel's so-called "security fence" clearly undermines and warps the enjoyment of the fundamental rights and freedoms of the Palestinian people, including: access to work; enjoyment of private property and exploitation of centuries-old farmland; access to healthcare; access to water (the largest water reserves are on the Israeli side of the wall); connection with other Palestinian zones, which have been turned into islands cut off from any other Palestinian territory; or the possibility to trade with other countries or communities.[79] This crucial impact that *de facto* prevents Palestinians from enjoying most of their fundamental rights has also been highlighted and denounced by the Special Rapporteur, Martin

Bulgaria, comprises a total of 135 kilometres of fencing standing 4 metres tall. Abuses by the mounted police of the ultraconservative Hungarian government have been documented along it, and Hungary later asked the European Commission to co-finance it. The request was denied. Finally, see the wall between Slovenia and Croatia, with a border spanning 670 kilometres, which will not be entirely fortified, on which construction began in late 2015.It is intended to prevent the displacement of people arriving to their territory from Greece especially towards Austria and Germany; however, in practice it has caused serious environmental damage.

77 This case law began with the case *Loizidou v. Turkey, (Preliminary Objections)*, Application No. 15318/89, of 23 March 1995, and was maintained in the following cases: *Loizidou v. Turkey (Merits)*, Application No. 15318/89, of 18 December 1996, para. 56; and *Cyprus v. Turkey*, Application No. 25781/94, of 10 May 2001.

78 Three States Parties to the Convention recently maintained the repeal of Article 15 ECHR: France, Turkey and Ukraine. See https://coe.int/en/web/conventions.

79 Statistics from the Israeli Information Centre for Human Rights in the Occupied Territories (BTselem), available here.

 DOI:10.17103/sybil.23.22

Scheinin, in his fifth report on respect for human rights and the fight against terrorism,[80] which, in theory, was the ultimate reason for the wall.

However, the clearest and most obvious example of these walls' "inhumanity" and the blatant violations they entail of certain fundamental rights may be the wall dividing Mexico from the US and the latter government's fight against illegal immigration. The construction dividing these two countries is the most comprehensive example of a tangible and intangible barrier to the movement of people and the most radical attempt to regulate and manage a problem of international dimensions from an obstinately unilateral perspective that presents immigration as a national security emergency in the face of serious crime.[81]

Because the executive orders and countless other orders, guidelines and memoranda adopted by the Trump administration against immigration offer an extensive catalogue of restrictive, repressive, persecutory and deterrent measures not only against immigration, but also against application for any form of international protection, they are an attack on human dignity.[82] The two executive orders, which sought to make good on one of President Trump's main campaign promises, make the construction and reinforcement of the US-Mexico border wall their main objective. To this end, they called for, and continue to call for even today, extraordinary funding — in terms of both nature and quantity — which the president turned into a national emergency, triggering the longest government shutdown in US history, and which he finally partially obtained from the Pentagon, after a close decision by the Supreme Court.[83]

As seen earlier, the philosophy of resuming the construction and reinforcement of the wall reflects the conception of immigration as a form of crime *per se*, as the new regulations have transformed what was once only an administrative offence into a criminal one. However, beyond this starting point, the most unfortunate aspect is the attack it constitutes on certain basic principles of the rule of law and on a series of human rights long-established in the international system.

With regard to the former, the new system designed in Trump's executive orders largely strips the court system of its ability to intervene, transferring the power to decide on the study and concession of any form of protection to the border police, although not to specialized personnel, protection officers or immigration judges. At the same time, it allows individuals to be detained merely "on suspicion" of violating federal or state law, which includes unauthorized entry.[84]

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[80] See Doc. HRC Report on Economic, Social and Cultural Rights in the Context of Countering Terrorism (2007), A/HRC/6/17. In this regard, see R. Busbridge, 'The wall has feet but so do we: Palestinian workers in Israel and the separation wall', 44 *British Journal of Middle Eastern Studies* (2017-3) 373-390 [doi: https://doi.org/10.1080/13530194.2016.1194187].

[81] As for the declaration of a national emergency by President Trump, see Reuters, 'Trump vows "VETO!" after bipartisan Senate rebuke on wall', 14 March 2019.

[82] See D. García-Ricci, 'El muro en la frontera México-Estados Unidos: un atentado a la dignidad humana', 10 *Derechos Humanos México* (2009) 147-164.

[83] See *The Guardian*, 'Supreme Court allows Trump to use $2.5bn in Pentagon funds for border wall', 26 July 2019; and *The New York Times*, 'Supreme Court Lets Trump Proceed on Border Wall', 26 July 2019. A one-paragraph-long 5-to-4 ruling was finally adopted, allowing President Trump to access funds from the Pentagon whilst a district court decides on the merits.

[84] See National Immigration Justice Center, Annotated Border Immigration Enforcement Executive Order, Section 2 (b).

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The new regulations adopted by the Trump administration add a further restriction to these obstacles, so-called "expedited removal", a procedure allowing officials from the Department of Homeland Security (DHS) to summarily remove noncitizens without affording them a hearing before an immigration judge or a review by the Board of Immigration Appeals (BIA). Additionally, the Homeland Security Secretary has the authority to apply expedited removal to any individual "apprehended at a place other than a port of entry, who is inadmissible under either of those grounds, has not been admitted or paroled, and cannot show that he or she has been continuously present in the US for two or more years".[85] Expedited removal differs deeply from removal proceedings before an immigration judge as in the latter case, noncitizens may have an attorney represent them, may apply for relief from removal and are entitled to substantial due process guarantees, in accordance with the requirements of the Fifth Amendment. Executive Order 13767 instructs the Homeland Security Secretary to apply this existing procedure to the fullest extent of the law,[86] thereby further depriving noncitizens of this fundamental right, as stated by Judge Pregerson in his dissenting opinion in *U.S. v. Peralta-Sanchez*.[87] At the same time, it blurs the separation of powers, stripping immigration judges of one of their main powers.

Moreover, depriving certain immigrants in different states (e.g. Washington or Minnesota) of their temporary protection status, and, therefore, subjecting them to immediate removal, affects the funding that states receive from the federal government to cope with medical care, education, employment, business, family relations, etc., which is calculated according to their respective populations. In light of this situation, US courts have granted a temporary restraining order (TRO) against certain actions (anti-immigration measures) taken by the executive, viewing them as a further example of invasive activity by the executive branch with regard to the other two branches of government as far as immigration regulation is concerned.[88]

Several states filed the same claim with domestic courts after the US executive's attempt to include a question on citizenship status in the 2020 ten-year census questionnaire that would likely make most non-US nationals reluctant to answer it and, thus, fail to take part in the census. According to some states (the plaintiffs), this would deeply alter the final result of the census, whose main purpose is to guide the allotment of congressional seats to the states based on their respective populations. As has been pointed out, the federal government also relies on census data to determine how to distribute billions of dollars in funding each year, including funds for Medicaid, Medicare Part B, the Supplemental Nutrition Assistance Program and the Construction Program. Additionally, the most affected states would be those with the

[85] *Ibid.*, at 2.

[86] See Section 11 (c) of Executive Order 13767.

[87] In particular, the judge stated that: "[T]he deportation process can begin and end with a CBP officer untrained in the law ... There is no hearing, no neutral decision-maker, no evidentiary findings, and no opportunity for administrative or judicial review. This lack of procedural safeguards in expedited removal proceedings creates a substantial risk that noncitizens subjected to expedited removal will suffer an erroneous removal." See *U.S.A. v. Rufino Peralta-Sanchez*, case no. 14-50393, decided 7 February 2017, at 42. Likewise, see *U.S. v. Raya-Vaca*, case no. 13-50129, decided 10 November 2014.

[88] See *State of Washington et al. v. Donald J. Trump at al.*, case no. C17-0141JLR, decided 3 February 2017.

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highest number of non-US-national residents,[89] which have traditionally been more permissive and open to immigrants. Consequently, the move to include a question on citizenship for the first time in the history of the US census would additionally hit more open states harder and, thus, decrease the Democratic opposition in the US Congress.

Returns at the border without allowing the submission of asylum or protection applications also clearly violate the obligation of non-refoulement agreed under Article 33 of the Refugee Convention, to which the US is a party. This fact is not remedied by the system of returning applicants to the other side of the border to wait for their asylum applications to be studied or by the fact that the US executive has begun to sign international agreements with third countries with a view to outsourcing the work of intercepting Central American migrants to the US. This violation is compounded by the imposition of the removal at all costs of immigrants who illegally enter the country and the obligation for asylum seekers to stay on the other side of the border whilst their asylum status is decided, as a deterrent to migration to the US, as well as the elimination of the possibility of obtaining immigration "parole", i.e. of temporarily entering the US despite lacking a visa or green card, as had previously been possible.[90]

Additionally, to the extent that the preferred course of action with regard to migrants is detention, the fundamental right of access to legal assistance to defend, for example, their innocence or their petition for asylum or protection, which should moreover occur within a specified amount of time and which had already been difficult, has become virtually impossible,[91] especially if the applicant is not allowed to enter the country but rather must wait on the other side of the border until his or her status can be decided. In this regard, and in addition to this new harmful procedure for dealing with asylum seekers, other complementary measures have been taken to support the Trump administration's new immigration policy, the so-called "zero-tolerance" policy. Thus, the Homeland Security Secretary took a series of decisions following the issue of President Trump's executive orders on immigration, consisting of terminating the agreed temporary protected status for certain nationals arriving from Central American countries (El Salvador, Nicaragua and Haiti) and from Africa (Sudan) about whom President Trump's public declarations had veered dangerously close to racism. Lawsuits in US district courts have demonstrated not only how deeply polluted those decisions are by an openly declared anti-immigrant sentiment, but also that courts have found them to be discriminatory and contrary to the Equal Protection Act. Apart from this racially discriminatory immigration policy that runs contrary to the US constitution and Fifth Amendment

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[89] See *State of California et al. v. Wilbur Rose et al.* and *City of San José et al. v. Wilbur Rose at al.*, cases nos. 18-cv-01865-RS and; 18-cv-2279-RS, decided 17 August 2018. See also *Robyn Kravitz et al. v. United States Department of Commerce* and *La Union del Pueblo Entero et al. v. Wilbur Rose et al.*, cases nos. GJH-18-1041 and GJH-18-1570, decided 28 December 2018; and *State of New York et al. v. United States Department of Commerce et al.* and *New York Immigration Coalition et al. v. United States Department of Commerce et al.*, cases nos. 18-CV-2921 (JMF) and 18-CV-5025 (JMF), decided 15 January 2019.

[90] See *National Venture Capital Association et al. v. Elaine Duke, Acting Secretary, U.S. Department of Homeland Security, et al.*, Civil Action No. 17-1912 (JEB), decided 1 December 2017; and. *Ansly Damus et al. v. Kirstjen Nielsen, Secretary of the Department of Homeland Security, et al.*, Civil Action No. 18-578 (JEB), decided 2 July 2018.

[91] See I. Eagly and S. Shafer, Access to Counsel in Immigration Court, American Immigration Council; and 'Asylum under Threat: Impact of President Trump's Immigration Executive Orders and the Department of Homeland Security's Memoranda on Asylum Seekers', Human Rights First, Fact Sheet, February 2017.

 DOI:10.17103/sybil.23.22

rights themselves, the material consequences include the expulsion of these nationals from the country. This indisputably causes irreparable harm and great hardship, as beneficiaries who have lived, worked and raised families in the US (many for more than a decade) would be subject to removal (refoulement, in fact, to places whose violence they once fled) and be uprooted from their homes, jobs, careers and communities. Furthermore, their US-born children would have to choose between staying alone in the US (the only country and community they have known) or leaving with their parents for countries to which they have few to no ties and which might not be safe.[92] The spectre of racism has also cast its shadow over the adoption of some of the Trump administration's travel bans, whether collective (the seven-country ban) or individual, as in the cases of *Washington v. Trump* and *Trump v. Hawaii*.[93]

In short, the harmful effects of the physical wall built by the US on its border with Mexico have been compounded, from an anthropocentric perspective, by numerous violations of fundamental rights guaranteed by the US Constitution, as well as various international law obligations by which the country is bound, in the most thorough example of how a tangible and intangible barrier has been built and reinforced between two states.

Last but not least, a dramatic situation persists with regard to minors, in particular those who left their home countries with their parents and have since become unaccompanied minors, as the new policy at the US southern border consists in separating adults from their underage children, so that parents can be detained for unauthorized entry and be subjected to criminal proceedings or put in immigration facilities in accordance with the aforementioned zero-tolerance policy. Although the new regulation[94] is claimed to be intended to preserve family units whilst also ensuring rigorous enforcement of migration laws, measures were not put in place to enable communication between the government agencies responsible for detaining the parents and those responsible for housing the children or ready communication between the separated parents and children themselves. No reunification plan was decided or in place, and families, including some with very young children (e.g. an 18-month-old baby), have been separated for months across distances of thousands of miles, as the federal government failed to enough housing for migrant families. The practice has resulted in the casual, if not deliberate, separation of families, including those that lawfully presented themselves at the port of entry seeking asylum. Some parents have even been deported without their children, who remain in government facilities in the US. This inhumane practice has also been condemned by US courts.[95]

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92 See *Crista Ramos et al. v. Kirstjen Nielsen et al.*, case No. 18-cv-01554-EMC, decided 3 October 2018; *Casa de Maryland, INC., et al. v. Donald J. Trump, in his official capacity as President of the United States, et al.*, case No. GJH-18-845, decided 18 November 2018; *East Bay Sanctuary Covenant et al. v. Donald J. Trump et al.*, case No. 18-cv-06810-JST, decided 19 December 2018; and *Innovation Law Lab et al. v. Kirstjen Nielsen et al.*, case No. 19-cv-00807-RS, decided 8 April 2019.

93 *Washington v. Trump*, case No. 17-35105, decided 17 March 2017. See also Harvard Law School, 'The Impact of President Trump's Executive Orders...', *supra* n. 49, at 5; and *Trump, President of the United States et al. v. Hawaii et al.*, case No. 17-965, decided 26 June 2018.

94 See Executive Order, Affording Congress an Opportunity to Address Family Separation, 20 June 2018.

95 See *Ms. L. et al. v. U.S. Immigration and Customs Enforcement ("ICE") et al.*, case No. 18cv0428 DMS (MDD), decided 26 June 2018.

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(D) SOME CONCLUDING REMARKS

Although the consequences of the main examples discussed in this study (Europe, Israel/Palestine, India/Pakistan and, especially, Mexico/the US) differ depending on the different contexts in which they occur, there are important similarities in the arguments used to build and justify these walls; what they mean in relation to the political identity, sovereignty and territory of each state; how they affect the lives of the border populations; and their negative impact on people. Recourse to such measures, the way they are used and their consequences usually lead to violations of international obligations and the transformation of essential concepts of contemporary international law.

However, the mutual understanding, respect and trust that ultimately comprise the basis for international peace and stability are not forged or maintained by building separation walls that disrupt communication, contact and all facets of life and that moreover use defence systems banned under international law, as is clearly the case of walls reinforced with anti-personnel mines, which are banned under the Ottawa Treaty. Walls ensure a continuous state of mutual distrust, alertness and, in the end, insecurity for the populations they separate, and they are used to justify all types of abuses and violations of states' international obligations. Therefore, they are not a valid solution for any of the problems they purport to solve.

Today's growing "wallmania" is nothing other than a new way of understanding international law and of regulating international relations from a perspective that is not only unilateralist but also strictly "security"-based and isolationist. This perspective is wearing away at basic constitutional principles of contemporary international law, whilst at the same time fuelling regressive reinterpretations of state sovereignty, human rights, the use of force and normal neighbourly relations between states. In short, all of this leads to a denial of the very concept of contemporary international law as a cosmopolitan system committed to a set of values and protecting the individual. By disrupting dynamic cross-border flows and preventing contact between different societies, in a word, preventing them from mixing, walls inevitably lead to cultural impoverishment and the unilateralization of international and European law, resulting in their dehumanization and the loss of their values.

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The Walls of Fortress Europe: Externalization of Migration Control and the Rule of Law

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Abstract: The aim of this contribution is twofold. First, it seeks to identify the main elements of the European policies of offshoring and outsourcing migration control and to describe the threats that these policies pose to the guarantees inherent to the Rule of Law. Second, given the serious risk of evasion of democratic controls that these policies entail, it attempts to find in the case law of European courts, specially the European Court of Human Rights, the elements that would make it possible to rebuild the eluded system of checks and balances.

Keywords: Border Control, European Migration Policy, Fortress Europe, Frontex, Access to Asylum, Extra-territorial Application of the ECHR.

(A) EUROPEAN OFFSHORING OF MIGRATION CONTROL

Above and beyond the lofty rhetoric used in the grand political pronouncements that have undergirded European action in the field of immigration and asylum,[1] it is the metaphor of Fortress Europe that best reflects the harsh reality of policies that have made border control and the fight against irregular immigration the core components of European action in this area.[2] This emphasis on migration control works two ways. In addition to a reactive dimension embodied in the return and readmission policies, aimed at forcing irregular migrants to leave, it includes a proactive facet intended to prevent such migrants

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[1] Since the Tampere Council Meeting, the EU has insisted that immigration and asylum policies should be carried out "fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments" and be able to "ensure the integration into our societies of those third country nationals who are lawfully resident in the Union" (Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, para. 4). The idea of balance is also the basis for the "global" approach on which the so-called external dimension of those policies is based. See: *Global approach to migration: Priority actions focusing on Africa and the Mediterranean*, European Council, Brussels, 15 and 16 December 2005, Annex I; European Council, Brussels, 14 and 15 December 2016, paras. 21 and ff.; and The Global Approach to Migration and Mobility, Communication from the Commission, 18 November 2011, COM(2011) 743 final.

[2] See, *per omnium*, P. García Andrade, *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias* (Valencia, 2015), at 46 and ff.

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from reaching European territory. Compared to the reactive dimension, this preventive facet is much more lightly regulated, is pursued much more opaquely and has received far less attention in the literature, especially in Spain.

In keeping with an approach first piloted elsewhere, and deepening a strategy initiated by the southern peripheral countries of the Schengen Area — quite singularly, Italy and Spain — the EU and its Member States have been fervently pursuing what have come to be called *non-entrée*[3], non-arrival[4], *neo-refoulement*[5] or front-door[6] policies. These policies typically entail the multiplication of so-called interception measures, in the broadest sense of the term. Interception measures refer to the set of legal, administrative and executive actions aimed at blocking or interrupting transit to European countries, with a view to preventing access to European territory by persons who, from the time they leave the countries of origin of the main migration flows and throughout their journey, aspire to access the European Union despite not meeting legal immigration requirements.[7]

The proliferation of interception measures entails an externalization process, in both the geographical and functional sense. It involves not only offshoring migration control, but also entrusting it to, or, at least, involving in its performance, organizations external to and/or independent of the European Member States themselves, whether private operators, third-country agents, or supra-state agencies such as Frontex. The European Union's strategy in response to the so-called refugee crisis, outlined in the European Agenda on Migration and debuted with the controversial EU-Turkey Statement of March 2016, unequivocally deepens these types of policies.

(B) THE WALLS OF FORTRESS EUROPE: INTERCEPTION MEASURES

Within the context of the Integrated Border Management System (IBMS), interception measures at the European level are intended to target migration flows at every point of the journey. These measures are fundamentally, if not exclusively, fivefold:

(a) First, they include a two-part *model for controlling access at source*. On the one hand, it consists of a visa system that requires migrants from almost all countries of origin of economic migrants and

3 J. Hathaway, 'The Emerging Politics of Non-Entrée', 91 *Refugees* (1992), at 40 and ff.; J. Hathaway and T. Gammeltoft-Hansen: *Non-Refoulement in a World of Cooperative Deterrence*, University of Michigan Law School, Law & Economics Working Papers (8 January 2014) 235-284; A. Gerard: *The Securitization of Migration and Refugee Women* (London-New York, 2014), at 67 and ff.

4 E. Taylor Nicholson: *Cutting Off the Flow: Extraterritorial Controls to Prevent Migration*, The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, Issue Brief (July 2011), at 2.

5 J. Hyndman and A. Mountz, 'Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe', 43 *Government and Opposition* (2008) 249-269, at 249.

6 M. Paz, 'The Law of Walls', 28 *EJIL* (2017) 601-624, at 609.

7 Likewise, see: *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*. Executive Committee of the High Commissioner's Programme, Standing Committee, 18th meeting (EC/50/SC/CRP.17), 9 June 2000, para. 10; and A. Klug and T. Howe, 'The Concept of State Jurisdiction and the Applicability of the Non-refoulement Principle to Extraterritorial Interception Measures', in B. Ryan and V. Mitsilegas: *Extraterritorial Immigration Control: Legal Challenges* (Leiden-Boston, 2010), at 69.

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refugees to the EU[8] to first obtain a visa, which, except in exceptional circumstances, they must apply for at embassies and consulates abroad.[9] On the other, it establishes a strict system of responsibility for carriers, who, under threat of harsh penalties, are compelled to perform de facto border control functions.[10]

(b) Second, *encouraging countries of origin and transit — especially neighbouring ones — to cooperate on the containment of migration flows* is an essential component of the IBMS and, therefore, of the external dimension of European immigration and asylum policy.[11] The refugee crisis and the strategy embodied by the "New Partnership Framework" have made cooperation on migration control a central issue in EU policy vis-à-vis the main countries of origin and transit. To this end, policies aimed at securing the indispensable political will of these countries have been made stricter. They have shifted from a strategy of intrinsically and eminently positive conditionality,[12] based on the granting of limited advantages with regard to migration, to one that, in addition to increasing the resources to be used, makes all EU and Member State policy towards these countries — including development cooperation policy — conditional in a way that does not rule out the use of negative incentives as well.[13]

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[8] Introduced in 1993 in the context of Schengen, the common list was incorporated into EU law in 2001, after the necessary attribution of powers by the Treaty of Amsterdam to the then European Community. See: Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 81, 21 March 2001, at 1). As it has been amended more than 15 times, it is advisable to check the unofficial codified version: Doc. 02001R0539-20170611.

[9] See, in relation to the uniform visa, Articles 4.1 and 10 of the Community Code on Visas. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) (OJ L 243, 15 September 2009, 1-58).

[10] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (OJ L 187, 10 July 2001, at 45 and ff.). In compliance with the obligations so undertaken, in Spain, the inbound control system implemented by carrier companies is regulated under Art. 66.3 of the Law on Immigration (LOEX), and Arts. 16 and 18 of its implementing regulations (REX). On the access control system based on the establishment of a system of responsibility on the part of carriers, see: V. Moreno-Lax, 'Must EU Borders Have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States' Obligations to Provide International Protection to Refugees', *European Journal of Migration and Law* (2008), at 315 and ff.; T. Rodenhäuser, 'Another brick in the wall: carrier sanctions and the privatization of immigration control', 26 *IJRL* (2014) 223-247.

[11] S. Gil Araujo, 'Redefiniendo las fronteras de Europa. Sobre la deslocalización del control migratorio comunitario', in I. Markez (ed.): *Respuestas a la exclusión. Políticas de inmigración, interculturalidad y mediación* (Donostia-San Sebastián, 2006), at 60.

[12] On the traditional reservations regarding negative conditionality, in particular, as a response to the Spanish-British proposal submitted by the Blair and Aznar governments at the Seville Council Meeting in 2002, see: K. Eisele, 'EU External Relations and Migration Policy: The Historical Development of the External Dimension', in J. Niessen and E. Guild (eds.): *The External Dimension of EU Immigration Policy* (Leiden, 2014), at 99 and ff.; and S. Lavenex, 'Shifting Up and Out: The Foreign Policy of European Immigration Control', in V. Guiraudon and G. Lahav (eds.): *Immigration Policy in Europe: The Politics of Control* (London, 2007), at 329 and ff.

[13] Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration, Brussels, 7 June 2016, COM(2016) 385 final, at 10. On the new approach embodied by this strong emphasis on negative incentives and the ensuing controversy, see: C. Castillejo, 'The EU Migration Partnership Framework: Time for a Rethink?', *German Development Institute, Discussion Paper* 28/2017.

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Achieving and maintaining political will is not enough. It is also necessary to *build up the capacity of these third countries*, providing them with material resources, training their personnel and using the appropriate technological means to ensure effective surveillance and the exchange of information required to successfully carry out the interception operations. Largely replicating the networked cooperation structure that the Spanish[14] and Italian[15] border control services have used over the past decade with their respective African partners, the European Union has, via Frontex, assumed the mission of promoting and deepening this operational cooperation, involving as many Member States as possible in the effort.[16] As a result, outbound migration control actions involve a wide variety of players, including, in addition to third-country border control services, supra-state agencies (Frontex), peripheral EU Members States, and other Member States providing support for these peripheral states. Whilst these limits do not fall within the scope of primary law, Frontex Regulation nevertheless limits the powers of this European border agency, which, despite its name, has no border guards.[17] This, coupled with the added value that the peripheral Member States can bring to these operations, explains why, whenever possible, this operational cooperation relies on those states for leadership. In any case, the extraordinary opacity surrounding this operational cooperation, whether it is carried out directly by Frontex or implemented by the Member States, makes it extremely difficult to learn the details of the specific types of cooperation involved in the performance of material interception operations.

(c) Building on the precedent of similar practices carried out in the United States and Australia,[18] the EU Member States have begun to conduct various types of *sea patrol* operations that include interception

[14] L. Gabrielli, 'La externalización europea del control migratorio ¿La acción española como modelo?', *Anuario CIDOB de la Inmigración 2017*, at 129 and ff.; and M. Casas Cortes *et al.*, '"Good neighbours make good fences": Seahorse operations, border externalization and extra-territoriality', 23 *European Urban and Regional Studies* (2016), at 231 and ff.

[15] A. Di Pascale, 'Migration Control at Sea: The Italian Case', in B. Ryan and V. Mitsilegas (eds.): *Extraterritorial..., supra* n. 7, at 296 and ff.; and S. Hamood, 'EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?', 21 *Journal of Refugee Studies* (2008), 19-42.

[16] Cooperation with third countries, "focusing in particular on neighbouring countries and on those third countries which have been identified through risk analysis as being countries of origin and/or transit for illegal immigration" (Art. 4.f) is one component of European integrated border management. It has been defined as an objective of the European Border and Coast Guard with a view to managing — i.e. controlling — border crossings and addressing the challenges of migration and cross-border crime (Art. 4). See: Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard (OJ L 251, 16 September 2016, at 1 and ff.) (hereinafter, Frontex Regulation).

[17] See Art. 2, para. 14, of the Schengen Borders Code (Regulation 2016/399), cited in Art. 2.3 of the Frontex Regulation, as well as Art. 20 of this latter instrument.

[18] On US practice, see: N. Frenzen, 'US Migrant Interdiction Practices in International and Territorial Waters', in B. Ryan and V. Mitsilegas (eds.), *Extraterritorial..., supra* n. 7, at 375 and ff.; N. Legomsky, 'The USA and the Caribbean Interdiction Program', 18 *IJRL* (2006), at 677 and ff.; and G. Goodwin-Gill, 'The Haitian Refoulement Case: A Comment', 5 *IJRL* (1994), 103-110. On Australian practice, including the famous *Tampa* case, see, amongst others: C. Bailliet, 'The Tampa Case and Its Impact on Burden Sharing at Sea', 25 *Human Rights Quarterly* (2003), at 741 and ff.; C.M.J. Bostock, 'The International Legal Obligations Owed to the Asylum Seekers on the *MV Tampa*', *IJRL* (2002), at 279 and ff.; S. Kneebone, 'Controlling Migration by Sea: The Australian Case', in B. Ryan and V. Mitsilegas (eds.): Extraterritorial..., *supra* n. 7, at 347 and ff.; P. Mathew, 'Australian Refugee Protection in the Wake of the Tampa', 96 *AJIL* (2002), at 661 and ff.; and E. Willheim, 'MV Tampa: The Australian Response', 15 *IJRL* (2003), at 159 and ff.

measures. In the Italian case, in accordance with agreements with the Albanian and Libyan authorities, Italian patrol boats directly detained and returned intercepted migrants to the coasts of departure. The ECtHR's rejection, in 2013, of this policy of returning migrants to Libya prompted a change of strategy, consisting in building up the Libyan coastguard's material, logistic and personal capacity and charging it with carrying out this practice directly.[19] Subtler from the outset, the Spanish operations, conducted in third-country waters in the form of joint patrols — in practice, agents from those countries are brought onboard Spanish patrol boats — avoid contact with migrants through interceptions based on the interposition and action, in the form of directions, of local agents.[20]

The creation of Frontex has, through its most visible and costly activity, strengthened national actions with major operations. With European funding, the Agency organizes and coordinates the support of Member States, and any third countries that voluntarily agree to it, for the Member State that is especially affected, which, in turn, leads the operation. Maritime operations are subject to detailed regulations, enshrined in the 2014 Sea Borders Regulation,[21] derived from the general concept governing the Schengen and Dublin systems, whereby the host state is responsible for the operation's operational management and the disembarkation of the intercepted persons. Despite the progressive inclusion of search and rescue activities in the mandate of the maritime operations, they are an incidental and secondary function in relation to their main mission, which is none other than border control. In any case, the operations are carried out with a remarkable opacity and lack of transparency.[22]

(d) Although they have received far less attention in the media than similar infrastructure in other countries, the peripheral Member States whose land borders are most affected by irregular migration flows have been making a serious effort to secure those borders through the construction of so-called *migration fences*. In fact, these are more or less sophisticated structures that usually combine deterrent

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[19] Regarding Italian practice prior to Colonel Qaddafi's fall, see: S. Hamood, 'EU-Libya Cooperation...', *supra* n. 15, at 19 and ff.; A. Di Pascale, 'Migration Control...', *supra* n. 15, at 296 and ff.; and E. Papastavridis, *The Interception of Vessels on the High Seas: Contemporary Challenges to the Legal Order of the Oceans* (Oxford, 2014), at 284 and ff.

[20] CAT, *J.H.A. v. Spain*, Decision of 10 December 2008, Communication No. 323/2007, CAT/C/41/D/323/2007; CEAR, *La situación de los refugiados en España. Informe 2008,* at 51 and ff.; and A. Sánchez Legido: *Controles migratorios y derechos humanos*, section 2.3.2 (forthcoming).

[21] Regulation (EU) No 656/2014 of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (OJ L 189, 27 June 2014, 93-107).

[22] For an overview of Frontex's maritime operations, see: J.A. Quindimil López, 'La Unión Europea, Frontex y la Seguridad en las Fronteras Marítimas. ¿Hacia un Modelo Europeo de Seguridad Humanizada en el Mar?', 41 *Revista de Derecho Comunitario Europeo* (2012), at 57 and ff.; G.A. Oanta, 'Desarrollos jurídicos controvertidos en la vigilancia de las fronteras marítimas exteriores de la Unión Europea en el marco de Frontex. A propósito de la Decisión 2010/252/UE', in J.M. Sobrino Heredia et al. (eds.): *El desarrollo del Tratado de Lisboa: un balance de la Presidencia española. Décimas Jornadas Extraordinarias Escuela Diplomática-Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*, Madrid, 22 June 2010, Escuela Diplomática, Ministerio de Asuntos Exteriores y de Cooperación, Colección Escuela Diplomática No. 17 (2011), at 171 and ff.; F. Esteve García, 'El rescate como nueva función europea en la vigilancia del Mediterráneo', 111 *Revista CIDOB d'Afers Internacionals* (2015), at 153 and ff.; and S. Marinai, 'The interception and rescue at sea of asylum seekers in the light of the new EU legal framework', 53 *Revista de Derecho Comunitario Europeo* (2016), at 901 and ff.

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and containment features — fences, barbed wire, ditches or pits — with communication channels and technological surveillance and detection devices. With the conspicuous precedent of the sophisticated Ceuta and Melilla fences,[23] built in the late 1990s and substantially reinforced since then, at least half a dozen other EU Member States — including Greece, Bulgaria, Hungary, Slovenia, Austria and France — in addition to one neighbouring country — Macedonia — have decisively undertaken more or lesssimilar initiatives.[24] Although, given the unpopularity of these types of migration control mechanisms, the European Commission has traditionally distanced itself from any express support for them, the model on which the Schengen system is based clearly encourages the peripheral Member States to use them.

(e) Finally, European countries have also resorted to the *excision of territory*, i.e. partially stripping border areas of their status as state territory in order to deny those who reach them the guarantees arising under migration and asylum law. This would include the French and British practices with regard to the international areas of ports and airports[25] or the imaginative concept of operational border developed by Spanish Interior Ministry authorities.[26] However, this procedure has not yet taken on the importance it has acquired elsewhere, especially in Australian practice.[27] This is largely due, as will be seen below, to the ECtHR's case law.

(C) EVASION OF RESPONSIBILITIES AND REHABILITATION OF THE SYSTEM OF GUARANTEES: THE RESPONSE OF THE EUROPEAN COURT OF HUMAN RIGHTS

To attempt a legal analysis of these European externalization policies, it is first necessary to recall four ideas. First, the implementation of these policies can have horrible consequences for the people subjected to the interception measures, both in material terms and for the enjoyment of human rights. Second, although states have wide-ranging recognized sovereign powers to regulate the entry and stay of aliens in

[23] J. Castán Pinos, 'Building Fortress Europe? Schengen and the Cases of Ceuta and Melilla', Working Paper, Centre for International Border Research, Belfast, 2009; M.A. Acosta Sánchez, 'Las fronteras terrestres de España en Melilla: delimitación, vallas fronterizas y tierra de nadie', 28 *REEI* (2014), at 17 and ff.; and S. Saddiki: *World of Walls: The Structure, Roles and Effectiveness of Separation Barriers* (Cambridge, 2017), at 37 and ff.

[24] A. Sánchez Legido, *Controles migratorios..., supra* n. 20, section 2.4.

[25] See, respectively, the factual background of the *Amuur* and *Gebremedhin* cases cited below and R. Barnes, 'The International Law of the Sea and Migration Control', in B. Ryan and V. Mitsilegas: *Extraterritorial..., supra* n. 7, at 117-119. For an overview of these types of practices, see: A. Valle Gálvez, 'Las zonas internacionales o zonas de tránsito de los aeropuertos, ficción liminar fronteriza', 9 *REEI* (2005), at 3.

[26] It is a paralegal reasoning tactic developed by the Interior Ministry, intended to provide a legal basis for so-called *hot returns*, whose trail must be traced through the parliamentary remarks and statements of Interior Ministry officials and internal documents of the Civil Guard commanders. For more information, see: P. García Andrade, 'Devoluciones en caliente de ciudadanos extranjeros a Marruecos', 67 *REDI* (2015-1), at 214 and ff.; and I. González García, 'Inmigración y derechos humanos: las devoluciones en caliente de inmigrantes subsaharianos desde España a Marruecos', 17 *Anuario de los Cursos de Derecho Humanos de Donostia-San Sebastián* (2017), at 151 and ff.

[27] Undoubtedly, the most conspicuous example is that of the immigration detention and processing centre built by the Australian authorities on Christmas Island. See: Commonwealth Ombudsman, *Christmas Island immigration detention facilities. Report on the Commonwealth and Immigration Ombudsman's Oversight of Immigration Processes on Christmas Island. October 2008 to September 2010*. February 2011.

 DOI 10.17103/sybil.23.23

their territory and to enforce those regulations, those powers are not unlimited. Amongst the limits, those arising under international and European human rights law and law on international protection are pre-eminent.[28] Third, at least in the case of Europe, the countries that implement and the institutions that promote the externalization of migration control are defined, respectively, as states and as a union based on the rule of law. As the Luxembourg court recalled in the *Les Verts*[29] case, this means that *all* public power is subject to the law. And, fourth, notwithstanding all these considerations, more than a few authoritative voices have suggested that the migration control externalization policies conceal a strategy for evading responsibilities and circumventing domestic and international legal guarantees through a dissociation of controls and rights that displaces the former without accompanying them with the latter.[30]

V. Mitsilegas is right when he notes that such policies pose intense challenges to the requirements arising under the rule of law and to the core of the notion of human dignity.[31] Surely, as suggested by B. Ryan, the best way to tackle these challenges is to try to restore the legal and democratic guarantees that have thus been excluded.[32] In such a restoration of the eluded controls, the response of the international bodies tasked with safeguarding human rights, in particular, the ECtHR, is extraordinarily important. In fact, in response to the question of whether or not those controls can be restored, the Strasbourg court's case law offers some affirmative answers, which, although only partial with regard to the general panorama of offshoring policies, are nevertheless important.

Thus, the Court has rejected the fictitious offshoring strategies embodied by the excision of areas and territories in relation to the international areas of ports and airports since the early *Amuur v. France*[33] case. In contrast, under the pretext of not getting into the Spanish-Moroccan territorial dispute over areas in North Africa, the chamber that decided the *N.T. and N.D. v. Spain* case in the first instance sidestepped the issue of whether the land between the Melilla fences is territory subject to the Convention's

[28] For an overview of this issue, see the recent contribution: S. Torrecuadrada García-Lozano, 'Los derechos humanos como límite a la gestión de los flujos migratorios mixtos', 36 *REEI* (2018).

[29] ECJ Judgment, Parti écologiste "Les Verts" v. European Parliament, C-294/83, EU:C:1986:166, para. 23.

[30] In this regard, see, amongst others: L. Bialasiewicz, 'Off-shoring and out-sourcing the borders of Europe: Libya and EU border work in the Mediterranean', 17 *Geopolitics* (2012), at 843 and ff.; T. Gammeltoft-Hansen, 'The refugee, the sovereign and the sea: EU interdiction policies in the Mediterranean', DHS Working Paper, No. 2008/6, at 238; B. Ryan, 'Extraterritorial Immigration Control: What Role for Legal Guarantees?', in B. Ryan and V. Mitsilegas: *Extraterritorial..., supra* n. 7, at 3; E. Brower, 'Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and Its Member States', in B. Ryan and V. Mitsilegas, *Extraterritorial..., supra* n. 7, at 200; E. Taylor Nicholson, 'Cutting off the Flow: Extraterritorial Controls to Prevent Migration', Warren Institute, University of California, Berkeley Law School, July 2011, at 2; M. Fernández, *La responsabilité du fait des violations des droits de l'homme dans le cadre des opérations maritimes coordonnées par l'Agence Frontex,* Université Panthéon-Assas, Paris, 2012, at 64; and M. Paz, 'Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls', 34 *Berkeley Journal of International Law* (2016), at 21.

[31] V. Mitsilegas, 'Extraterritorial Immigration Control in the 21st Century: The Individual and the State Transformed', in B. Ryan and V. Mitsilegas: *Extraterritorial..., supra* n. 7, at 63.

[32] B. Ryan, 'Extraterritorial...', *supra* n. 7, at 46 and ff.

[33] *Amuur v. France*, 25 June 1996, § 39, Reports 1996-III, §§ 41 and ff. The same idea underlies the decisions of the ECtHR in the cases *D. v. The United Kingdom*, 2 May 1997, Reports 1997-III, § 48, and *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, 26 April 2007, §§ 66-67, Reports 2007-II. The Spanish Constitutional Court's position is likewise based on it. See: Constitutional Court Writ 53/1996, of 6 March, F.J. 5.

 DOI:10.17103/sybil.23.23

application.[34] Had it adopted a different attitude and based jurisdiction on the territorial link, it would have confirmed that the migration fences were fully subject to the limits that the Convention imposes on such facilities, as the ECtHR itself already noted in its judgments on the Berlin Wall.[35] This appraisal is hardly trivial, given the concerns raised by certain recurring features in the design of anti-migration fences.[36] Spain's appeal of the decision offers the Grand Chamber the chance to rectify this mistake.

Likewise, in an attitude diametrically opposed to that taken by the US[37] and Australian[38] Supreme Courts, in the pivotal *Hirsi Jamaa* case, the ECtHR confirmed the Convention's applicability to maritime interceptions carried out by agents of the States Parties on the high seas from state vessels flying their flags.[39] It further found that the removal of intercepted or rescued persons to the authorities of a third country where there exists a real risk that they will be subjected to inhumane treatment, with no prior identification and without affording them the chance to demonstrate the personal circumstances based on which they might challenge their return, constitutes a violation of the prohibition on returns set out under Article 3 of the Convention, as well as of the prohibition on collective expulsions established in Article 4 of its fourth additional protocol.[40]

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[34] *N.T. and N.D. v. Spain*, Nos. 8675/15 and 8697/15, 3 October 2017, ECHR 2017, §§ 54-55. So as not to touch on the Spanish-Moroccan dispute even incidentally, the court based its jurisdiction on the verified effective control by the civil guard officers over the plaintiffs in the intermediate zone.

[35] For the ECtHR, the use of automatic and indiscriminate lethal systems in the context of the practice and legislation concerning the Berlin Wall and the categorical nature of the order to "annihilate border violators" were not only a breach of international human rights law but also criminal conduct according to the general principles of law recognized by the international community. Therefore, the authors' punishment could not be considered a violation of the principle of legality in criminal law, even if these practices were required under the domestic law of the GDR. See: *Streletz, Kessler and Krenz v. Germany* [GC], Nos. 34044/96, 35532/97 and 44801/98, §§ 72 and 73, 22 March 2001, Reports 2001-II; and *K.-H.W. v. Germany*, No. 37201/97, §§ 66 and 67, 22 March 2001, Reports 2001-II. The Human Rights Committee reached a similar conclusion. See: *Baumgarten v. Germany*, Communication No 960/2000, Human Rights Committee (CCPR), 78th session, Doc. CCPR/C/78/D/960/2000, 19 September 2003, § 9.4.

[36] Europa Press, 'El Defensor del Pueblo: "Las concertinas es un sistema de una crueldad extraordinaria"', 14 June 2018.

[37] In the *Sale* case, the US Supreme Court upheld the policy of offshore interdiction and automatic return ordered by President G.H.W. Bush to address the problem of Haitian "boat people" in the early 1990s, essentially based on the supposed lack of extraterritorial effectiveness of the non-refoulement principle set out in Art. 33 of the Geneva Convention. *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993), section IV. For a critical analysis of the case, see: G.S. Goodwin-Gill, 'The Haitian Refoulement Case: A Comment', 6 *IJRL* (1994), at 103 and ff. The solution upheld in the *Sale* case was rejected four years later by the Inter-American Commission on Human Rights.*ComIDH, The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, § 157.

[38] In the *Tampa* case, the Federal Court of Australia upheld the strategy of containing migration at sea known as the "Pacific Solution", holding that the performance of "gatekeeping" functions, i.e. those geared towards preventing entry into Australian territory, were a prerogative power of the executive branch that had not been altered by migration legislation and that the intervention of the Australian agents had not generated a situation of detention that could give rise to the issue of a writ of *habeas corpus*. *Ruddock v. Vadarlis* [2001] FCA 1329 (18 September 2001), Federal Court (Full Court) (Australia).

[39] *Hirsi Jamaa and others* v. Italy, 23 February 2012, ECtHR 2012, §§ 81-82.

[40] *Idem*, §§ 122 and ff., and 180 and ff. The extraordinary interest that the *Hirsi Jamaa* case elicitedin the literature bears witness to its importance. See, amongst others: J.A. Carrillo Salcedo, 'Reflexiones a la luz de la Sentencia del Tribunal Europeo de Derechos Humanos en el caso Hirsi Jamaa y otros contra Italia (Sentencia de 23 de febrero de 2012). Derechos de los inmigrantes en situación irregular en España', 32 *Teoría y Realidad Constitucional* (2013), at 285 and ff.; M.D. Bollo Arocena, 'Push back, expulsiones colectivas y non refoulement. Algunas reflexiones a propósito de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia (2012)', in S. Torres Bernárdez (ed.): *El derecho internacional en el mundo*

 DOI:10.17103/sybil.23.23

(D) THE PENDING RECONSTRUCTION: THE STRASBOURG COURT'S PROBABLE JURISDICTION IN RELATION TO OTHER INTERCEPTION MEASURES

Beyond the aforementioned cases, the question of whether, under the ECHR, the controls circumvented with the offshoring strategies could be deepened and expanded to include other interception measures is shrouded in incredible uncertainty. Because they are *measures implemented abroad*, the basis for them must consider the ECtHR's increasingly broad doctrine in cases in which, in accordance with Article 1 ECHR, an individual located beyond a State Party's borders is subject to its jurisdiction. However, because these measures are increasingly *implemented by bodies, agents or individuals that do not have the status of a State Party organ* and because *they increasingly involve multiple players,* it is also essential not to lose sight of the international norms governing the attribution of conducts and responsibility to those States.[41] Nevertheless, it must be recalled that the solutions that these latter norms point to can only be followed to the extent that they are compatible with an instrument that is both a human rights treaty and, in the words of the ECtHR, the constitutional instrument of European public order.[42]

The concept of extraterritorial regional disembarkation platforms first broached in the summer of 2018 has not yet been sufficiently defined. However, from the outset it can be said that any formula similar to that tried by the United States in Guantanamo or Australia in Nauru or Papua New Guinea would quite likely imply effective control over persons and the exercise of public prerogatives by authorities of the States Parties and would, thus, entail the Convention's application. This may be why the European Commission has clearly distanced itself from such solutions in the still highly ambiguous exploratory exercise it has been conducting regarding that concept.[43]

As for contactless maritime interception operations,[44] i.e. ones that do not include even brief custody of the affected individuals, they must be viewed, first, in relation to those operations verified directly by State Party vessels under the control of the State Party's own agents, who, rather than bringing the intercepted persons on board, simply block the path of their boat, dinghy or other more or less precarious inflatable craft, requiring them to return to the coast of departure or enabling their capture by third-

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multipolar del siglo XXI: Obra homenaje al profesor Luis Ignacio Sánchez Rodríguez (Iprolex, Madrid, 2013), at 647 and ff.; and V. Moreno-Lax, 'Hirsi v Italy or the Strasbourg Court v Extraterritorial Migration Control?', *Human Rights Law Review* (2012), at 574 and ff.

41 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (hereinafter, DARSIWA), *Yearbook of the International Law Commission* (2001), Vol. II (Part Two).

42 ECtHR case law has repeatedly noted that the Convention's provisions should be interpreted "as far as possible" in accordance with other international law rules (amongst many others, in *McElhinney v. Ireland*, No. 31253/96, 21 November 2001, § 36; *Hassan v. The United Kingdom*, No. 29750/09, 16 September 2014, § 77, ECtHR 2014; *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, § 77, ECtHR 2011; and, quite especially, *Loizidou v. Turkey*, No. 15318/89, 18 December 1996, § 43, Reports 1996-VI).

43 European Council, Brussels, 28 June 2018, EUCO 9/18, para. 5. The idea is still in an exploratory phase: European Commission, *Non-paper on regional disembarkation arrangements.* Accessible through the hyperlink in the text of the press release *Managing migration: Commission expands on disembarkation and controlled centre concepts*, Press Release, Brussels, 24 July 2018.

44 Terms from V. Moreno Lax and M. Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows', in S. Juss (ed.):*Research Handbook on International Refugee Law* (forthcoming).

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country coastguards. In these situations, the precedents of the *Marine I*[45] case before the Committee Against Torture (CAT) and the *Xhavara*[46] case before the ECtHR make it possible to consider the existence of an effective control over persons that would trigger the Convention's application. Second, building even on the idea of control of specific situations or events on which essential rights recognized in the Convention depend used by the ECtHR in the *Jaloud*[47] case, surely a basis could be found for the ECHR's application and the possible responsibility of the States Parties in situations of breach of international search and rescue obligations by State Party vessels present in the area of an accident or whose intervention results in the capture of persons by foreign coastguards. And, third, with regard to joint patrols, such as those conducted by Spanish patrol boats from the Civil Guard's maritime service (SEMAR) in Mauritanian and Senegalese waters,[48] it could be argued that Spain should be held responsible under the ECHR. This is because everything indicates that this is not a case in which it placed its agents or bodies at the disposal of a third state as provided for under Article 6 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (DARSIWA), insofar as they are neither under the exclusive direction and control of the third state, nor are they acting pre-eminently for the purposes of that state.[49]

It could likewise be argued that the Convention, and any responsibility of the States Parties under it, applies in cases in which interception measures are *imposed on private operators or carried out through them.* In cases similar to that of the incident resulting in the preventive seizure of the *Open Arms* by the Italian authorities,[50] and provided the existence of orders or instructions by the relevant state's authorities

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45 Committee Against Torture, *J.H.A. v. Spain*, Decision of 10 December 2008, Communication No. 323/2007, CAT/C/41/D/323/2007, § 8.2.

46 *Xhavara and others v. Italy and Albania* (Dec.), No. 39437/98, ECtHR 2001.

47 *Jaloud v. the Netherlands,* No 47708/08, 20 November 2014, § 139, ECtHR 2015. Likewise, in a case involving very similar facts, *Pisari v. The Republic of Moldova and Russia*, No. 42139/12, 21 April 2015, § 33, ECtHR 2015.

48 In execution of the Seahorse programmes and Operation Hera, and on board the Civil Guard's SEMAR vessels stationed in Mauritanian and Senegalese ports, the joint patrols carry out surveillance activities against irregular migration and other forms of crime. In that context, under the coordination of the Santa Cruz de Tenerife Coordination Centre, they participate in interception operations that are even conducted in the territorial sea and contiguous areas of those countries to prevent the departure of *cayuco* boats and other vessels carrying irregular migrants to the Canary Islands (M. Casas-Cortes, *et al.*, 'Good Neighbours...', *supra* n. 14, at 242-243; and S. Carrera, *The EU Border Management Strategy: Frontex and the Challenges of Irregular Immigration in the Canary Islands,* CEPS, 2008, at 21-22). There are indications that similar experiences have been attempted by Spain with Morocco (M.T. Gil-Bazo, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension – The Safe Third Country Concept Revisited', 18 *IJRL* (2006), at 587; and P. García Andrade, 'Extraterritorial Strategies to Tackle Irregular Immigration by Sea: A Spanish Perspective', in B. Ryan and V. Mitsilegas (eds.):*Extraterritorial..., supra* n. 7, at 319) and by Italy with Libya (M. Den Heijer, 'Europe beyond Its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control', in B. Ryan and V. Mitsilegas:*Extraterritorial..., supra* n. 7, at 172). The opacity that, as noted, surrounds these types of actions makes it difficult to determine the exact action protocols and, therefore, to know what would seem to be a decisive piece of information when applying the rules to determine the existence of jurisdiction and/or the attribution of responsibility to the European States, namely, the exact role that the States Parties' agents play in the interception operations.

49 On the interpretation of Art. 6.2 DARSIWA on which that observation is based, see the corresponding commentary in *ILC Yearbook* (2001), *supra* n. 41, at 45.

50 See: A. Sánchez Legido, '¿Héroes o villanos? Las ONG de rescate y las políticas europeas de lucha contra la inmigración irregular (A propósito del caso Open Arms)', 46 *Revista General de Derecho Europeo* (2018).

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could be accredited, any delivery of persons rescued by private vessels, whether belonging to rescue NGOs or otherwise, to foreign authorities — e.g. the Libyan coastguard — where there exists a risk of serious violation of essential rights recognized under the Convention could be considered a case of personal control through interposition verified by the private operator acting under those authorities' instruction and control. This would trigger a possible breach of the Convention attributable, for the same reason, to that State Party in accordance with Article 8 DARSIWA.

Similarly, the overseas performance by diplomatic or consular authorities of functions linked, amongst other things, to migration control and access to the territory is a case that the ECHR implementing bodies have already accepted as triggering its extraterritorial application.[31] In light of that finding, it can be quite plausibly asserted that the States Parties are responsible under the Convention for actions to control access to means of transport carried out by private carriers overseas. In fact, the ILC itself cited such control activities to exemplify the cases, falling under Article 5 DARSIWA, of attribution to a State of the conduct of entities empowered to exercise its governmental authority when they act in that capacity.[32]

(E) THE DUBIOUS APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO MEASURES ENCOURAGING COOPERATION ON MIGRATION CONTROL BY STATES OF ORIGIN AND TRANSIT

In contrast, the difficulties involved in justifying that the ECHR and its enforcement body could be, respectively, the appropriate instrument and channel for establishing the legal responsibility of States Parties for policies aimed at encouraging and/or forcing states of origin and transit to perform strict border controls — in this case, to prevent departures — are almost insurmountable. For one thing, the need to have been personally affected in some way, whether directly or indirectly,[33] implicit in the

[31] The Strasbourg court considers it "clear" that "the acts of diplomatic and consular agents, who are present in a foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others". *Al-Skeini and others v. The United Kingdom*, No 55721/07, 7 July 2011, § 134; and *Bankovic and others v. Belgium and others* (Dec.) [GC], No. 52207/99, § 75, 12 December 2001, Reports 2001-XII, § 73. Based on its reference to the case law of the former European Commission of Human Rights in making this assertion, the Court is understood to accept as cases involving the exercise of jurisdiction and consequent application of the Convention actions aimed at promoting the expulsion of an individual from a third state (*X. v. Germany*, No. 1611/62, Commission Decision of 25 September 1963, Yearbook 8, at 158), to respond to claims aimed at obtaining the custody of a minor residing in a Member State (*X. v. the United Kingdom*, No. 7547/76, Commission Decision of 15 December 1977, DR 12, at 73), or to manage the petition for protection before the host state authorities, at least when it is resolved, allowing said authorities to enter diplomatic premises and arrest the interested parties (*W.M. v. Denmark*, No. 17392/90, Commission Decision of 14 October 1992, DR 73, at 193).

[32] In what appears to answer the question of whether this is an example of the de facto case provided for in this precept, in its commentaries, the International Law Commission mentions as an example cases in which "[p]rivate or State-owned airlines may have delegated to them certain powers in relation to immigration control". DARSIWA, commentary to Article 5, para. 2, *ILC Yearbook* (2001), *supra* n. 41, at 44.

[33] According to the doctrine laid down by the Strasbourg court, an individual does not have standing to sue a State Party unless that individual can accredit that he or she is affected by the violation he or she cites from the Convention. If that violation is the result of general policies or measures, that means that, except in exceptional cases — e.g. secret measures that make it impossible to know whether a potential victim has really been affected or not — only those people who have been the subject of actions involving the application of those measures have access to the court. *Vhavara* (2001), *supra* n. 46, § 4.

 DOI:10.17103/sybil.23.23

establishment of the status of victim required for individual applications to be admissible (Article 34 ECHR) makes the possibility of using this procedure to call on the ECtHR to act against alleged violations arising from general laws or policies extremely unlikely.

Additionally, according to the criteria set out in the DARSIWA, it is all but impossible to attribute to the States Parties executive interception actions that, whilst encouraged by European states, are carried out in territories outside their sovereignty and not subject to their effective control by third-country bodies that are not acting under their instructions, direction or control. The Draft Articles provide for two cases in which pressure by one state over another could give rise to the former's international responsibility. In both cases, however, the requirements to be met are so strict that their concurrence in the cases considered here is exceedingly unlikely. With regard to the first case direction and control exercised over the commission of an internationally wrongful act by another state provided for under Article 17, the ILC has insisted that it refers to cases of domination and/or actual direction by one state over the specific conduct performed by another and that it cannot be construed as including mere influence or concern, nor mere incitement or suggestion.[34] Meanwhile, for the pressure applied to constitute coercion triggering responsibility for the act carried out by the coerced state in this case, an interception measure as provided for under Article 18, the ILC has indicated that it must have the same essential character as *force majeure*, such that the coerced state has no choice but to commit the wrongful act. In other words, it is not enough for the pressure simply to have made compliance with the obligation in question more difficult or onerous.[35] These same considerations suggest that, in theory, none of the criteria used by the ECtHR as jurisdiction links triggering the Convention's application is met.

However, the assistance provided by the European countries and, especially, Italy to the Libyan coastguard is of such a singular nature as to raise the question of whether the Libyan agents' actions in the *respingimenti per procura*, or 'pull-back by proxy', might not give rise to situations in which migrants and refugees would be subject to Italian jurisdiction, which, in turn, would trigger Italy's responsibility under the Convention. Just as the ECtHR has indicated, in the Northern Cyprus, Transnistria and Nagorno-Karabakh cases, that jurisdiction exists when the entities that effectively control a territory depend on the support and assistance of a State Party for their very existence,[36] it can be plausibly understood that this could also be the case when the support and assistance of the State Party is vital to the performance of actions involving effective control over persons, as well as a possible breach of the Convention. Whether the support provided by Italy and other European states to the Libyan coastguards can be considered vital in this way and whether the resulting personal control can be used as grounds for the Court's jurisdiction and the responsibility of those states under the Convention are questions that the ECtHR will have to settle

[34] DARSIWA, commentary to Art. 17, para. 7, *ILC Yearbook* (2001), *supra* n. 41, at 73.

[35] DARSIWA, commentary to Art. 18, para. 2, *ILC Yearbook* (2001), *supra* n. 41, at 73.

[36] *Ivantoc and others v. Moldova and Russia*, No. 23687/05, § 115, 15 November 2011, ECtHR 2011; *Catan and others v. The Republic of Moldova and Russia*, No. 43370/04, 19 October 2012, *supra*, § 122; *Mozer v. The Republic of Moldova and Russia*, No. 11138/10, § 110, 23 February 2016, ECtHR 2016; and *Chiragov and Others v. Armenia*, No. 13216/05, § 186, 16 June 2015, ECtHR 2015.

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in response to a lawsuit filed in May 2018 over an incident that took place months earlier involving the *Sea-Watch 3*, in which more than 20 people drowned.[57]

Aside from exceptional cases of vital assistance, and even though Article 16 DARSIWA provides for the hypothetical case of responsibility for aid and assistance in the commission of a wrongful act by another state that, in this case, by definition, is not a State Party to the ECHR, it is virtually impossible to claim that jurisdiction under Article 1 exists and, thus, that the Court is competent in relation to interception actions performed by third states that maintain the capacity to perform their intrinsic functions — as occurs in the most important cases for Spanish practice. Therefore, and for elementary considerations of democratic conviction, it is absolutely essential to do away with the obscurantism and lack of effective parliamentary oversight that, under cover of secret memoranda of understanding, have characterized Spain's operational cooperation with half a dozen African countries and, especially, Mauritania and Senegal.

(F) PROBLEMS OF RESPONSIBILITY AND JUDICIAL OVERSIGHT ARISING FROM FRONTEX'S INVOLVEMENT IN INTERCEPTION MEASURES

In a development as necessary as it is positive, the more or less founded suspicions regarding Frontex's involvement in human rights violations[58] have given rise to a process to correct, at least, the most glaring structural shortcomings that, from the point of view of respect for fundamental rights, marred the Agency's original configuration, leading it to be regarded as some sort of irresponsible legal monster. Today, its obligations with regard to fundamental rights are much clearer and more specific, and the institutions created within it to promote and monitor this respect — the Consultative Forum and the Fundamental Rights Officer (FRO) — should be able to effectively ensure it. A suitable functioning of the new individual complaint mechanism would be helpful in that regard. However, the scant means allocated to the FRO[59] and, especially, the strong resistance that the Agency continues to show to accepting transparency requirements with all of the ensuing consequences are grounds for serious concern.

Although the current Frontex Regulation clearly lays out the obligation of States participating in operations coordinated by the Agency to respect fundamental rights,[60] there is still some ambiguity. Its executive bodies thus have broad discretion with regard to the measures to be taken in response to

[57] See: *Mare Clausum. The Sea Watch vs Libyan Coast Guard Case. 6 November 2017*, available at www.forensic-architecture.org. For an initial assessment of this case, see: A. Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?', 20 *European Journal of Migration and Law* (2018), at 396 and ff.

[58] S. Casella Colombeau *et al.*, *Agence Frontex: quelles garanties pour les droits de l'Homme. Étude sur l'agence européenne aux frontières extérieures en vue de la refonte de son mandat*, Les Verts/ALE, November 2010; and S. Keller *et al.*, *Frontex Agency: Which Guarantees for Human Rights?*, Migreurop, March 2011.

[59] I. Arnáez, 'Mecanismos para el control de los derechos fundamentales en las actividades de Frontex', in C. Blasi Casagrán and M. Illamola Dausà (eds.): *El control de las agencias del Espacio de Libertad, Seguridad y Justicia* (Madrid, 2016), at 129.

[60] Art. 25.3 Frontex Regulation.

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violations of those rights.[61] Aside from that, it must be recalled that the border guards *placed at the disposal* of the Agency as provided for under its Regulation are not entities *placed at its disposal* in the sense with which this expression is used in the DARSIWA. Therefore, the conduct of these agents is not attributable to it.[62] Hence, in application of the doctrine laid down by the ECtHR in the *Al-Jedda*[63] case, given that the assistance and coordination tasks the Agency carries out do not entail effective control or ultimate control and authority over the executive actions carried out by the Member States, their responsibility under the Rome Convention remains intact.

Of course, the possible responsibility of the Member States does not exclude that of the Agency itself. The sort of presumption of non-responsibility that the Agency seems to infer, based on the discourse of its leaders, from the exclusive competence that secondary law grants to Member States over the operational implementation of migration controls is inadmissible.[64] The likely concurrence of the requirements foreseen under the Art. 14 of the Draft Articles on the Responsibility of International Organizations (DARIO)could be the basis for the Agency's legal responsibility, whether complementary or concurrent with that of the Member States, for aiding or assisting in the possible violation of fundamental rights by those states. However, considering that the draft agreement on accession to the ECHR is at a standstill since Opinion 2/2013, today it is virtually impossible to seek the international responsibility of the Agency, or of the EU, before the ECtHR.[65]

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[61] Opinion on the European Ombudsman's own-initiative inquiry into the implementation by Frontex of its fundamental rights obligations, 17 May 2012, at 9.

[62] Under the DARSIWA, *placementatdisposal* involves acting under the authority of the receiving state, i.e. "under its exclusive direction and control, rather than on instructions from the sending State".[62]Although the concept of *placement at disposal* is broader under the DARIO, the attribution of the fact is conditional upon the exercise of effective control over the conduct by the international organization (Art. 7 and, especially, the commentary to para. 8, *ILC Yearbook 2011*, at 62-63). The Frontex Regulation makes it clear that, in the context of operations coordinated by Frontex, the border guards remain under the control of the Member States. See, in particular, Arts. 16.3.f, 21.2, 40.3 and 21.5 of the Frontex Regulation.

[63] *Al-Jedda v. the United Kingdom* [GC], No. 27021/08, ECtHR 2011, § 4 and point 3 of the recitals; and *Jaloud* (2014), *supra* n. 47, §§ 149-152. Without getting into the thorny issue of when there exists "control in the last resort" by an international organization, suffice it to say that it clearly does not seem to exist when, in the words of the Agency's own regulation, the international organization limits itself to "supporting the application of Union measures related to external border management through the strengthening, evaluation and coordination of the actions of the Member States that implement those measures". Preamble, para. 6, and Art. 5.3 of the Frontex Regulation.

[64] Even if it is true that the debate over Frontex's responsibility may have been driven by a mishandled "blame game" that diverted attention with regard to who the main responsible parties were (J. Rijpma, 'Frontex: successful blame shifting of the Member States?', *Real Instituto Elcano (ARI)*, No. 69 (2010), at 1), it is one thing to acknowledge that reality and quite another to claim that one cannot speak of the Agency's complementary, incidental or residual responsibility in case of violation of obligations linked to respect for fundamental rights that unequivocally arise for it under the regulation applicable to it.

[65] Nevertheless, it must be recalled that the doctrine of equivalent protection by reason of which the Strasbourg court refrains from prosecuting Member State conduct regulated by EU Law is as the German Federal Constitutional Court famously put it *solange*, i.e., valid provided that or as long as EU law ensures a level of human rights protection equivalent to that offered, in this case, by the Rome Convention system. It can be deduced from the ILC's work that, were it to be confirmed in any case that Frontex were a simple shield designed or used by the Member States to evade their obligations and responsibilities under the Convention, those States could incur international responsibility for the Agency's conduct. See Art. 61 DARIO ("Circumvention of international obligations of a State member of an international organization"), and the corresponding commentary in which the codifying body invokes the *Bosphorus* case (Commentary to Art. 61, para. 4, *ILC Yearbook 2011*, at 110).

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However, certainly since the Treaty of Lisbon, Frontex has unquestionably been subject to the mechanisms for the review of legality and to the actions to establish liability that are the competence of the ECJ.[66] Notwithstanding the difficulties posed by the strict admissibility and substantive requirements to which the Luxembourg court's action is subject,[67] EU law clearly already offers real possibilities to ensure effective judicial review of a legal framework that likewise unequivocally imposes obligations to respect and enforce fundamental rights on all participants in the operations that the Agency coordinates. Nor must it be forgotten that the fact that the EU regulates the Member States' actions in the framework of operations coordinated by the Agency automatically entails the application — extraterritorial, where necessary — of the EU Charter of Fundamental Rights, whose application is not conditional on the existence of the jurisdictional links applicable in the case of the ECHR.[68]

(G) FOR A REBUILDING OF THE SYSTEM OF CHECKS AND BALANCES IN FORTRESS EUROPE

Few areas of action of the European public powers — whether at the Union or national level — pose such a risk of systemic breakdown of the checks and balances of the rule of law as that underlying the policies externalizing migration control. This situation can be dealt with, as has occurred elsewhere, by accepting rigid lines of separation, whether fictitious or manifestly real in the form of walls, based on the idea that only those on the inside are deserving of such enlightened principles. Alternatively, it can be addressed by trying to rebuild the democratic controls to ensure that they accompany migration control wherever it is performed. Possibilities to do so exist, and it is largely in the hands of the European courts to act on them. Whether we wish to see it or not, nothing less than European public order is at stake.

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[66] On the situation prior to the Lisbon Treaty, see: A. Hinarejos Parga, *Judicial Control in the European Union: Reforming Jurisdiction in the Intergovernmental Pillars* (Oxford, 2009), at 83 and ff.; and V. Mitsilegas, 'Border Security in the European Union: Towards Centralized Controls and Maximum Surveillance', in E. Guild and F. Geyer (eds.):*Security versus Justice? Police and Judicial Cooperation in the European Union* (Aldershot, 2008), at 374 and ff.

[67] F. Esteve García, 'El control judicial de las agencias del Espacio de Libertad, Seguridad y Justicia', in C. Blasi Casagrán and M. Illamola Dausà (eds.):*El control..., supra* n. 59; and, more specifically in relation to Frontex, M. Fink:*Frontex and Human Rights: Responsibility in "Multi-Actor Situations" under the ECHR and EU Public Liability Law* (Oxford, 2018).

[68] ECJ, *Åkerberg Fransson*, EU:C:2013:105, para. 21; and ECJ, *Pfleger and others*, C-390/12, EU:C:2014:281, para. 34.

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Legal Consequences of the Construction of a Wall in the Occupied Sahrawi Territory

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Abstract: During the armed conflict waged from 1975 to 1991 between the Sahrawi and Moroccan armies, the occupying state built a wall that continues to be reinforced and has divided in two the territory of Western Sahara. This article analyses the legal consequences of the existence of the wall, and in particular of the fact that the POLISARIO Front still controls one third of the territory to the east of the wall, where the SADR exercises the powers that correspond to a state.

Keywords: Wall, Self-Determination, Western Sahara, Law of Occupation, "Liberated territories"

(A) INTRODUCTION

The title of this article, which paraphrases that of the case in which the ICJ issued an advisory opinion in 2004in relation to Israel's construction of the wall in the occupied Palestinian territories[1], arises from certain premises upon which, despite being a part of the hard core of general international law, it is necessary to insist once again, as not only the European institutions themselves, but also some states have questioned or even denied, for example, the fact that the POLISARIO Front is a national liberation movement, that Spain is the administering power (this has been confirmed on three occasions by the Spanish National High Court)or that Morocco is the occupying power of the Sahrawi territory.

In October 1975 Morocco began the invasion of the "Spanish Sahara", by means of the so-called *Green March*, a supposedly peaceful invasion with which, in the words of King Hassan II, the Moroccan people was going to "embrace their Southern brothers" (the "bear hug"?). Though officially the march was peaceful, the reality was very different. On the one hand, immediately behind this photogenic civilian procession draped in Moroccan flags, marched the powerful Moroccan army; on the other, this very same army had begun the invasion of the territory at other points on the Sahrawi-Moroccan border days prior to the start of the march. Following several years of combat, from 1980 onwards, with the help of Israel, the USA, France, Saudi Arabia and other states, Morocco built five successive walls, stretching for almost 2,800 kilometres, which divided the Sahrawi territory in two.

This wall was intended to deny the POLISARIO Front access to the sea, where it continued its armed struggle, and distance it from the so-called "useful triangle", which included the phosphate deposits of Bu

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[1] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion,* ICJ Reports 2004.

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Craaand the two main Sahrawi cities, El Aaiún and Smara. With the construction of the wall, the outcome of the war was decided; the Sahrawi army's military activity was gradually restricted toa zone within a few hundred metres of the length of the wall. It was clear that the POLISARIO Front, heavily outnumbered and outgunned by the Moroccan army, could never defeat the latter.

However, in 1988 the enormous cost to Morocco of maintaining along these 2,800 kilometres hundreds of thousands of soldiers and military hardware the condition of which deteriorated rapidly in such a harsh desert climate, forced King Hassan II to sit down with the POLISARIO Front, which he had always branded as no more than a terrorist movement, and negotiate the Settlement *Plan*, which three years later was replaced by the so-called *Peace Plan*, which was finally approved by the UN Security Council. For, though as been noted, the Saharawi army could never hope to defeat its enemy in traditional warfare, it had the capacity to wage for many years the guerrilla war that it was engaging in within the vicinity of the wall. Of nomadic tradition and with expert knowledge of the land, el POLISARIO Front could launch simultaneous attacks at different points of the wall and flee at great speed, before the Moroccan army had time to respond, before attacking again at another point.[2]

These were the reasons why Morocco recognised the need for a definitive solution to the conflict and negotiated with the POLISARIO Front, under the auspices of the United Nations and the Organisation for African Unity, the holding of a referendum on self-determination, with a fixed census and two possible options: integration within Morocco or the territory's independence. This is not the place to recall the lengthy process of identification of voters or the obstacles systematically placed by Morocco to prevent the referendum, a question that I have analysed in earlier works[3]. Suffice it to say that the peace process was paralysed when almost a decade later the beginning of the voter identification process (the Peace Plan anticipated the holding of referendum within six months!), in February 2000 the MINURSO published the census for the referendum,[4] and Morocco, after accusing the United Nations of favouring Saharawi interests, officially announced that it would never accept a referendum on self-determination in the territory. Although the Morocco or French representatives frequently issue declarations to the effect that the referendum has not been held because "there are technical problems regarding the census over which agreement has not been reached", it should be made clear that these problems do not exist.

After a decade of hard work, and despite the repeated obstacles placed by Morocco, the referendum census was correctly prepared by the MINURSO. The only reason why the referendum has not been held is Morocco's refusal to fulfil its own commitments, a refusal unconditionally supported by France's veto in the Security Council, which in turn is openly applauded by the Spanish Government[5]. All that is required

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2 Cf. I. Fuente Cobo and F. Mariño Méndez, *El Conflicto del Sahara* Occidental, Conflictos Internacionales Contemporáneos (nº 4, Ministry of Defence, Madrid, 2005) at 19-117.

3 Cf. my works '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; 'The Conflict in Western Sahara After Forty Years of Occupation: International Law versus *Realpolitik*', *German Yearbook of International Law* (59-2016) at 199-205.

4 Report of the Secretary General on the Situation concerning Western Sahara. UN Doc. S/2000/131 (2000), par. 6.

5 Cf. J. González Vega, 'La España impasible: una aproximación crítica a nuestra política exterior en relación con el

in order to end the conflict is for the Security Council, acting within the framework of Chapter VII of the UN Charter, to decide to impose the application of the Peace *Plan*, which, moreover, was freely negotiated by both parties, deciding on the holding of the referendum, with the participation of those people included in the MINURSO census, in other words, the Saharawi people, and no-one else. But this unlikely to occur because France, which in other conflicts seeks to give human rights lessons to other States, vetoes any solution that is not acceptable to Morocco. Let there be any doubt in this respect, it is worth recalling that France has on various occasions vetoed the US proposal that the MINURSO should have competences in questions of human rights.

Almost thirty years after the implementation of the ceasefire, the wall splits the Saharawi population in three: those who since 1975 have suffered the Moroccan occupation of their own land, those who had to flee the Moroccan and escape to the Tinduf refugee camps, in the south of Algeria, and those who remain in the part of the territory that was never occupied by Morocco, and which, therefore, is under the control of its actual owner, the Sahrawi people. The Moroccan wall also fulfils another of the original objectives at the time of its construction: leave the exploitation of the territory's natural resources, particularly phosphates and fishing, under the exclusive control of the occupying State[6].

(B) THE OCCUPIED TERRITORIES

As a starting point, it should be stated very clearly that the territories situated on the western side of the Wall that limits the non-autonomous territory of the Western Sahara are *militarily occupied territories.*

The International Court of Justice itself clearly established in its 1975ruling on the Western Sahara some points that are worthwhile remembering. To this end I shall follow the order of the questions presented to the Court:

(1) About the time of the Spanish colonisation, the territory was not *terra nullius.* The decision was mainly supported by two arguments. On one hand, because at the time Spain began the colonisation, the territory "was inhabited by peoples who, although they were nomadic, were socially and politically organized into tribes, under the command of chiefs who were competent to represent them"; and on the other hand, because when Spain colonized the territory, it did so convinced that it was not a territory with no owner.[7]

(2) About *the "legal ties" and the "ties of territorial sovereignty",* the Court reached three conclusions: the existence of legal ties of allegiance between the Sultan of Morocco and certain tribes which inhabited Western Sahara; the non-existence of ties of territorial sovereignty over Western Sahara by Morocco[8];

Sahara Occidental', in *Sahara Occidental. Del Abandono Colonial a la Construcción de un Estado* (Pregunta, Zaragoza, 2019) at 58-90.

6 For greater knowledge of the technical and strategic-military aspects of the wall, cf. G. Nah Bachir, *El Muro Marroquí en el Sahara Occidental. Historia, estructura y efectos* (Élite de Impresión y Publicación, 2017).

7 *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 39, par. 81.

8 "The material so far examined does not establish any tie of territorial sovereignty between Western Sahara and that State. It does not show that Morocco displayed effective and exclusive State activity in Western Sahara. It does however provide indications that a legal tie of allegiance had existed at the relevant period between the Sultan and some, but only some, of the

and the non-existence of ties which might modify the application of Resolution 1514 (XV) of the General Assembly[9].

In 2002 the United Nations Legal Advisor, Hans Corell, confirmed some of the observations already made by the Court, stating that,

> "The Madrid Agreement did not transfer sovereignty over the Territory, nor did it confer upon any of the signatories the status of an administering Power, a status which Spain alone could not have unilaterally transferred.
>
> Following the withdrawal of Mauritania from the Territory in 1979 (...), Morocco has administered the Territory of Western Sahara alone. Morocco, however, is not listed as the administering Power of the Territory in the UN list of NSG Territories."[10]

It is obvious that, as Morocco is not the Administering Power, its presence on Saharawi territory can only be described as that of an occupying power.

In the same sense, and even if finally the ECJ Ruling to which I shall refer later disregards the fact, it is worth recalling that, in his conclusions prior to the ECJ Ruling of February 2018, the Advocate General reached the conclusion that Morocco" is the occupying power of Western Sahara"[11], after indicating the following:

> "it is appropriate to examine whether the Kingdom of Morocco's presence in Western Sahara is an occupation within the meaning of Article 42 of the 1907 Hague Regulations that the Union cannot recognise or to which it cannot render aid or assistance. According to that provision, 'territory is considered occupied when it is actually placed under the authority of the hostile army' (...) In that regard, it should first of all be stated that the existence of a state of occupation is a question of fact.(...) Furthermore, the existence of a Moroccan occupation in Western Sahara is widely recognised, even by Hans Corell."

He went on to note that

> "According to the International Court of Justice, in order to know whether 'a State, the military forces of which are present on the territory of another State as a result of an intervention, is an 'occupying Power' in the meaning of the term as understood in the *jus in bello*, [it is necessary to examine] whether there is sufficient evidence to demonstrate that the ... authority [of the hostile army] was in fact established and exercised by the intervening State in the areas in question'. *That is clearly the case for the greater part of Western Sahara, which extends to the west from the sand wall*

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nomadic peoples of the territory" (*Ibid.*, par. 107.)

9 "The materials and information presented to the Court show the existence, at the time of Spanish colonisation, of legal ties of allegiance between the Sultan of Morocco and some of the Tribes living in the territory of Western Sahara. They equally show the existence of rights, including some rights relating to the land, which constituted legal ties between the Mauritanian entity, as understood by the Court, and the territory of Western Sahara. However, 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 (see paragraphs 54 – 59 above)" (*Ibid.*, par. 162). It should be remembered that, as Professor Carrillo recalled, "except for the colonial enclaves, the international legal status of all non-self-governing territories must be respected just as by the administering powers as by third party States, even in the situation that there had been alleged legal ties between the non-self-governing territory and a third party State before the appearance of the colonial power. (...) The historical entitlements, except for the cases of colonial enclaves, cannot hinder the application of the principle of free self-determination." J.A. Carrillo Salcedo, 'Libre determinación de los pueblos e integridad territorial de los Estados en el dictamen del T.I.J. sobre el Sáhara Occidental', XXIX-I *Revista Española de Derecho Internacional* (1976) at 48.

10 UN Doc. S/2002/161, of 12 February 2002.

11 Opinion of Advocate General Wathelet of 10 January 2018, Case C-266/16, EU:C:2018:1, par. 238.

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> *built and controlled by the Moroccan army and which has been under the authority of the Kingdom of Morocco since its annexation* in two stages (in 1976 and in 1979). It has been administered in a structured manner by the Kingdom of Morocco since that time, *without the consent of the people of Western Sahara*, which has not yet exercised its right to self-determination."

The Advocate General concludes that moreover,

> "It should further be noted that the existence of an occupation is not limited to the continental territory, but also extends to the internal waters and to the territorial sea"[12].

For all these reasons, and in spite of the insistence of the institutions of the European Union and some States, in the wake of the ECJ Rulings of 2016 and 2018 it is no longer possible to claim that Morocco is the territory's administering power; not even the "*de facto* administering power", a perverse expression that began to appear in anything but innocent fashion for the first time in Kofi Annan's reports in the late 1990s, and which the EU has used in order to attempt to justify the agreements it has signed with Morocco. In international law there is no such institution as "*de facto* administering power". An administering power is the State recognised by the United Nations as being in possession of the right to administer a colonial territory until its population exercises the right to self-determination. Morocco has never been granted such a mandate by the UN. Whoever does not exercise the *de iure* administration of the territory does so in violation of international law. *Morocco is the occupying power.*

(C) THE "LIBERATED TERRITORIES"

Following construction of the wall and, as consequence, the POLISARIO Front's forced withdrawal to the west thereof, in other words, once the map of occupation as we know it today had been drawn up, the Sahrawi people began to call "liberated territories" those that have since that moment been under their control. Although this term is typical of times of war, it does not seem quite appropriate, since only some areas of this part of the non-autonomous territory, the international borders of which are not questioned, were occupied by Morocco, and only briefly, during some moments of the conflict between 1976 and 1979.[13]

In any case, aware of the need to exercise the functions of a State in their territory, and given the impossibility of doing so in the part now occupied by Morocco, from the very beginning of the war of national liberation, it is in this part of the territory where Sahrawi leaders have issued any declarations and performed any actions of relevance to international relations.

Thus, the first and most important of these, the proclamation of the Sahrawi Democratic Republic (SDR), took place on February 27, 1976 in the town of Bir Lehlu. The fact that its President, Mohamed Abdelaziz, underlined this fact upon communication of the proclamation of the new State to the Fourth Commission (November 11, 1976), is an eloquent reflection of the Sahrawi leaders' determination to

[12] *Ibid.*, par. 248-250.

[13] Between 1989 and 1991 Tifariti regained its importance because of the commencement of works to build various administrative and health centres. But shortly before the beginning of the ceasefire, the Moroccan army bombed the city, destroying practically everything that had been constructed.

exercise effective control over their territory, aware of the fact that a Government that proclaims the independence of a territory needs to exercise effective control over the latter.[14]

The importance of this question for both parties was highlighted during the XII Congress of the POLISARIO Front (December 2007), held, despite the Moroccan Government's protests, in Tifariti, 70 kilometres to the east of the wall, as the decision was taken here to intensify the effectiveness of Sahrawi government over the territories under its control, accelerating the development of this area. The Moroccan Government's reaction was immediate, evidencing the significance within its annexationist aspirations of this part of the territory. In the words of the UN Secretary General, "On 3 March 2008, in a meeting with the Force Commander of MINURSO, the Moroccan military threatened action by 'adequate means', including 'air strikes', to prevent further construction in the area of Tifariti".[15] Morocco is perfectly aware that, in spite of the immense power of its allies, and even if political situation in the Maghreb and Sahel today plays in its favour, however long it waits, so long as the POLISARIO Front controls this part of Western Sahara, the territory will never be annexed.

(D) THE VIOLATION OF THE MILITARY AGREEMENTS: THE CONSTRUCTION OF NEW WALLS

Given that the MINURSO has neglected its main function, reflected in that "R" which is such a source of irritation for Morocco and its allies, since it is a reminder that this is a UN mission to organise and guarantee the holding of the *referendum* in Western Sahara, and it being clearly impossible to monitor the human rights situation in the territory (in my opinion, any UN mission, by its very nature, has a minimum obligation to inform the Organisation vis-à-vis the human rights situation in the territories in which it acts), the mission members basically limit themselves to "supervising" the ceasefire, reporting any activity that may threaten the latter, and controlling mine clearance operations.

One of the most serious crises to have arisen in the vicinity of the wall in recent times took place between August 2017 and January 2019 in the village of Guerguerat, situated in the south-west of Western Sahara, beyond the territory occupied by Morocco. Two facts underlined the fragility of this "non-war" situation and the permanent instability of this "border", the very existence of which is a flagrant violation of the principle of *uti possidetis iuris,* one of the main principles of international law.

One of these is related to the Moroccan plans to asphalt the route that connects the occupied zones of the south of the Western Sahara with Mauritania, in the aforementioned village of Guerguerat. The workers' arrival in the area, accompanied by Moroccan troops,provoked the rapid reaction of the POLISARIO Front, which put its army on standby. Officially, Morocco intended to carry out mine clearance tasks, but the real objective was to improve the state of this path, to turn it into a road and facilitate the transport of goods from the occupied territories. The other crisis was related to the announcement (yet another) that a rally (*Africa Eco Race*) was going to cross the border at this point, which it eventually did during the first

14 UN Doc. A/C.4/31/SR.22, par. 31.

15 UN Doc. S/2008/251, of 14 April 2008.

week of 2019. Although there were moments of maximum tension, when only a few hundred metres separated the Sahrawi and the Moroccan troops, the situation soon calmed down. These are very infrequent situations, but they reflect an underlying tension.[16]

In any case, it is no coincidence that these events occurred shortly after publication of the General Court of the European Union ruling with regard to the legality of the free trade agreements signed between the EU and Morocco. Among others, the Court's assertion that the Western Sahara is not part of Morocco (nothing new; the ICJ had already stated this in 1975, but now it is the turn of the highest European court to do so) put on the front pages of the world's leading newspapers a conflict that had begun in the middle of the Cold War, and recalled the fact that well into the 21st century, the largest non-autonomous territory in Africah as still to be decolonised.

One of the major violations of the military agreements, specifically *military agreement nº 1*, which has been condemned on several occasions by the UN Secretary General, is the construction by Morocco of two more sand walls! One in Mahbas, near the Algerian border town of Tinduf, and the other in Auserd, in the south-west of the territory, 80 and 30 kilometres long respectively. Morocco has ignored the MINURSO's instructions to dismantle both walls, arguing that they are necessary in order to deal with flooding, wind and smugglers.[17]This is one of the most serious violations of the peace agreements, since it represents a further attempt to consolidate the annexation of that part of the Sahrawi territory, in violation of the aforementioned principle of *uti possidetis iuris.* As we know, in virtue of this principle, or the intangibility of the frontiers established in the colonial era, border delimitations must be respected and maintained as they had been inherited from the former metropolis (frontiers drawn up in international agreements made by the former colonising owners and those deriving from the simple internal administrative divisions of the colonial powers). This principle, whose objective, in the words of the ICJ was "to preserve the conquests of the peoples who have struggled for their independence, and to avoid the breakup of a balance which would lead to the African continent losing the benefit of so many sacrifices (...) in order to survive, develop and progressively consolidate their independence", constitutes "a principle of general order necessarily linked to decolonisation wherever this might occur"[18]. In fact, it can be stated that the principle of territorial integrity is for States what the *uti possidetis iuris* principle is for peoples subjected to colonial or foreign domination.

As was to be expected, and despite António Guterres's repeated condemnations in his reports of the seriousness of these violations[19], Security Council resolutions regarding the Sahrawi conflict do not even

[16] Cf. J.D. Torrejón Domínguez, 'The Crisis at Guerguerat and the Escalation of the Western Sahara Conflict', *SYbIL* (2018) at 415-426, [doi: 10.17103/Sybil.22-21].

[17] UN Doc. S/2019/282, of 1 April 2019.

[18] *Frontier Dispute, Judgment, I.C.J., Reports 1986*, p. 566 et seq., paras.25 and 23.

[19] UN Doc. S/2018/889, of 3 October, and S/2019/282, of 1 April 2019. The Secretary General also condemned in the first of the reports mentioned that the construction of various buildings by the POLISARIO Front constitutes a violation of military agreement number 1. It should be remembered that this agreement, which has never been officially published (available here), was signed in 1997, and that it covered "the period from now until the start of the transitional period (D-Day, the day the provisional list of Sahrawi people eligible to vote is published) within the framework of the present peace process". The census was made public in 2000. It is logical that, in the absence of other agreements, the Secretary General and the MINURSO refer

mention the question...

(E) THE LANDMINE ISSUE

Within the MINURSO's few remaining functions, apart from monitoring and reporting the continual violations of the Peace Plan, probably the most important is that of clearing the area of landmines. Since construction of the Wall began in the 1980s, the lands on both sides of it have been riddled with mines. Even in these "non-war" times this is a crucially important question, since every year accidental explosions cause ether death of dozens of Sahrawis as, insofar as circumstances permit, they continue to practise their nomadic life. As the UNMAS (*United Nations Mine Action Service*), acting since 2008 as a component of the MINURSO, has indicated in this respect "these explosive hazards continue to endanger the lives of local nomads, daily activities in settlements, as well as the livestock on which they are dependent, United Nations military observers monitoring the ceasefire and humanitarian workers"[20].

The MINURSO itself has acknowledged that "owing in part to the vast expanse of Western Sahara, it has not been possible to obtain a comprehensive picture of the number of accidents related to mines and explosive remnants of war in the Territory", since 1975 over 2,500 people have died or been mutilated as a result of explosions[21].The MINURSO continues to supervise mine clearance on both sides of the wall, but added to the weather conditions (the Sirocco, sand movements and the rain have moved and buried many mines, on occasions making exact localization impossible), is the absence of Moroccan cooperation. For this reason, the MINURSO is obliged to include in its reports the data provided by Morocco, the accuracy of which is impossible to confirm, while directly supervising the mine clearance operations undertaken by the POLISARIO Front.

(F) THE WALL AND "ILLEGAL IMMIGRATION"[22]

Although its author is not deserving of a single line in this work, one should at least mention, as a curiosity,

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to the latter; but, in my opinion, it has not been in force for almost twenty years. It is obvious that the construction of new sections of the wall attack the heart of the Peace Plan, as it seeks to consolidate a foreign military occupation, as occurs with the construction of the Israeli wall in the occupied Palestinian territories. But it is ridiculous to claim that the POLISARIO Front violates the *Peace Plan* in attempting a minimum development of the part of its territory that remains under its own control and expect it to respect military agreements negotiated with a view to the holding of a referendum on self-determination, when Morocco has ruled out such a referendum, the main objective of the entire Peace *Plan*.

[20] It's activity on Sahrawi territory has materialized in the following measures: 147,513,196 square meters of hazardous areas released and/or cleared; 35 of 61 known minefields and 425 of 498 known cluster strike areas cleared; 9,278 km of routes verified or cleared for UN military observers' patrols (1,181 km verified since 1 July 2015); 7,866 landmines removed and destroyed; 8,372 explosive remnants of war (ERW) destroyed; 23,643 sub-munitions destroyed; 3,228 MINURSO personnel received ERW Awareness Briefings; 73,044 local and nomadic people received risk education (RE); 252 individuals (28 survivors of mine accidents and 224 of their dependents) received victim assistance. Over 1,000 mine victims have been recorded east of the berm (source: UNMAS).

[21] "Since 1975, Moroccan authorities have registered at least 2,171 accidents caused by mines and explosive remnants of war." (UN Doc. S/2008/251, of 14 April 2008).

[22] I use the expression "illegal immigration" in purely expository fashion, although I consider that the action of human beings

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the recent proposal by the US President, Donald Trump, to the Spanish and European Union Foreign Minister, Josep Borrell. The former has suggested to the European Union that, following the model being employed on the Mexican border, it should build a wall in the Western Sahara (another one?) to stem the arrival of immigrants[23].But leaving aside this perverse proposal, the fact is that, as has been reported by such important NGOs as *SOS Racismo, Médicos del Mundo* and *Doctors Without Frontiers,* since the identification process was paralysed in 2000,the Moroccan authorities have been using the issue of immigration and the wall for propaganda purposes.

These organisations and the POLISARIO Front itself have on numerous occasions condemned the abandonment by the Moroccan police of sub-Saharan immigrants near the wall. These people, arrested by the police in other areas of Morocco, sometimes as far away as the border with Ceuta or Melilla, have reported that, after being detained, they have been transported in military trucks to zones near the wall, where they have been abandoned to their fate.[24]

(G) THE LEGAL STATUS OF THE TERRITORIES CONTROLLED BY THE POLISARIO FRONT

The aforementioned decision taken at the 2007Congress of the POLISARIO Front had a clear purpose: show the world that, though much of its territory is subjected to military occupation, *the Western Sahara, the SADR, exists*. The construction of buildings (hospitals, administrative centres, and even a fledgling university) in Tifariti and the steady stream of refugees arriving from the Tinduf camps is a means of reaffirming and consolidating Sahrawi control of their own land (or at least this part of it)and is also a way of asserting that the SADR is a State, as it satisfies the conditions established by international law: a population, a territory and a government capable of exercising its authority over the territory in effective fashion. Yet it is unable to do so in the whole of the territory, but in a significant part thereof, yes.

As I mentioned earlier, the ECJ stated very clearly that Western Sahara is not part of Morocco. Given that the European court's jurisprudence vis-à-vis the legality of the free trade and fishing agreements between the European Union and Morocco has already been the subject of various doctrinal works[25], I

who flee war, horror or hunger, and risk their lives to find a better life in Europe, cannot be described as illegal.

[23] See the reference here.

[24] "Last week, the Moroccan security forces abandoned hundreds of irregular sub-Saharan immigrants to their fate at different points of the south-eastern Moroccan border (...) The Moroccan security forces have located and housed in military camps in the vicinity of the defensive wall dozens of immigrants who had previously been abandoned in the desert by members of the same security forces" (*La Vanguardia*, 19 October 2005). In the same sense, cf. *El Confidencial*, 16 October 2005; *El Mundo*, 13 October 2005; *El País*, 11 October 2005.

[25] Apart from my work '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', 46 *RGDE* (2018) at 61-114, cf. A. Annoni, 'C'è un giudice per il Sahara occidentale?', 99-3 *Rivista di Diritto Internazionale* (2016) at 866-876 [http://hdl.handle.net/11392/2352826]; 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 [urn:issn:0021-8170]; J. Ferrer Lloret, 'El conflicto del Sahara Occidental ante los tribunales de la Unión Europea', 42 *RGDE* (2017) at 13-64; 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 *RDCE* (2018) at 515-561 [https://doi.org/10.18042/cepc/rdce.60.02]; 'El Sáhara occidental, de

shall only offer a cursory analysis thereof, in order to focus on a question of critical importance, which arises precisely from this affirmation which, however obvious, is far from irrelevant.

As is indicated by this jurisprudence, for the agreements not to infringe international law, the consent of the Sahrawi people is necessary. I shall not dwell on the sense of shame produced by the Council and the Commission's interpretation, recently endorsed by the European Parliament,[26] according to which the approval of the trades union, administrative and political associations of the (non-autochthonous) inhabitants of the territory equates to this consent. The United Nations recognises the right to self-determination of the people of the Western Sahara; not of the "local populations", and even less so in the case of the colonists brought by Morocco to the territory in violation of the Geneva Conventions of 1949, which specifically prohibits the transfer of the population of the occupying State to the occupied territory. If I broach this question it is because the European institutions have sought to ignore the will of the native population of the territory. If, on the one hand, the POLISARIO Front, "the only legitimate representative of the Sahrawi people", refused to consent to any agreement that involved the exploitation of the natural resources of its territory in which Morocco participated, on the other, there was no consultation of the Sahrawi population in the occupied territories, neither of those Sahrawi's the Tinduf refugee camps... nor of those living in the part of the territory under Sahrawi control.

But the General Court made a subtle reference to an important question. In its 2015 ruling, which annulled the decision regarding the liberalisation agreement in its application to the territory of the Western Sahara, confirmed an evidence that was even acknowledged by the European institutions themselves, albeit one which later both the Council and the Commission and the ECJ attempted to ignore: the agreement *is applied* in Western Sahara, "or more specifically, *in most of this territory*, controlled by the King of Morocco"[27]. This jurisprudence states without further detail that if the requirement of the consent off the Sahrawi people were fulfilled, the agreements would be applicable *in Western Sahara*. Does this mean that the agreements between the European Union and Morocco are applicable throughout the territory? ¿Would they, therefore, be applicable in the part of the territory under Sahrawi

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nuevo, en Luxemburgo: las implicaciones de una unión de Derecho', 56 *La Ley Unión Europea* (February 2018); P. Hipold, 'Self-determination at the EuropeanCourts: The Front POLISARIO Case or The Unintended Awakening of a Giant', 2-3 *European Papers* (2017) at 907-921 [doi: 10.15166/2499-8249/184]; S. Hummelbrunner and A. CarlijnPrickartz, 'It's not the Fish that Stinks! EU Trade Relations with Morocco under the Scrutiny of the General Court of the European Union', 32 (83) *Utrecht Journal of International and European Law* (2016) at 19-40[http://doi.org/10.5334/ujiel.322]; E. Milano, 'Front POLISARIO and the Exploitation of Natural Resources by the Administrative Power', 2-3 *European Papers* (2017) at 953-966 [doi: 10.15166/2499-8249/182]; Odermatt, J., 'Council of the European Union v. Front Populaire pour la Libération de la Saguia-El-Hamra et Du Rio de Oro (Front POLISARIO)', III-3 *4JIL* (2017) at 731-738 [https://doi.org/10.1017/ajil.2017.50]; 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 [doi: 10.15166/2499-8249/158].

[26] EP Resolution of 16 January 2019 (not yet published in the Official Journal). Evidencing its clear intention to ignore international law, the Parliament previously rejected *an opinion from the Court of Justice on the compatibility with the Treaties of the proposed Sustainable Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, the Implementation Protocol thereto and an exchange of letters accompanying the said Agreement* (EP Motion for a Resolution of 6 February of 2019, 2019/2565(RSP)).

[27] The high courts has recognised that the agreements are applied "*de facto*", as if this expression did not imply that their non-application "*de iure*" is purely and simply contrary to international law.

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control? Can the European Union negotiate with Morocco with regard to the part of the territory that is free of military occupation? Accepting the European institutions' perverse interpretation of what should be understood as "consent of the people of Western Sahara", does the European Union require the consent of these "local populations", in this case genuinely autochthonous? Should it be understood that the agreements are also applicable to the products of unoccupied Sahara?

And these questions give rise to others that are equally important: what is the legal status of the territory under Sahrawi control? *Terra nullius* in the 21st century? What legal status do the European institutions attribute to the POLISARIO Front? Is it a national liberation movement ... or a terrorist movement controlling a territory by force, in similar fashion to what occurs in the "Islamic State"? Are we faced with a legal loophole in international law?

Will the UN and the EU permit the consolidation of the legal annexation of an important part of the territory, allowing the other part to remain in a kind of legal limbo, particularly in such an unstable part of the world, preventing moreover progress towards the desirable future of a strong, united Maghreb that would provide greater stability?

(II) SOME CONCLUSIONS

International law has appropriate responses to all these questions. In fact, the International Court of Justice itself provided them in the case of the construction of the Israeli wall in the occupied Palestinian territories. The Advocate-General, Melchior Whatelet, echoed them in an excellent report[28] which, unfortunately, the ECJ magistrates, bowing to the pressure exercised by the institutions of the European Union and some States, did not even mention, in a ruling that, like the aforementioned European Parliament resolution, is an embarrassment, since the Court ignores the Law and exercises a political function that does not correspond to it.[29]

As the ECJ states, Western Sahara is not part of Morocco and is a non-autonomous territory pending decolonisation. Even if successive governments have insisted on claiming the contrary, Spain continues to be the administering power of the territory. Consequently, and as the Advocate General declares, Morocco is the occupying power in the territory, so the applicable law in the occupied territories is humanitarian international law. The construction and maintenance of the wall constitutes a violation of the principle of *uti possidetis iuris*. Although the institutions of the European Union (Council, Commission and Parliament) deny the fact, "the negotiation and conclusion with the Kingdom of Morocco of an international agreement applicable to Western Sahara and to the waters adjacent thereto constitutes in itself *de iure* recognition of the integration". For this reason, the European Union incurs international responsibility for violating the obligation not to recognise an illegal situation resulting from a breach of the right of the people of Western Sahara to self-determination and not to render aid or assistance in

[28] Opinion of 10 January 2018, *Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, C-266/16, EU:C:2018:1.

[29] Judgment of 27 February 2018, *Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, 266/16, EU:C:2018:118.

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maintaining that situation.

The SADR is a State partially recognised by the international community, but is a founder member of the African Union and controls part of its territory, in which it effectively exercises state functions. It is true that many factors combine in this conflict in opposition to the application of international law and to the Sahrawi State being able to exercise its powers throughout the territory, at least in the short or medium term: the scant or zero interest of the major powers and their allies in finding a solution to this conflict; the peaceful nature of the Sahrawi people's struggle for their self-determination; the current international context and the Sahrawi territory's proximity to the Sahel; the bullying of the Moroccan *Majzen*, that continually threatens Europe with opening the gate to immigration (it opens them periodically when it wishes to exert pressure), which provokes incidents alongside the fenced borders of Ceuta and Melilla or threatens not to cooperate with the European Union in the question of Islamic terrorism; the supposed danger of instability in Morocco in the event of the latter "losing" territories that do not belong to it; the unconditional support for the illegal annexation of the territory expressed by a permanent member of the Security Council... All these factors make it very difficult to reach a solution to the conflict in accordance with international law. However, and although the day of Morocco's withdrawal from Western Sahara seems distant, it is equally difficult to imagine the SADR ceasing to control and administer the part of the territory under its control, which appears to render this conflict eternal.

In the occupied territories the gulf that exists between the Sahrawi population and the settlers has continued to widen since the Moroccan Government has used the latter to attack the autochthonous population following the events of Gdeim Izik. The Sahrawi population continues to be marginalised in their own territory, subjected to systematic violations of their human rights. In the refugee camps the situation is gradually deteriorating, as has been noted on various occasions by the UN Secretary General. Humanitarian aid, indispensable for the mere survival of the population in the inhospitable lands of southern Algeria, is decreasing daily, which means that the social situation of much of the refugee population is gradually becoming unsustainable. There is no doubt that the maintenance of the *statu quo* of the territory is neither an option nor a solution, and that only with justice will there be peace. The United Nations is obliged to promote the decolonisation of the territory. In the first place, for the sake of its own interest and credibility. But most particularly, because this is the UN's debt to a people that laid down its weapons in the belief that that the Organisation would impose a solution in accordance with international law.

In spite of the dark picture painted by the conflict and the ECJ's outrageous recent jurisprudence, in the five years since the POLISARIO Front decided to appeal to the courtsto demand compliance with international law, the Sahrawi people has made more progress towards self-determination than in the previous forty years of occupation. As a jurist, I continue to trust that, as has occurred throughout history in other spheres of human rights, the courts will gradually see reason, and the Law will achieve something that politics is far from achieving: the application of international legality and the Sahrawi people's recovery of control over all of their territory.

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Relevant International Legal Obligations Due to the Environmental Impact of the Construction of Walls and Reinforced Fences

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Abstract: The aim of this paper is to analyse the main universal and regional environmental legal instruments applicable to the construction of defensive walls, as well as the international standards for the protection of living natural resources and certain shared resources, such as international watercourses. Additionally, as such actions can give rise to violations of conventionally protected environmental human rights, it will also examine the case law of the European and inter-American protection systems.

Keywords: border wall, environmental impact assessment, international watercourses, biodiversity, environmental rights, national security

(A) INTRODUCTION

The primary reason for building a border wall is to prevent the movement of people.[1] Only in exceptional cases are they built to prevent the movement of animals for public health reasons.[2] Consequently, this increasingly common phenomenon is usually approached from the perspective of its dramatic impact on people. In contrast, not much attention has been given to the adverse environmental impact of such structures, even though all states acknowledge that they have (more or less significant) consequences when assessing them through the relevant procedures or internal administrative techniques.

This article will examine the relevance of international and European environmental law rules. In the author's view, of all the institutional, procedural and substantive rules in this area of international law, the obligation to undertake an environmental impact assessment is the basic requirement that every state must meet, due to its customary nature. Building on this basic rule, this paper will analyse the regional specificities of this technical-administrative instrument, making special reference to European Union law. Likewise, although not all scenarios involve them, it will look at the specific legal system governing those elements classified as shared natural resources, including, amongst others, international watercourses and

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1 H. Ruiz Fabri, 'Murs, accessibilité et libre circulation', in J.-M. Soreal (ed.), *Les Murs et le droit international* (Pedone, Paris, 2010), at 153.

2 A. Trouwborst *et al.*, 'Border Fences and Their Impacts on Lage Carnivores, Large Herbivores and Biodiversity: An International Wildlife Law Perspective', 25 (3) *Review of European Community & International Environmental Law* (2016) 291-306, at 292 [doi: https://doi.org/10.1111/reel.12169].

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certain species of fauna and flora. This article will not address issues related to biological diversity, which are discussed elsewhere in this section.

The environmental damage arising from the installation of fences can also lead to human rights violations. Although some regional human rights protection instruments do recognize the right to the environment, they do so in only a very limited way. Nevertheless, their control bodies have endowed certain fundamental rights with an environmental dimension. The most important of these with regard to the topic at hand are those rights of a collective nature, especially from the perspective of procedural guarantees.

(B) ENVIRONMENTAL IMPACT ASSESSMENTS

All states must ensure that activities carried out in their territory do not cause damage to the environment of other states or areas beyond their national jurisdiction (*sic utere tuo ut alienum non laedas* principle).[3] This is the obligation of prevention that requires states to take all appropriate measures to prevent significant transboundary harm or, in any case, to minimize the risk thereof.[4] As the International Court of Justice has indicated, a state would not be exercising its duty of vigilance and prevention were it to fail to carry out an environmental impact assessment of a project's potential effects.[5] However, the specific content of that obligation depends on the source thereof, with each state's domestic law determining the exact specifications.[6]

(1) The EIA: A Customary Obligation

The lack of a regional conventional regime is no longer enough to circumvent this requirement because it is a customary obligation and has also been included in some of the main multilateral environmental agreements, including the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol), the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on the Law of the Non-navigational Uses of International Watercourses, or the Convention on Biological Diversity.

In the *Pulp Mills on the River Uruguay* (*Argentina v. Uruguay*)case, the International Court of Justice declared that it is an obligation, enshrined in general international law, to undertake an environmental impact assessment where there is a risk that an industrial activity might have a significant adverse impact in a transboundary context.[7] Years later, in the *San Juan River* (*Nicaragua v. Costa Rica*) case, it went even further, stating that it should be applied to all proposed activities that may have a

3 Principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972) and Principle 2 of the Declaration on Environment and Development (Rio de Janeiro, 14 June 1992).

4 On this principle, see: S. Salinas, 'La Evaluación de Impacto Ambiental: Instrumento privilegiado de aplicación del principio de prevención en el Derecho internacional y de la Unión Europea', *La Evaluación de Impacto Ambiental y su régimen jurídico* (Lajouane, Buenos Aires, 2012) 271-314.

5 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, para. 204.

6 P.-M. Dupuy and J. Viñuales, *International Environmental Law* (Cambridge University Press, Cambridge, 2015), at 70.

7 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, para. 204.

 DOI: 10.17103/sybil.23.25

significant adverse impact in a transboundary context.[8] The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea went one step further in its *Advisory opinion on Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area*, considering that the "Court's reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to 'shared resources' may also apply to resources that are the common heritage of mankind".[9] More recently, the arbitral award in the *South China Sea* (*Philippines v. China*) case confirmed that this obligation is not limited to transboundary contexts, considering it "an essential part of a comprehensive environmental management system".[10]

If the assessment confirms that there is a risk of significant damage, the state of origin of the activity must officially notify and consult with the affected state (and, where applicable, the competent international organizations or secretariats of the multilateral agreements) sufficiently in advance with a view to taking appropriate measures to prevent or mitigate the risk, offering enough information for the cooperation process to fully make sense. Whilst it has been recognized that states have a certain margin of discretion regarding their approach to the assessment, the obligation to report its results is absolute.[11]

(2) The Environmental Risk Threshold (Screening)

The first stage of this process consists in determining whether the projected activity triggers this obligation, which requires the state to carry out a preliminary and systematic assessment on a case-by-case basis (a process known as "screening"). Some international legal instruments, such as the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991),[12] facilitate this decision by listing the activities likely to cause an adverse transboundary impact.[13] Although the Convention does not mention the kinds of infrastructure discussed here, that does not mean that they are automatically excluded, as its provisions could be applied if the parties involved so agree, provided that the proposed activities have an adverse transboundary impact due to their size, location (proximity to an international border) and effects over long distances.[14]

According to the Rio Declaration, "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and *are subject to a decision of a competent national authority*."[15] The responsible parties

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8 *Certain Activities Carried Out by Nicaragua in the Border of the Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Judgment, ICJ Reports 2015, para. 104.

9 *Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion*, 1 February 2011, ITLOS Reports 2011, para. 148.

10 *South China Sea Arbitration (Philippines v. China)*, Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on Law of the Sea, Final Award, PCA Case No. 2013-19, 12 July 2016, para. 948.

11 *Ibid.*, para 948.

12 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991).

13 Annex I.

14 Article 2 (5) in conjunction with Annex III.

15 Principle 17 (emphasis added).

 DOI: 10.17103/sybil.23.25

cannot circumvent this obligation simply by underestimating or ignoring the risk, for, as the International Law Commission observed in the *Draft articles on Prevention of Transboundary Harm from Hazardous Activities* of 2001, the "notion of risk is thus to be taken *objectively*, as denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had".[16] Therefore, the fact that certain activities are excluded under domestic law, subject to government approval, could be a violation of the due diligence required under the prevention principle.[17]

The International Court of Justice has ruled, on several occasions, that the risk of transboundary harm must be *significant*.[18] In the *Draft articles on Prevention*, the International Law Commission uses the term *significant*, in the sense of "something more than 'detectable' but [that] need not be at the level of 'serious' or 'substantial'". The harm may be caused in different spheres, such as human health, the environment or agriculture, and it must be possible to measure it by "factual and objective standards", providing rigorous evidence and proof. The project's size and impact on especially protected areas are very important factors for determining this risk.[19] In any case, *significant* should be understood to involve "more factual considerations than legal determination".[20]

(3) Scope and Content (Scoping)

Most of the international agreements currently in force do not specify the scope and content of these environmental impact assessments. Therefore, in theory, each state must determine the specific content thereof in its domestic law.[21] However, as has been indicated in the literature, due diligence and the basic elements of this customary obligation must be respected.[22] This obligation of due diligence cannot be uniformly applied, but rather requires considering the evolving context and standards,[23] including new scientific and technological knowledge.[24]

According to the International Law Commission's recent *Draft guidelines on the protection of the atmosphere*, it is necessary to speak of "the obligation to ensure that an environmental impact assessment is undertaken", because it is an obligation of conduct insofar as what the state is required to do is to put a legislative framework into place so that the assessment can be conducted, even though it may be economic

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16 *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries*, Report of the International Law Commission on the work of its fifty-third session, *Yearbook of the International Law Commission* (2001-II), Part. 2, UN Doc. A/56/10, commentary on Article 1 (para. 14).

17 J. E. Viñuales, 'La protección ambiental en el Derecho consuetudinario internacional', 69 *Revista Española de Derecho Internacional* (2017), 71-91, at 85 [doi: https://doi.org/10.17103/redi.69.2.2017.1.03].

18 *Pull Mills on the River Uruguay*, para. 204; *Certain activities Carried Out by Nicaragua in the Border Area*, para. 153.

19 *South China Sea Arbitration*, para. 988.

20 *Text of the draft guidelines on the protection of the atmosphere, together with preamble, adopted by the Commission on first reading*, Report of the International Law Commission, Seventieth session (30 April - 1 June and 2 July - 10 August 2018), UN doc. A/73/10, commentary on Guideline 4(para. 5).

21 *Pull Mills on the River Uruguay*, para. 204

22 Viñuales, *supra* n. 17, at 87.

23 *Text of the draft guidelines on the protection of the atmosphere,* commentary on Guideline 3(para. 5).

24 *Responsibilities and Obligations of States with Respect to Activities in the Area*, para. 117.

 DOI: 10.17103/sybil.23.25

actors who carry it out.[25] However, it must include at least an "evaluation of the possible transboundary harmful impact" of the activity on persons, property and the environment, so that the potentially harmed states can assess the risk to which they are exposed.[26] Furthermore, it is not enough to adopt appropriate rules and measures; a certain level of vigilance in their enforcement and administrative control of public and private operators must be exercised as well.[27]

It is not easy to determine the specific content of this stage, a process known as "scoping", at the international level. The Conference of the Parties to the Convention on Biological Diversity explains this stage of the process thusly:

> 'During scoping relevant impacts are identified resulting in the terms of reference for the actual impact study. The scoping stage is considered critical in the process as it defines the issues to be studied and it provides the reference information on which the review of the study results will be based. Scoping and review usually are linked to some form of public information, consultation or participation. [...] *Scoping* [is used] to identify which potential impacts are relevant to assess (based on legislative requirements, international conventions, expert knowledge and public involvement), to identify alternative solutions that avoid, mitigate or compensate adverse impacts on biodiversity (including the option of not proceeding with the development, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or providing compensation for adverse impacts), and finally to derive terms of reference for the impact assessment.'[28]

In clear keeping with this description, the Espoo Convention establishes minimum requirements for what the report must include: a description of the proposed activity and its purpose; a description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative; a description of the environment likely to be significantly affected by the proposed activity and its alternatives; a description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance; a description of mitigation measures to keep the adverse environmental impact to a minimum; an explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used; an identification of gaps in knowledge and uncertainties encountered in compiling the required information; where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and a non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).[29]

In any case, the environmental impact assessment does not end with the mere submission of a report; it is a continuous obligation, meaning the project's effects must be monitored, where necessary, throughout its lifespan.[30]

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25 *Text of the draft guidelines on the protection of the atmosphere,* commentary on Guideline 4 (para. 2).

26 *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities,* commentary on article 7 (para. 7).

27 *Responsibilities and Obligations of States with Respect to Activities in the Area*, para. 117.

28 Decision VIII/28. Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment, UNEP/CBD/COP/8/31, 15 June 2006, para. 2-5 (b).

29 Appendix II.

30 *Pull Mills on the River Uruguay*, para. 205; *Certain activities Carried Out by Nicaragua in the Border Area*, para. 161.

 DOI: 10.17103/sybil.23.25

(C) THE IMPACT ON NATURAL RESOURCES (SHARED RESOURCES AND CERTAIN SPECIES OF FLORA AND FAUNA)

Defensive infrastructure projects can have an adverse environmental impact if they lead to the fragmentation of habitats and wildlife populations, resulting in a lack of connectivity in a territory. At the same time, the construction of such structures can cause significant alterations in the course and flow of international watercourses, and they can act as dams in case of flooding. Although they do not specifically address these types of projects and activities, many legal instruments (both regional and universal) can prevent and mitigate their impacts.

(1) The Impact on Species of Fauna and Flora

New artificial barriers can become an obstacle to wildlife, scuttling decades of international conservation efforts to save certain animals.[31] One of the main protection instruments is the Bonn Convention on the Conservation of Migratory Species of Wild Animals.[32] Although many of its provisions are pertinent to the matter at hand, they have varying degrees of regulatory power. Thus, Article III, paragraph 4, although quite relevant to this study, is merely a request or recommendation, requiring only that range states of a migratory species *endeavour* to eliminate or minimize the adverse effects of obstacles that impede or prevent the migration of protected species. In contrast, immediately thereafter, the Convention uses imperative language to establish the obligation to prohibit the taking of animals belonging to such species out of their natural habitat.[33] Although the purpose of these types of infrastructure is not the premeditated capture of these species,[34] they can nevertheless pose a hindrance for them, which would be in contravention of the Convention.[35]

The proposed new walls can also affect certain habitats that fulfil fundamental environmental functions for plants and animals, such as wetlands (as in the case of the actions on the border between Greece and Turkey, near the Evros Delta). In these cases, under the Ramsar Convention,[36] the parties must formulate their planning so as to promote their conservation, report any changes in the environmental conditions of the wetlands due to human interference, and consult with each other in the case of shared wetlands.[37]

Attention should also be given to regional treaties, such as the Migratory Bird Convention,[38] which aims to protect migratory birds "in their movements across the United States of America and the United

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31 J. D. C. Linnell *et al.*, 'Border Security Fencing and Wildlife: The End of the Transboundary Paradigm in Eurasia?', 14 (6) *PLOS Biology* (2016) 1-13 [doi: https://doi.org/10.1371/journal.pbio.1002483].

32 Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979).

33 Art. III. 5.

34 Art. I.i.

35 A. Trouwborst *et al.*, *supra* n. 2, at 300.

36 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971).

37 Arts. 3-5.

38 Convention for the Protection of Migratory Birds and Game Mammals (adopted 7 February 1936). As amended 7 March 1972.

DOI: 10.17103/sybil.23.25

Mexican States, in which countries they live temporarily".[39] Under the Convention, the Parties undertake, amongst other things, to establish legal provisions to prevent the capture of these species.

(2) And on International Watercourses

The obligation to provide notification of projects that may have a significant adverse effect on other watercourse states is one of the principles provided for under the Convention on the Law of Non-navigational Uses of International Watercourses,[40] which sets out the rights and basic obligations in relation to these hydrological systems. It is also included in regional agreements concluded between watercourse states prior and subsequently to it. In any case, as the International Court of Justice has repeatedly pointed out, the provisions of these types of treaties can be approached dynamically, which would allow for new environmental requirements to be considered, with regard to both the undertaking of new activities and the continuation of activities implemented in the past.[41]

The construction and reinforcement of the border wall between the US and Mexico, along a border spanning 3,175 kilometres, including 2,033 kilometres delimited by the Rio Grande, is subject to significant constraints included in the agreements governing that watercourse. The first is the Treaty Relating to Utilization of Waters of the Colorado and Tijuana Rivers of 1944.[42] This treaty establishes an order of preferences regarding use of the water: domestic and municipal uses; agriculture and stock raising; electric power; industrial uses; navigation; fishing and hunting; and any other beneficial uses which may be determined by the [International Boundary and Water] Commission (an international body responsible for settling any differences that may arise in the Treaty's application).[43] Some authors argue that, although the Treaty does not explicitly mention conservation as one of its priority functions, it can be inferred from some of its uses (fishing and hunting) and, especially, from practice in relation to the Treaty, including repeated actions to create nature reserves and conservation areas, which is a fundamental objective. Thus, any barriers that might be built along the riverbanks could impede the movement of migratory species required for them to access the water.[44] However, they could also affect water quality, which, although not expressly cited, would be related to the priority uses (domestic and agricultural use). In fact, one of the main disputes between the two countries arose when the salinity levels of the water delivered to Mexico were too high, prompting the International Boundary and Water Commission to intervene. It was agreed that both Parties would consult with each other prior to undertaking any work involving surface or

39 Art. I.

40 Art. 12.

41 *Gabčikovo-Nagymaros (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, para. 140.

42 Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande Treaty, U.S.-Mexico (adopted 3 February 1944), 3 U.N.T.S. 313.

43 Art. 3.

44 S. Mumme and O. Ibáñez, 'U.S.-Mexico Environmental Treaty Impediments to Tactical Security Infrastructure Along the International Boundary', 49 *Natural Resources Journal* (2009) 801-824, at 812.

 DOI: 10.17103/sybil.23.25

groundwater water resources that might adversely affect the other Party.[45] It should moreover be recalled that these actions could violate Article 17, which provides that "[t]he use of the channels of the international rivers for the discharge of flood or other excess waters shall be free and not subject to limitation by either country…".[46]

The second is the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary,[47] which is fundamental for settling disputes between the two countries along a very dynamic border located in a geographically complex region spanning numerous ecosystems.[48] It aims to prevent alterations of the location of the dividing line due to the unilateral action of either state. Thus, in many cases, works in border areas must be carried out by mutual agreement. In this regard, Article IV allows each state to execute works on the course within its territory "provided, however, that in the judgment of the Commission the works that are to be executed under this paragraph do not adversely affect the other Contracting State through the deflection or obstruction of the normal flow of the river or of its flood flows".[49] If the Commission finds that the works executed in the watercourse or in its territory do have such consequences, "the Government of the Contracting State that constructed the works shall remove them or modify them and, by agreement of the Commission, shall repair or compensate for the damages sustained by the other Contracting State".[50] Therefore, as has been noted in the literature, should Mexico consider that US actions are in breach of the treaty, the United States could be required to take various remedial measures, from restitution (eliminating the security infrastructure) to compensation.[51]

(D) THE IMPACT ON ENVIRONMENTAL HUMAN RIGHTS

States' decisions to build border infrastructure can give rise to violations of environmental human rights protected by conventions, which, in turn, can lead to private actions before the jurisdictional bodies created by regional human rights protection systems. Of course, such actions are unlikely to succeed at the European level, because the legal goods susceptible to protection are considered on an individualized basis, meaning applicants must be directly and individually affected by the alleged violation. In contrast, in

45 M. Anglés Hernández, 'Los cursos de agua compartidos entre México y los Estados Unidos de América y la variable medioambiental. Una aproximación', 6 *Anuario Mexicano de Derecho Internacional* (2006) 89-166, at 113 [doi: http://dx.doi.org/10.22201/iij.24487872e.2006.6].

46 K. Sutton and I. Uluc,'Donald Trump's Border Wall and Treaty Infringement', 12 *Mexican Law Review* (2019) 3-31, at 26 [doi: http://dx.doi.org/10.22201/iij.24485306e.2019.2.13636].

47 Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.-Mexico (adopted 23 November 1970), 23 U.S.T. 37.

48 Sutton and Uluc, *supra* n. 46, at 17.

49 Art. IV.A.

50 Art. IV.B (2).

51 Sutton and Uluc, *supra* n. 46, at. 27.

 DOI: 10.17103/sybil.23.25

the Americas, such violations have been addressed from a community perspective, especially in relation to the interests of indigenous peoples.

(1) The European Protection System

Neither the European Convention on Human Rights[32] nor any of its protocols includes environmental rights. However, the European Court of Human Rights has developed original and extensive case law whereby certain attacks on the environment can give rise to violations of certain rights. Of all of them, Article 8 (right to respect for private and family life and non-violability of the home) has provided the most protection through the safeguard of various areas of personal autonomy.[33] However, this protection mechanism does not allow for complaints *in abstracto* in defence of collective public interests, such as damage to natural resources, but rather requires personal injury.[34] The individual must demonstrate that he or she has been directly affected by the alleged violation and that there is a sufficiently close connection.[35] Additionally, environmental events must reach a "minimum threshold of severity",[36] meaning less serious behaviours are not addressed.[37]

Complaints for environmental damage caused by infrastructure development are thus unlikely to succeed insofar as nothing other than the destruction of habitats and of fauna and flora species, as well as other shared resources, can be alleged. Some of the ECtHR's decisions confirm this. In the *Kyrtatos v. Greece* case, which originated in a lawsuit brought by Greek citizens over the development of a marshland area adjacent to the applicants' home, the Court ruled that Article 8 of the Convention had not been violated because, although the marshland fauna was shown to have been damaged, this damage did not directly affect the applicants' private and family lives.[38] It moreover recalled that protection of the environment per se[39] is not one of the Convention's objectives, and that other international instruments and domestic legislation are thus more pertinent in dealing with that aspect.

Another more recent case, (*Ahunbay and others v. Turkey*) reflects the aforementioned challenges. The Court addressed the potential violation of various articles of the Convention (amongst others, Article 8 and Article 2 of Protocol No. 1) due to the future loss of an archaeological site dating back more than 12,000 years (the city of Hasankeyf in the Tigris Valley) as a result of the imminent construction of the Ilisu dam.[60] The applicants' status as victims was based, first, on *humanity's right to education*, on the right to

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32 European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950).

33 E. Martínez, *La Tutela Ambiental en los Sistemas Regionales de Protección de los Derechos Humanos* (Tirant lo Blanch, Valencia, 2017), at 60.

34 *Sdružení Jihočeské Matky v. the Czech Republic* (decision), no. 19101/03, 10 July 2006, para. 2.1.

35 *Caron and Others v. France* (decision), no. 48629/08, 29 June 2010, para. 1.

36 *Martínez Martínez and Pino Manzano v. Spain*, no. 61654/08, 3 July 2012, para. 46; *Moreno Gómez v. Spain*, no. 4143/02, 16 November 2004, para. 58.

37 *Fadeyeva v. Russia*, no. 55723/00, 9 June 2005, para. 68-69; *Galev and Others v. Bulgaria* (decision), no. 18324/04, 29 September 2009; *Hardy and Maile v. the United Kingdom*, no. 31965/07, § 188, 14 February 2012.

38 *Kyrtatos v. Greece*, no. 41666/98, 22 May 2003, ECHR 2003-VI, para. 53.

39 Para. 52.

60 *Ahunbay and others v. Turkey* (decision), no. 6080/06, 29 January 2019.

DOI: 10.17103/sybil.23.25

know about one's cultural heritage and transmit that knowledge, which would lead to a violation of the right to information insofar as the planned works would prevent the transfer of values between civilizations.[61] Second, they complained about the project's harmful effects on the environment, including the irreversible impact it would have on the region's ecology and landscape.[62] After examining the applicable legal instruments in depth in order to determine whether there exists an emerging consensus or international trend in the matter, the Court concluded that there is indeed a shared European and international perception regarding the need to protect the right of access to cultural heritage.[63] However, that shared perception only exists with regard to the right of certain minorities, ethnic peoples, to freely enjoy their own culture and to the right of indigenous peoples to maintain, control and protect their cultural heritage.[64] In contrast, it found that it was impossible to infer from the Convention's provisions the existence of a "universal individual right to the protection of one or another part of the cultural heritage". The application was thus declared inadmissible *ratione materiae*.[65]

(2) The Inter-American Protection System

Such a case might have resulted in a different judicial solution had it been brought in the sphere of the inter-American protection system, where *ratione personae* jurisdiction is less restrictive. Furthermore, the regulatory instruments establishing the catalogue of fundamental rights (the American Declaration of the Rights and Duties of Man[66] of 1948 and the American Convention on Human Rights[67] of 1969) afford protection to certain collective rights that considerably broaden the scope of environmental protection (mainly linked to indigenous peoples). This is of interest to the matter at hand, because, as noted in relation to the wall between the United States and Mexico, the wall's construction could jeopardize the access of such peoples to their ancestral lands and territories, their livelihoods, and the exercise of their cultural and religious practices.[68] This is true even though the United States is not a party to the American Convention, or Pact of San José, as the Inter-American Commission can determine violations of the rights enshrined in the American Declaration of the Rights and Duties of Man, a source of international obligations, as the Court itself has repeatedly recognized.[69]

The Court's case law has repeatedly affirmed that indigenous communities are holders of certain

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61 Para. 17.

62 Para. 18.

63 Para. 23.

64 Para. 24.

65 Para. 25.

66 American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 rev 1 at 17 (1992).

67 American Convention on Human Rights (1969) OAS Treaty Series No 36; 1144 UNTS 123.

68 M. Guzman and Z. Hurwitz, *Violations on the Part of the United States Government of Indigenous Rights Held by Members of the Lipan Apache, Kickapoo, and Ysleta del Sur Tigua Tribes of the Texas-Mexico Border* (The Working Group on Human Rights and the Border Wall, University of Texas, 2008).

69 I/A Court H.R., *Case of the Community Garifuna Triunfo de la Cruz and its members v. Honduras*. Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 305, para. 226 *et seq*.

 DOI: 10.17103/sybil.23.25

rights, as many of these rights can only be exercised through the community to which they belong.[70] This is a recognition not only of the members of indigenous peoples, but of these peoples as such. Therefore, each individual member of such a people does not have to be personally present to defend his or her rights, as any violation has consequences for all of them and not for just some specifically. Under this case law, the Court has found violations of judicial guarantees and judicial protection,[71] rights of movement and residence,[72] and, most importantly for the case at hand, property.

Article 21 of the American Convention on Human Rights and Article XXIII of the American Declaration of the Rights and Duties of Man, which includes the right to private property, have been interpreted very broadly,[73] beyond the classic concept of property,[74] considering that there is no single way of using and disposing of goods, but rather different ways depending on each community's cultures and customs.[75] Hence, a communal form of collective ownership of the land, of a community's traditional territories, has been recognized, linked to the group rather than the individual,[76] which, at the same time, is respectful of the right to cultural identity and to the community's very survival.[77] Amongst other things, these links can consist of "the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering; hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture".[78]

The territorial rights of indigenous peoples include the use and enjoyment of their natural resources. Although the Convention does not prohibit the development of infrastructure in their territories per se, such infrastructure may not jeopardize their traditional lifestyle or their cultural identity, social structure,

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[70] I/A Court H.R., *Entitlement of legal entities to hold rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador*). Advisory Opinion OC-22/16 of February 26, 2016. Series A No. 22, para. 83.

[71] I/A Court H.R., *Case of the Community Garifuna Triunfo de la Cruz and its members v. Honduras*. Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 305, para. 226 *et seq*.

[72] I/A Court H.R., *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 20, 2013. Series C No. 270, para. 315 *et seq*.

[73] M. Barraondo, 'El caso Awas Tingni: la esperanza ambiental indígena', in F. Gómez Isa (ed), *El caso de Awas Tingni contra Nicaragua: nuevos horizontes para los derechos humanos de los pueblos indígenas* (Universidad de Deusto, Bilbao, 2003), at 52; S. Torrecuadrada, 'El cambio climático y los pueblos indígenas', in A. Remiro Brotóns and R.M. Fernández Egea (eds), *El cambio climático en el derecho internacional y comunitario* (Fundación BBVA, Bilbao, 2009), at 294.

[74] I/A Court H.R., *Case of the Xucuru Indigenous People and its members v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 5, 2017. Series C No. 346, para. 115.

[75] I/A Court H.R., *Case of the Garífuna Punta Piedra Community and its members v. Honduras*. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 304, para. 100; *Maya Indigenous Community of the Toledo District v. Belize* (Merits), Case 12.053, IACHR Report No. 40/04 (12 October 2004), para. 114.

[76] I/A Court H.R., *Case of the Kaliña and Lokono Peoples v. Suriname*. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309, para. 129.

[77] I/A Court H.R., *Case of the Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, para. 147.

[78] I/A Court H.R., *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, para. 131.

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economic system, customs, beliefs and distinctive traditions.[79] To ensure that restrictions respect this right to property, they must comply with three guarantees. The first is the need to ensure the effective participation of the indigenous peoples using procedures that are culturally adapted to their traditions.[80] The second is the obligation to ensure that an environmental and social impact assessment is performed with the state's supervision.[81] And the third and final one is to guarantee that the indigenous people will reasonably and equitably share in the projects' benefits.[82]

Also of interest to the present paper, it has been noted that the territory must be "sufficiently large and in one place, that is to say, it should not be fragmented, in order for those peoples to enjoy the full exercise of their ancestral ways of life".[83] In fact, in a case now *sub judice* before the Inter-American Court, concerning precisely the division or parcelling up of territory, the Commission has already acknowledged that the petitioners are right in their consideration that Article 21 of the Convention had been violated when the state tolerated the installation of wire fences, as they did not meet some of the aforementioned requirements, that is, because prior, free and informed consultations had not been held, nor had social and environmental impact assessments been performed, nor had the indigenous communities' participation been ensured.[84] It thus recommended the removal of the fences tended within the indigenous territory.[85]

(E) FINAL CONCLUSIONS

Infrastructure construction must respect the environmental legislation of each domestic legal system. However, when it is built to defend national security, that purpose can be used as grounds for not applying the obligations contained therein. An example of this is the actions of the US authorities, specifically, of the Department of Homeland Security, which, under Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, has waived an extensive range of environmental laws in order to build the border wall.[86] European Union law also provides for the possibility of circumventing the application of some European environmental rules. For instance, the Habitats Directive[87] provides for the possibility of carrying out a project despite a negative assessment of the implications for the site and in the

[79] I/A Court H.R., *Case of the Saramaka People. v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172, para. 121.

[80] I/A Court H.R., *Case of the Kaliña and Lokono Peoples v. Suriname*, para. 202 *et seq.*

[81] I/A Court H.R., *Case of the Saramaka People. v. Suriname,* para. 41.

[82] *Ibid.*, para. 138-140.

[83] *Garífuna Community of 'Triunfo de la Cruz' and Its Members v Honduras* (Merits), Case 12.548, IACHR Report No 76/12 (7 November 2012), para. 208.

[84] *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina* (Merits), Case 12.094, IACHR Report No. 2/121 (26 January 2012), para. 249.

[85] *Ibid.*, para. 250.

[86] Sutton and Uluc,*supra* n. 46, at 6.

[87] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206).

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absence of alternative solutions for imperative reasons of public interest, such as public safety,[88] provided that it can be shown that the interest overrides that embodied in the Directive's ecological objective.[89]

Such reasons cannot, however, be used to justify violations of internationally assumed environmental legal obligations. But as we have just seen, there are no conventional rules specifically addressing the environmental impact of this type of defensive infrastructure, or even concrete proposals to amend existing international agreements. Consequently, in the author's view, the permanent cooperation structures created by most of these conventions, in which the Conference of Parties plays a key part, must take on a decisive role insofar as they are tasked with taking the necessary decisions to promote and supervise the effective implementation of their provisions, periodically adapting the assumed commitments.[90] Even if they are not binding for the parties, such decisions can embody a subsequent agreement or subsequent practice under Article 31.3 of the Vienna Convention on the Law of Treaties,[91] i.e. "in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty".[92]

[88] Article 6(4) of the Habitats Directive. However, according to CJEU case law, "it must be recalled that, as an exception to the criterion for authorisation laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) must be interpreted strictly" (Judgment of 21 July 2016, *Orleans and Others*, C-387/15 and C-388/15, EU:C:2016:583, para. 60).

[89] Judgment of 28 February 1991, *Commission* v *Germany*, C-57/89, EU:C:1991:89, para. 20 and 21 (in this case, however, it referred to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103).

[90] In this regard, see: R. Churchill and G. Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: A little-noticed phenomenon in international law', 94 *American Journal of International Law* (2000) 623-659 [DOI: https://doi.org/10.2307/2589775]; N. Lavranos, 'Multilateral Environmental Agreements: Who makes the binding decisions?', 11 *European Environmental Law Review* (2002) 44-50 [https://doi.org/10.1023/A:1014201626147]; V. Röben, 'Conference (Meeting) of States Parties', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, vol. II (Oxford University Press, Oxford, 2012) 605- 611; P. Sand, 'The role of environmental agreements: Conferences of the Parties', in Y. Kerbrat and S. Maljean-Dubois (eds), *The Transformation of International Environmental Law* (A. Pedone-Hart, Paris-Oxford, 2011), 89-96.

[91] D. Bodansky, J. Brunnée and L. Rajamani, *International Climate Change Law* (Oxford University Press, Oxford, 2017), at 94; J. Brunnée, 'COPing with consent: law-making under multilateral environmental agreements', 15 *Leiden Journal of International Law* (2002) 1-32, at 31.

[92] *Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties* (Conclusion 11, Decisions adopted within the framework of a Conference of States Parties), Report of the International Law Commission, Seventieth session (30 April - 1 June and 2 July - 10 August 2018), Supplement No. 10 (A/73/10), at 15.

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The Influence of the Decisions of the European Court of Human Rightson EUNAVFOR MED Operation Sophia

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Abstract: Operation Sophia was launched in 2015 with the main goalof eradicating migrant smuggling and human trafficking from Libya. The decision of the European Court of Human Rights (ECHR) in *Hirsi Jamaa and Others v. Italy*required the migrants given aid at sea to disembark in Italy.The lack of progresson the missionas a consequence of due respect for international law, in addition to Italian attitudestowardsthe influx of migrants, resulted in the end of the mission's maritime operation as it was initially conceived.

Keywords: EUNAVFORMED Sophia *Hirsi Jamaa and Others v. Italy* European Court Human Rights Trafficking of Migrants UNCLOS SOLAS.

(A) INTRODUCTION

For hundreds of years, Europe has been the preferred destination for countless numbers of people, primarily from Africa, seeking nothing more than to escape from ongoing armed conflicts, dire poverty and a lack of basic resources in their countries of origin, or simply to find better opportunities for themselves and their families.[1]

The institutional and political weakness in Libya since 2011, in addition to its geographical proximity to the European coasts, strengthened criminal organizations within its borders. The Mediterranean Sea thus became not only a channel for human trafficking and the smuggling of migrants to Europe in the mafias' relentless pursuit of business development, but also the place where thousands of these migrants were killed. Indeed, the death of more than 800 migrants off the Libyan coast on 18 April 2015 was a turning point for European institutions, governments and non-governmental organizations. This event encouraged the European Union to launch EUNAVFOR MED Operation Sophia through Council Decision (CFSP) 2015/778, of 18 May 2015, to disrupt the business model arising from the smuggling of people from Libya.

In a parallel effort, United Nations Security Council (UNSC) Resolution 2240 (2015) of 9 October authorized states to act against vessels suspected of being used for human smuggling or trafficking on the high seas or those originating from the Libyan coast. It also urged Member States to fulfil their obligations regarding the protection of international human rights and refugee law.

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[1] A. Poncela Sacho, 'EUNAVFOR MED Operación Sophia: un instrumento de la Política Exterior y de Seguridad Común de la Unión Europea', 13 *Boletín del Instituto Español de Estudios Estratégicos* (2019), at 361-362.

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To this end, the resolution reaffirmed the need to protect and enforce the human rights and fundamental freedoms of all migrants, regardless of their political or social status, thereby emphasizing that migrants should be treated with humanity and dignity.

In this regard, in recent years, Operation Sophia has been conducted off the Libyan coasts, where many players have tried to protect migrants from risking their lives trying to reach Europe, even though this mission was not included in Decision 2015/778. War vessels, state vessels, vessels chartered by non-governmental organizations, merchant vessels and all other types of vessels have provided aid to individuals endangered at sea, including traffickers, pursuant to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention),and the 1979 Search and Rescue Convention (SAR Convention).

Unfortunately, the treatment received by these migrants during and after the assistance cannot be considered fair. Due to their status as migrants or refugees and the perception of them as potential criminals, respect for their human rights has been, at times, a function of whether they were lucky enough to be rescued.

One common denominator of the aid provided by vessels not belonging to the coast guards or to the Libyan navy has been the application of the principle of *non-refoulement* of potential refugees or their delivery to a "safe port". In the author's view, this is based, amongst other things, on the 2012 decision of the European Court of Human Rights (ECHR), in the case *Hirsi Jamaa and Others v. Italy*.

The limitations on how Operation Sophia could be conducted, due to respect for both international public law and Libyan sovereignty, coupled with the social and political implications of the relocation to Europe of thousands of migrants rescued at the sea, were key to preventing it from fulfilling the mission's objectives, resulting in the end of the naval mission in accordance with Decision 2019/535, of 29 March 2019, of the Council of the European Union.

(B) OPERATION SOPHIA: AN OVERVIEW OF THE MISSION

On 18 April 2015, several vessels coming from the Libyan coast tried to cross the Mediterranean Sea to Italy. The adverse weather conditions and the precarious nature of the vessels led to the shipwreck and drowning of more than 800 people. This shipwreck was not an isolated event, but the sheer number of deaths prompted the European Union to take action.[2] Hence, the launch of Operation EUNAVFOR MED, a military operation promoted within the framework of the European Union's Common Security

[2] "EU has never taken the issue of migration as seriously as we are doing now. With this operation, we are targeting the business model of those who benefit from the misery of migrants. But it is only a part of a broader strategy including the cooperation with our partners in Africa, particularly in the Sahel region, and the work with the International Organization for Migration and the UNHCR. As EU, we are determined to contribute to save lives, dismantle the networks of the smugglers of human beings and address the root causes of migration." "The target, let me be very clear, are not the migrants, the targets are those who are making money on their lives and too often on their deaths. It is part of our efforts to save lives". (Statement by High Representative Vice-President Federica Mogherini on the European Union Council decision to launch the naval operation EUNAVFOR Med – 22 June 2015).

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and Defense Policy with the objective of responding to the impunity of the mafia networks operating from Libya and trafficking humans across the Mediterranean Sea.

(1) Phases

The mission was founded pursuant to Council Decision (CFSP) 2015/778, of 18 May 2015.[3] However, it was amended over the years, including the addition of new mandates (combating trafficking in arms and weapons, training and monitoring the coast-guards and Libyan navy, etc.). Its main aim has always been to contribute to "the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean, achieved by undertaking systematic efforts to identify, capture and dispose of vessels and assets used or suspected of being used by smugglers or traffickers, in accordance with applicable international law, including UNCLOS and any UN Security Council resolution".

To that end, Operation Sophia was divided into four phases. The first phase was geared towards the exercise of freedom of navigation on the high seas in order to gather information regarding the mafia networks' activities. The second phase allowed Operation Sophia war vessels on the high seas to exercise the rights of boarding, search, seizure and diversion of vessels suspected of being used for human smuggling or trafficking, in accordance with the applicable international law, including Article 110.1.d) of the United Nations Convention of Law of the Sea of 1982 and Articles 8.1 and 8.7 of the Protocol against the Smuggling of Migrants of 2000. The third phase authorized the boarding, search, seizure and diversion, in Libyan Sea territory, of vessels suspected of being used for human smuggling or trafficking, with the consent of the Libyan government or in accordance with any applicable UNSC resolution. The last phase's objective was the adoption of necessary measures, including the removal or disablement of vessels suspected of being used for human smuggling or trafficking in state (Libyan) territory,in accordance with the conditions established in the relevant applicable UNSC resolution or with the consent of the relevant coastal state.

(2) Points of Action of the War Vessels during the Operation

The second phase of Operation Sophia, which was undertaken only on the high seas, immediately triggered a twofold response or consequence.

On one hand, the mafias altered their *modus operandi* in the maritime areas. These organizations ceased to accompany the migrants to the high seas, restricting their to wing of vessels to within the 12 nautical miles comprising the border of Libya's sea territory and, thus, stopping short of the maritime area where the Operation Sophia vessels were located. This situation made it impossible to board the mafias' vessels without infringing upon the limits imposed by international law (i.e. the need for the consent of the Libyan government or the issuance of an executive resolution by the UNSC).[4]

3 Council Decision (CFSP) 2015/778, of 18 May 2015.

4 At present, the Libyan coastguard's increasing operational capacity has led mafia networks not to tow migrants' vessels to the outer limit of the Libyan territorial sea, but rather operate directly from land. This allows them to maintain their lucrative business, whilst at the same time minimizing the risk of being arrested.

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On the other hand, due to the greater security this new position afforded them, the mafias significantly increased the number of vessels from Libya to Europe. Taking into account the location of the European war vessels beyond Libya's territorial sea and the duty under international law to provide assistance to vessels and persons in distress at sea,[5] human traffickers stopped towing the migrants and began simply to supply the precarious vessels with the minimum fuel required to go beyond the territorial sea and be rescued before sinking.

Thus, unable to act against the mafia organizations without consent or a resolution allowing them to act in Libyan seas, the Operation Sophia vessels were forced to limit their activities to providing assistance to vessels and persons in distress in SOLAS scenarios,[6] transferring the rescued migrants to European ports and triggering an involuntary call effect.[7]

(3) Limits Imposed by Public International Law: Possible Causes

In order to carry out Operation Sophia in accordance with the planned phases, the consent of the Libyan government or a UNSC resolution covered by Chapter VII of the Charter of the United Nations was required as *a sine qua non*. Otherwise, any action by the European Union could have been considered a hostile act of interference and violation of the sovereignty of Libya and its territory.[8]

The consent of the Libyan government for the Operation Sophia vessels to act in its territory has always been regarded as an unfeasible option given the country's status as a "failed" state since 2011.[9] Additionally, the existence of multiple opposing factions supporting various centres of power[10] has been of little to no help, although these factions do agree on the need to find a solution without external interference.

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5 Art. 98 of the United Nations Convention on the Law of the Sea: "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost (...)". Regulation 33 of the Convention for the Safety of Life at Sea: "The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance, if possible informing them or the search and rescue service that the ship is doing so. This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found (...). Masters of ships who have embarked persons in distress at sea shall treat them with humanity, within the capabilities and limitations of the ship."

6 The rescue of migrants is only provided for in the second paragraph of the sixth recital of Council Decision (CFSP) 2015/778: "The UNCLOS, SOLAS and SAR Conventions include the obligation to assist persons in distress at sea and to deliver survivors to a place of safety, and to that end the vessels assigned to EUNAVFOR MED will be ready and equipped to perform the related duties under the coordination of the competent Rescue Coordination Centre".

7 C. González Enríquez, 'Detener inmigración en el Mediterráneo, un imposible para Europa', 2 June 2015.

8 In the Atalanta Operation against piracy there was express support not only from the Somali Transitional Government, but also from the UNSC through various resolutions.

9 C. Ramón Chornet, 'Sobre el impacto de la crisis de refugiados en la PCSD de la Unión Europea', 31 *Anuario Español de Derecho Internacional* (2015), at 248-249. Ramón Chornet identifies the following requirements for a state to be considered failed: (i) an inability to provide basic services; (ii) an inability to interact with other states; (iii) the loss of physical control of the territory or of the monopoly of the use of force; and (iv) a strong detriment to the decision-making capacity of the constituted and legitimate authority.

10 I. Fuente Cobo, 'Libia, la guerra del General Jalifa Haftar', *Instituto Español de Estudios Estratégicos*, No. 70 (2017).

 DOI: 10.17103/sybil.23.26

The lack of a UNSC resolution, despite Libya's inability (and perhaps unwillingness) to control illegal trafficking from its coasts, can be explained by multiple factors: first, a reinterpretation of its powers;[11] second, the potential for such a resolution to be used to sow discord amongst the various militias; and third, its politicization by the permanent members of the Security Council due to the application, with little consent among the states, of the principle of the responsibility to protect in 2011. That year, the UNSC issued Resolution 1973 (2011), of March 17, in response to the use of widespread and systematic force by the Gaddafi regime against the civilian population,[12] authorizing a military action in Libyan territory without the country's consent.[13]

(C) THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE CASE OF *HIRSI JAMAA AND OTHERS V. ITALY*

The rescue of migrants has been a constant throughout Operation Sophia, even though it was not, strictly speaking, part of the mission. The systematic transfer of rescued migrants to European ports is based on the judgment delivered on 23 February 2012 by the Grand Chamber of the European Court of Human Rights (27765/09) in the case Hirsi Jamaa and Others v. Italy.[14]

(1) Facts

On 6 May 2009, three vessels carrying about 200 migrants were intercepted by three vessels from the Italian Revenue Police (*Guardia di finanza*) and the Coastguard 35 nautical miles south of the island of Lampedusa (i.e. within the Maltese Search and Rescue region of responsibility). As a result, the migrants

[11] "[T]his resolution (UNSC 2240/2015) provides us with a great opportunity to reflect upon the worrying tendency among states to resort to the authority of the UNSC under Chapter VII in order to permit the use [of] force and violation of state sovereignty in the suppression of transnational criminality". M. Bo, 'Fighting Transnational Crimes at Sea under UNSC's Mandate: Piracy, Human Trafficking and Migrant Smuggling', *EJIL:Talk*, October (2015).

[12] On 22 February 2011, the United Nations High Commissioner for Human Rights, Navi Pillay, issued a statement stating that Libya has the obligation to protect the right to life, liberty and security of the civilian population. She enjoined the Libyan authorities to cease the illegal use of force against protesters, as such actions constitute crimes against humanity. 'UN Human Rights Chief Pillay Calls for International Inquiry into Libyan Violence and Justice for Victims'.

[13] A. J. Bellamy, 'Libya and the responsibility to protect: the exception and the norm', *Ethics & International Affairs* (2011); E. Menendez del Valle, 'Responsabilidad de proteger: la ONU en acción', *Real Instituto Elcano*, Documento de Trabajo No. 2 (2016); A 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).

[14] Case Hirsi Jamaa and others v. Italy; J.A. Carrillo Salcedo, 'Reflexiones en torno a la Sentencia del Tribunal Europeo de Derechos Humanos en el caso HirsiJamaa y otros contra Italia (sentencia de 23 de febrero de 2012)'32 *Teoría y realidad constitucional* (2013) at 285-291; M.D. Bollo Arocena, 'Push back, expulsiones colectivas y non refoulement. Algunas reflexiones a propósito de la sentencia dictada por la gran sala del TEDH en el caso Hirsi Jamaa y otros c. Italia (2012)', in *El Derecho Internacional en el Mundo Multipolar del Siglo XXI: Obra Homenaje al Profesor Luis Ignacio Sánchez Rodríguez* (2013), at 647-666; C. de Castro Sánchez, 'Tribunal Europeo de Derechos Humanos – TEDH – Sentencia de 23.02.2012 (Gran Sala), HirsiJamaaet.a. c. Italia, 27765/09. Artículo 3 y 13 del CEDH; Artículo 4 del Protocolo nº 4 – Tortura y tratos inhumanos y degradantes – derecho a un recurso efectivo – prohibición de las expulsiones colectivas de extranjeros',46 *Revista de Derecho Comunitario Europeo* (2013) 1119-1135.

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were transferred to Italian military vessels and to the Libyan authorities,[15] in accordance with the Bilateral Cooperation Agreement signed in 2007 (and amended in 2009) between Italy and Libya to combat illegal immigration from Libya. Under that agreement, the states undertook to patrol the Libyan territorial sea and international waters, repatriate illegal migrants, and conclude agreements with their countries of origin to limit illegal immigration.[16]

(2) Lawsuit

Several of the migrants who were returned to Libya (11 Somalis and 13 Eritreans) filed a lawsuit against the Republic of Italy on the grounds that there had been a violation of, *inter alia*, Article 3 of the European Convention on Human Rights, which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment", and of Article 4 of Protocol No. 4, whereby "collective expulsions of foreigners are prohibited".

(3) Relevant Issues

The Article 3 violation was based on the fact that the plaintiffs' lives and physical integrity were put at risk due to the possibility of being subjected to inhuman or degrading treatment in Libya, the country from which they fled, as well as in Eritrea and Somalia, their countries of origin.

The Court asserted its awareness of the difficulties that states forming the external border of the European Union faced in dealing with the arrival of immigrants and asylum seekers. Consequently, in its judgment, it stated that the High Contracting Parties have the right to control the entry, stay and expulsion of foreigners as a matter of consolidated international law, without prejudice to the obligations resulting from the treaties they have signed, including the Convention.[17]

Notwithstanding the above, the Court clarified that any measure aimed at expelling a foreigner could pose difficulties from the perspective of Article 3 when there are reasonable grounds to believe that the individual in question, if expelled, could be exposed to a real risk of being tortured or subjected to inhuman treatment.

In the present case, in order to affirm that the plaintiffs had run a real risk of being subjected to torture or inhuman treatment, the Court examined the probative material at its disposal, especially the reports of human rights organizations (Amnesty International).In these reports, the organizations warned that in Libya, Somalia and Eritrea there were serious and widespread problems of insecurity due to arbitrary

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[15] At a press conference on 7 May 2009, the Italian interior minister declared that the operations were carried out in compliance with the principle of cooperation between states. He said that the return policy was very effective in combating illegal immigration (more than 471 illegal migrants had been intercepted on the high seas and returned to Libya under these bilateral agreements).

[16] In this regard, the Court ruled that "in accordance with the principle of 'pacta sunt servanda', a State cannot evade its obligations under the Convention by invoking commitments derived from bilateral or multilateral agreements related to the fight against illegal immigration".

[17] See, amongst other examples of case law, *Abdulaziz, Cabales and Balkandali v United Kingdom*, 28 May 1985 (paragraph 67, A Series, no. 94) and *Boujlifa v France*, 21 October 1997 (paragraph 42, Judgments and Decisions Book 1997-VI).

 DOI: 10.17103/sybil.23.26

detentions, torture, and lack of medical or hygienic assistance, coming not only from public officials, but also from individuals or groups of individuals.

Thus, the expulsion of a person, regardless of whether he is an illegal immigrant, would be subject to the principle of *non-refoulement* (referred to in Article 19.2 of the Charter of Fundamental Rights of the European Union[18]) to countries where there could be a real risk of being subjected to torture or inhuman treatment.[19]

On the other hand, the possible violation of Article 4 was based on collective expulsion, performed without evaluating the individual circumstances of each affected party. The Court held that the expulsion of foreigners as a result of their interception on the high seas in order to prevent them from reaching the borders of the relevant state implied a responsibility of the corresponding state pursuant to Article 4 of Protocol No.4.

The Court found that the breach of Article 4 of Protocol No.4 was due not to the collective expulsion of the intercepted group of migrants, but to the failure to conduct a preliminary review of the individual situation of each claimant. In the Court's opinion, the military vessels were not prepared to carry out individual interviews or provide the assistance of interpreters or legal advisers, which would have provided sufficient safeguards to carry out an actual methodical evaluation of the individual circumstances of each of the people involved and allowed for a decision on the expulsion of each one.

(D) EFFECTS OF THE ECHR RULING ON THE SOPHIA OPERATION

Despite the arrest of some suspects at the beginning of the mission,[20] the operation's stagnation resulted in the prohibition of navigating within Libyan territorial seas and, consequently, in a drastic reduction in the number of arrests of persons linked to migrant smuggling. These facts, together with the mission's similarity to previous and similar naval operations carried out by Italy and Frontex (the European Border and Coast Guard Agency) in the same area of the Mediterranean Sea, generated scepticism about Operation Sophia's effectiveness.[21] However, these were not the only reasons for the end of the operation.

The author's experience on board the operation's vessels indicates that they lacked the necessary mechanisms to thoroughly individualize the personal circumstances of each migrant. Therefore, in accordance with the ECHR's criteria, the migrants could not be expelled from the high seas. To a greater

[18] "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".

[19] E. Carli, 'Operation EUNAVFOR MED Sophia in the Framework of the European Agenda on Migration: Practical Aspects and Questions of International Law', 2 *Freedom, Security & Justice: European Legal Studies* (2018) 135-151.

[20] According to official sources, since 2015 (when the EUNAVFOR MED operation began) and until the end of 2018, it has only been possible to arrest and transfer to the Italian authorities 143 suspects of trafficking with migrants or other persons and to neutralize 545 vessels used for such trafficking.

[21] C. Espaliú Berdud, 'The Spanish Maritime Security: Main Challenges', 35 *Revista Europea de Derecho de la Navegación Marítima y Aeronáutica* (2018), at 28-29.

extent, the instability in Libya was enough evidence to suggest that disembarking the migrants at Libyan ports would pose a danger to their life and integrity.[22]

As a result of the above, and considering that, from the start, the most important part of the mission was located in Italy (perhaps because of its proximity or its interests in the region), the Italian ports were designated as safe ports to receive the migrants rescued by Operation Sophia vessels.[23]

The conclusions reached in the ECHR judgment in*Hirsi Jamaa and Others v. Italy* on one hand, and the prohibition of entry into Libyan territorial seas on the other, forced the war vessels involved in Operation Sophia to transfer rescued migrants to Italian ports, due to their status as a "place of safety". Notwithstanding the above, the perception of the Italian ports as the only "place of safety" has not been unanimous. As the Court stated in its judgment, referring to Resolution 1812 (2011) of the Parliamentary Assembly of the Council of Europe regarding the interception and rescue at sea of asylum seekers, refugees and irregular migrants, "certain Member States also questioned the application of the principle of 'non-refoulement' on the high seas". And "while the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a 'place of safety', the notion of 'place of safety' does not appear to be interpreted in the same way by all Member States".

However, the Assembly noted that "place of safety" should be interpreted as "meaning a place which can meet the immediate needs of those disembarked and in no way jeopardizes their fundamental rights, since the notion of 'safety' extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation."

The problem can be explained by the fact that the safeguarding of the human rights of migrants, in accordance with the ECHR ruling, has collided frontally and sharply with the fear of the massive and uncontrolled arrival of migrants to their territory held by a significant part of Italian public opinion.

Security issues (such as the safeguarding of external borders or the need to guarantee national security against possible terrorist attacks or criminal acts) and social aspects (such as the existence of limited resources, lack of social adaptation or discrimination) have caused Italy to close its borders, preventing the arrival of rescued migrants,[24] which has resulted in the end of the participation of warships in Operation Sophia.[25]

In other words, the impossibility of disembarking rescued migrants in Libyan territory due to the threat it would pose to them, as the ECHR ruled, together with the operation's suspension due to the lack

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[22] Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, provides that "in accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of "non-refoulement", or from which there is a risk of expulsion or return to another country in contravention of that principle."

[23] N. Arenas-Hidalgo, 'Flujos masivos de población y seguridad: La crisis de personas refugiadas en el Mediterráneo', 36 *Revista Iberoamericana de filosofía, política y humanidades* (2016), at 353-356.

[24] 'Firmato divieto di ingresso per la Sea Watch', Reppublica.it, 15 June 2019.

[25] This raises the question of whether only European ports meet the safety requirements mentioned by the ECHR or if other ports close to the area of operations (such as those of a Westernized country like Tunisia) could also have been used as safe ports.

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of consent by Libya or a UNSC resolution, as well as the recent decision of the Italian interior minister to prohibit the massive and indiscriminate arrival of rescued migrants to "safe" Italian ports, have caused Operation Sophia, as initially proposed, to fail.

Rights violations have occurred many times at sea and even after the migrants reach the coasts. Fear of the unknown, the concern for safeguarding borders, the need to preserve national and international security, the occasional unfounded prejudices against various backgrounds, and the alarm over the constant and increasing threat of terrorism are some of the reasons that led Italy to close its border to migrant disembarkation.

Be that as it may, the failure to move forwards on the different phases of Operation Sophia due to the observance of binding international law, in other words, the absence of the consent of a failed state such a Libya for it to enter its territory or of a UNSC resolution, and the Italian interior minister's decision to prohibit the massive and indiscriminate disembarkation of rescued migrants to Italian "places of safety", triggered the failure of Operation Sophia as it was first created in accordance with its initial mandate.[26]

As a consolation, there is still hope that the training of coastguards and the Libyan navy, which is also part of the mission, will take on a central role in the fight to end human smuggling and trafficking from Libya.

[26] Council Decision (CFSP) 2019/535 of 29 March 2019 amending Decision (CFSP) 2015/778 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED operation SOPHIA).

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Challenges for Biodiversity Protection Stemming from Border Walls in Slovenia and Korea

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Abstract: The proliferation of border walls around the world, including in European Union territory, is a fact. Their construction can have harmful and irreparable consequences for biodiversity and ecosystems. This paper analyses the construction of the border fence between Slovenia and Croatia, paying special attention to the violations of European and international law and to the harm caused to the biodiversity of the Dinaric Alps region. It will also look at the singular case of the demilitarized zone between North and South Korea, which, because it has been free of human interference for more than sixty years, has enabled wildlife to thrive and the establishment of a unique ecosystem in the world. The challenge for international law is thus twofold: to ensure the conservation and protection of biodiversity without compromising the peace process or a hypothetical reunification.

Keywords: biodiversity transboundary cooperation endangered species border wall border fence Slovenia Korea

(A) INTRODUCTION

Today, there is a consensus in the literature regarding the need and importance of promoting, implementing and strengthening transboundary cooperation between states. However, states have begun to call this paradigm into question, due to the security challenges they have faced since 2001: the fight against terrorism, organized crime or migratory crises in a context of economic crisis and a crisis of institutional representation. The securitization[1] of phenomena such as migration has hindered the fulfilment of the assumptions underlying the transboundary cooperation paradigm.

Transboundary protection of biodiversity has also been affected by the spread of border walls and fences around the world, including in European Union (EU) territory. Their construction is a barrier to the conservation of biodiversity, whilst their direct consequences for habitats are, in most cases, irreversible. This spread of threats to habitats and protected species flies in the face of the recommendations of the

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[1] Term coined by the Copenhagen School. Some of the most interesting studies on the securitization of international relations include: J.D.C. Linnell, 'Border controls: Refugee fences fragment wildlife', 529 (7585) *Nature* (2016) 156 [doi: https://doi.org/10.1038/529156a]; B. Pokorny *et al.*, 'Border fence: a new ecological obstacle for wildlife in Southeast Europe', 63 (1) *European Journal of Wildlife Research* (2017) 1-6 [doi: https://doi.org/10.1007/s10344-016-1074-1]; C. Perrings and G. Halkos, 'Who Cares about Biodiversity? Optimal Conservation and Transboundary Biodiversity Externalities', 52 (4) *Environmental and Resource Economics* (2012) 585-608 [doi: https://doi.org/10.1007/s10640-012-9544-8]; L.E. Ogden, 'Border Walls and Biodiversity: New barriers, new horizons', 67 (6) *BioScience* (2017) 498-505 [doi: https://doi.org/10.1093/biosci/bix044].

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latest IPBES report,[2] which notes that around one million species face extinction and around 25% of fauna and flora are threatened. Unfortunately, security interests, or interests that have been "securitized", are taking precedence over all other realities. Thus, the protection of biodiversity is not considered a priority compared to states' hypothetical national security threats.

Notwithstanding these considerations, this paper will analyse the construction of two border walls in order to show that there are ecological, economic, political, peace-related and legal reasons to devote efforts to ensuring transboundary protection of biodiversity.[3] First, it will examine how the construction of a border fence by Slovenia to stop the migratory flow has endangered numerous protected species. Despite the existing international legal framework, which includes EU and Council of Europe instruments that are binding on Slovenia, security-related reasons have once again taken precedence. Second, it will study and analyse the unique case of the establishment of the demilitarized zone (DMZ) between North and South Korea. The decision to create this zone, taken by the United Nations (UN) forces and North Korea in the 1953 armistice, entailed the establishment of a zone free of any type of human interference. This has resulted in the emergence of a unique and special place in the world that has enabled the development of biodiversity and the creation of a singular habitat. Because of its exceptional nature, it is necessary to study how international law could protect and conserve this habitat without undermining the peace process or a hypothetical reunification.

(B) THE SLOVENIAN BORDER FENCE

(1) Background: The Migratory Crisis and the Threat to Protected Species

In 2015, more than five years after the start of the financial crisis that wracked the EU Member States, one of the most decisive episodes in shaping the Union's agenda took place: the migrant crisis. The massive flow of migrants to the EU's borders in the midst of a crisis of confidence in both European and national institutions tested the strength of European institutions, as well as the Member States' willingness to ensure transboundary cooperation in such a difficult situation. Despite the EU Council's decision to set resettlement quotas,[4] the different governments responded differently to the arrival of the flow of migrants at their national borders. This disparity of responses is captured perfectly by two extremes: whilst Germany chose to open its borders, other states, such as Hungary, decided to build a border wall to put an end to uncontrolled border crossings.

Indeed, it was Hungary's construction of this border wall that triggered the problems that will be discussed here.[5] Because the wall prevented migrants and refugees from accessing Hungary, the

[2] IPBES/7/10/Add.1, Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services.

[3] See, for example, D. van Niekerk and L. Hildebrandt, 'Transboundary Protection of Biodiversity in the Context of Human and Environmental Security and Climate Change', in L.J. Kotzé and T. Marauhn (eds), *Transboundary Governance of Biodiversity* (Brill, 2014) 342-367, at 352-354 [doi: https://doi.org/10.1163/9789004273894].

[4] Council Decision (EU) 1209/8/15, OJ L 248 of 24 September 2015, at 80/94.

[5] The construction of the border wall in Hungary was completed in October 2015.

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migratory flows were channelled towards states whose borders were still permeable. One such state was Slovenia, which, since the construction of the Hungarian wall, has witnessed an increase in the number of migrants reaching its border. Overwhelmed by the growing flow and unable to maintain control over the border, the Slovenian government chose to emulate the Hungarian government's decision and ordered the construction of a border fence along the border with Croatia.[6]

The border between Slovenia and Croatia spans a total of 349 kilometres across one of the continent's richest regions in terms of wildlife: the Dinaric Alps. This region is a unique habitat home to a large number of species, many of them protected, including the brown bear, the wolf, the red fox or the Eurasian lynx. Numerous studies have demonstrated the impact of the construction of border walls and fences on specific habitats and species. Broadly speaking, direct human interference in protected habitats causes problems related to habitat fragmentation, the loss of genetic wealth, and species extinction. All these problems are taking place, or will take place, in the Dinaric Alps in relation to the aforementioned species. This makes it necessary to analyse the applicable EU and international regulations to determine whether or not the border fence's construction is compliant with the laws that are binding on Slovenia.

In any case, the fence's construction raises an issue worth considering: the introduction of national security as a factor enabling circumvention of international obligations. Since the 1990s, the Copenhagen school has been analysing the "securitization" of international relations,[7] i.e. the absorption into the sphere of security of areas that once fell beyond its scope. In this regard, states have evaded their obligations towards asylum seekers and in relation to environmental protection for urgent reasons of national security.

(2) Has the International Legal Framework on the Transboundary Protection of Biodiversity Been Respected?

The construction of border fences raises several legal questions related to the protection of biodiversity. This paper will focus on just two: the need to perform an environmental impact assessment for any project that might affect the environment, and due protection of endangered species or singular habitats.

(i) *The Obligation to Perform an Environmental Impact Assessment*

The obligation to perform an environmental impact assessment before building anything that might disturb the environment is established in numerous international instruments, although of varying scope and with different levels of detail. It was set forth in the 1992 Rio Declaration, has been specified by instruments such as the Espoo Convention and was established as an obligation of customary

[6] Although it cannot be exclusively attributed to the construction of border walls, illegal border crossings fell dramatically beginning in 2015, just as these walls were built. Whilst in 2015, 764,033 attempted illegal border crossings were detected, by 2018, the number had fallen precipitously to 5,869 people. (Data from FRONTEX.)

[7] B. Buzan, O. Wæver and J. de Wilde, *Security: A New Framework for Analysis* (Lynne Rienner Publishers, 1998); J. Huysmans, 'Revisiting Copenhagen: Or, On the Creative Development of a Security Studies Agenda in Europe', 4 (479)*European Journal of International Relations* (1998) 479-505 [doi: https://doi.org/10.1177/1354066198004004004]; H. Stritzel, 'Towards a Theory of Securitization: Copenhagen and Beyond', 3 (13) *European Journal of International Relations* (2007) 357 383 [doi: https://doi.org/10.1177/1354066107080128]; M. McDonald, 'Securitization and the Construction of Security' 14 (53)*European Journal of International Relations* (2007) 563-587 [doi: https://doi.org/10.1177/1354066108097553].

international law by the International Court of Justice in 2010. Likewise, EU law, through various directives, also provides for this obligation with enough specificity to prevent evasion of the responsibility to carry these assessments out. It is thus important to determine not only whether the objective requirements established by the different regulatory instruments were met, but also whether the emergency situation alleged by Slovenia to exclude its obligation to perform such an assessment falls within the scope of the law.

Article 17 of the 1992 Rio de Janeiro Declaration[8] establishes the obligation to undertake an environmental impact assessment. However, it characterizes such assessments as national instruments that must be implemented when an activity is likely to have a significant adverse impact. Citing this ambiguity of terms, the Declaration's non-binding nature and the fact that the decision is left to national authorities, the literature has underscored the legal uncertainty resulting from the difficulty of determining the existence of the objective element, namely, the existence of a risk.[9] In any case, this obligation has been determined by the International Court of Justice, which, in considering the obligation to perform an environmental impact assessment a customary norm, has specified the duty of states to perform one prior to undertaking a project, as well as to monitor the project's impact throughout the activity's duration.[10] It is thus an obligation that arises prior to the undertaking of the project, but which remains in force for the duration thereof.[11]

The mandatory environmental impact assessment was not carried out prior to the construction of the border fence between Slovenia and Croatia. Considering the massive arrival of migrants following the closure of the Hungarian border an emergency situation, the Slovenian authorities cited national security concerns to bypass the procedural obligation to perform one. Although the alleged circumstances are not provided for in the Rio Declaration and are referred to only summarily by the International Court of Justice,[12] they are set out and provided for in other binding international instruments for Slovenia.

Given the lack of specificity of the obligation and the determination of the objective elements giving rise to it, both part of the literature and Judge Bhandari, in his separate opinion,[13] consider that the Espoo Convention[14] should be the instrument of reference for determining its content. As Slovenia is a party to

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8 A/CONF.151/26 (Vol. I), Rio Declaration on Environment and Development.

9 J.E. Viñuales, 'La protección ambiental en el Derecho consuetudinario internacional', 69 *Revista Española de Derecho Internacional* (2017) 71-91, at 85 [doi: https://doi.org/10.17103/redi.69.2.2017.1.03].

10 *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), judgment of 20 April 2010*, at § 205, and *Certain Activities Carried Out by Nicaragua in The Border Area (Costa Rica v. Nicaragua)*, at § 161.

11 In fact, the International Court of Justice restricted the customary international law international obligation regarding Article 17 of the Rio Declaration, limiting it to a cross-border context, as in the case of the construction of the border wall between Slovenia and Croatia. See: P.-M. Dupuy, G. Le Moli and J.E. Viñuales, 'Customary International Law and the Environment', 2 *C-EENRG Working Papers* (2018) 1-23, at 19; and S. Marsden, 'Determining Significance for EIA in International Environmental Law', *Questions of International Law, Zoom-in 42* (2017), at 1-2.

12 Inversion of the burden of proof.

13 Separate Opinion of Judge Bhandari, in *Certain Activities Carried Out by Nicaragua in The Border Area (Costa Rica v. Nicaragua)*, at 10 § 33.

14 Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 1997); Slovenia has been a party since 22 May 1992, as is the European Union, which signed it on 25 February 1991 and ratified it on 24 June 1997.

that convention, it is obliged to fulfil its requirements, namely: to conduct the assessment *ex ante* should any of the criteria set out in Appendix III for determining the existence of a risk be met, i.e., the size of the project, its location or any complex or adverse effects it might have for human beings, the existing or potential use of the area, additional loading on the environment, or, as in the case at hand, for valued species or organisms. Subsequently, it must establish a period for notification and queries, as well as monitor compliance with the conditions set out in the project and review its impact to ensure proper management.[15] The obligation to perform an environmental impact assessment is also set out in EU legislation, specifically, in the Directive on the assessment of the effects of certain public and private projects on the environment.[16] Nevertheless, like the rest of the European states that closed their borders, Slovenia obviated the environmental impact assessment, neither carrying out, nor even trying to justify its failure to do so in accordance with the aforementioned rules.

Given that the present paper focuses on the protection of biodiversity, it is essential to look at how the construction of the border fence affected the protected species that live in the Dinaric Alps. To this end, once the breach of this specific obligation has been explicitly defined, identifying the applicable biodiversity protection regime will be essential to analyse Slovenia's violations.

(ii) *The Biodiversity Protection Regime: A Breach with Serious Consequences*

As noted, the Dinaric Alps are a unique habitat home to numerous protected species. The construction of the border fence may affect them, and the consequences could be irreparable. Is the fence's construction protected by applicable international regulations? As already noted, the obligation to perform an environmental impact assessment was breached. However, to answer this question, it is necessary to refer to the Bern Convention, the Bonn Convention and the EU's Habitats Directive, the legal framework regulating the protection of the affected species, mainly, the brown bear, the wolf, the red deer and the Eurasian lynx.

The Council of Europe's Bern Convention[17] laid the foundations for the European biodiversity protection system, paying special attention to species and habitats whose conservation requires transboundary cooperation. The Convention can be considered a direct predecessor of the regulations that would later be established by the EU in two ways: first, it created the Emerald Network,[18] the predecessor of the Natura 2000 network established in the Habitats Directive; second, it established strictly protected species of fauna,[19] including the wolf, bear and Eurasian lynx, all of which are found in the Dinaric Alps. The Convention requires states to take all appropriate measures to ensure the conservation of these species, prohibiting their capture, the deterioration of their breeding sites or resting places, and

15 All contained in Appendix V.

16 European Parliament and Council Directive 2011/92/EU, OJ L 26, 28 January 2012, 1-21.

17 Convention on the Conservation of European Wildlife and Natural Habitats.

18 Emerald Network of Areas of Special Conservation Interest.

19 Annex II.

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any disturbance that might adversely affect them.[20]

The regulations established under the Habitats Directive[21] are similar to those set forth in the Bern Convention. To this end, it sets up the Natura 2000 network, made up of "special areas of conservation" due to their great value in terms of biodiversity. One of these special protection areas is the Dinaric Alps. Several important factors are worth considering for the case at hand. The first is the state mandate regarding the obligation to take all appropriate steps to prevent the habitats' deterioration.[22] It also requires the performance of an environmental impact assessment before any plan or study that might affect the protected areas, an obligation that, as noted earlier, Slovenia ignored.[23] Finally, attention should be called to a mechanism included in the Directive that Slovenia could have used to except the project from the protection regime. Article 6.4 provides for the following possibility: if the outcome of the environmental impact assessment shows that the project could have negative implications for sites that host a priority natural habitat type and/or priority species — such as the species in question here — states may allege public-safety considerations. However, this option requires prior consultation with the Commission, and a report on the exceptions applied must be submitted to the Commission every two years.[24] In other words, mechanisms to exclude the strict protection regime did exist, but Slovenia chose not to use them. This was most likely due to the demanding procedural conditions, which remain in force until the cause giving rise to the exceptional regime comes to an end.

Although they lack binding force, it is worth noting that two resolutions of the Conference of Parties to the Bonn Convention,[25] of which Slovenia is a party, have stressed how important it is for the states party to carry out an environmental impact assessment,[26] as well as the potential impacts of building border fences for the conservation status of mammals. In the latter case, it indicated that the risks to species range from mortality to habitat fragmentation.[27]

The negative consequences of the construction of border walls, in this case a metal fence, for biodiversity can be irreversible. One might expect states to cooperate closely to ensure the protection of the protected species whose habitats are not confined by national borders. According to Fleurke and Trouwborst,

> "It would thus appear that neighboring Member States are to cooperate in the designation and protection of cross-border habitat sites, and likewise are to coordinate their efforts concerning transboundary populations of strictly protected species (...) Large carnivores such as Eurasian lynx (*Lynx lynx*), wolves and brown bears (*Ursus arctos*) are prime examples of the latter, and the adoption of transboundary population-level management plans has been

[20] Art. 6 of the Convention.

[21] Council Directive 92/43/EEC, OJ L 206 of 22 July 1992, 7-50.

[22] Art. 6.2.

[23] Art. 6.3.

[24] Art. 16.2.

[25] Convention on the Conservation of Migratory Species of Wild Animals.

[26] UNEP/CMS/Resolution 07.02 on Impact Assessment and Migratory Species (24 September 2002), at § 2: "The COP has requested contracting parties to conduct an EIA or SEA for potentially harmful projects and plans, including assessment of any 'effects involving impediments to migration' and any transboundary effects on migratory species".

[27] UNEP/CMS/Resolution 11.24 on the Central Asian Mammals Initiative (9 November 2014), at preamble § 2: "fences can have a particularly detrimental impact on the conservation status of migratory mammals and may cause direct mortality and fragmentation of habitats, disrupting essential movement from one place to another".

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recommended for these species."[28]

However, cooperation has been non-existent. In a magnificent study,[29] Linnell et al. sounded the alarm regarding the specific potential threats to each protected species. Bears would be the species to suffer the fewest consequences, insofar as the population would not be threatened unless the two states failed to adapt their domestic laws on hunting. Wolves, in contrast, would suffer horrible consequences, as packs would be isolated, which, because of the resulting incest and loss of genetic wealth, would render the species' survival unfeasible in the long term, due to population fragmentation. And the Eurasian lynx would be doomed to disappear because of the fence's construction.

It can be concluded that security considerations take precedence over all other issues, including environmental ones and, more specifically, those related to biodiversity protection. According to Trouwborst, impacts on wildlife are not considered in the decision-taking process, and environmental legislation is not applied or is simply ignored when the security element is introduced.[30]

(3) The Failure to Respond to Breaches: A Mistake with Serious Consequences

Given the breach of the international obligations discussed above, one would have expected at least the European institutions to respond, establishing sanctioning mechanisms for the breach of EU law, specifically, the Habitats Directive. However, the response was limited to a letter sent by the Croatian foreign minister in 2015, with no specific repercussions.[31] Clearly, the European Commission should have initiated the established procedure for breaches of EU law, which, ultimately and in the case of a hypothetical breach of the requirement, would have allowed the Court of Justice to rule on the matter.

Another remarkable aspect, which serves to confirm the securitization theory, is that, although the Slovenian government cited an alleged security emergency to build the border fence, it remains standing four years later. In other words, the justification for the border fence's construction was the massive arrival of migrants to Slovenian borders. However, since the agreement was signed with Turkey,[32] migration flows have decreased dramatically, calling into question the need, if ever there was one, for the fence to remain standing. The damage to biodiversity started the moment work began on its construction.

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[28] F. Fleurke and A. Trouwborst, 'European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats Directive', in L.J. Kotzé and T. Marauhn (eds), *Transboundary Governance of Biodiversity*, (Brill, 2014) 129-162, at 145 [doi: https://doi.org/10.1163/9789004273894].

[29] J.D.C. Linnell *et al.*, 'Border Security Fencing and Wildlife: The End of the Transboundary Paradigm in Eurasia?', 14 (6) *PlOS Biology* (2016) 1-13, at 4 [doi: https://doi.org/10.1371/journal.pbio.1002483].

[30] A. Trouwborst *et al.*, 'Border Fences and Their Impacts on Large Carnivores, Large Herbivores and Biodiversity: An International Wildlife Law Perspective', 25 (3) *Review of European Community & International Environmental Law* (2016) 291-306, at 292 [doi: https://doi.org/10.1111/reel.12169].

[31] This diplomatic note was not intended as an official protest against the construction of the border fence and its potential repercussions for biodiversity. It was sent to protest the border fence built on the River Čabranka, which Croatia considers part of Croatian territory. See: V. Pavlic, 'Croatian Foreign Minister on Migrant Crisis and Relations with Slovenia', *Total Croatia News* (2016).

[32] EU-Turkey Statement, 18 march 2016. For more information on the agreement between the EU and Turkey and the nature thereof, see: F. Peña Díaz, 'La Agenda Europea de Migración: últimos desarrollos', 33 *RevistaElectrónica de EstudiosInternacionales* (2017), at 8-14 [doi: https://doi.org/10.17103/reei.33.10].

Mechanisms should have been put into place to minimize the adverse effects for the protected species. As it stands, much of the damage done may be irreparable.

In any case, although this paper has focused on Slovenia, Croatia shares some of the responsibility. Transboundary cooperation for the protection of biodiversity requires interstate collaboration. Rather than inaction, the Croatian government should have responded strongly and vigorously to protect a common heritage: the protected habitat, included in the Natura 2000 network, of the Dinaric Alps.

(B) THE KOREAN DEMILITARIZED ZONE

Notwithstanding the foregoing, some studies have shown that the construction of border walls can, potentially, have a positive impact on biodiversity protection.[33] Mainly, these effects occur when they manage to isolate a given habitat from human interference. Some authors have proposed the radical utopian possibility of leaving half the planet untouched by humans, to allow ecosystems to restore themselves.[34] Although for different reasons, and in a post-conflict scenario, this is what has happened in the Korean DMZ. The zone is a singularity and a good example of the beneficial effects that a lack of human interference in nature can have for the conservation and protection of biodiversity.

(1) The Creation of the Demilitarized Zone in the 1953 Armistice: A Unique Ecosystem

After the armed conflict from 1950 to 1953, the armistice that ended the hostilities between the North Korean forces and the UN troops established a demilitarized zone between North and South Korea.[35] The zone stretches two kilometres to the north and south of the military demarcation line and is thus 248 km long and 4 km wide, comprising a total of 907 square kilometres. No type of economic activity is permitted in the DMZ, and military authorization from both parties is required to engage in any kind of activity near it. Together, the DMZ and the area in which authorization is required to engage in any type of activity are known as the "civilian control zone".[36] There is thus a buffer zone that goes beyond the boundaries of the DMZ itself, which constitutes a barrier to human activity.

Despite its name, the "demilitarized zone" is one of the most militarized places in the world, with mined areas and constant surveillance by the military forces on both sides of the border. This highly idiosyncratic state of affairs makes the zone unique in the world, as it constitutes a dual reality: on the one hand, the zone has enabled and continues to enable the development and spread of biodiversity; on the other, it exists under constant threat of destruction.[37] The risks looming over the ecosystem include both

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[33] Linnell, 'Border security…', *supra* n. 29, at 7. Specifically, the study highlights the benefits of the construction of a border fence between Mongolia and China for the khulan (*Equus hemionus*).

[34] E. O. Wilson, *Half-Earth: Our Planet's Fight for Life* (Liveright, New York, 2016).

[35] Armistice Agreement.

[36] E.-G. Hwang, 'The DMZ and the Destiny of a Divided Korea', in R. Guo and C. Freeman (eds), *Managing Fragile Regions: Method and Application* (Springer-Verlag, New York, 2011) 47-59, at 50 [doi: https://doi.org/10.1007/978-1-4419-6436-6_3].

[37] *Ibid.*

those due to military activity[38] and those stemming from a potential reunification (land reclamation, natural resource exploitation, economic uses and infrastructure construction).

This article will attempt to respond to the following question: can international law be the tool needed to ensure the conservation and protection of the DMZ's ecosystem? To do so, some information on the species that live there, especially the protected ones and those that are most endangered, would be helpful. As noted in the widely acclaimed study by Kim,[39] the DMZ is the habitat of two of the world's most endangered bird species — the white-naped crane (*Grus vipio*) and the red-crowned crane (*Grus japonensis*) — as well as rare mammal species, such as the black bear (*Selenarctos thibetanus ussuricus*) and the musk deer (*Moschus moschiferus caudatus*).[40] The difficulty of accessing the zone, couple with the reluctance to perform the necessary assessment to enable accurate identification of the fauna and flora that make up the ecosystem, are a stumbling block that must be overcome to ensure effective protection and conservation.

(2) Ensuring the Ecosystem's Protection through International Law

(i) *Making the Demilitarized Zone a Peace Park*

In the wake of armed conflicts, numerous aspects and factors shape the post-conflict scenario. However, land management and environmental protection are rarely considered beyond the need to clear the conflict areas of war *matériel* such as antipersonnel mines. Armed conflicts have dire consequences for the territory in which they are fought, consequences that continue to be felt many years after the conflict ends.[41] However, the transformation of military zones into environmental sanctuaries is rarely proposed. One method for achieving such a transformation is "warfare ecology",[42] a tool that would allow for policies to be implemented to enable the transition from military zones to areas of special environmental conservation, for example, through the creation of "peace parks".

Peace parks are defined as:

> "transboundary protected areas that are formally dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and to the promotion of peace and cooperation"[43]

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38 As noted in K.-G. Kim, 'Status and Ecological Resource Value of the DMZ Area' in K.-G. Kim, *The Demilitarized Zone (DMZ) of Korea* (Springer-Verlag, Berlin Heidelberg, 2013) 55-71, at 61 [doi: https://doi.org/10.1007/978-3-642-38463-9_3]. military activity, such as burning parts of the forests to improve visibility, can be harmful for the ecosystems.

39 K.C. Kim, 'Preserving Biodiversity in Korea's Demilitarized Zone', 278 *Science* (1997) 242-243, at 242 [doi: http://dx.doi.org/10.1126/science.278.5336.242].

40 The expansion of wildlife in the zone has also been reported in the press. See: S. Wilson, 'Korea's Demilitarised Zone Is Becoming a Haven for Wildlife' or L. Brady, 'How wildlife is thriving in the Korean peninsula's demilitarised zone'.

41 See, for example: J. Hupy, 'The Environmental Footprint of War', 14(3) *Environment and History* (2008) 405-421 [doi: https://doi.org/10.3197/096734008X333581].

42 G.E. Machlis and T. Hanson, 'Warfare Ecology' in G. Machlis *et al.* (eds), *Warfare Ecology: NATO Science for Peace and Security* (Springer Netherlands, 2011) 33-40, at 38 [doi: https://doi.org/10.1007/978-94-007-1214-0_5].

43 A. Hammill and C. Besançon, 'Measuring Peace Park Performance: Definitions and Experiences' in S.H. Ali (ed),*Peace Parks: Conservation and Conflict Resolution* (MIT Press, Cambridge, Massachusetts, 2007) 23-40, at 24.

From the author's point of view, and despite the misgivings of some authors,[44] the use of the DMZ as a tool to catalyse regional cooperation could have numerous benefits for resolving the conflict and protecting the ecosystem. The creation of a peace park would have positive consequences for the DMZ and the Korean peninsula as a whole, as it would promote environmental protection and could prompt the development of the respective domestic laws. However, it would need to be determined and created prior to any peace talks or in parallel to the peace process to prevent the non-military threats hanging over the DMZ from transpiring.

In their 2018 letter to the UN Secretary-General,[45] the representatives of both countries undertook to "transform the DMZ into a peace zone in a genuine sense". Although the message they sought to convey was powerful, it was not free of ambiguity. The South Korean government has already sought to turn the DMZ into a peace park to facilitate peace-building through the conservation of biodiversity in the past. It is thus difficult to understand why the recent efforts to bolster the peace talks have seemingly failed to pursue the same goals. It may suggest that both states wish to obtain an economic and social return from the use and exploitation of the DMZ's resources. That would undeniably be a grave mistake that would only further degrade Korean wildlife. As noted earlier, transboundary cooperation has positive effects from an ecological, political (insofar as it promotes political interaction between states with positive consequences), economic (through alternative activities, such as eco-tourism or poverty reduction in local communities through payments for ecosystemic services) and peace-related effects.[46]

(ii) *The Existing Tools in International Law to Ensure Protection of the Ecosystem*

International law thus faces a twofold challenge: it must ensure the protection of the biodiversity without creating obstacles for reconciliation and cooperation between North and South Korea. In the author's view, turning the DMZ into a peace park could thus be a good tool to achieve this dual objective. There are two mechanisms that could be proposed in the current climate of goodwill: a joint nomination of the DMZ for designation as a biosphere reserve or its inclusion on the World Natural Heritage list. For either nomination to succeed, several requirements must be met.

The first option available to both states is to jointly nominate the DMZ for biosphere reserve status. Biosphere reserves are defined as:

> "[A]reas of terrestrial and coastal/marine ecosystems or a combination thereof, which are internationally recognized within the framework of UNESCO's Programme on Man and Biosphere."[47]

Biosphere reserves have a threefold function: a conservation function, through the preservation of resources, species, ecosystems and landscapes; a development function, insofar as they enable the region's human and economic development; and a logistical support function, as they provide support for research,

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44 K.C. Kim, 'Preserving Korea's DMZ for Conservation: A Green Approach to Conflict Resolution', in S.H. Ali (ed), *Peace Parks: Conservation and Conflict Resolution* (MIT Press, Cambridge, Massachusetts, 2007) 239-260, at 251.

45 A/72/109-S/2018/820, Letter dated 6 September 2018 from the representatives of the Democratic People's Republic of Korea and the Republic of Korea to the United Nations addressed to the Secretary-General.

46 D. van Niekerk and L. Hildebrandt, *supra* n. 3, at 352-354.

47 Biosphere Reserves: The Seville Strategy and the statutory framework of the world network, at 4.

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environmental-education and conservation-monitoring projects. All these functions would be very positive for the DMZ, beyond the aforementioned conservation and protection of biodiversity. For example, both states have already been encouraged to inventory and conduct a study of the DMZ's existing biodiversity.[48] The economic and tourism development of the region bordering the DMZ could also provide an incentive for North Korean involvement in the proposal.

South Korea submitted an individual nomination of the DMZfor biosphere reserve status[49] in 2012. However, the nomination was denied, amongst other things, because it failed to meet certain technical requirements — a buffer zone had not been defined — and the proposal did not have the consent of the UN Command. Nevertheless, much of the territory located in the southern area of the DMZ has achieved biosphere reserve status,[50] which opens a hopeful path for a hypothetical joint nomination.

Likewise, it would be interesting to seek the DMZ's inclusion on the World Natural Heritage List, under the World Heritage Convention.[51] As the DMZ meets the requirements established in Article 2 of the Convention,[52] the necessary political will could lead to its inclusion[53] on the list of world natural heritage. In this case, although sovereignty over the zone would need to be defined, designating the DMZ as world natural heritage would turn it into a "global commons", making its conservation for future generations essential.[54]

In short, regardless of the tool used to do so, in the author's view, turning the DMZ into a peace park is the best way to ensure the protection of the unique ecosystem constituted by the region. It is also necessary for the protection and conservation of the habitat to be ensured as soon as possible, to prevent degradation as a result of military activities and the negative impacts of any hypothetical reunification or dismantling of the DMZ. To involve North Korea, which is less developed and has greater needs than South Korea, it will be imperative to ensure the necessary transfer of resources to prevent the existing natural resources and desire to appropriate them from destroying this unique and exceptional ecosystem.

(C) CONCLUSIONS

As explained and analysed, the proliferation of border walls or fences for security reasons has a negative

48 Convention on Biological Diversity — Fifth National Report Korea (2016).

49 Korea DMZ Biosphere Reserve Nomination.

50 The 31st Session of the International Coordinating Council (ICC) of the MAB.

51 Convention Concerning the Protection of the World Cultural and Natural Heritage.

52 "For the purposes of this Convention, the following shall be considered as 'natural heritage': natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty."

53 Political will demonstrated by the government of the region of Gyeonggi (South Korea), which aims to submit its bid to be designated a World Natural Heritage Site in 2022.

54 A. Gillespie, *Protected Areas and International Environmental Law* (Martin Nijhoff Publishers, Leiden/Boston, 2007), at 101.

 DOI: 10.17103/sybil.23.27

impact and implications for the protection and conservation of biodiversity in transboundary contexts. Therefore, despite the lack of any international law rule preventing states from creating physical barriers on their borders, their construction should be avoided or restricted. In any case, national security cannot be an obstacle to compliance with binding international law for states intended to mitigate the negative repercussions for biodiversity, essentially habitat fragmentation and the restriction of migration.

As seen here, the construction of the Slovenian border fence, outside of international law, had no consequences. Neither the obligation to perform a prior environmental impact assessment, with all the ensuing procedural requirements, nor the obligations arising under the Habitats Directive have been respected. Yet no sanctioning procedure has been initiated for breach of EU law, which undermines environmental protection and the international law system itself. Additionally, the data on migrant flows show that the alleged emergency has abated. This suggests that the fence should not remain standing, as there are other more effective ways of controlling entry into Slovenian territory that do not entail such great harm for biodiversity.

Finally, and as one of the exceptions to the aforementioned considerations, the establishment of the Korean DMZ, delimited by two border fences, has led to the creation of a unique ecosystem in the world. Indeed, one could argue that the development and spread of wildlife has been the sole positive consequence of the armed conflict that ended with the signing of the armistice in 1953. The main challenge now is its protection. The wealth of resources that it contains must not compromise its conservation. In this regard, its transformation into a peace park could provide the necessary impetus and serve as a catalyst for transboundary cooperation between the two states. Thus, two great aspirations would be realized: ending the temporary albeit long-lasting situation established in the armistice by reaching a peace agreement, whilst ensuring the ecosystem's conservation and protection.

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The extraterritorial application of European Union Data Protection Law

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Abstract: This paper will examine the extraterritorial application of European Union Law regarding the Internet in three particular cases that exemplify a current trend and make apparent the advantages and challenges of this approach. The examples relate to the protection of personal data and, in particular, the scope of the General Data Protection Regulation, the right to be forgotten and cross-border access to electronic evidence. The paper will end with some recommendations on how to avoid the problems that the extraterritorial application of the law in this field may entail.

Keywords: Personal data protection electronic evidence extraterritoriality human rights right to be forgotten

(A) INTRODUCTION

Internet was at its inception a virtual space, a way to communicate regardless of borders. Nevertheless, we are far from the first utopian approaches of John Perry Barlow that in his *Declaration of the Independence of Cyberspace* famously proclaimed "Governments of the Industrial world, (...) I come from Cyberspace, (...) on behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather". Internet and the activities anyone undertake on it should be subject to the law as any other human endeavour. The question is which law and if it is possible to build walls around it.

The European Union (EU) must regulate matters such as protection of copyright, the fight against terrorism, commerce, etc. However, this gets complicated when it involves the Internet, a medium that by its very nature is global.[1] The conception of Law and its application are traditionally linked to the territory for reasons of sovereignty and effectiveness. This has not prevented other states from taking measures that tend to fragment the Internet[2] as the *Great Firewall of China* or Russia's new Law that hopes to reclaim a "sovereign Internet".[3] Nevertheless, an organization like the EU based on the values of the protection of human rights, the rule of law and democracy cannot rely on such kind of measures that seek to create walls and contribute to censorship.

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1 The problem of laws related to the Internet and jurisdiction has been discussed for more than twenty years but it is still unresolved. See D. R. Johnson and D. Post, "Law and Borders - The Rise of Law in Cyberspace", 48 *Stanford Law Review* (1996), 1367-1402 [doi: 10.2307/1229390]; J. R. Reidenberg, "Lex Informatica", 76(3) *Texas Law Review* (1998), 553-593; and D. C. Menthe, "Jurisdiction in Cyberspace: A Theory of International Spaces", 4 *Michigan Telecommunications and Technology Law Review* (1998), 69-103.

2 This phenomenon is defined as "splinternet" or the "balkanization" of the Internet.

3 See K. Idrisova, "Explainer: Russia's drive for a sovereign internet", *BBC Monitoring's*, published on 12 February 2019, accessed on 19 July 2019.

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The EU has problems in making its legislation effective and companies that offer their services in the EU should not be able to escape from its regulations just by placing their servers in third countries, but the EU can neither simply impose its own rules at a global level interfering with the jurisdiction of other states. Laws with an extraterritorial application are not new,[4] but they are gaining traction in all the fields related to the Internet.[5]

This paper will examine the measures taken or proposed in the EU in specific fields related to the protection of personal data as the scope of the General Data Protection Regulation (B) or the right to be forgotten (C) and cross-border access to electronic evidence (D). These are only three particular areas but they are examples of a broader trend in the EU and make apparent the advantages but also the problems of applying laws extraterritorially.

(B) THE SCOPE OF THE GENERAL DATA PROTECTION REGULATION

The General Data Protection Regulation (GDPR)[6] has a marked extraterritorial impact since it applies to millions of companies located outside the EU. The GDPR, as stated in its Article 3, applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the EU (regardless of whether the processing takes place in the EU). In addition, it also applies to the processing of personal data of persons who are in the EU by a controller or processor not established in it, where the processing activities relate to the offering of goods or services[7] to persons in the EU, or the monitoring of their behaviour.[8] As we can see, the first part follows a subjective territoriality principle, taking into account who processes or controls the data, while the second adds a passive personality principle following the target of such actions.

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4 For a thorough study of some examples to inform EU policy-making, see R. Dover and J. Frosini, *The Extraterritorial Effects of Legislation and Policies in the EU and US* (European Union, Brussels, 2012) [doi: 10.2861/75161].

5 See Internet Society, *The Internet and extra-territorial effects of laws* (Internet Society, 2018). In this concept paper (at 1), the Internet Society warns that "decision-makers in many states are imposing rules that spill over onto the Internet elsewhere, hamper innovation, deter investment in their own countries and risk creating new digital divides that disadvantage their own citizens."

6 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

7 Recital 23 GDPR helps to clarify this concept: "in order to determine whether such a controller or processor is offering goods or services to data subjects who are in the Union, it should be ascertained whether it is apparent that the controller or processor envisages offering services to data subjects in one or more Member States in the Union. Whereas the mere accessibility of the controller's, processor's or an intermediary's website in the Union, of an email address or of other contact details, or the use of a language generally used in the third country where the controller is established, is insufficient to ascertain such intention, factors such as the use of a language or a currency generally used in one or more Member States with the possibility of ordering goods and services in that other language, or the mentioning of customers or users who are in the Union, may make it apparent that the controller envisages offering goods or services to data subjects in the Union."

8 Recital 24 GDPR helps to clarify this concept: "in order to determine whether a processing activity can be considered to monitor the behavior of data subjects, it should be ascertained whether natural persons are tracked on the internet including potential subsequent use of personal data processing techniques which consist of profiling a natural person, particularly in order to take decisions concerning her or him or for analyzing or predicting her or his personal preferences, behaviors and attitudes."

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Companies have a huge incentive to abide by the GDPR because in case of a serious violation of it, the offender can be subject to fines up to 20 000 000 €, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher (Article 83 GDPR).

The goal of this ample territorial scope is that the protection offered by the GDPR "travels" with the personal data wherever it goes in a globalized society where data crosses borders with a simple click. Offering protection only for data processing taking place within European borders would be meaningless in a globalized society. This measure also seeks to offer a level-playing field for European companies not creating a stricter regulation that would create burdens only for them. The extraterritorial application of the GDPR means that any company wanting access to the European market for offering its services and goods and dealing with "European" personal data in the process should abide by these rules.

Nevertheless, the GDPR has been harshly criticized because, with the number of businesses that fall under these criteria worldwide, it is easier for big firms to adapt to it while it is very costly for small and medium enterprises.[9] In addition, data protection authorities in the member states have limited resources, so Svantesson argues that "as there clearly will be more foreign businesses failing to comply with the GDPR than there are resources to investigate them, the actual application of the GDPR will necessarily be arbitrary, which arguably undermines the legitimacy of any enforcement actions taken."[10] Although Azzi considers "the EU rather benefits from the "legitimacy" of the extraterritorial claims and is equipped with the relevant tools to enforce it abroad"[11]. Hert and M. Czerniawski add that "this approach, although not without drawbacks and challenges to state interests and individual rights (...) solves one of the biggest problem European data protection law currently faces, which is lack of jurisdiction over third country's data controllers processing substantial numbers of EU data subjects' data."[12]

The problems are manifold and the critics have good reasons to be concerned, but the difficulty to ensure the application of the GDPR or the lack of resources for it cannot make us aim for lower standards of protection of fundamental rights,[13] even if the EU has to be mindful of the problems and challenges and strive to improve them.

The European legislators were quite conscious that the exterritorial application of laws could have undesirable impacts. The very GDPR in its recital 115 states that the extraterritorial application of some laws, regulations and other legal acts "may be in breach of international law and may impede the

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9 See M. Scott, L. Cerulus and L. Kayali"Six months in, Europe's privacy revolution favors Google, Facebook", *Politico.eu*, published on 23 November 2018, or M. Scott, L. Cerulus and S. Overly, "How Silicon Valley gamed Europe's privacy rules",*Politico.eu*, published on 22 May 2019, both accessed on 19 July 2019.

10 D. J. B. Svantesson, "European Union Claims of Jurisdiction over the Internet – an Analysis of Three Recent Key Developments", 9 (2) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2018), 113-125, at para. 30.

11 A. Azzi, "The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation",9 (2) *Journal of Intellectual Property, Information Technology and E-Commerce Law* (2018), 126-137, at para. 90.

12 P. de Hert and M. Czerniawski, "Expanding the European data protection scope beyond territory: Article 3 of the General Data. Protection Regulation in its wider context", 6 (3) *International Data Privacy Law* (2016), 230-243, at 230 [doi:10.1093/idpl/ipw008].

13 Art. 8 of the Charter of Fundamental Rights of the EU recognizes personal data protection as a fundamental right.

 DOI:10.17103/sybil.23.28

attainment of the protection of natural persons ensured in the Union by this Regulation. Transfers should only be allowed where the conditions of this Regulation for a transfer to third countries are met." The GDPR states its own extraterritorial application but precludes that of foreign laws in many cases.

For the extraterritorial application of a law, it is essential to find a substantial connection to avoid the risk of overregulation. Article 3 of the GDPR achieves this, even if its "targeting test" will need refinement by the case law of the Court of Justice of the EU.

Another key element is that the GDPR will enhance the fundamental rights of Internet users. It will have positive effects for European users but also for the ones outside EU borders as foreign companies who improve their personal data protection standards may decide to apply the enhanced standards worldwide. In addition, European data protection law has a spill over effect that makes that other states tend to converge with it (especially if they want a decision of adequacy of the European Commission).

A universal international treaty to deal with these matters would be even better. However, the United Nations could not reach such outcome and the only hope in this sense is the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe. Nevertheless, this one is also limited, even if its scope goes far beyond Europe with Argentina, Cabo Verde, Mauritius, Mexico, Morocco, Senegal, Tunisia or Uruguay as state parties.

(c) The scope of the "right to be forgotten"

An issue that merits a particular approach in this field is the controversial "right to be forgotten". The Court of Justice of the EU in the case *Google Spain*[14] created a kind of "right to de-referencing", based on the right to the protection of personal data. It ruled that the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages when the data subject makes such a request,[15] even if some exceptions have to be considered, for example, when the information has public interest. This right has been widely criticized because it places such decisions in the hands of Internet intermediaries instead of judges and because it creates conflicts with the right to freedom of expression and the right to information.[16] Nevertheless, the GDPR

[14] Judgment of the CJEU (Grand Chamber) of 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12. ECLI:EU:C:2014:317.

This case already presented some questions about the territorial application of EU personal data protection law. The Court ruled that Directive 95/46 was "to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State."

M. Gömann, in "The new territorial scope of EU data protection law: Deconstructing a revolutionary achievement" 54 (2) *Common Market Law Review* (2017) 567 – 590, argues that the broadening of the scope of the GDPR was not as revolutionary as many believe as it was largely foreshadowed by the Court of Justice's judgment in this case.

[15] Because the information may be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine.

[16] See M. J. Oghia, *Information Not Found: The "Right to Be Forgotten" as an Emerging Threat to Media Freedom in the Digital Age* (CIMA Digital Report) published on 9 January 2018, accessed on 19 July 2019.

 DOI: 10.17103/sybil.23.28

enhanced it creating a "right to erasure" in its article 17.

Google does not apply the de-referencing of the controversial content globally to all its domains, but geo-blocks the requests for such information coming from the EU only. The French National Commission for Information Technology and Freedoms (CNIL) considered that this was not enough because the rights of Europeans were not effectively protected and sanctioned Google, which appealed the 100 000€ fine. A decision on the preliminary ruling before the Court of Justice of the EU is currently pending.[17]

The French Council of State asked whether a search engine is required, when granting a request for de-referencing, to deploy the de-referencing to all of the domain names used by it so that the links at issue no longer appear, irrespective of the place from where the search initiated on the basis of the requester's name is conducted, and even if it is conducted from a place outside the territorial scope of the Directive 95/46;[18]or a search engine is only required to remove the links at issue from the domain name corresponding to the state in which the request is deemed to have been made or, more generally, on the domain names distinguished by the national extensions used by that search engine for all of the member states of the EU. The French Council of State also asked if the search engine operator is required to remove the results using the "geo-blocking" technique, from searches conducted on the basis of the requester's name from an IP address deemed to be located in the state of residence of the person benefiting from the "right to de-referencing", or even, more generally, from an IP address deemed to be located in one of the member states subject to Directive 95/46, regardless of the domain name used by the internet user conducting the search.

The simplified question would be if Google has to de-reference the controversial result worldwide or is it enough to limit it to the queries coming from the EU using geo-blocking. It is important here to underline that we are speaking about a different kind of exterritorial application of the law as the one explained in the previous section. In the case of the scope of the GDPR, the question was who has to abide by it, in the present case the question is not who but how. It is clear that Google has to abide by EU Law; the question is which should be the scope of the compulsory de-referencing.

The CNIL has strong arguments against limiting its application to requests to access content coming from the EU. Its President has explained that not to apply it worldwide "would be to empty the Europeans' rights of their substance and to consider that the scope of a fundamental right is variable in geometry, depending not on the one who exercises it but on the one who looks at the results."[19] In addition, this option could be easily circumvented through different mechanisms like virtual private networks or proxies.

However, imagine that an American writes a comment on an American blog, newspaper or social media that offers its services also in the EU and says something true about a European person. It may be going too far to force Google to de-reference it worldwide when that American was writing something

[17] Request for a preliminary ruling from the Conseild'État (France) of 21 August 2017, *Google Inc. v. Commission nationale de l'informatiqueet des libertés (CNIL)*, Case C-507/17.

[18]It is interesting to underline this takes as legal basis the Directive that preceded the GDPR.

[19] I. Falque-Pierrotin, « Pour un droit au déréférencement mondial », *Le Monde*, 29 December 2016.

 DOI: 10.17103/sybil.23.28

legal in America, in an American medium, as this will affect the freedom of expression of that person and potentially the freedom to receive information of millions of people all over the world.

Furthermore, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of the United Nations warned that "the logic of these demands would allow censorship across borders, to the benefit of the most restrictive censors".[20] Imagine that a country as China makes all media de-reference information of the reaction to the protests in Tiananmen Square in 1989 because speaking about this is illegal in its territory. The EU should be mindful that "excessive jurisdictional claims by democratic countries undermines those countries' objections to such claims made, for example, by oppressive dictatorships."[21] In some cases, keeping walls in the application of laws to a territory may be the most respectful option with human rights.

The key question is how to balance the human rights at stake asthe result could not be the same in different states. This is the reason why the Advocate General Szpunar positioned himself on the cautious side taken in this case by Google. He considered that there could be a danger that if an authority within the EU could order de-referencing on a worldwide scale, an inevitable signal would be sent to third countries, which could also order de-referencing under their own laws. Therefore, third countries could interpret certain of their rights in such a way as to prevent persons located in a member state of the EU from having access to information they sought. The Advocate General understood that there would be a genuine risk of a race to the bottom, to the detriment of freedom of expression, on a European and worldwide scale.[22]

Szpunar, in its Opinion, proposed the Court to declare that the search engine is not required to de-reference on all its domain names in such a way that the links at issue no longer appear, regardless of the place from which the search on the basis of the requester's name is carried out. He considered that the search engine should only be required to delete the links at issue from the results displayed following a search carried out in a place located in the EU. In that context, that operator is required to take all steps available to ensure effective and complete de-referencing. That includes, in particular, geo-blocking from an IP address deemed to be located in one of the member states regardless of the domain name used by the internet user conducting the search. In any case, the Court in its decision will have to make a very thorough balancing of rights.[23]

The Opinion in this case seems to be at odds with the one of the same Advocate General in the case *Glawischnig-Piesczek*.[24] That case, also pending a decision of the Court of Justice of the EU, refers to an

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[20] D. Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 6 April 2018 (A/HRC/38/35), at 6.

[21] As stated by D. J. B. Svantesson, "Extraterritoriality in Data Privacy Regulation", 7(1) *Masaryk University Journal of Law and Technology* (2012), 87-96, at 92-93.

[22] Opinion of Advocate General Szpunar, 10 January 2019, Case C-507/17, *Google LLC v. Commission nationale de l'informatique et des libertés (CNIL)*, § 61, ECLI:EU:C:2019:15.

[23] See B. van Alsenoy and M. Koekkoek, *The extra-territorial reach of the EU's "right to be forgotten"*, CiTiP Working Paper 20/2015, KU Leuven Centre for IT & IP Law, 2015.

[24] Opinion of Advocate General Szpunar, 4 June 2019, Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, ECLI:EU:C:2019:458.

 DOI: 10.17103/sybil.23.28

Austrian politician who sought to eliminate some comments from Facebook, as she considered them defamatory. Among other questions, the Austrian Supreme Court asked about the exceptions of liability of the Directive on electronic commerce[25] and if Facebook was supposed to retire that information worldwide or in the relevant member state. There are other dangerous questions about the need to retire also information with an equivalent meaning but this falls out of the scope of this paper.

Szpunar has being criticized, because he stated that the territorial scope of a removal obligation imposed on a host provider in the context of an injunction is not regulated by any provision of the Directive and therefore it does not preclude ordering host provider to remove worldwide information disseminated via a social network platform (§ 93).[26] In his opinion, this is a key difference with the case already explained. However, the absurd result of this differentiation will be that if something is regulated in EU Law it should in principle only be applied in the EU, but if something is regulated in national law it can be applied worldwide.[27]

A case of defamation is obviously different from a case of "right to be forgotten" and this may have had an impact on the result. Nevertheless, if we look closer to this case we may see that it is not just a case of defamation but also political speech and as the European Court of Human Rights has stated in its case-law politicians should be open to a high degree of criticism in the framework of democratic debate.[28]However, it could be difficult for the Court to consider this as it is not part of the questions posed by the national court. Therefore, the solution again is not simple as it is the case in many instances when you try to regulate content.

Szpunar adds more nuanced comments when he states that, owing to the differences between national laws and the protection of the private life and personality rights and to respect widely recognized fundamental rights, the court must adopt an approach of self-limitation. In the interest of international comity, the court should limit the extraterritorial effects of its junctions concerning harm to private life and personality rights. The implementation of a removal obligation should not go beyond what is necessary to achieve the protection of the injured person. Thus, instead of removing the content, that court might order that access to that information be disabled with the help of geo-blocking (§ 100).

The defamation example highlights some of the problems a worldwide "right to be forgotten" may face. In the United States (US), "the Congress has already adopted a blocking statute concerning what they see as "libel tourism": it makes mandatory the non-recognition of foreign defamation judgments where a US Court would have reached a different judgment under the First Amendment."[29]

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[25] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178/1.

[26] See P. Cavaliere, "AG Opinion on C-18/18: Towards Private Regulation of Speech Worldwide", *European Law Blog*, published on 28 June 2019, accessed on 19 July 2019.

[27] See D. J. B. Svantesson, *Grading AG Szpunar's Opinion in Case C-18/18 – A Caution Against Worldwide Content Blocking As Default*, at 4, published on 14 June 2019, accessed on 19 July 2019 [doi: 10.2139/ssrn.3404385].

[28] See P. Cavaliere, "Facebook, defamation and free speech: a pending CJEU case", *EU Law Analysis*, published on 17 May 2019, accessed on 19 July 2019.

[29] A. Azzi, *supra* n. 11, at para. 68.

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(D) CROSS-BORDER ACCESS TO ELECTRONIC EVIDENCE

Another field where it is possible to face a collision between the protection of personal data and other rights is the access to electronic evidence, as shown by the Court of Justice of the EU in its data retention case law.[30] This gets even more complicated when the access to data takes places across-jurisdictions. Many police investigations require information in the hands of intermediaries located in another country or hosted abroad. Therefore, it is imperative to facilitate cross-border access of police and judicial authorities to these data to enable them to prosecute crimes effectively. However, this must be done always with the necessary safeguards of human rights to ensure a fair and equitable process. Mutual legal assistance (MLA) mechanisms do not respond well to this need because they take a lot of time when the information can be sent from one jurisdiction to another with a click, and, in many cases, the information may be fragmented across jurisdictions. Response times are extremely long normally from six to 24 months and this causes that many requests and thus investigations are abandoned.[31]

This topic has been widely discussed in the EU and the US, and the latter took the legislative lead in the matter. It was pushed to do so by a case where Microsoft refused to comply with a US court warrant requesting the content of emails stored on a server in Ireland as part of a drug trafficking investigation that was taking place in the US. The case reached the Supreme Court (*United States of America v. Microsoft Corporation*)[32] and the European *Amici Curiae* on it show the EU positions in the matter.

Several members of the European Parliament involved in the drafting of the GDPR presented a brief of *Amici Curiae* in support of Microsoft. They considered that "the successful execution of the U.S. warrant would extend the scope of U.S. jurisdiction to a sizeable majority of the data held in the world's datacenters (most of which are controlled by U.S. corporations) and would thus undermine the protections of the EU data protection regime, specifically intended and designed to cover data stored in an EU Member State."[33] In this case, it is not the extraterritorial application of the GDPR that posed a

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[30] Judgements of the Court of Justice of the EU of 8 April 2014, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General*; and *KärntnerLandesregierung, Michael Seitlinger, Christof Tschohl and others*, joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238; and of 21 December 2016, *Tele2 Sverige AB v. Post-ochtelestyrelsen*, and *Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis*, joined cases C-203/15 and C-698/15, ECLI:EU:C:2016:970.

Even after the decisions of the Court, the member States continue looking for a way to create EU legislation on data retention and the Council of the EU tasked the European Commission to draft a comprehensive study on possible solutions for retaining data, in its Conclusions of 27 May 2019 (Doc. 9663/19).

[31] Cybercrime Convention Committee, *The mutual legal assistance provisions of the Budapest Convention on Cybercrime*, 3 December 2014 (T-CY(2013)17rev), at. 123.

[32] For a good explanation of the US *Charming Betsy* canon and an in-depth study of the challenges of this case see A. J. Colangelo and A. L. Parrish, *International Law and Extraterritoriality: Brief of International and Extraterritorial Law Scholars as Amici Curiae (U.S. v. Microsoft)*,(SMU Dedman School of Law Legal Studies Research Paper No. 382, 2018), [doi: 10.2139/ssrn.3105491].

[33] *Brief of* Amici Curiae *Jan Philipp Albrecht, Sophie in 't Veld, Viviane Reding, Birgit Sippel, And Axel Voss, members of the European Parliament in support of respondent Microsoft Corporation*, at 14.

conflict with other laws, but the other way around, as the EU is not the only one following this extraterritorial trend.

The European Commission was quite cautious in its *Amicus Curiae*. It underlined that, in the EU's view, any domestic law that creates cross-border obligations should be applied and interpreted in a manner that is mindful of the restrictions of international law and considerations of international comity.[34] It also acknowledged that the application of domestic law to foreign conduct may cause friction with foreign countries and result in violations of international law, and it is necessary to mitigate such risks.[35]

The Supreme Court never decided the case, because the US Congress enacted the Clarifying Lawful Overseas Use of Data Act (H.R. 4943), known as the CLOUD Act, on 23 March 2018, rendering the case moot. This federal law states that a provider of electronic communication service or remote computing service under US jurisdiction shall preserve, backup, or disclose the contents of a wire or electronic communication and any record or other information pertaining to a customer or subscriber within such provider's possession, custody, or control, regardless of whether such communication, record, or other information is located within or outside of the US. This includes personal data stored in the EU that fall under the protection of the GDPR.

The GDPR has very strict rules of when these data can be facilitated to authorities outside the EU and the simultaneous application of the GDPR and the CLOUD Act in certain cases can pose serious conflicts to Internet intermediaries, as abiding by one would mean breaching the other. The LIBE Committee of the European Parliament asked the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) about the implications of the CLOUD Act. They declared in their joint response that "unless a US CLOUD Act warrant is recognized or made enforceable on the basis of an international agreement,[36] the lawfulness of such transfers of personal data cannot be ascertained, without prejudice to exceptional circumstances where processing is necessary to protect the vital interests of the data subject."[37]

This gets even more complicated because the European Commission has decided also to propose a mechanism to facilitate the access of European authorities to electronic evidence in criminal matters

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34 *Brief of the European Commission on behalf of the European Union as* Amicus Curiae *in support of neither party*, at 5. Ireland did not align itself formally with Microsoft but argued that the procedures provided for in the MLA Treaty between it and the US represented the most appropriate means to address such requests and offered to process it as expeditiously as possible. *Brief for Ireland as Amicus Curiae in support of neither party*, at 11.

35 *Ibid.* at 6.

36 One of the main problems, in the opinion of the EDPB and the EDPS, is that the MLA Treaty in force between the EU and the US only aims at facilitating judicial cooperation, and therefore contains very limited provisions relevant from a data protection point of view. Another option will be the new Protocol to the Council of Europe Convention on Cybercrime to facilitate cross-border access to electronic evidence currently negotiated of which both the US and the EU are supposed to become parties when it is finalized.

37 Joint letter of the EDPB and the EDPS addressed to Juan Fernando López Aguilar, Chair of the LIBE Committee on 10 July 2019.

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through the creation of EU Production and Preservation Orders.[38] The draft Regulation lays down the rules under which an authority of a member state may order directly a service provider offering services in the EU, to produce or preserve electronic evidence, regardless of the location of data (Article 1.1). According to Article 2.4 of the draft, "offering services in the Union' means enabling legal or natural persons in one or more member state(s) to use the services listed in the relevant article and having a substantial connection to the member state(s)."[39] It follows although not with exactly the same wording a similar logic to the GDPR with a passive personality or target principle to justify its extraterritorial application and it will apply to a high number of companies outside the borders of the EU. This may entail further conflict with the CLOUD Act, as this has a second part which is a "blocking statute" that forbids Internet providers to facilitate data to a foreign authority if there is not an executive agreement between that state and the US. The European Commission is working to solve this problem as in May 2019 it received a mandate from the Council to open negotiations to conclude an agreement with the US on cross-border access to electronic evidence for judicial cooperation in criminal matters.

Nevertheless, this is not the only problem of the proposed Production and Preservation Orders for electronic evidence. The design of these mechanisms does not incorporate enough human rights safeguards. It places the Internet intermediaries as the only ones who could defend the interests of the data subjects as they will not be notified of the request usually. The intermediaries will not have much time to react and will not have enough information available to assess its compatibility with the human rights of the person targeted by the request so all the incentives will be to comply and none to appeal the order.[40]

(D) CONCLUSIONS

All this shows that when it comes to regulating aspects related to the Internet, in many cases, it is impossible not to resort to a certain extraterritorial effect of the rules and this may be justified in some cases. However, in others, we should consider if the use of geo-blocking is not a better solution. This

[38] Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters, COM/2018/225 final.

[39] Recital 28 of the draft clarifies the meaning of "substantive connection" as follows "Such a substantial connection to the Union should be considered to exist where the service provider has an establishment in the Union. In the absence of such an establishment, the criterion of a substantial connection should be assessed on the basis of the existence of a significant number of users in one or more Member States, or the targeting of activities towards one or more Member States. The targeting of activities towards one or more Member States can be determined on the basis of all relevant circumstances, including factors such as the use of a language or a currency generally used in that Member State, or the possibility of ordering goods or services. The targeting of activities towards a Member State could also be derived from the availability of an application ('app') in the relevant national app store, from providing local advertising or advertising in the language used in that Member State, or from the handling of customer relations such as by providing customer service in the language generally used in that Member State. A substantial connection is also to be assumed where a service provider directs its activities towards one or more Member States as set out in Article 17(1)(c) of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters."

[40] See M. Böse, *An assessment of the Commission's proposals on electronic evidence*, European Parliament, 2018 [Doi: 10.2861/247211] and *Joint Civil society letter to Member States about their draft position on "e-evidence"* of 5 December 2018.

must be analysed with special care to try to apply solutions proportional to the problems and the interests at stake.[41] It is especially important to think about what consequences any regulation will have in practice and, above all, for human rights, knowing that sometimes there will be conflicts of fundamental rights. For example, a blocking order with global scope is justified for some kinds of content as child pornography but may not be for a de-referencing order to comply with the right to be forgotten affecting freedom of expression and information in a place where such right does not even exist.

The EU is a global normative leader in Internet related laws. For this reason, its legislators should think about the consequences of the extraterritorial application of its laws because certain countries that do not share its democratic values could do with similar laws if they applied them for spurious reasons. Although the Internet by its very nature knows no limits, the regulation of many of the aspects linked to it must do so. However, this should not stop us when considering norms that may increase the standard of the protection of human rights worldwide as the GDPR.

The cross-border access to electronic evidence would be better regulated by international treaties, where that is possible, than by unilateral measures. The way forward is to negotiate an agreement between the EU and the US and a Protocol to the Cybercrime Convention that contain the necessary human rights safeguards.

The EU must ease access to electronic evidence in criminal matters but the proposed production and preservation orders have to include also the appropriate human rights safeguards. This mechanism may be mimicked in others parts of the world so the EU should be coherent with its aim of increase the respect for human rights globally. Both the CLOUD Act and the European Commission proposal should be amended to improve their mechanisms to solve conflicts of laws as they would surely appear sooner than later.

Another issue common to the right to be forgotten and the production and preservation orders and many other initiatives related with online regulation is that we place Internet intermediaries as the ones who will have to decide in "the first instance" if they reject or grant these requests (not the person who created the content or the data subject). In most cases, they would be businesses moved by the increase of their benefits not by the well-being of their users so we have to make sure not to privatize law-enforcement and not to create incentives heavily weighted on the side of ignoring the rights of users and just comply with any request they get. States cannot relinquish their primary responsibility to protect human rights in the name of efficiency and swiftness. This may also mean the need to create new avenues of accountability for Internet intermediaries.[42]

The question at the end it is not really if we should build walls or break them but how to create laws that may go beyond borders or stop at them as the best solution in each case. In this sense, as in many others, the reply should be to do whatever improves the protection of human rights taking the necessary measures that follow legitimate goals in a proportional way.

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[41] See J. C. Daskal, "Speech Across Borders" (February 21, 2019). *Virginia Law Review* (2019), [doi.org/10.2139/ssrn.3407716].

[42] Kaye, *supra* n. 20, at 20.

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The Interoperability of EU Information Systems and Fundamental Rights concerns

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Abstract: In early 2019, the Council of the European Union, together with the Parliament, adopted Regulation 2019/817 on establishing a framework for interoperability between EU information systems in the field of borders, visa and law enforcement. This is the first legislative act ever adopted creating such a large-scale interoperable framework. Until recently, the different EU information systems were strictly separated, fragmented and disconnected. By establishing interoperability, national authorities are now able to access data on the identity of persons fast and easy without major bureaucratic or administrative hurdles. By establishing such a framework it is now possible to better prevent potential terrorist threats and migration-related crimes, such as human trafficking. At the same time it gets more and more obvious that individuals, especially third-country nationals, are increasingly becoming transparent. While the prevention of terrorism and the maintenance or re-establishment of internal security clearly constitute legitimate interests of society, establishing interoperability between EU information systems raises fundamental rights concerns, especially with regard to data protection and the right to privacy. When the European Commission adopted its final proposal for the aforementioned regulation in 2018, the Fundamental Rights Agency (FRA) was asked to evaluate the text with regard to potential fundamental rights violations. Furthermore, the European Data Protection Supervisor (EDPS) and the Data Protection Working Party (WP29) analyzed the proposal from a legal perspective and scrutinized it carefully. It turned out that especially the law on data protection, as well as the case law provided by the ECJ had significant impact on Regulation 2019/817 and the way in which it had been finally formulated. Overall, the criticism expressed by the FRA, the EDPS and the WP29 has been taken seriously by the Council and the Parliament respectively. Nevertheless, account shall be taken of the fact that a general trend within the EU can be observed of granting authorities access to different systems and databases which were originally established for different purposes. This development makes it all the more important to be particularly cautious when it comes to adopting and formulating EU legislation.

Keywords: data protection interoperability EU information systems right to private life fundamental rights data minimisation purpose limitation

(A) INTRODUCTION

Since 2015, the European Union (EU) has been facing an unprecedented wave of migrants and refugees. The rising number of people trying to enter the EU through either the so-called "Balkan Route" or the Mediterranean Sea has jeopardized and caused the lives of many people, including children. At the same time, EU Member States have been increasingly overwhelmed with the situation especially by the great number of "irregular arrivals", which resulted *inter alia* in the tightening of rules for asylum seekers and migrants. The number of people trying to enter the EU dropped significantly within the last two years but considering the continuous political tensions worldwide and other factors, such as climate change, more people are expected to arrive in the coming years.[1]

The large influx of third-country nationals challenged (and is still challenging) the EU and its Member States in a twofold manner. On the one hand, thousands of people risk their lives when fleeing or migrating to Europe, for example when crossing the Mediterranean Sea trying to reach European shores. Many are

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[1] Eurostat, Asylum Statistics, text available electronically at https://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics, accessed 31 July 2019.

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stranded in camps living in constant fear of deportation. On the other hand, the rising number of "irregular arrivals" has given rise to security concerns in EU Member States. In early 2015, the EU High Representative for Foreign Affairs and Security Policy, Federica Mogherini, called upon the UN-Security Council to support efforts of the EU to combat the trafficking in migrants and similar criminal offences.[2] After it had turned out that at least one of the terrorists who killed more than 120 people in the 2015 Paris terror attacks supposedly was a Syrian refugee who had entered Europe via Greece, security issues with regard to the so-called "refugee and migratory crisis" became the center of the political debate in Europe.[3]

The EU has already provided for an abundance of instruments and measures in order to regulate and control the entry of third-country nationals and to handle security concerns in general by enacting legislation on border management and law enforcement. These measures include *inter alia* the establishment of the Schengen Information System[4] (SIS), as well as the Visa Information System[5] (VIS) and the adoption of the Eurodac Regulation[6]. All these systems collect different types of personal data, reaching from fingerprints to facial images and in some cases DNA. Until recently, these systems were fragmented, strictly separated and unconnected.[7] In order to respond better to the aforementioned challenges, the European Commission (EC) – on the invitation of the Council[8] – adopted its first proposal for a Regulation on establishing a framework for interoperability between EU information systems in

[2] The Telegraph, 'Migrant Crisis is a Security Crisis' says EU Foreign Policy Chief, accessed 31 July 2019.

[3] CNN, Passport Linked to Terrorist Complicates Syrian Refugee Crisis, accessed 31 July 2019.

[4] Regulation 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381/4; Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2007 L 205/63; Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates, OJ 2006 L 381/1.

[5] Council Decision 2004/12/EC of 8 June 2004 establishing the Visa Information System (VIS), OJ 2004 L 213/5; Regulation 767/2008 of the European Parliament and of the Council of July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ 2008 L 218/60.

[6] Regulation 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ 2013 L 180/1.

[7] Cf. Amended Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399, Regulation (EU) 2017/2226, Regulation (EU) 2018/XX [the ETIAS Regulation], Regulation (EU) 2018/XX [the Regulation on SIS in the field of border checks] and Regulation (EU) 2018/XX [the eu-LISA Regulation], 13 June 2018, COM/2018/478 final.

[8] Draft Council Statement calling on the Commission to Propose a Comprehensive Framework for Law Enforcement Access to Various Databases in the Area of Justice and Home Affairs, with a View to Greater Simplification, Consistency, Effectiveness an Attention to Operational Needs, Summary Record of 21 March 2017, 7177/18.

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2017.[9] After lengthy discussions within the Council,[10] the Commission adopted and amended the proposal in 2018.[11] After having consulted the FRA[12], the EDPS[13] as well as WP29[14], the Council together with the Parliament adopted Regulation 2019/817. Apparently, the Council and the Parliament took the criticism expressed by the aforementioned institutions seriously, as Regulation 2019/817 deviates clearly from the Commission's original proposal.

This article aims to analyze the significant influence the FRA, the EDPS and the WP29 played in the process of adopting Regulation 2019/817. The breaking down of immaterial walls by establishing interoperability and thus making individuals more transparent is as such clearly opposed to the distinct fundamental rights awareness within the EU. The FRA, the EDPS as well as the WP29 contributed to the process of adopting Regulation 2019/817 greatly and at the same time the Council and the Parliament have worked together with these three institutions on a constructive basis. Admittedly, weighing between legitimate interests of society as a whole, such as the prevention of terrorist threats and fundamental rights protection is a true balancing act. Regulation 2019/817 seems to have found that balance. Given the significant complexity of Regulation 2019/817, it cannot be ruled out that the ECJ will soon be called upon to clarify certain elements of it, for example by way of preliminary rulings procedure. For the time being, however, the Regulation can be summarised as a positive step forward in order to face current challenges adequately, while at the same time making sure that fundamental rights are sufficiently protected.

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9 Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, COM/2017/0793 final.

10 See, for example, Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (borders and visa) and amending Council Decision 2004/512/EC, Regulation (EC) No 767/2008, Council Decision 2008/633/JHA, Regulation (EU) 2016/399 and Regulation (EU) 2017/2226, ST 15119 2017 INIT. For more details see Procedure 2017/0351/COD, electronically available at https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2017:0793:FIN/2017-12-14_DIS_byCONSIL, accessed 31 July 2019.

11 Amended Proposal COM/2018/478 final, *supra* n. 7.

12 FRA, Interoperability and fundamental rights implications, Opinion of the European Union Agency for Fundamental Rights, 11 April 2018, FRA Opinion 1/2018; Regulation (EU) 2019/817 of the European Parliament and the Council of 20 May 2019, on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA, OJ 2019 L 135/27. See also M. Gutheil, Q. Liger, J. Eager, Yemi Oviosu and D. Bogdanovic, *Interoperability of Justice and Home Affairs Information Systems*, Study for the Libe Committee, April 2018, PE 604.947; P. Hanke/D. Vitello, *High-Tech Migration Control in the EU and Beyond: The Legal Challenges of "Enhanced Interoperability"* in E. Carpanelli/N. Lazzerini (eds.), *Use and Misuse of New Technologies* (Springer, Cham 2019) at 3–35.

13 EDPS, Opinion 4/2018 on the Proposals for two Regulations establishing a framework for the interoperability between EU large-scale information systems, 16 April 2018. See also Summary of the Opinion of the European Data Protection Supervisor on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems, 4 July 2018, C 233/12. See also the Reflection paper on the interoperability of information systems in the area of Freedom, Security and Justice, 17 November 2017.

14 WP29, Opinion on Commission proposals on establishing a framework for interoperability between EU information systems in the field of borders and visa as well as police and judicial cooperation, asylum and migration, 11 April 2018, WP266, 18/EN. In this context, processes which have taken place at the level of the Council of Europe should be mentioned as well. See, for example, the Practical guide on the use of personal data in the police sector, 15 February 2018, T-PD(2018)01.

(B) CURRENT AND FUTURE IT SYSTEMS

Regulation 2019/817 foresees that the Schengen Information System (SIS)[15], the Visa Information System (VIS)[16] and the Eurodac Regulation[17] will be made interoperable in order to facilitate border management and law enforcement by reducing administrative and technical hurdles and to guarantee better and faster access to different kinds of data. Furthermore, three new IT systems will supplement the pre-existent ones, namely the Entry-Exit System (EES)[18], the European Travel Information and Authorisation System (ETIAS)[19] as well as the European Criminal Record Information System for third-country nationals (ECRIS-TCN)[20]. In addition, Regulation 2019/817 includes the Stolen and Lost Travel Documents Database (SLTD)[21] provided by Interpol.[22] It also entails data provided by Europol[23] in as much as it is

15 Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381/4; Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2007 L 205/63; Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates, OJ 2006 L 381/1. On the latest developments regarding the SIS see Council of the European Union, Press Releases, Schengen Information System: Council adopts new rules to strengthen security in the EU, accessed 31 July 2019.

16 Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ 2008 L 218/60.

17 Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ 2013 L 180/1.

18 Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, OJ 2017 L 327/20.

19 Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, OJ 2018 L 236/1.

20 Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, OJ 2019 L 135/1.

21 Interpol, Stolen and Lost Travel Documents database, accessed 31 July 2019.

22 Cf. Amended Proposal, COM/2018/478 final, *supra* n. 7, Explanatory Memorandum.

23 Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ 2016 L 135.

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relevant for the ETIAS. The Prüm Framework[24], the Passenger Name Record Directive (PNRD)[25] as well as the Advance Passenger Information Directive (APID)[26] are not part of the Regulation.[27]

(1) The Schengen Information System (SIS)

The SIS was the first EU-wide IT system in the area of border management and law enforcement.[28] With the entry into force of the Schengen Convention in 1995 it finally became operative.[29] The SIS allows Member States authorities to consult and enter alerts on both persons and objects. In 2013, the original SIS was replaced by SIS II,[30] a more advanced version of the SIS with more competences and functionalities, such as the use of biometric data, the possibility of linking alerts, as well as the competence to store copies of the European Arrest Warrant (EAW).[31] Given the fact that the SIS II was endowed with such a broad range of competences, ranging from immigration policy to police and judicial cooperation, it is based on three different legislative acts.[32] Regulation 1987/2006[33] addresses the area of border management by allowing border guards, visa issuing as well as migration authorities "to enter an alert or consult alerts on third-country nationals for the purpose of refusing their entry into or stay in the Schengen area."[34] Council Decision 2007/533/JHA[35] allows both police as well as judicial cooperation with regard to missing persons and persons or objects in connection with criminal offences, including persons wanted for arrest or for surrender purposes. Furthermore, Regulation No. 1986/2006[36] establishes an alert system for stolen vehicles. Currently, thirty different countries are participating at the SIS II, including 26 EU Member States and 4 Schengen Associated Countries (Iceland, Liechtenstein, Norway and Switzerland).

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[24] Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ 2008 L 210.

[25] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ 2016 L 119.

[26] Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ 2004 L 261.

[27] Amended Proposal COM/2018/478 final, *supra* n. 7, Explanatory Memorandum.

[28] Cf. F. Boehm, *Information Sharing Data Protection in the Area of Freedom, Security and Justice: Towards Harmonised Data Protection Principles for Information Exchange at EU-level* (Springer, Berlin – Heidelberg 2012), at 260.

[29] *Ibid.* Convention Implementing the Schengen Agreement of 14 June 1985, 22 September 2000, OJ L 239.

[30] Originally, it was planned to replace the SIS in 2007. Due to technical problems, the SIS II could be finally realized in 2013.

[31] European Commission, Migration and Home Affairs, Second generation Schengen Information System (SIS II), accessed 31 July 2019.

[32] Cf. F. Boehm, *Information Sharing*, *supra* n. 28, at 262.

[33] Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), 28 December 2006, OJ L 381.

[34] See European Commission, Migration and Home Affairs, Schengen Information System, accessed 31 July 2019.

[35] Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second-generation Schengen Information System (SIS II), 7 August 2007, OJ L 205.

[36] Regulation (EC) No 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates, 28 December 2012, L 381/1.

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Ireland and Cyprus do not participate at the SIS itself, while the UK operates the SIS without participating at the Schengen area.[37] In 2018, the Council and the Parliament reached an agreement to broaden the types of biometric data which can be stored in the SIS, which will also include DNA.[38]

(2) The VISA Information System (VIS)

The VIS, which was established by Council Decision 2004/512,[39] allows Schengen states to exchange visa data.[40] It consists of a central information system and a communication infrastructure between the central information system and its national counterpart in the EU Member States.[41] After lengthy discussions, an updated version of the VIS was adopted in 2008 with the entry into force of the VIS Regulation[42] allowing for the first time to store biometric data. When applying for a visa, applicants leave their fingerprints as well as a photograph. Using biometric data helps clarify whether a person is the rightful holder of his/her identity documents. The VIS was created for the purpose of *inter alia* facilitating visa procedures, to fight against fraud and most of all to prevent threats against the internal security of EU Member States. According to the VIS Regulation, visa applications are stored irrespective of whether a visa had been issued, annulled, extended, revoked or refused.[43] The gathered data reach from "short-stay visas to transit visas, airport transit visas, visas with limited territorial validity and long stay visas".[44]

(3) The Eurodac Regulation

Eurodac[45] can be described as a fingerprint database for asylum procedures. Whenever an individual applies for asylum, his/her fingerprints are taken and transferred to the Eurodac database. The Eurodac system was created to implement the Dublin II Regulation[46], which aims to ascertain which country is responsible for the examination of an asylum application.[47] The first Eurodac Regulation was adopted in

37 For more details, see Schengen Information System, European Commission, accessed 31 July 2019.

38 *Ibid.*

39 Council Decision of 8 June 2004 establishing the Visa Information System (VIS), (2004/512/EC), OJ 2004 L 213/5.

40 F. Boehm, *Information Sharing*, *supra* n. 28, at 281.

41 Council Decision 2004/512/EC, *supra* n. 39, Art 1 para 2.

42 Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ 2008 L 218/60.

43 *Ibid.* Art 10 – 14. Cf. F. Boehm, *Information Sharing supra* n. 28, at 280 – 281.

44 *Ibid.* 283.

45 Regulation 603/2013, *supra* 6.

46 Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, replaced by Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L 180/31.

47 Cf. F. Boehm, *Information Sharing*, *supra* n. 28, at 304 – 305.

 DOI: 10.17103/sybil.23.4

2000[48], whereas the system as such had been operatively active since 2003.[49] National asylum authorities may enter the Eurodac system and find out whether the applicant has already applied for asylum in a different EU country.[50] In addition, police authorities are also allowed to consult the Eurodac system under very narrow circumstances.[51] In general, the Eurodac database contains all different kinds of data, including *inter alia* fingerprints of asylum seekers but also of migrants, who have been arrested for crossing illegally EU borders. Furthermore, the Eurodac Regulation allows to take fingerprints of those persons, who have been found illegally in one of the EU's Member States.[52]

(4) The Entry-Exit System (EES) and the European Travel Information and Authorisation System (ETIAS)

The Entry-Exist System[53] is a new system that will collect data of visa-required as well as visa-exempt third-country nationals, who are permitted to stay in the Schengen area with a short-term visa (90 days).[54] It replaces the manual stamping of passports and allows for the storage of different types of data, including biometrics.[55] The system is able to evaluate the exact moment a short-term visa expires and the exact point of time an individual has no legal status to reside in the EU anymore.[56] It is the overall purpose of the EES, to "improve the management of external borders, to prevent irregular immigration and to facilitate the management of migration flows."[57] Eu-LISA will be responsible for the technical feasibility of the EES, which will be operable as from 2020.[58]

The European Travel Information and Authorisation System (ETIAS)[59] is an electronic travel authorisation system comparable to the US-American model "ESTA". It applies to third-country nationals coming from visa-exempt countries wishing to enter the Schengen area. They will have to undergo

48 Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ 2000 L 316.

49 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013 L 180.

50 T. Balzacq/S. Carrera, *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy* (Centre for European Policy Studies, Brussels 2005) 45.

51 Regulation 603/2013, *supra* n. 6.

52 For more information see Boehm, *Information Sharing*, *supra* n. 28, at 306.

53 Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, OJ 2017 L 327.

54 *Ibid.* Art 16 and 17.

55 Cf. *Ibid.* Art 17.

56 Cf. European Council, Entry-exit system: final adoption by the Council, accessed 31 July 2019.

57 Regulation 2017/2226, *supra* n. 53, recital 15.

58 European Council, Entry-exit system: final adoption by the Council, *supra* n. 56.

59 Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, OJ 2018 L 236.

additional security checks and to pay a fee prior to their entry into the Schengen area.[60] It is expected that ETIAS will be operational in 2020.[61]

(5) The European Criminal Record Information System (ECRIS-TCN)

The European Criminal Record Information System for third-country nationals (ECRIS-TCN system) is an electronic system processing personal data of third-country nationals as well as stateless persons within the EU, who have been convicted of a crime and whose conviction is stored in the Member States' criminal records. [62] Collected data encompass both alphanumeric data and fingerprints. Under certain circumstances, the storage of facial images shall be possible as well.[63] The ECRIS-TCN is part of a greater "ECRIS" package,[64] which seeks to collect data on both EU citizens and third-country nationals as well as stateless persons, who have been convicted of a criminal offence and whose conviction appears in one of the criminal records databases.[65] While the former ECRIS system worked on a decentralised basis, the new ECRIS-TCN will be a centralized system allowing Member States to ascertain which EU country holds criminal records about a third-country national or a stateless person.[66] The ECRIS-TCN will be operable within the next years.[67]

(C) REGULATION 2019/817

Regulation 2019/817 aims to create the interoperability of the aforementioned systems, which are either already existing or which will be operatively active soon. In order to do so, the Commission is planning to create four different mechanisms, which will be elaborated in more detail in the following chapter.

(1) The European Search Portal (ESP)

The ESP will function as a "message broker" allowing for the simultaneous querying in different IT systems, such as the VIS, Eurodac, EES etc. It is the overall aim to guarantee "fast, seamless, efficient, systematic and controlled access by Member State authorities and Union agencies to the EU information systems, Europol systems and Interpol databases".[68] However, national authorities shall only have access

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60 *Ibid.* Art 1.

61 ETIAS Homepage, accessed 31 July 2019.

62 Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, OJ 2019 L 135/1.

63 *Ibid.* Recital 15.

64 *Ibid.* See also Directive (EU) 2019/884 of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA, OJ 2019 L 151/143.

65 European Commission, EU Information Systems, Security and Borders, accessed 31 July 2019.

66 Regulation 2019/817, *supra* n. 12, Art 5 – 8.

67 European Commission, EU Information Systems, Security and Borders, *supra* n. 65.

68 Regulation 2019/817, *supra* n. 12, recital 13.

 DOI: 10.17103/sybil.23.4

to those databases they are allowed to access according to their relevant (national) access rights.[69] As already indicated, the ESP will be used to query simultaneously the EES, the VIS, ETIAS, Eurodac and ECRIS-TCN but it will also be an additional tool to query the SIS, Interpol and Europol by "complementing the existing dedicated interfaces."[70] The European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (Eu-LISA) will develop the ESP and guarantee its technical feasibility.[71] In order to specify the technical details of the relevant system, the Commission is authorized to adopt delegated acts.[72] Logs will be kept of all processed data including the information on which national authority entered the query as well as the time and the date of the query. The data will be deleted one year after they had been established.[73]

(2) The Biometric Matching Service (BMS)

The BMS will supplement the CIR, the MID as well as the EES, the VIS, the Eurodac and the SIS. Instead of entering queries based on the name of a specific person, biometric data can be used to enter a query by storing so-called biometric templates.[74] It will consist of a centralized infrastructure which will store all different types of biometric data, including data stored in the EES, the VIS, the SIS, the Eurodac system as well as the ECRIS-TCN.[75] Regulation 2019/87 emphasizes that Member States have to guarantee minimum standards of data quality when entering data into the aforementioned systems. As in the case of the ESP, logs will be kept containing information on the creation of the biometric templates, information on which EU information system had been queried by the BMS, the type of biometric data, date, time of the relevant query as well as its length. One year after their creation, the logs shall be erased.[76] Regulation 2019/87 also refers to questions relating to data retention. According to the Regulation, the data stored in the BMS shall be stored as long as they are stored in the underlying systems, that is to say, in the CIR or the SIS.[77]

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69 *Ibid.* Art 6 para 1.

70 *Ibid.* Recital 17. It is worthy of note that the SIS, Europol and Interpol already have centralized systems as well as national systems and a communication infrastructure between the national and the centralized systems. See, for example, Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ 2006 L 381/4. Art 4. Therefore, the ESP will be an additional tool to query these systems. Whether this may change in future remains to be seen.

71 *Ibid.* Art 6 para 3.

72 *Ibid.* Art 9 para 7.

73 *Ibid.* Art 10. For more details see Bogensberger, *Police Cooperation* in: M. Klamert/M. Kellerbauer/J. Tomkin, Commentary on the EU: Treaties and the Charter of Fundamental Rights (Oxford University Press, Oxford 2019) 925 – 938, at 930.

74 Regulation (EC) No. 1987/2006, *supra* n. 70, Art 12 para 1 and Art 14.

75 *Ibid.* Art 13.

76 *Ibid.* Art 16 para 2.

77 *Ibid.* Art 15. Cf. Bogensberger, *Police Cooperation*, *supra* n. 73, at 930. See also P. de Hert/J. Saifert, Police, Privacy and Data Protection from A Comparative Legal Perspective, in: M. den Boer (ed.), Comparative Policing from a Legal Perspective (Edward Elgar Publishing, Cheltenham – Northampton 2018) 306 – 328, at 332.

 DOI: 10.17103/sybil.23.4

(3) The Common Identity Repository (CIR)

The CIR will create an individual file of each person whose information is contained in the EES, the VIS, the Eurodac, the ECRIS-TCN and ETIAS. It will allow *inter alia* police authorities – in accordance with their powers under national law – to access the CIR which contains biometric data of a person. Member States authorities will be able to access the CIR for different purposes. Where the national law allows so, police authorities may query the CIR solely for the purpose of identifying a person.[78] This might include biometric data, such as fingerprints. In addition, whenever it turns out that a person might be having multiple identities,[79] the Member States authorities may query the CIR and access all the information contained therein. Likewise, Member States authorities may query the CIR in order to prevent, detect or investigate into possible terror acts or other, serious criminal offences. Whenever it turns out that data on a person are contained in the CIR, the CIR replies by making a reference indicating which of the aforementioned systems contains such information (hit/no-hit).[80] In order to be granted full access to the data contained therein, the Member States themselves can authorize their national authorities in this regard.[81] As in the case of the BMS, data contained in the CIR will be stored and retained as long as they exist in the underlying systems. Again, logs will be kept for a maximum of one year containing information, such as the purpose of the access, the time and duration of the query as well as their result.[82]

(4) The Multiple Identity Detector (MID)

The MID primarily serves the purpose of storing links between data contained in the relevant information systems, such as the CIR (which covers the data contained in the VIS, ETIAS, Eurodac and the ECRIS-TCN system) and the SIS. It is the overall aim to facilitate identity checks in general and to detect possible identity fraud.[83] The launching of a multiple detection might be necessary in case an individual file is created according to the EES regulation, in case an application file is provided according to the VIS, the ETIAS regulation or an alert entered into the SIS. The whole system works on a hit/no-hit basis. In case the system reveals that both the biometrical as well as the identity data are identical, a white link is created.[84] The same holds true in case the system reveals the same biometric but different identity data but the responsible authority concludes – by manual verification – that the identify lawfully belongs to one person. In case the query reports differences, such as same biometric data but different information on identity (such as the last name), a yellow link occurs in case manual verification did not take place.[85] In case of same biometrics but similar identities, a green link occurs provided that the competent authority responsible

78 *Ibid.* Art 20.

79 Cf. *Ibid.* Art 28 para 4.

80 In this regard it should be noted that "hit flags" constitute personal data in itself and therefore require authorities to maintain sufficient procedural safeguards. See WP29, Opinion on Commission proposals, *supra* n. 14, at 21.

81 *Ibid.* Art 22. Cf. Bogensberger, *Police Cooperation*, *supra* n. 73, at 930.

82 *Ibid.* Art 24.

83 *Ibid.* Art 25.

84 *Ibid.* Art 33.

85 *Ibid.* Art 30.

 DOI: 10.17103/sybil.23.4

with regard to the relevant subject matter concludes that the different data on identity belong to different persons.[86] A red link occurs in case the data reveals same biometric but different data on a person's identity and the relevant national authority arrives at the conclusion that the different identities unlawfully belong to one person only.[87]

As in the case of the CIR and the BMS, the MID will retain the relevant information as long as it is stored in the underlying systems. Logs will be kept containing information on the purpose of access, the exact date and duration of the query as well as the reference to the relevant data linked.[88]

(D) FUNDAMENTAL RIGHTS CONCERNS

As already mentioned, the FRA, the EDPS as well as the WP29 were asked to comment on the Commission's proposal establishing an interoperable EU information system. All three of them expressed serious concern over potential fundamental rights violations, most of all the right to data protection.[89] Apparently, the Council as well as the Parliament took the criticism seriously when finally adopting Regulation 2019/817. In fact, the final Regulation deviates clearly from the Commission's original proposal of 2018.

According to its "founding document", Council Regulation 168/2007, the FRA is allowed to refer to a plethora of legal sources including the Fundamental Rights Charter (FRC)[90], EU secondary law and the European Convention on Human Rights (ECHR)[91]. However, in its 2018 opinion, the agency addressed the ECHR only marginally, while primarily focussing on the FRC as well as EU secondary law.[92] In substantial terms it is worthy of note that the FRA primarily scrutinized the Commission's proposal with regard to the right to non-discrimination and the right to protection of personal data. However, the FRA explicitly stressed that other fundamental rights could be jeopardized as well, such as the right to asylum, the protection on the event of removal, expulsion or extradition as well as the rights of the child and the right to an effective remedy and a fair trial.[93]

The EDPS, on the other hand, was established by Art 41 para 1 of Regulation 45/2001[94]. Its main functions include the insurance that fundamental rights and freedoms are being adhered to by the

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86 *Ibid.* Art 31.

87 *Ibid.* Art 32. See also P. Hanke/D. Vitiello, *High Tech Migration Control in the EU and Beyond*, *supra* n. 12, at 20.

88 *Ibid.* Art 36.

89 FRA, Interoperability and Fundamental Rights Implications, *supra* n. 12. As early as in 2017, it published a report dealing with fundamental rights issues and the proposal in a more general way. See Fundamental Rights Agency, Fundamental Rights and the Interoperability of EU information systems: borders and security, 2017, accessed 31 July 2019. See also EDPS, Opinion 4/2018, *supra* n. 13, at 12; WP29, Opinion on Commission proposals, *supra* n. 14.

90 Charter of Fundamental Rights of the European Union, OJ 2012 C 326/391.

91 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 005.

92 See Council Regulation (EC) No. 168/2007 of February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1, recital 9 and Art 3.

93 FRA, Interoperability and Fundamental Rights Implications, *supra* n. 12, at 13 – 15.

94 Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8/1.

 DOI: 10.17103/sybil.23.4

Commission and other EU institutions.[95] At first, the EDPS acknowledged the EU's pressing need to take specific measures in the area of security and border management as especially the large influx of third-country nationals poses significant administrative but also legal challenges. According to the EDPS, the smart use of technology, for example by establishing an EU-wide information system connecting several already existing or future IT systems, is a helpful tool in accomplishing the objective of protecting and maintaining security within the EU.[96] However, the EDPS criticized the Commission's proposal for various reasons. Especially the use of data for new purposes and the facilitated identification of third-country nationals during identity checks raise severe legal concerns. Basically, the comments made by the FRA and the EDPS point in the same direction. Both institutions criticize the Commission's proposal for being – at least in some points – incompatible with the principle of purpose limitation but also with the principle of data minimisation.

The WP29 was established by Art 29 Directive 95/46/EC[97] but was replaced by the European Data Protection Board (EDPB) in 2018, which was established by Art 68 of Regulation 2016/679[98]. The criticism expressed by the WP29 is similar to the comments made by the FRA and the EDPS respectively. Especially the CIR and the principle of purpose limitation have led to concern.

This article will not analyze the criticism and comments made by the aforementioned institutions in their entirety. It is the overall purpose to analyze the broader picture and to raise awareness for the most severe and the most significant fundamental rights concerns.

(1) General Concerns: Non-Discrimination

Establishing interoperability between EU information systems may particularly affect certain groups of people, such as women and migrants, but also children, the elderly and persons with disabilities. These groups of people enjoy a multifaceted range of legal protection. While the FRC itself, with its binding nature for both the EU, its institutions and agencies, and Member States when implementing EU law, provides for an abundance of legal norms protecting vulnerable groups of people, the Commission's proposal itself contains several provisions aiming to protect those who may be particularly affected by the envisaged measures. Prior to a more in-depth legal analysis, the general fundamental rights concerns, which were especially mentioned by the FRA, seem worth mentioning.[99]

(b) *General Concerns*

95 *Ibid.* Art 41 para 2.

96 EDPS, Opinion 4/2018, *supra* n. 13, at 19.

97 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31.

98 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

99 For more details on the competences of the EDPS see Art 46 and 47 of Regulation 45/2001, *supra* n. 94.

 DOI: 10.17103/sybil.23.4

The FRA identified the MID, which aims to tackle identity fraud as the most problematic area when it comes to fundamental rights. Whenever a query into the system results in the same biometric data but different identities, for example, the competent national authority has to ascertain whether the different identities lawfully or unlawfully belong to one or more persons. In fact, women change their identity a lot more frequently than men. In many EU countries, it is still the practice that the spouse changes her name after marriage and takes over her husbands' last name. This may increase significantly the probability that women will be stopped and scrutinized more frequently than men. Moreover, certain groups of people will also be affected negatively, especially those people coming from societies where particular names are very frequent.[100]

Another problem that will eventually arise is that the gathering of data of people with dark skin is more difficult than in the case of people with white skin as dark skin reflects less light and the quality of the data might be different.[101] Poor quality of such data may increase the risk that such people are scrutinized and checked more frequently at border crossings, for example. Children might be affected in a negative way as well.[102] Fingerprints of children may change over time significantly, especially in case fingerprints have been taken at a very young age. This may lead to "data confusion" which increases – again – the probability that children will be scrutinized and checked more often than other people. Furthermore, people with disabilities might not be able to leave fingerprints at all. If they are not provided with sufficient help and support, they will be affected more negatively by the envisaged measures than others. All these factors might – in a greater or lesser extent – amount to unlawful discrimination against vulnerable groups of people.[103]

(c) *Non-Discrimination*

The Commission's proposal aims to address the aforementioned problems. According to Art 5, the processing of personal data "shall not result in discrimination against persons on any grounds such as sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Taking into account that certain groups of people will be affected more negatively than others, Art 5 expressly states that "particular attention shall be paid to children, the elderly and persons with a disability".[104] However, people seeking international protection have not been qualified as vulnerable. In contrast to this, Regulation 2019/817 not only qualifies children, the elderly and the disabled as vulnerable people but also persons in need of international protection. In addition, the Regulation not only calls for the protection of the right to non-discrimination but of all other fundamental rights, including the right to private life and the right to data protection.[105]

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[100] FRA, Interoperability and Fundamental Rights Implications, *supra* n. 12, at 13 – 15.

[101] *Ibid.*

[102] The ECtHR has expressly called upon Member States to take into account the specific needs of children also in the context of processing personal data. *S. and Marper v. The United Kingdom*, ECHR (2008), Applications Nos. 30562/04 and 30566/04, para 124.

[103] FRA, Interoperability and Fundamental Rights Implications, *supra* n. 12, at 13 – 15.

[104] Amended Proposal for a Regulation, COM/2018/478 final, *supra* n. 7, Art 5.

[105] Regulation 2019/817, *supra* n. 12, Art 5.

 DOI: 10.17103/sybil.23.4

Mentioning explicit groups of vulnerable people and requiring Member States to protect all fundamental rights is a positive sign and illustrates the Union's increased awareness for fundamental rights and their protection. However, it remains questionable whether the explicit mentioning of particular groups of people and calling upon Member States to pay particular attention to them, does have any legal repercussions. There are several arguments, which clearly support this assumption. In fact, Regulation 2019/817 is directly applicable and the terminology used in Art 5 is clear and precise, allowing individuals to derive concrete rights from it. As already indicated, people with disabilities might not be able to give their fingerprints. Member States, which do not provide sufficient support for those people, could be in violation of Art 5 of the Regulation. Likewise, children, who gave their fingerprints at a very young age and whose fingerprints changed over time, shall not face significant disadvantages by being scrutinized at borders more often than other people. The wording of Art 5 of Regulation 2019/817 obliges Member States to take specific measures in order to avoid a disproportionate burden for children, e.g. at border crossings. By the same token, the processing of data of people in need for international protection will have to be subjected to strict conditions. As the FRA criticized, it is possible that data of persons in need of international protection are being queried against Interpol databases.[106]

This entails a clear risk that information on asylum applicants becomes available to their country of origin, which could jeopardize the applicants' family members. The wording of Art 5 of Regulation 2019/817 clearly requires Member States to take active measures in order to avoid the transfer of data to non-EU countries if the processing would constitute a risk for asylum seekers or their families. The provision thus apparently takes note of the fact that particular groups of people are more likely to be affected negatively by the envisaged measures than others. By requiring Member States to pay particular attention to such people, the regulation sets an appropriately high standard of protection, which may lead to infringement proceedings before the ECJ in case of non-compliance.[107]

The WP29 criticized that Art 5 of the Commission's proposal referred to children, the elderly and people with disabilities in a rather general way, whereas other legislative acts, such as Regulation 2017/2226 establishing the Entry/Exit System refer to specific safeguards for children.[108] As a result, the WP29 concluded that the envisaged Regulation should not only entail a general clause stressing the requirement to take into account the particular vulnerability of children, the elderly and the disabled, but it should also make a clear reference to specific safeguards applied vis-à-vis these groups of people, especially in case biometric data are being processed.[109] Despite the WP29's recommendation, Regulation 2019/817 does not entail specific safeguards in this regard. The only provision taking into account the increased level of vulnerability of certain groups of people is Art 5, which – in light of the aforementioned – becomes all the more important in the context of protecting children, the elderly, the

[106] FRA, Interoperability and Fundamental Rights Implications, *supra* n. 12, at 13–15.

[107] Regulation 2019/817, *supra* n. 12, Art 5.

[108] Regulation 2017/2226, *supra* n. 18, Art 10 para 2. See also WP29, Opinion on Commission proposals, *supra* n. 14, at 17.

[109] *Ibid.*

 DOI: 10.17103/sybil.23.4

disabled and other groups of people in need of protection, which could arguably lead to infringement proceedings initiated by the Commission in case of non-compliance by Member States.

(d) *Data Quality*

Another rather technical problem especially the FRA addressed was that pictures taken from people with darker skin may be lower in quality than pictures taken from people with white skin for the sole reason that dark skin reflects less light than white skin.[110] This and other problems are realities which can only be limited by obliging Member States to establish or maintain a certain level of data quality.[111] In addition, the WP29 warned against the use of poor quality fingerprints in the BMS.[112] According to Art 13 para 3 of the Commission's proposal, biometric data shall only be entered into the system if they had undergone a quality check first. According to Art 13 para 4, the storage of data in the BMS shall meet a certain level of quality standards, which are elaborated more specifically in Art 37. Likewise, Art 18 para 3 stresses that the data stored in the CIR shall meet a certain quality standard as elaborated more specifically in Art 37, which explicitly refers to the different measures which will be taken in order to ensure data quality. Eu-LISA shall establish an automated system in order to guarantee data quality regarding data stored in the EES, ETIAS, VIS, SIS, the BMS, CIR and the MID, provide regular reports on data quality for Member States as well as the Commission itself and establish common indicators with regard to data quality. The implementation of the different quality standards and mechanisms shall be evaluated on a regular basis. If necessary, the Commission may make recommendations, whereas Member States shall present action plans on how to remedy the relevant deficiencies as identified by eu-LISA and the Commission respectively. The evaluation report by the Commission will be transmitted to several EU-institutions, including the European Parliament, the European Data Protection Supervisor as well as the FRA.

Even though reporting systems are incomparable to full judicial review, the positive effects of international review procedures are generally acknowledged.[113] Ultimately, this also applies to Art 37 of the proposal. Even though the problem of insufficient quality standards of different types of data might as such not be 'justiciable' in the traditional meaning of the term, Art 37 at least provides for the maintenance of a certain minimum level regarding such standards. Regulation 2019/817 has not changed the terminology used in the 2018 proposal (neither the terminology used in Art 13 paras 3 and 4, nor the terminology used in Art 18 para 3 and 37). On the contrary, it stresses (again) the importance of establishing the technical instruments to guarantee the quality of data gathered and entered into the different systems by EU Member States.

(2) The Right to Data Protection

[110] FRA, Interoperability and Fundamental Rights Implications, *supra* n. 12, at 13 15.

[111] Cf. M. Tzanou, *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance* (Bloomsbury, Oxford Portland 2017) at 27.

[112] WP29, Opinion on Commission proposals, *supra* n. 14, at 7.

[113] Cf. W. Kälin, *Examination of State Reports*, in: H. Keller/G. Ulfstein (eds.), UN Human Rights Treaty Bodies (Cambridge University Press, Cambridge 2012) 16 72, at 17.

 DOI: 10.17103/sybil.23.4

The right to data protection can be found *inter alia* in Art 8 ECHR as a right inherent to the right to private life.[114] The right to data protection as enshrined in Art 8 FRC (as well Art 16 TFEU) is separated from the right to private life, which can be found in Art 7. The clear and distinct separation of these rights in the FRC did not change their original interrelatedness. Nowadays, however, it is understood that the right to data protection exists irrespective of any privacy concerns. Moreover, the protection of data is conceived as a mandatory prerequisite for the enjoyment of other fundamental rights, especially the right to non-discrimination. As many other fundamental rights, the right to data protection is not absolute. The FRC stresses that "[A]ny limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others." The permissibility of limiting fundamental rights for the purpose of preventing terrorist attacks or other serious crimes has been affirmed by the ECJ in *Kadi* and *Al Barakaat*[115] when the Court emphasized in both cases that the fight against terrorism constitutes a legitimate "general interest" within the meaning of Art 52 para 1 FRC. More specifically, the ECJ confirmed that the processing of data may be an adequate tool in order to maintain or re-establish public security[116]. The ECHR, on the other hand, does not contain a specific limitation clause. Permissible limitations of human rights have to be found at each individual right.[117]

The right to data protection is also enshrined in an abundance of secondary legislative acts, including the General Data Protection Regulation (GDPR)[118], the Police Directive[119] as well as Regulation 2018/1725[120]. It is the objective of the GDPR to "lay down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data."[121] However, the scope of the Regulation is limited. It does not apply, *inter alia*, to the processing of data "by competent authorities for the purposes of the prevention, investigation, detection or prosecution of

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[114] Cf. *Leander v. Sweden*, ECHR (1987), Application No. 9248/81, para 48; *M.M. v. The United Kingdom*, ECHR (2013), Application No. 24029/07. For more details, see W. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, Oxford 2017) at 382 – 383.

[115] Judgement of 3 Sepetember 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, C-402/05 P and C-415/05 P, EU:C:2008:461, para 363.

[116] Judgement of 8 April 2014, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána and Kärntner Landesregierung*, C-293/12 and C-594/12, EU:C:2014:238, para 43.

[117] X. Groussot/G.T. Petursson, *The EU Charter of Fundamental Rights Five Years on: The Emergence of a New Constitutional Framework?*, in: S. d Vries/U. Bernitz/S. Weatherhill, The EU Charter of Fundamental Rights as Binding Instrument (Bloomsbury, Oxford – Portland 2015) 135 – 154, at 139.

[118] GDPR, *supra* n. 98.

[119] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (Police Directive), OJ 2016 L 119/89.

[120] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, 2018 L 295/39.

[121] GDPR, *supra* n. 98, Art 1 para 1.

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criminal offences, or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security." With regard to these criminal matters, the Police Directive applies. In addition, Regulation 2018/1725 governs the processing of data undertaken by the European Union and its bodies respectively. This "triad" of relevant secondary acts poses another challenge for the analysis of the Commission's proposal. In its opinion of 2018, the FRA primarily criticized the proposal for two reasons. On the one hand, several provisions might be incompatible with the principle of "purpose limitation" and therefore rise strong fundamental rights concerns. On the other hand, various provisions might infringe upon the principle of so-called "data minimization".

(a) *The Principle of Purpose Limitation*

The principle of purpose limitation ranks among the most cardinal principles in European data protection law.[122] It is reflected *inter alia* in Art 8 para 2 FRC, according to which "data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law." Moreover, Art 5 para 1 lit b GDPR stresses that personal data shall be "collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes (...)."[123]

At the outset it should be borne in mind that establishing interoperability between the different EU information systems clearly blurs the line between migration policy, border control, law enforcement and criminal investigations. Art 20 of the Commission's proposal foresees that police authorities – in case this is provided by national law – are allowed to query the CIR for the sole purpose of identifying a person (as long as the identity check takes place for the purpose of contributing to preventing and combating irregular migration and to contribute to a high level of security).[124] As already mentioned, the CIR contains different types of data, including fingerprints. At the same time, Art 20 states that Member States have to define *themselves* as to what parameters and under which circumstances Member States authorities may query the CIR within the greater framework of contributing to an increased level of security and of preventing and/or combating irregular migration.[125] The FRA argued that leaving at the discretion of the Member States to decide when the CIR can be queried is incompatible with recent jurisprudence provided by the ECJ.[126]

In *Digital Rights Ireland*, the ECJ clarified that legislative acts have to be formulated clearly, that is to say, with a sufficient level of determinacy, in case the relevant rule in question interferes (or has the potential of interfering) with fundamental rights.[127] According to the Court, "[T]he need for such

[122] Cf. Council of Europe and FRA, Handbook on European Data Protection Law, 2018 edition, at 122.

[123] For more details see Art 29 Data Protection Working Party, 00569/13/EN WP 203.

[124] Cf. Art 2 para 1 lit b and c Proposal.

[125] Cf. EDPS; Opinion 4/2018, *supra* n. 13, nn. 37 and 40.

[126] FRA, Interoperability and Fundamental Rights Implications, *supra* n. 12, at 26.

[127] *Digital Rights Ireland*, *supra* n. 115, para 46. See also Judgement of 21 December 2016, *Tele2 Sverige AB v. Post- och telestyrelsen and Secretary of State for the Home Department v. Tom Watson, Peter Brice, Geoffrey Lewis*, C-203/15 and C-698/15, EU:C:2016:970, para 122; Judgement of 6 October 2015, *Maximillian Schrems v Data Protection Commissioner*, C-362/14, EU:C:2015:650, para 78; Opinion 1/15 of the Court of 26 July 2017, EU:C:2017:592, para 38; Judgement of 13 September

 DOI: 10.17103/sybil.23.4

safeguards is all the greater where (...) personal data are subjected to automatic processing and where there is a significant risk of unlawful access to those data."[128] Since the Commission's proposal merely states that it is upon the Member States to establish specific rules according to which the CIR may be queried for the purpose of identifying a person, the FRA concluded that Art 20 is incompatible with the principle of purpose limitation. By the same token the EDPS stressed that the identification of a person as such "is not an end in and of itself but needs to serve a specific objective; for instance to check whether the person is wanted by the police or has the right to stay in the EU".[129] The EDPS criticized that Art 20 of the proposal is formulated too broadly as it merely refers to Art 2 para 1 lit b and c of the Commission's proposal according to which identity checks by national authorities are lawful for the purpose of preventing and combating irregular migration and contributing to a high level of security. According to the EDPS, the terms referred to in Art 2 para 1 lit b and c are too broad and require further clarification. The EDPS therefore recommended defining more clearly the terms "combating irregular migration" and "contributing to a high level of security" in the Commission's proposal.[130] Likewise, WP29 emphasized that Art 20 of the Commission's proposal allowing legislators to grant access rights for the purpose of general identity checks is highly doubtful. Precise conditions need to be established foreseeing in detail under which circumstances and according to what parameters the CIR may be queried.[131] Furthermore, the EDPS also criticized that in its original version the Commission's proposal generally allows to access the CIR in order to identify a third country national for the purpose of maintaining a high level of security. This terminology erroneously suggests the conclusion that generally third-country nationals pose a threat to security. In order to avoid this falsification, the EDPS suggested to reformulate the proposal in that such identity checks vis-à-vis third-country nationals shall only be allowed "where access for the same purposes to similar national databases exist and under equivalent conditions."[132]

It is particularly worthy of note that the Commission's original proposal foresaw identity checks based on biometric data. The EDPS emphasized that taking biometric data systematically would stigmatize third-country nationals as being a general risk to public security. He therefore suggested reformulating the Commission's proposal by stressing that biometric data shall only be used as a last resort and identity checks based on Art 20 shall only be allowed in the presence of the person concerned and only in case the person concerned is *inter alia* unable to cooperate or is not in the possession of documents proving their identity.[133] Regulation 2019/817 has been formulated differently as it now establishes concrete criteria according to which the CIR may be queried by Member States. More precisely, Art 20 states that national police forces are only allowed to access the CIR in case "a police authority is unable to identify a person due to the lack of a travel document or another credible document proving that person's identity."

2018 (referral to Grand Chamber on 4 February 2019), Case of Big Brother Watch and Others v. The United Kingdom, ECtHR Application Nos. 58170/13, 62322/14 and 24960/15, paras 224 – 228.

[128] *Digital Rights Ireland*, *supra* n. 115, para 46.

[129] EDPS, Opinion 4/2018, *supra* n. 13, at 13.

[130] *Ibid.*

[131] WP29, Opinion on Commission proposals, *supra* n. 14, at 21.

[132] EDPS, Opinion 4/2018, *supra* n. 13, at 14.

[133] *Ibid.* At 16 – 18.

 DOI: 10.17103/sybil.23.4

Another aspect which has been criticized by the EDPS was that according to Art 17 and 18 of the Commission's proposal, the CIR would include *inter alia* data stored in the ECRIS-TCN (conviction information on third-country nationals and stateless persons). This is particularly problematic as the CIR has been established for the purpose of facilitating the correct identification of a person as well as for the detection of multiple identities.[134] This raises the question of whether using data stored in the ECRIS-TCN for these two purposes meets the criteria of necessity and proportionality.[135] According to Art 24 para 1 Regulation 2019/816, "[T]he data entered into the central system shall only be processed for the purpose of the identification of the Member States holding the criminal records information on third-country nationals." The terminology used in the Commission's proposal establishing an interoperable IT framework goes far beyond the terminology used in Regulation 2019/816 by allowing to query the ECRIS-TCN to "detect multiple identities and to facilitate identity checks" in general. This clearly contradicts the principle of purpose limitation.[136] Regulation 2019/817 now foresees that "[A] common identity repository (CIR), creating an individual file for each person that is registered in the EES, VIS, ETIAS, Eurodac or ECRIS-TCN containing the data referred to in Article 18, is established for the purpose of facilitating and assisting in the correct identification of persons registered in the EES, VIS, ETIAS, Eurodac and ECRIS-TCN in accordance with Article 20, of supporting the functioning of the MID in accordance with Article 21 and of facilitating and streamlining access by designated authorities and Europol to the EES, VIS, ETIAS and Eurodac, where necessary for the prevention, detection or investigation of terrorist offences or other serious criminal offences in accordance with Article 22."

(b) *The Principle of Data Minimisation*

The FRA also criticized the Commission's proposal for infringing of the principle of data minimisation, which is mentioned *inter alia* in Art 5 para 1 lit c of the GDPR.[137] Personal data shall be "adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed."[138] Regulation 2018/1725, which applies to the processing of personal data by the Union institutions, bodies, offices and agencies, uses the same terminology. It is worthy of note that prior to the entry into force of the GDPR[139], the notion of "data minimisation" has not been used as a distinct term in any legislative act adopted by the

[134] Proposal Art 17 para 1.

[135] EDPS, Opinion 4/2018, *supra* n. 13, at 49 – 51.

[136] *Ibid.* At 49 – 53.

[137] See the latest judgment rendered by the ECJ, Judgement of 16 January 2019, *Deutsche Post AG v. Hauptzollamt Köln*, C-496/17, EU:C:2019:26, para 18. The ECHR has explicitly referred to the principle of data minimisation as enshrined in the GDPR as well. See *Barbulescu v. Romania*, ECHR (2017), Application No. 61496/08, para 51.

[138] Cf. N.N. Gomes de Andrade/S. Montelone, *Digital Natives and the Metamorphosis of the European Information Society. The Emerging Behavioral Trends Regarding Privacy and Their Legal Implications*, in: S. Guthwirth/R. Leenes/P. de Hert/Y. Poullet (eds.), European Data Protection: Coming of Age (Springer, Dordrecht 2013) at 131.

[139] Art 99 para 2 GDPR, *supra* n. 98. Regulation 2018/1725 entered into force the 20st day after its publication in the OJ, which was 21 November 2018. See Art 101 para 1 Regulation 2018/1725.

EU. The Data Protection Directive[140], which was replaced by the GDPR, used a very similar terminology but did not mention the term "data minimisation" explicitly. Everything changed with the entry into force of both the GDPR and Regulation 2018/1725, which both use the notion of "data minimisation" as a distinct term.

It should also be emphasised that the content and meaning of the principle of data minimisation changed with the entry into force of the GDPR and Regulation 2018/1725. While the previous Data Protection Directive stated that the processing of data shall be "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed"[141], the GDPR only allows for the processing of personal data if such processing is necessary in relation to the relevant purpose to be achieved.[142] The terminology used in the Police Directive is different. According to Art 4 para 1 lit c the processing of personal data needs to be "adequate, relevant and not excessive in relation to the purposes for which they are processed." It should be noted that all three legislative acts, the GDPR, the Police Directive and Regulation 2018/1725 apply to Regulation 2019/817. This leads to the fact that different concepts of data minimisation will apply, either the concept enshrined in both the GDPR and Regulation 2018/1725 (the concept of "necessity") or the concept enshrined in the Police Directive, clearly referring to proportionality considerations. It remains to be seen how the ECJ will react to the different wording when it comes to data protection.[143]

In substantial terms, the FRA but also WP29 criticized the processing of specific types of biometric data in the BMS. For example, the BMS stores biometric templates obtained from the SIS in the area of law enforcement,[144] which includes DNA.[145] Generally, biometric data denote "personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data."[146] The WP29 stressed that biometric templates also constitute sensitive data despite the fact that they contain only a limited amount of personal information. Since the biometric templates stored in the BMS will be used as "universal identifiers" the WP29 suggested to treat those biometric templates just like biometric data themselves.[147] The same approach has been taken by the FRA,

[140] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 2005 L 281, no longer in force: 24/05/2018.

[141] *Ibid.* Art 6 para 1 lit c.

[142] Cf. P. Voigt/A. von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide (Springer, Cham 2017)* at 90.

[143] See also Art 5 lit c Convention 108.

[144] The proposal refers to the current SIS proposal. See Proposal for a Regulation of the European Parliament and of the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No 1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU, COM/2016/0883 final - 2016/0409 (COD).

[145] *Ibid.* Art 20 para 3 lit w and x.

[146] Art 4 para 14 GDPR, *supra* n. 98.

[147] WP29, Opinion on Commission proposals, *supra* n. 14, at 8.

 DOI: 10.17103/sybil.23.4

for example. It should be noted that, in principle, the GDPR does not allow for the processing of biometric data unless "the processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject." That means, the processing of biometric data is subject to strict conditions. As already indicated, the main purpose of the BMS is to "facilitate the identification of an individual who is registered in several databases, by using a single technological component to match that individual's biometric data across different systems, instead of several components". Processing biometric data for the sole purpose of identifying a person may well be of "substantial public interest" within the meaning of Art 9 para 2 lit g GDPR. However, account shall be taken of the fact that some types of biometric data, such as DNA and palmprints, are only stored in the SIS. Hence, it would be technically impossible to undertake a "cross-system comparison" with regard to DNA and palmprints. In light of the wording of Art 5 para 1 lit c GDPR, the processing of such data therefore inevitably appears to be unnecessary in relation to the relevant purpose for which they are processed. Given the fact that data obtained from the SIS cannot be used for cross-checks, the criterion of necessity cannot be fulfilled. It is also worthy of note here that Regulation 2019/817 expressly states that the BMS will not process data obtained from the SIS as this would clearly constitute a violation of the principle of data minimisation.[148]

Finally, it also should be pointed out that the processing of certain types of biometric data is subject to particularly strict criteria. This holds especially true for DNA. Art 22 para 1 lit b of the Commission's latest proposal of a Regulation on the Establishment, Operation and Use of the Schengen Information System (SIS) in the Field of Police Cooperation and Judicial Cooperation in Criminal Matters stresses clearly that DNA "may only be added to alerts provided for in Article 32(2)(a) and (c) and only where photographs, facial images or dactylographic data suitable for identification are not available." Therefore, among several types of biometric data, DNA ranks among the most sensitive data which can be used for the purpose of identifying a person. This aspect has been stressed by Art 29 Data Protection Working Party in its Opinion of 2018.[149] Moreover, both the ECtHR and the ECJ have already highlighted the strict criteria which apply to the processing of biometric data in general. In *S. and Marper v. The United Kingdom*[150] the ECtHR indicated that biometric data need to be treated with increased sensitivity, especially when it comes to people who have been convicted of a criminal offence. Likewise, in *M.K. v. France*[151], the ECtHR called the preventive storing and retention of fingerprints "tantamount to justifying the storage of information on the whole population of France, which would most definitely be excessive and irrelevant". In *Schwarz v. Bochum*, which dealt with the storing of biometric data in relation to the issuing of passports, the ECJ indicated that especially strict criteria apply to the storing of biometric data in centralised storage

[148] See also the comments made by the EDPS, Opinion 4/2018, *supra* n. 13, at 79.

[149] WP29, Opinion on Commission proposals, *supra* n. 14, at 5 – 6.

[150] *S. and Marper v. The United Kingdom*, ECHR (2008), Applications Nos. 30562/04 and 30566/04, paras 66 – 125. Cf. F. Boehm, *Information Society*, *supra* n. 28, at 267 – 268.

[151] *MK v. France*, ECHR (2013) Application No. 19522/09, para 40.

 DOI: 10.17103/sybil.23.4

systems.[152] Overall, it can be stated that the processing of certain types of biometric data, such as DNA, is subject to strict conditions, whereas distinctly looser conditions are applied to other, less sensitive types of biometric data. This aspect will play a pivotal role in interpreting Regulation 2019/817 and the principle of data minimisation.

(D) CONCLUSION

Regulation 2019/817 and its drafting process reflect several challenges the EU and its Member States have been confronted with over the past few years. Given the increased number of migrants and refugees trying to enter the EU, specific measures were necessary in order to guarantee interoperability between the different EU information systems. As emphasized by the FRA, specific groups of people are more likely to be affected by the aforementioned measures than others. There is an increased probability that, *inter alia*, children, the disabled and people seeking international protection will be controlled at border crossings. By emphasizing explicitly that, particular attention has to be paid to such vulnerable groups and their fundamental rights and by – at least implicitly – calling upon Member States to take specific action in this respect, Regulation 2019/817 establishes an appropriately high standard of fundamental rights protection.

It should be noted that the interplay between Member States and their national authorities with EU-institutions including centralised IT systems is becoming increasingly complex. The establishment of a centralised and fully interoperable IT system at the Union level has created a dual compound of data entered into national databases, which are later transferred to a centralised EU system. Regulating such complex aspects, which almost inevitably bear the risk of infringing upon the right to data protection, requires EU legislation to lay down precise criteria governing the relevant measures in question. In its recent jurisprudence on data protection the ECJ has established such criteria. In future, the findings of the Court will play an ever important role when it comes to the interpretation and application of Regulation 2019/817. Furthermore, Member States are increasingly inclined to broaden the types of personal data that can be used for the purpose of identifying a person, especially when it comes to third-country nationals, as the recent developments with regard to the SIS clearly illustrate. The use of biometric data has always constituted a delicate matter in legal terms. The increased interest in using DNA thus has caused great concern of the FRA, the EDPS as well as WP29. At least when it comes to the sole purpose of identification, the use of DNA would not be in line with the principle of data minimization. Hence, DNA usage may only be contemplated if dactyloscopic data are unavailable and DNA is the only option to identify individuals who need to be placed under protection, such as children.

In addition to these material considerations, Regulation 2019/817 and its drafting process also illustrate clearly the significant influence the FRA, the EDPS and WP29 were/are able to exert when it comes to the awareness for and protection of fundamental rights. Evidently, the criticism expressed by the agency was taken seriously and major amendments were made prior to the final adoption of Regulation 2019/817.

[152] Judgement of 17 October 2013, *Michael Schwarz v. Stadt Bochum*, C-291/12, EU:C:2013:670, paras 59 – 63.

 DOI: 10.17103/sybil.23.4

Apparently, the FRA, the EDPS as well as the WP29 were able to find a balance between rising interest for security, the increased transparentizing of individuals and fundamental rights. As a result, the relevant EU legal framework, especially the GDPR, can be understood as a normative firewall against excessive transparency and the evergrowing thirst of European institutions and domestic authorities for the collection and processing of personal data.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

María del Carmen CHÉLIZ INGLÉS, *La sustracción internacional de menores y la mediación. Retos y vías prácticas de solución* (Tirant lo Blanch, Valencia 2019), 405 pp.

International child abduction is not a new topic for research in the field of Private International Law but the interesting approach offered by the author of this book, María del Carmen Chéliz Inglés, is undoubtedly appealing from both a theoretical and a practical point of view. International child abduction cases as a part of International Family Law are progressively increasing following the trend in private international relationships- and they imply not only difficult legal issues due to the complex existing legal framework but also, and above all, emotional implications which arise in family disputes aggravated by the presence of children and the imperious need to protect their best interest. In this field, it is unanimously understood that the protection of the best interest of the child requires resolving this kind of cases as effectively as possible in the shortest feasible time. The legal instruments covering international child abduction controversies establish short deadlines and time is a factor that can lead to a different solution depending on the circumstances at stake. But such instruments have deficiencies and the deadlines are usually violated, so in this context, mediation as an alternative dispute resolution mechanism appears as a major tool as explained by the author in this remarkable monograph.

The book includes a Prologue signed by Professor Diago Diago, three Chapters and a number of final remarks. The first Chapter deals with the problems arisen from the interrelation between the two main instruments governing international child abduction cases that take place within the European Union: the Hague Convention on the Civil Aspects of International Child Abduction of 1980 and the European Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. After a deep analysis of their respective scopes and main solutions, the author concludes this first Chapter providing the limitations of both instruments, namely: their restricted territorial scope of application, the inconsistency to real life of key concepts like "child abduction" and "right of custody", the heterogeneous interpretation of the grounds for refusal to order the return of the child, the violation of the procedural deadlines and the lack of a consequence derived from such violation and finally, the absence of preventive measures. These deficiencies justify the need to think about alternatives which may be more in line to the needs of these particular controversies, as well as to the achievement of the desirable outcomes that they deserve.

Indeed, the second Chapter of the monograph deals with mediation as a "revulsive" to the limitations of these legal instruments, which actually refer to the usefulness of "amicable solutions", of mediation in particular. The multiple advantages of this alternative dispute resolution mechanism are explained in detail in this Chapter: it goes further the territorial scope of application of the said legal instruments, it improves the

 DOI: 10.17103/sybil.23.30

adaptability of the solution to the particular case on the basis of party autonomy, it promotes celerity and decreases the costs, it allows the adoption of preventive measures and it entails additional advantages like the resolution of related conflicts or the avoidance of future possible abductions. Still, mediation also presents some weaknesses and the author is well aware of them: the need to assess beforehand the adequacy of the use of mediation for a particular case (the so-called "mediability of the dispute"), the resort to mediation as a way to delay the return of the child, the limits established by the law governing the mediation and the cross-border recognition and enforcement of the mediation settlement. This latter issue is one of the key aspects the success of mediation in cross-border cases relies on. It cannot be fully developed or successful if the agreement the parties have reached is not granted efficacy in every country where it is required to be enforced. The third Chapter tackles this crucial and complex issue.

The cross-border enforcement of mediation agreements is regulated in two main international instruments in Spanish Private International Law: the already mentioned European Regulation 2201/2003 and the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996. These instruments shall be applied to the circulation of mediation agreements on matters falling under their scope of application (parental responsibility) among the Member States of the European Union or the relevant contracting states (46 in the latter case, including the 28 Member States of the European Union) respectively, and therefore it is advisable, if not necessary, that the parties (and/or their legal advisors) and the mediator know beforehand the requirements for the future recognition and enforcement of settlements in the relevant countries in order to ensure that the achieved agreement is fully enforced.

However, even in those cases where the aforementioned legal instruments are applied, the existing legal framework does not always resolve the arising situations and therefore, the current system still has some room for improvements. To this end, the author provides in this monograph *de lege data* and *de lege ferenda* solutions. Among the latter ones, the possible adoption within the Hague Conference on Private International Law of a legal instrument governing "package agreements" (that include decisions the parties have achieved regarding several Family Law aspects: parental responsibility, right of access, maintenance...) is particularly interesting. This model will be based on the following aspects: the "one-stop shop" rule in the sphere of international jurisdiction, the predominant role of party autonomy and the creation of a simple procedure of recognition and enforcement. The author considers that the adhesion of the European Union to this future instrument may help to improve the current system.

Notwithstanding, even with an improved system, international child abduction cases do not only involve countries where the above rules are applicable as the author properly points out in this Chapter. The adoption of bilateral or multilateral instruments favours the resolution of cross-border cases but their entry into force in a country depends on the

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subsequent ratification based on the political will. Not every international convention is ratified by all the countries worldwide and the lack of a binding instrument between two or more countries hinders the path towards a satisfying outcome since national authorities will apply their own systems and not common rules. This is particularly challenging in cases involving parties coming from countries with different cultural backgrounds. For instance, the family organisation and the rights of women notably differ in societies based on opposing values and principles and this heterogeneous panorama has also an impact in private international relations. Mediation can still play a significant role in this scenario but issues like the determination of the law governing the mediation settlement and its recognition and enforcement in all the countries involved become more difficult to deal with. From the Spanish perspective, the author analyses the rules set up in the Law 5/2012 on Mediation in Civil and Commercial Matters and the Law 29/2015 on International Legal Cooperation in Civil Matters.

In conclusion, the book authored by María del Carmen Chéliz Inglés provides a detailed and rigorous analysis of the legal framework governing international child abduction in Private International Law and the convenience and usefulness of resorting to mediation, when appropriate, as a way to improve the resolution of these disputes within and outside the European Union. I would strongly recommend reading this book to anyone interested in deepening in mediation in Family Law matters and specifically in international child abduction, a field where this alternative dispute resolution mechanism can contribute to ameliorate access to justice and the protection of the interest of the child as evidenced in Ms Chéliz's research.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

Monserrat Abad Castelos: *¿Es posible combatir el terrorismo yihadista a través de la justicia? El retorno de los combatientes del Estado Islámico tras sus crímenes* (Bosch, Barcelona, 2019).

Professor Montserrat Abad Castelos (Carlos III University of Madrid) has dedicated her monographic studies to very different and diverse topics of public international law, from the precautionary protection of the rights of States by the ICJ in 2002, to NGOs and civil society in 2004 or the marine renewable energy in 2013. Nevertheless, the study of international terrorism has been present among her research topics since the beginning of her already long university career. It must be stressed that she is the author of one of the first monographs on terrorism published in Spain from the perspective of public international law (*La toma de rehenes como manifestación del terrorismo internacional y el Derecho internacional*, Madrid, 1997), the result of research that, under the direction of Professor Manuel Pérez González, her mentor, earned her the Ph.D in Law degree.

The book I review is the product, therefore, of a research background of more than 20 years of Professor Abad Castelos, in which terrorism has been very present. It is enough to mention her contribution "Terrorism, international humanitarian law and current armed conflicts to the *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz* in 2009 or to her collaborations in the books *Terrorismo y legalidad internacional*, directed by Professor Elena Conde Pérez and coordinated by Professor Sara Iglesias Sánchez, and *Lucha contra el terrorismo, Derecho Internacional Humanitario y Derecho penal internacional*, directed by Professor Manuel Pérez González and coordinated by Professor Elena Conde Pérez, both published in 2012. But this book is more than the result of her past and present research on international terrorism. Truly, the essential purpose of the book is the difficulties, inconsistencies and legal loopholes to avoid impunity for foreign terrorist fighters enlisted in the Islamic State (Da'esh), not so much for the crime of terrorism, but for the commission of the "atrocity crimes" (genocide, crimes against humanity and war crimes). More specifically, the object of study is those difficulties, inconsistencies and loopholes to avoid the impunity of foreign terrorist fighters for the commission of those crimes in Iraq.

Thus, appealing to perfectly understandable reasons, the author defines the object of study of the monograph according to three criteria. First, she is especially interested in the commission of the "atrocity crimes", and not so others, such as terrorism. The atrocity, brutality or transcendence of those crimes is the main reason. It should be noted that, in one way or another, those crimes had previously been the object of the investigations of Professor Abad Castelos, for example, in publications from 1995-1996, 1998, 1999 or 2011. Second, she focusses the commission of such crimes in Iraq, not in Syria. Her starting point is the scenario post-conflict, that is, after the termination of the non-international

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armed conflict(s) that took place in Iraq between mid-2014 and the end of 2017, and she takes for granted that the "atrocity crimes" have been committed (including genocide against the Yazidi minority, including perhaps against Christians and Shia Muslims). This limitation is justified by the consolidation of the termination of the conflict in Iraq and the fact that trials are taking place there, on the one hand, and, on the other, by the territorial scope of the mandate of the Investigative Team provided in the resolution 2379 (2017) of the Security Council. The author is aware, however, that many of the analysis can be transferred to the (more abundant) "atrocity crimes" committed by foreign terrorist fighters in Syria. In fact, allusions to Syria appear repeatedly throughout the book. But it is a reasoned choice. And, thirdly, the object of study is limited to the commission of crimes by foreign terrorist fighters, and not by other members of the Islamic State (Da'esh) or, in general, by other parties to the conflict. States seems to apply once more the victor's justice… However, albeit tangentially, the Iraqi reaction to serious violations of IHRL and IHL committed by the other parties to the conflict is addressed. It must also be noted that, though the book deals with issues that properly affect returned foreign terrorist fighters or, in general, those who have left Iraq (for example, their persecution in third States' national jurisdictions), the object of study is not limited to returned foreign terrorist fighters.

Bearing in mind the contents, that is, the questions and the answers to those questions contained in the book, I must review their correspondence with the title and subtitle of the book. I know that these are not random choice of the author and the editor. It should be noted, however, that neither one (Is It Possible to Combat Jihadist Terrorism Through Justice?) nor the other (The Return of the Fighters of the Islamic State After Their Crimes) are completely consistent with that essential object of the investigation. This despite the fact that the author herself refers to the multiple meanings of "justice", other than the prosecution of foreign terrorist fighters, which are present in many contents of the book (for example, the issue of transitional justice in Iraq, the causes of terrorism or the role of equity as a fundamental ingredient in confronting jihadism). Interestingly, the author indicates that, if the book had an additional subtitle, it could be expressed by stating the essential object of the investigation aforementioned: Difficulties, Inconsistencies and Legal Loopholes to Avoid Impunity… (pp. 37-38).

The contents of the monograph are preceded by some Previous Words by the author and a Foreword by Mr. Enrique Mora Benavente, Director General of Foreign and Security Policy of the Spanish Ministry of Foreign Affairs, European Union and Cooperation. It does seem that a list of abbreviations is not necessary. In her Previous Words, among other things, the author reveals that, on the one hand, the monograph has been conceived and elaborated during a research visit at the Center for European Law and Internasionalisation of the Law School of the University of Leicester which perhaps explains that, instead of some scattered references, Spain's response to the problem of foreign (and Spanish nationals) terrorist fighters is not specifically addressed and, on the

 DOI: 10.17103/sybil.23.31

other, that it was part of her exercises in the competition to become a full Professor of Public International Law at the Carlos III University of Madrid.

After an Introduction, the contents of the book are structured in two Parts, followed by an Epilogue and the Conclusions. The bibliography and other sources of knowledge cited and included in the Annex (pp. 327-397) account for the scientific rigor and seriousness of the research. In the First Part (The scenarios and the actors), the following topics are addressed in different chapters: some relevant coordinates for the future of the country and its geopolitical environment; the Islamic State, the barbarism of its crimes in Iraq and the absence of adequate bases to ensure transitional justice; the foreign terrorist fighters, with special emphasis on Security Council resolutions 2178 (2014) and 2396 (2017) and Madrid Guiding Principles (2015/2018), particularly on the specific issue of women and children, which Professor Abad Castelos had already dealt with in 2011 and 2012; and the Investigative Team and its Terms of Reference.

In the Second Part (In the Labyrinth of Criminal Justice), an essential part of the investigation, the author addresses the difficulties in prosecuting foreign terrorist fighters for the commission of "atrocity crimes" in three chapters. First, in Iraq, where the "atrocity crimes" are not established as criminal offences, and there are problems with the situation in prisons, the guarantee of a fair trial and the validity of the death penalty. Then prosecution at the international level, encounters the (so far) lack of "objective" jurisdiction of the ICC and the inexistence of other competent international or hybrid criminal court. Finally, the prosecution in national jurisdictions other than the jurisdiction of Iraq meets with the option between alienation (non-return or non-repatriation), prosecution, rehabilitation or reintegration of foreign terrorist fighters. The third States are not always willing or able to exercise jurisdiction over their nationals and, even less, the universal jurisdiction, whose problems had already been studied by Professor Abad Castelos, particularly between 2012 and 2014. In the worst case, as the author rightly highlights, this lack of disposition manifests itself in targeted killings against foreign terrorist fighters.

Together with the analysis of these difficulties, Professor Abad Castelos openly completes in the Epilogue the essential object of the investigation, that is, addresses the inconsistencies of States facing foreign terrorist fighters and the loopholes to avoid impunity for foreign terrorist fighters enlisted in the Islamic State (Da'esh).

Among the conclusions, perhaps the most evident are that difficulties and inconsistencies are twofold based: on the relative preference for prevention (of terrorism and threats caused by terrorist acts, including those perpetrated by foreign terrorist fighters, and by the return of the foreign terrorist fighters in itself) over the repression (of "atrocity crimes") and the reparation of the victims; and, as usual, on the determining character of the political will of the States. I would dare to underline another conclusions: the possibility of taking advantage of the revision provided in resolution 2379; the duty of States to request the extradition of their national (foreign) terrorist fighters; the novel

 DOI: 10.17103/sybil.23.31

aspects related to the evidences of the commission of "atrocity crimes"; the aspects of the object of study on which it should be further investigated in the future; and the complex, heterogeneous, interconnected and global nature of the problems that are behind, and that has raised, the emergence of the Islamic State (Da'esh), beginning with the invasion of Iraq in 2003 (reviewer's note: the aggression against Iraq). In the words of Professor Abad Castelos, "it is about meditating on the future we want for society" (p. 321).

Outstanding book, in short, that must be added to the debit of the Spanish public university, which has in its credit undoubtedly many serious problems, but also teachers, researchers and managers such as Professor Abad Castelos who are counterpoint and source of inspiration for overcoming those problems.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

Avatares del proceso de adhesión de la Unión Europea al Convenio Europeo de Derechos Humanos. By José Manuel Cortés Martín (Editorial Reus. Madrid, 2018)247 pp.

Since the sixties of the last century —when the Court of Justice of the European Communities began to protect by praetorian way the fundamental rights as general principles of the Law— until the consideration by the Treaty of Lisbon of the Charter of Fundamental Rights of the Union European as primary and binding law, and the mandate to the European Union to adhere to the European Charter of Human Rights, more than 30 years have passed. However, even today, in the 21st century, there is a feeling of dissatisfaction with the system of protection of fundamental rights in the EU and the question of the model of protection of human rights remains unsolved. Much has been written in recent years on this issue that, despite not being novel, still remains topical. Professor Cortés Martín has spent more than a decade dedicated to the study of the protection of fundamental rights in the European Union. He has therefore a broad and consolidated background in this area.

In this monograph, which can be considered a mature work in the matter, Professor Cortés does not just present an overview of the evolution of the protection of human rights in the EU, but rather poses a comprehensive approach to the problem, proposing ways of solution whose implementation must necessarily be accompanied by a clear political will on the part of both the European Union and the Council of Europe. In the introduction, Professor Cortés gives a clear vision of the evolution of the protection of human rights in the EU and shows the work plan to be developed throughout his work. He refers to the way in which EU accession to the ECHR could provide coherence to the protection of human rights in an area where the same jurisdictional bodies must simultaneously apply different legal texts that do not always have the same standards, structures and terminologies (the national legal systems, the ECHR and the CDFUE). Chapter I focuses on the question of whether accession to the ECHR is still necessary or, on the contrary, the progress that has been made in the EU in terms of the protection of fundamental rights, especially the existence of its own Bill of Rights with binding character, has made of this accession a superfluous issue.

In chapter II, the author delves into the jurisprudence of the European Court of Human Rights. On the one hand, he examines its position in relation to the presumption of equivalence of Union law with the European Convention on Human Rights in the case of obligations arising from the European Union law in respect of which the Member States lack discretion (Bosphorus doctrine). On the other hand, he analyzes how this presumption is broken from the Mathews/United Kingdom judgment in 1999, and finally points out the inconsistencies of that presumption. In Chapter III Professor Cortés conducts an in-depth study of the negotiation and the very content of the EU accession Project to the ECHR as well as the scope of the accession in relation to the respect for the ECHR, of the powers of the EU and the autonomy of the law of the Union. Finally, he focuses on the Opinion 2/13 of December 18, 2014, in which the Court of Justice declared that the EU's accession to the ECHR as designed in the Project was not compatible with the Treaties. In Chapter IV, finally, the author makes a series of reflections with a view to

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a renegotiation of the EU accession project to the ECHR, wondering whether the Court of Justice of the European Union will not have opted for a protection too exacerbated of the principle of the autonomy of the law of the European Union, taking into account, above all, the categorical mandate of Article 6.2 of the Treaty of the European Union, which clearly establishes the obligation of the Union to adhere to the European Charter of Human Rights. This work has been edited by Reus Editorial. Due to its moderate length and the specialised but accessible language the author uses, it is a work of interest to any academic, practitioner and, above all, postgraduate students, since there is a growing number of students who orient their final degree projects to these topics of general interest. For all the above said, I congratulate my colleague Professor Cortés Martín, for his useful work and I highly recommend reading it.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

***El Derecho del Mar y las personas y grupos vulnerables*. By Gabriela A. Oanta (ed.), (Bosch Editor, Barcelona, 2018), 426 pp.**

Edited by Gabriela A. Oanta, the volume collects the proceedings of a conference held in Vigo on 24 May 2018, in the framework of a Jean Monnet module that the editor coordinates at the University of Coruña. Particularly appreciable for its timeliness, the publication provides up-to-date insights on the human dimension of the law of the sea, a topic to a great extent still unsettled and scarcely researched until recently. Most notably, the volume focuses on "vulnerable" individuals and groups, whose rights are susceptible to being violated in the maritime context.

In the last decade, the notion of vulnerability has seen increasing use in international and EU law, as well as in the doctrine. At the UN level, the International Law Commission (ILC) has emphasized on various occasions the obligation of States not to discriminate against vulnerable groups and individuals, including the positive obligation to give specific attention to their needs. For instance the 2014 Draft Articles on the Expulsion of Aliens provides that "[c]hildren, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion" shall be treated and protected with due regard to their vulnerabilities, enhancing the level of protection as compared to that reserved for non-vulnerable persons. A similar reference to the "needs of the particularly vulnerable" can be found in the ILC Draft Article on the Protection of Persons in the Event of Disasters (2016) (see extensively T. O'Donnell, 'Vulnerability and the International Law Commission's Draft Articles on the Protection of Persons in the Event of Disasters', 68 *International and Comparative Law Quarterly* (2019) 573-610). As Abrisketa emphasizes, the concept of vulnerable groups is also gaining momentum in the jurisprudence of the European Court on Human Rights. Introduced in the *Chapman v the United Kingdom* judgment of 18 January 2001 (ECtHR, Application No. 27238/95, para. 93, referring to the Roma minority), it has been extended to include detained persons, women, persons with disabilities, and migrants. The Court has attached legal consequences to the status of applicants as members of marginalized and underprivileged groups, for example to establish whether their conditions of detention reached the "minimum level of severity" to fall within the scope of Article 3 of the Convention, or while undertaking proportionality assessments relating to other Articles. As far as EU law is concerned, provisions on vulnerable persons can be found mainly in migration legislation (see e.g. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013, laying down standards for the reception of applicants for international protection).

Against this backdrop, the choice underlying the selection of the issues tackled in the book's chapters is based on a looser notion of vulnerability —not unknown in the literature (T. O'Donnell, *supra*)— that encompasses vulnerable individuals, groups and even States. In the Introduction, Oanta explains the editorial strategy behind the choice

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of topics. Two main themes that run through the book may be identified. The first group of chapters deals with the individual rights of vulnerable persons, a class that includes migrants, seafarers, and children. The second group deals with the rights of peoples and of communities particularly worthy of protection, which are disadvantaged due to geographical conditions, denial of self-determination, poverty and underdevelopment. These include indigenous peoples, peoples living in non-autonomous territories, and the inhabitants of poor States, most notably small islands and archipelagic States.

The book's first chapter, by Abrisketa, presents a thoughtful discussion on the protection of the human rights of people at sea. The author evidences the gaps in the UN Law of the Sea Convention (LOSC), which mainly regulates the exploitation of natural resources and the allocation of jurisdiction among States in different maritime areas. In this connection, it has been insightfully noted that the very wording of many provisions of the LOSC, referring to vessels rather than to persons onboard, reveals "a latent desire to keep people and all the problems arising out of their presence out of the law of the sea picture" (I. Papanicolopulu, *International Law and the Protection of Persons at Sea* (Oxford University Press, Oxford, 2018), at 130). As revealed *inter alia* by the *Intertanko* judgment, the idea of the LOSC as an instrument having exclusively a horizontal, inter-state character, has found ample support (Court of Justice (Grand Chamber), case C-308/06, Judgment of 3 June 2008, *Intertanko*, paras. 55-65). However, Abrisketa succeeds in demonstrating that, as also amply supported by international jurisprudence, human rights rules and principles need to be taken into consideration in order to interpret the LOSC, thus allowing the consistency between the two bodies of law to be enhanced.

The second chapter, by Miguel A. Acosta Sánchez, is devoted to the human rights of migrants: after providing an account of irregular immigration across the Mediterranean Sea from the standpoint of international law, the author considers human rights issues relating to the activities of Frontex, and the struggle against irregular immigration from Morocco to Spain. Fleeing from war, persecution and extreme poverty, driven by sorrow to face the sea aboard unsafe and overloaded boats at the mercy of people smugglers, irregular migrants are without doubt the most vulnerable persons at sea. As a consequence, the reader might have expected to find in the volume more essays on the rights of migrants, refugees and asylum seekers. However, the editorial choice to focus on human rights abuses in contexts other than migration allows a wider range of topics to be covered, to which much less attention has been paid in the legal literature.

After the entry into force, in 2017, of the ILO Work in Fishing Convention No. 188 (2007), the volume pays commendable attention to the living and working conditions of seafarers. To work as a crew member in the fishing sector is one of the most dangerous occupations, even when carried out on board vessels flying the flag of industrialized countries (with regard to France, see A. Raybaud, *Marin, le métier le plus dangereux. Les cassés de la mer*, *Le Monde diplomatique*, December 2019, at 7): the majority of fishermen toil in poor working conditions threatening their safety and dignity, with innumerable fatal

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incidents and violations of workers' rights reported every year. In their chapters, Xosé Manuel Carril Vázquez provides a useful survey of international conventions and EU law provisions on maritime labour, while Adrés Ramón Trillo García focuses closely on Spanish legislation on retirement pensions. The gender dimension of fisheries law is tackled in the chapter by Gabriela Oanta. In particular, the Editor discusses the rights of women working in the fishing sector, by laying down a clear and well documented overview of international treaties, EU legislation and soft law instruments promoting a gender-equitable governance of fisheries. To these instruments, one should add the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UN Doc. A/RES/73/165, 17 December 2018), adopted by the General Assembly just a few days after the publication of the volume and applicable to small-scale fishers and fish workers as well. The first set of chapters ends with Belén Sánchez Ramos's contribution on the rights of the child at sea. The author focuses primarily on the exploitation of child labour in the fisheries sector (on board fishing vessels on the high seas and in on-land processing facilities) and on trafficking for forced labour.

Going on to the second group of chapters, François Féral explores the fishing rights of indigenous peoples, groups that are particularly vulnerable due to historical injustices, marginalization, and forced assimilation. Coastal States have often failed to safeguard traditional and small-scale fishing by indigenous peoples living in their territory, allocating quotas mostly to the benefit of a few large-scale fleets practising industrial fishing. This has resulted in depriving fishing communities of the resources upon which they traditionally depended, giving rise to what has been effectively described as "ocean grabbing"; to a lesser extent, the exercise of traditional small-scale fishing activities is hampered by environmental laws and regulations enacted by coastal States.

Two other chapters of the book are devoted to claims of control over the natural resources of the sea. José Manuel Sobrino Heredia explores questions relating to the conservation and management of fisheries in waters adjacent to non-self-governing territories, most of which are insular States having very large exclusive economic zones. This is a particularly current topic, as demonstrated by the judgment of the Court of Justice of the European Union concerning the Fisheries Partnership Agreement between the EU and Morocco (Court of Justice (Grand Chamber), case C-266/16, Judgment of 27 February 2018, *The Queen on the Application of Western Sahara Campaign UK v. Commissioner of Her Majesty's Revenue and Customs, Secretary of States for Food and Rural Affairs*) and by the *Chagos Archipelago* arbitration award, which ultimately originated from the exercise of jurisdiction over fisheries by the administering Power (*Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom*, arbitration award of 18 March 2015, *Reports of International Arbitral Awards*, volume XXXI, 359-606). In a very informative chapter, Laura Movilla Pateiro considers the steps undertaken by the international community to negotiate an internationally binding regime for marine genetic resources in areas beyond national jurisdiction. The chapter addresses the geopolitical

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implications of Access and Benefit-Sharing (ABS) regimes. It emphasizes the loopholes and inconsistencies of the Biodiversity Convention and of the Nagoya Protocol and accounts for the conflicting positions of States in the current multilateral negotiations. Some mention is also made of the debate (still in its infancy) concerning the legal regime of genetic resources *in silico*. Indeed, the advances in computer science and synthetic biology, while facilitating nonphysical access to genetic resources, are undermining traditional ABS regimes and may give rise to new forms of "biopiracy" as long as the transfer and use of digital sequence information remain unregulated.

Equally cutting-edge is the topic dealt with in the chapter by Antoni Pigrau Solé, relating to the effects of climate change upon Small Island Developing States, whose special "vulnerability" due to rising sea level has been expressly recognized in international fora. The author delves into climate justice issues, illustrating the international solutions and financial mechanisms inspired by the principle of common but differentiated responsibilities. Lastly, the volume considers the problems posed by failed States: Ángel J. Rodrigo underscores how these States can represent a threat to the interests of the international community, by failing to abide by their responsibilities as flag, coastal and port States.

From a methodological point of view, all the book's contributions focus mainly on the analysis of positive law, providing a well-documented and up-to-date treatment of a large body of law and practice, while at the same time proposing some *de jure condendo* solutions. The contextualization and understanding of "vulnerability" might have benefitted from a deeper discussion of the root causes of embedded inequality and marginalization at the various levels taken into account. In any event, addressing most of the new challenges of the international law of the sea, the volume is a valuable contribution to the state of the art and is successful in portraying this branch of international law as a particularly fluid and dynamic area.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

International markets regulation and the erosion of the European political and social model. La regulación internacional de los mercados y la erosión del modelo político y social. **By L.M. Hijonosa Martínez & P.J. Martín Rodríguez (eds.) (Thomson Reuters Aranzadi, Cizur Menor, 2019) 373 pp.**

This book summarizes the main scientific results achieved with the Research Project DER2014-57213-R financed by the Spanish Ministry of Economy, Industry and Competitiveness, led by the renowned International Law professors Hinojosa Martínez and Martín Rodríguez from the University of Granada Law School. The thirteen contributions are written in English and Spanish.

The starting hypothesis of the book is the idea that the technical regulation of markets is not objective, since any 'technical' decision reflects an ideological approach and has (positive and/or negative) social consequences. Both international law and European law impose significant constraints on the legal framework governing markets and limit the sovereign powers of states to regulate them. This situation has been exacerbated by the measures imposed by the EU to alleviate the economic crisis of 2008 that limit fundamental rights of citizens. The book analyses whether these restrictive measures eroded the European social and political model, and to what extent the international legal framework reinforces this trend. In doing so, the book scrutinizes the position of the individual and of their fundamental rights vis-à-vis the markets.

The book is divided into three parts. The first three chapters analyse the effects of the regulation of financial markets on the social model. The chapter 1, written by prof. Hinojosa Martínez scrutinize three paradigmatic examples of European financial reform (the recovery and resolutions of banks, the financial transaction tax and the limits on the remuneration of bank executives) in order to verify the degree to which fairness and maximization of social welfare are taken into account. The author concludes that the drafters of these EU rules have prioritized financial stability over the articulation of instruments generating more distributional effects. The efficient functioning of the financial markets is necessary to uphold a competitive economy, but, following the author, the EU financial reforms must be more sensible to take social rights into account.

In chapter 2, Justo Corti revises the feasibility of the creation of fiscal capacity within the EMU as a macroeconomic stabilization instrument. He explores also the limits that the no bailout golden rule, established by article 125(1) TFEU, impose to the solidarity between Eurozone countries. Jorge Urbaneja supports in chapter 3 the creation of a European Monetary Fund to move towards a genuine mechanism to share risks in EMU. It reaches this conclusion after a careful analysis of the EMU reform since the economic crisis. In particular, it reviews the European Stability Mechanism, the Stability, Coordination and Governance Treaty, and the banking union.

 DOI: 10.17103/sybil.23.34

The part II of the book comprises chapters four to nine, aimed at study the relationship between the regulation of international trade and the social model. Both chapter 4 and 5 are dedicated to the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA). Professor Segura Serrano analyses the trade and regulatory issues generated by CETA and Ozana Olariu studies more critically CETA's Investment Court System for foreign investor as other version of the classical Investor-State Dispute Settlement (ISDS). Chapter 6, written by Rafael Leal-Arcas underlines the stagnation of the multilateral trade system and proposes a bottom-up approach for its reform with greater citizen participation in order to win the race of energy transition from oil dependence to clean and removable energies. Augusto Piqueras García analises in chapter 8 the dialectical relation between trade liberalisation and the protection of national culture, distinguishing cultural goods and goods, protected through justified export control, and services produced by the cultural industry, protected trough protectionist quotas and subsidies. In chapter 8, Rael Marín Aís studies the feasibility for the EU to use the so-called 'economic diplomacy' to export its social values to third countries. After an analysis of the new generations of the EU trade agreements, the reformed instruments of trade defence, the measures fostering social corporate responsibility and the EU's Generalised System of Preferences, he concludes that it concludes that the EU is an actor socially responsible compared to other countries. Finally, Claire O'Brian and Olga Martín Ortega scrutinize the public procurements as a tool for the promotion of human and labour rights in Chapter 9. They propose the transition to a new 'sustainable' public procurement model to better protect the European social model. The current EU public procurement rules safeguard competition and equal treatment between bidders as primary objectives.

Finally, Part II of the book is composed by four dealing with the influence of market regulation on the political model of European countries. In Chapter 10, Carmela Pérez Bernáldez examines the instrument built by the EU to promote and protect the rule of law among the member states. She reviews the powers of the EU institutions to promote the rule of law and she points out the new ECJ's case law concerning the judicial independence of the national judges as an indispensable tool to protect the rule of law. The Chapter 11 is a stimulating work written by Pablo Martín Rodríguez on the ECJ's case law about measures adopted to counter the financial crisis and their consequences for the respect of the rule of law. The explanation is structured around three main axes: the principle of legal certainty, the protection of fundamental rights and the judicial protection of fundamental rights and legitimate expectations. The balance is negative and he concludes that the European responses to the crisis have had a negative impact on essential elements of the rule of law, both at the Union's and the Member States' level. The reasoning he develops is based in a careful analysis of the ECJ case law and the legal doctrine. In Chapter 12, José Antonio Soler Arrébola studies the extent to which collective bargaining instruments serve to transfer social rights from Europe to third countries, in

 DOI: 10.17103/sybil.23.34

particular signing international framework agreements that regulate the activity of European companies abroad. Maribel González Pascual exposes in Chapter 13 the role of national constitutions as the last resort guarantor of fundamental social rights when the EU adopts measures against the crisis that restrict social rights. She criticises the application of EU Character of Fundamental rights by the ECJ in the case law related to EU austerity measures, but she also points the problems experienced by some constitutional courts of the EU Member States to protect social rights against these austerity measures.

In conclusion, the book coordinated by professors Hijonosa Martínez and Martín Rodríguez provides an interesting analysis of some of the most relevant legal questions generated by the austerity measures adopted by the EU against the economic crisis and its negative impact on the rule of law and the preservation of social rights. The aim of the book was ambitious, but the challenge is met. Some contributions are more related than others to the core subject of the book, but it is usual in collective books. In any case, I would recommend reading this book to anyone interested in deepening the relationship between the regulation of the international markets and the protection of fundamental and social rights and the preservation of the European social model. In addition, in the Spanish legal doctrine there is a lack of work on this subject and of this quality. For all the above, I congratulate my colleagues Professors Hijonosa Martínez and Martín Rodríguez and all the contributors for his relevant and useful work on a technical and difficult subject, and I highly recommend reading it.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

AEPDIRI Journals' Review*

Revista Española de Derecho Internacional (REDI), Vol. 71/1 (2019)

Ricardo GOSALBO BONO, "Consideraciones en torno a la distinción entre el fondo y la forma en el Derecho internacional (público y privado)", 71(1) *Revista Española de Derecho Internacional* (2019) [DOI: http://dx.doi.org/10.17103/redi.71.1.2019.1.01]

Considerations on the distinction between form and substance in International law (public and private)

The distinction between form and substance based on watertight, rigid criteria has experienced a renewed actuality owing to a series of controversial international judgments that have introduced disproportionate formal requirements in the field of public international Law. These new formal conditions have put into question the traditional informal flexibility of public international law and have impaired the realization of fairness as a unitary and impartial *corpus*, both procedural and substantive, within the international Rule of Law. Notwithstanding, an analysis of the relevant international practice demonstrates that the quest for international justice at the present stage of change that the international community is experiencing, demands a fluid permeability between the frontiers of form and substance, which have become interdependent and without great value when applied autonomously. Simultaneously, in the field of private International Law, the requirements of the present dynamism of the international relations and transactions between private individuals and economic operators have revealed the failure and inadequacy of the rule *lex fori regit processum*, as formulated and applied in its traditional, unilateral and exclusive scope, both for the purpose of assuring equal treatment between the parties in a dispute and for the realization of substantial justice. In the absence of procedural, transnational principles and rules accepted universally, some national legislators and courts, in particular the European Union, have had a laudable recourse to developing bilateral conflict rules of a procedural nature in order to meet the new challenges, in particular those relating to the characterization and the application of foreign law.

Cástor Miguel Díaz Barrado, "La Cumbre de las Américas: Un espacio para la cooperación sin apenas proyección normativa", 71(1) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.1.2019.1.02]

The Summit of the Americas: An area for cooperation with little legal projection

The Summit of the Americas' practice shows us that it is a cooperation body between States of the region which has developed the little normative work. However, this Summit fulfils the precise

* This section has been prepared by the *SYbIL* Editor-in-Chief with the aid of the editors of the *REDI and REEI*.

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conditions to allow States to adopt legal agreements within it. Above all, the Summit of the Americas encourages the proclamation of some essential principles which could eventually be part of the international legal order. Beyond the specific results, under no circumstances we should dispense with bodies of this type in the domain of International Law. In fact, often and many times, practice shows that political positions of States receive a legal translation. As it is known, the Summit adopted no agreement on the establishment of a Free Trade Area in the Americas. However, at least, the Summit of the Americas has focused in the «democratic principle» which has gained legal force in the region as well as in the «Free Trade principle» that, surely, in the field of customary law is in the process of crystallization.

Guillermo Palao Moreno, "La determinación de la ley aplicable en los reglamentos en materia de régimen económico matrimonial y efectos patrimoniales de las uniones registradas 2016/1103 y 2016/1104", 71(1) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.1.2019.1.03]

The law applicable to matters concerning matrimonial property and property consequences of registered partnerships according to EU Regulations 2016/1103 and 2016/1104

Regulations 2016/1103 and 2016/1104 involve a new step forward in the development of a European Private International Law in the field of Family and Successions. From the perspective of choice-of-law, their solutions are strongly inspired by their conventional and European precedents, creating a new and uniform legal framework with an *erga omnes* effect for those Member States participating in the enhance cooperation procedure. Those instruments favour party autonomy, establishing solutions in defect of choice of law, which provide legal certainty and predictability for spouses/partners and third parties. Despite their benefits, from a general perspective, those Regulations are not free of uncertainties, apart from the internal problems which are linked to the lack of a Spanish legal framework for registered partnerships.

Felipe Gómez Isa, "La Declaración de las Naciones Unidas sobre los derechos de los pueblos indígenas: un hito en el proceso de reconocimiento de los derechos indígenas", 71(1) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.1.2019.1.04]

The United Nations Declaration on the Rights of Indigenous Peoples: A Milestone in the Process of Recognition of Indigenous Rights

Indigenous peoples have lived through a process of invisibility and systematic exclusion practically ever since the era of conquest. The arrival of republican States in Latin America following the decolonization process did not involve a substantial change in the traditional relationship of subjection and submission endured by native peoples in the Americas. In the mid-twentieth century, the international community began to pay attention to the marginalized situation of indigenous peoples. The main objective was to integrate some peoples that were considered to be backward and in need of protection. It was within this paradigm that most of the interactions with indigenous peoples have occurred, such as the first international treaty adopted in this field, Convention No. 107 of the International Labour Organization (ILO, 1957). This situation began to change with the adoption of Convention No. 169 by the ILO in 1989, and especially with the recently adopted United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007). From this point onwards, indigenous peoples have become subjects of rights under

international law rather than objects of protection, thus becoming protagonists of a far-reaching process of expansion of human rights.

Javier Morales Hernández, "Las relaciones internacionales en Rusia: desarrollo, enfoques y debates", 71(1) *Revista Española de Derecho Internacional* (2019)
[**http://dx.doi.org/10.17103/redi.71.1.2019.1.05**]

International Relations in Russia: Development, Approaches, and Debates

This article aims to analyze the emergence and development of International Relations as a scientific discipline in Russia, including its most recent debates. In the introduction, we explain the object of study in the context of the growing attention towards academic debates in languages other than English, as a response to the hegemony of American authors and paradigms. The following section describes the beginnings of scientific research and university teaching of International Relations in the USSR, as well as the changes that have taken place in the independent Russian Federation. The third section compares their various conceptions of the discipline, position within the social sciences and main theoretical approaches in the present day. The fourth section examines the debate about the convenience of preserving a national school of International Relations, opposed by those who prefer to adopt Western concepts and paradigms. Finally, the conclusions reflect on the challenges faced by Russian International Relations scholars to achieve greater international recognition.

Salomé Adroher Biosca, "la protección de adultos en el Derecho internacional privado español: novedades y retos", 71(1) *Revista Española de Derecho Internacional* (2019)
[**http://dx.doi.org/10.17103/redi.71.1.2019.1.06**]

Protection of adults in Private international Spanish law. News and challenges

Legal framework on international protection of adults in Spanish law has been recently modified through four different legal reforms: Law 7/2015 on jurisdiction rules, law 26/2015 on applicable law rules and laws 15 and 29/2015 on recognition and enforcement rules. This article analyzes these reforms through recent Spanish jurisprudence and administrative decisions and underlines the convenience of the ratification of the HAPC 2000 by Spain.

Stelios Stavridis, "La diplomacia parlamentaria: el papel de los parlamentos en el mundo", 71(1) *Revista Española de Derecho Internacional* (2019)
[**http://dx.doi.org/10.17103/redi.71.1.2019.1.07**]

Parliamentary diplomacy: the role of parliaments in the world

This study is about parliamentary diplomacy. It begins by asking if it is an oxymoron or a reality. It explains how, after having initially been of the realm of practitioners alone, now there is also academic interest in it. The article shows how from its initial meaning of «conference diplomacy», both the concept itself and its practice now represent a new form of diplomacy. The essay includes several illustrations of this practice and also mentions International Parliamentary Institutions (IPIs) as further empirical evidence of the «parliamentarization» of global affairs but also as yet another practical example of parliamentary diplomacy.

Revista Española de Derecho Internacional (REDI), Vol. 71/2 (2019)

Rui Manuel Moura Ramos: "A codificação do direito internacional privado português em perspectiva, meio século mais tarde", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.01]

The codification of portuguese private international law in perspective, half a century later

The present study deals with fundamental issues of Portuguese private international law codification, embodied in 1966 Civil Code. Placing this codification in the evolution of this matter in Portugal and in the situation existing at the time in the different european states, the Author refers the main characteristics of the system then adopted and the essential options that have been taken, either in the general or in the special part. In a second moment, the evolution that took place during the time the system has been in force is mentioned, characterized by the large number of rules contained in special laws, the reception of international conventions and, after, by the emergence of european union private international law. It is also stressed how these developments have stronly reduced scope of application of 1966 codification, also highligting the elements of materialisation, flexibility and specialisation already presents in portuguese private international law. Finally, permanence of some paradigms and emergence or renforcement of some leading concepts (as the constitutionalisation of the system and the deepening of parties autonomy) are stressed, and reference is made to the fields where new initiatives may be expected from Portuguese private international law legislator.

María Teresa Infante Caffi, "La Corte Internacional de Justicia se pronuncia sobre la demanda de Bolivia contra Chile relativa a una obligación de negociar. La sentencia de 1 de octubre de 2018", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.02]

The International Court of justice decided on the complaint of Bolivia against Chile relating to an obligation to negotiate. The judgment of 1 October 2018

By judgment of October 1, 2018, the International Court of Justice has decided on the submission of the Plurinational State of Bolivia regarding an alleged existence of an obligation under Chile, to negotiate an agreement granting Bolivia sovereign access to the sea. The Court has ruled that neither general international law nor the conduct of the parties resulted in the existence of such an obligation. The case raised the question of where and how that obligation had been generated, if it had been through the conduct of the respondent, or by agreement of the parties, as well as about the role of general international law. The case has recalled the theoretical debate according related to obligations characterized as part of a *pactum of negotiando* or of a *pactum of contrahendo*. The response of the Court to these various elements has been that it could not reach the conclusion that Chile had «the obligation to negotiate with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean», as stated by Bolivia in its submissions. Among other elements, the Court also affirms that art. 2.3 of the Charter of the United Nations establishes a general duty to settle disputes in order to preserve international peace and security, and justice. And, it does not indicate that the parties are obliged to resort to a specific method of settlement, such as negotiations, a term which is not mentioned in the said provision. Accordingly, the Court could not accept the other final submissions presented by Bolivia, which were premised on the existence of such an obligation.

Javier A. González Vega, "*En busca del esquivo mar:* la controversia Bolivia-Chile ante la Corte Internacional de Justicia", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.03]

In search of the elusive sea: the Bolivia-Chile dispute before the International Court of Justice

This article addresses the study of the dispute between Bolivia and Chile regarding the *obligation to negotiate an access to the Pacific Ocean*, focusing on the judgment on the merits of 1 October 2018. It starts by considering the stands taken by both Bolivia and Chile in the successive phases of the procedure, leading to the defining of restrictively the object of the controversy made by the Court in its previous decision on admissibility (preliminary objection) of 24 September 2015. Further, the analysis of the 2018 judgment reveals a Court's approach inspired by a formalist and voluntarist conception of International Law, unable to overlooking the slightest legal significance of the numerous diplomatic exchanges between the parties over almost a century of contacts. Contrary to this angle, it is argued that a more flexible approach to the elements of the case, paying due attention to the principle of good faith, might have drawn diametrically opposed conclusions and the consequent recognition of a legal obligation incumbent to Chile.

Fabián Novak, "La conducta ulterior de las partes como regla principal de interpretación de los tratados", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.04]

Subsequent conduct of the parties as main rule for treaty interpretation

This study analyzes recent advances and developments around one of the most important rules of treaty interpretation: the subsequent conduct of the parties. In this sense, this study aims to establish the content and scope of this main principle of interpretation, reflected both by the 1969 Vienna Convention on the Law of Treaties and by international custom, taking into account its application by international jurisprudence but also the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties adopted by the International Law Commission in August 2018. This will be especially useful for those who apply international law, both within the States as well as at international entities, in their permanent work of construing, applying and implementing international treaties.

Matthew Kennedy, "Las reclamaciones sin infracción en las diferencias relativas a la propiedad intelectual en la OMC", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.05]

Non-violation complaints in intellectual property disputes in the WTO

WTO Members have agreed many times not to file non-violation and situation complaints under the TRIPS Agreement, most recently in a Ministerial Decision adopted in Buenos Aires in December 2017. The ongoing dispute in *Australia - Tobacco Plain Packaging* is just the type of case where that Decision is intended to avoid non-violation claims. Even so, nothing prevented the complainants in that case from filing non-violation claims under Australia's tariff concessions on cigars and cigarettes. Drawing on that example, this article explores the scope for non-violation claims in intellectual property disputes as it emerges from the relationship between GATT 1994 and TRIPS. It concludes that non-violation claims have always been available in intellectual property disputes when filed under WTO Members' individual concessions and commitments, although they would be difficult to prove. However, if a Member presented such a claim under

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TRIPS itself after the expiry of the current Ministerial Decision, a panel could find that it disclosed no valid cause of action.

Nuria Marchal Escalona, "El marco regulador en proyecto en España para la resolución alternativa de conflictos: ¿nuevas perspectivas para las reclamaciones de consumo?", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.06]

The regulatory framework project in Spain for alternative conflict resolution: new prospects for consumer claims?

With Law 7/2017, the legislator intends to favor the development and qualification of alternative consumer dispute resolution systems to promote consumer confidence, although this task has not yet finished. Proof of this is the legislative initiative presented by the Spanish legislator for conflict resolution in the field of air transport and in which an *ad hoc* procedure is designed for this type of claims. Its general assessment, although positive, is susceptible to improvement for its complete adaptation to European Law and Law 7/2007. However, we believe that it is necessary for the Spanish legislator to bet on the development of joint and coordinated channels of action between the RAL entities and the judicial system. Consumer confidence would be greater if the RAL entities help facilitate the resolution of litigation in the judicial process, and the new Draft Law to promote mediation seems to be the opportunity to materialize this purpose, by opting in this area for a change of model oriented towards the «mitigated mandatory mediation». A model of mediation that, as we have shown, does not violate either the principle of autonomy of the will or that of effective judicial protection. In addition, we believe that this legislative initiative could be a great opportunity to help facilitate the resolution of litigation arising in the field of consumer law. However, it is an initiative in which there is scope for improvement.

Yaelle Cacho Sánchez, "El potencial desarrollo del nuevo procedimiento consultivo ante el Tribunal Europeo de Derechos Humanos: fortalezas, debilidades, oportunidades y amenazas", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.07]

The potential development of the new advisory procedure before the European Court of Human Rights: strengths, weaknesses, opportunities and threats

Protocol No. 16 to the European Convention on Human Rights, which came into force on 1 August 2018 for the States that have ratified it, allows the highest courts and tribunals of a State Party to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols. Due to recent developments, we have assessed the particular potential of this new advisory procedure to guarantee the long-term effectiveness of the Convention system. For that purpose, we have examined its context, which covers the reform process of the ECHR system, and its most significant elements as an advisory procedure promoting judicial dialogue. As a result of this analysis, we have identified some strengths and opportunities that may ensure the achievement of its objectives, as well as weaknesses and threats which may adversely affect the long-term effectiveness of the system. The latter may require to take, if necessary, appropriate corrective measures.

Gloria Fernández Arribas, "Corte Penal Internacional y crimen de agresión: el levantamiento de inmunidades mediante la remisión de asuntos por el Consejo de Seguridad", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.08]

The International Criminal Court and the crime of aggression: the waiver of immunities through Security Council referrals

The ability of the Security Council to make referrals under article 15 ter, which includes crimes of aggression committed in the territory of non-States parties or by nationals of non-States parties, opens the door to the analysis of the significance of foreign states officials' immunities before the ICC, since they would be the material authors of those crimes and the recognition of the immunities would render the Security Council's referrals practically ineffective. This paper will analyze the value of such immunities, focusing, in first place, on the existence of a rule of customary law of non-recognition of immunities before international criminal tribunals, and secondly, it will focus on the possibility that the Security Council's referrals entail an implicit waiver of immunities.

Ray Freddy Lara Pacheco, "Las ciudades mundiales y globales en el medio internacional, una revisión teórico-metodológica desde las relaciones internacionales", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.09]

World cities and global cities in the international medium, a theoretical and methodological revision from international relations

This paper summarizes the state of the art of the World and Global Cities studies which, adopting an International Relations point of view, have addressed the influence on global governance of World and Global Cities, together with their ability to create networks with political and economic interactions and their role as actors in the International System.
Like all theoretical and methodological approaches, the one espoused by the above-mentioned studies has been subject to criticism, which has been tacked with in parallel to the consolidation of an epistemic community on the «city» in the discipline of International Relations. The author of this papers claims that thanks to the progress experienced since the eighties until today by the school of the Global City, its approach has become the best positioned perspective in the area of IR, although it is not the only one.

Cesáreo Gutiérrez Espada, "Los sistemas de defensa contra drones, a la luz del derecho internacional", 71(2) *Revista Española de Derecho Internacional* (2019) [http://dx.doi.org/10.17103/redi.71.2.2019.1.10]

Defense systems against drones, in light of international law

The increasing use of drones, armed and unarmed, by states and non-state actors, in the framework of international and / or internal armed conflicts or in the absence of them, forces any State that intends to protect its citizens and infrastructures, as well as to its Armed Forces, bases and facilities, inside or outside the national territory, to equip itself with Defense Systems against Drones, particularly those of small size, reduced speed and limited height (LSS: Low, Slow, Small). This paper studies the types of existing systems and the critical assessment of their possession and use in the light of International Law. And it takes advantage of the recent adoption (January 2019) of a National Concept against UAS LSS by the Joint Center for the Development

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of Concepts (CCDC) of the Higher Center for Defense Studies (CESEDEN) (Ministry of Defense), to also pronounce on this text in the light of current International Law.

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Paloma García Picazo, 'Biopolítica del sistema mundial: varias reflexiones sobre sus derivas patológicas', 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.02]

Biopolitics of the world system: some reflections about its pathological drifts

Taken as a premise some of the substantive aspects of the present world accelerated climatic change and environmental degradation together with their estimated causes and effects; realistic forecasts announcing a constant and exponential planetary demographic growth; radical increase of world population's movements throughout the world: induced, forced and compulsory (migrations and internal and international displacements, adding their consequent and massive petitions of residence, citizenship, asylum and refugee rights), this article preceded by two theoretical proposals: Gaia Theory, Anthropocene- performs a specific theoretical digression in which coincide several thesis, conceptually coherent to the previous approach, stemming from M. Foucault extensive work: Biopolitics and Governmentality. Conceived in terms of just a conjectural essay, virtually useful to provide an overview of some of the most critical international issues which affect the present times, this contribution would not pretend at all to provide any 'recipe', 'diagnostic' or 'pronostic' of instrumental or empyrical character, intending merely to expose a qualified repertoire of eventually valuable elements for a theoretical international analysis, debate and reflection.

Angel Sánchez Legido, 'Externalización de controles migratorios versus derechos humanos', 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.03]

Externalization and outsourcing of migration controls vs. Human rights

The aim of this article is twofold. On the one hand, it tries to expose the main elements of the European policies of dislocation and outsourcing of migratory controls and to describe the risks that such policies entail from the point of view of human rights and international and European norms on international protection. On the other hand, taking into account the serious risk of evasion of Rule of Law controls that such policies entail, it is attempted to find in the case law of European courts and, above all, the European Court of Human Rights, the elements that would allow rebuild the system of checks and balances so eluded.

Yaelle Cacho Sánchez, "La agenda 2030 para el desarrollo sostenible y el Convenio Europeo de Derechos Humanos: ¿La reforma de su sistema de protección podría incidir en la implementación del ODS 16 ("paz, justicia e instituciones sólidas")?", 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.04]

The 2030 agenda for sustainable development and the European Convention on Human Rights: could the reform of its protection system influence the implementation of SDG 16 ("peace, justice and strong institutions")?

Beyond the human rights approach adopted by the 2030 Agenda, it seems possible to connect the SGD 16 about "Peace, justice and effective, accountable and inclusive institutions" with the ongoing reform process of the European Convention on Human Rights, since this process enshrines the right of individual application to the European Court of Human Rights as a cornerstone of the system and develops in such a way the principle of subsidiarity that States are committing themselves to institutional strengthening for the effective protection of human rights. On this basis, the reform of the ECHR may contribute to the implementation of the 2030 Agenda may be conceived. In this scenario, the ongoing reform process of the ECHR is analyzed briefly as a previous step required to understand the two elements identified. After a general contextualization of SDG 16 in the 2030 Agenda, the targets and indicators of this Goal are examined from the perspective of the right of access to justice and the institutional strengthening of the states, in order to verify the possible connections between this Goal and the two highlighted developments concerning the reform of the Convention. The goal is to find new solutions to achieve collective aspirations of human development represented by 2030 Agenda and to ensure its universal and transformative character.

Daniel Iglesias Márquez, "La litigación climática en contra de los carbon majors en los Estados de origen: apuntes desde la perspectiva de empresas y derechos humanos", 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.05]

Climate litigation against the carbon majors in the home states: An analysis from the perspective of business and human rights

The progress in the science of climate change have made it possible to identify and quantify in detail the extent to which the contribution of certain corporations to climate impacts affects the necessary conditions for the enjoyment of human rights. This implies that a specific group of corporations is becoming the target of various strategies of climate litigation before judicial and non-judicial mechanisms, in order to bear the cost of prevention and mitigation measures as well as to hold accountable for human rights violations associated with their climate impacts. This paper analyses, from a business and human rights perspective, the feasibility to file legal actions against corporations in their home States for their contribution to climate impacts in third States. In this regard, it argues that these particular kind of cases not only have the potential to influence in the climate actions of the major private greenhouse gas emitters, but also in the States' regulatory activity, especially those in the Global North.

Eva M. Vázquez Gómez, "La protección de la diversidad biológica marina más allá de la jurisdicción nacional. Hacia un nuevo acuerdo de aplicación de la Convención de Naciones Unidas sobre el Derecho del mar" , 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.06]

The protection of the marine biological diversity of areas beyond national jurisdiction. Towards a new implementing agreement of the United Nations Convention on the Law of the Sea

This paper, on the one hand, analyses the existing legal framework of the marine biodiversity in areas beyond national jurisdiction, and, on the other hand, the previous steps relating to the development of a new implementing agreement of the Law of the Sea Convention aimed at creating a global and specific legal system in this respect, including the elements which will be discussed during the negotiation.

Reyes Jiménez-Segovia, "Los sistemas de armas autónomos en la Convención sobre ciertas armas convencionales: Sombras legales y eticas de una autonomía ¿bajo el control humano?" , 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.07]

Autonomous weapon systems in the Convention on certain conventional weapons: Legal and ethical shadows of an autonomy, under human control?

Autonomous Weapon Systems, also known as Killer Robots, are in the armed conflicts to stay. Since 2014, the State Parties to the Convention on Certain Conventional Weapons debate on how to bring out an instrument for combat whose use raises serious legal challenges and important ethical issues. The impossibility of elaborating a common definition of this type of weapons has got the States repeatedly trapped in a vicious circle, preventing them from tackling legal and ethical issues of major humanitarian relevance. This study presents the technical keys of Autonomous weapons which originate the current blockage and delves into its consequences on legal and ethical issues and it proposes a set of comprehensive and clear actions that guarantee its use compliant with the international humanitarian law and subject to a continuous and meaningful control by the human beings.

Nuria Pastor Palomar, "Reservas a la Convención sobre los derechos de las personas con discapacidad", 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.08]

Reservations to the Convention on the rights of persons with disabilities

In expressing their consent to be bound by the Convention on the Rights of Persons with Disabilities, some States have made reservations and interpretative declarations that affect virtually all of their provisions. Some of these reservations raise problems regarding their compatibility with the object and purpose of the treaty: those directed to provisions that play a key role in the structure of the treaty, that do not allow derogation under any circumstances, those that express customary law or even jus cogens, or those written in a general way. In some cases, the other States parties have expressed their rejection, opting for the separability of the invalid reservation of the instrument of manifestation of consent, that is, by the application of the treaty in its entirety without the author State being able to benefit from its reservation. But this response has not been uniform. The treaty monitoring body, the Committee on the Rights of Persons with Disabilities, has also constantly warned about the obligations that allow the integrity of the treaty to be preserved. The study of these issues allows us to reflect on the scope of States' compliance with the new model of disability based on human rights adopted by the Convention.

Ángel Espiniella Menéndez, "Responsabilidad civil por accidentes de trabajo transfronterizos", 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.09]

Civil liability for cross-border work accidents

The civil liability of the employer derived from an international work accident has not been expressly regulated. After asking which could be the current model derived from this silence, its adaptation to the typology of accidents and to the intervention of third parties is analysed. With this aim, the essay is composed of five epigraphs: I. The silences of the rules of PIL: 1. The need of express rules. 2. Labour approach versus damages approach. II. Looking for a PIL approach for international work accidents: 1. International Jurisdiction: two insufficient approaches: A) Approach based on characterization. B) Approach based on jurisdictional order. 2. Applicable law: a puzzle of parties, damages and employment relationship: A) Law of the common habitual residence: proximity to the employer and employee. B) Law of the accident: proximity to the harmful event. C) Law of the contract of employment: the most connected law to the employment relationship. 3. Freedom of choice and work accidents: a blurred relation. A) Work accidents in international contracting clauses. B) Choice of law clauses. C) Choice of court clauses. III. PIL and Typology of international work accidents: 1. Standard Case: accident in the place of habitual performance of the work. 2. Special cases by the mobility of the employee: A) Accidents of transferred employees. B) Accidents of temporarily posted employees. C) Accidents of cross-border employees. D) Accidents of seasonal international employees. 3. Special cases by the international nature of the service: A) Work accidents during transnational services. B) Work accidents during nomadic services. C) Work accidents in international spaces. 4. Special cases by the irregularity of the relationship: A) International accidents of "false self-employed persons". B) Accidents of foreign employees in an irregular situation. IV. PIL and intervention of third parties in the international work accidents: 1. Several employers and international work accidents: A) Work accidents in cases of international subcontractors. B) Work accidents in cases of international assignment of workers. C) Work accidents in cases of international succession of firms. D) Common Aspects. 2. The insurer of the international employer's liability: A) Joint claims against the employer and the insurer, B) Direct claim of the employee against the insurer. V. Conclusions.

Javier Carrascosa González, "Traslado intraeuropeo de la sede social de las sociedades de capital", 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.37.10]

Cross border transfer of company seat in the European Union

This work deals with the transfer of the companies' head office under European private internacional law. The economic reasons for that transfer is examined as well as the three levels of regulation: European material law, the law of the State where the seat of the company was previously located and the law of the State of the new seat. Not only are the main judgments rendered by the ECJ in the matter considered, but also the consequences of that tranfer are carefully analized. The four seminal judgments by the ECJ Daily Mail, Cartesio, VALE Építési Kft. and Polbud shed some light on the necessary coordination between European substantive law, the law of the member state where the seat of the company was originally placed and the law of the member state of the company's new seat. Different legal options are open for companies that want to leave the state where the previous company's seat is located. Companies are allowed to transfer their seat to another member state with a parallel change of their governing law or manteining that law although the seat has been transfered to another member state.

Revista Electrónica de Estudios Internacionales (REEI), No. 38 (2019)

Teresa Fajardo del Castillo, "El Pacto Mundial por una migración segura, ordenada y regular: un instrumento de soft law para una gestión de la migración que respete los derechos humanos", 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.02]

The Global Compact for a secure, ordered and regular migration: a soft law instrument for management of migration respecting human rights

The Global Compact for a Secure, Ordered and Regular Migration was adopted on December 2018 by 163 States at the Intergovernmental Conference of Marrakech and some days later, it was endorsed by General Assembly of the United Nations in its Resolution 73/195. This Pact together with the Pact for Refugees faces normative action through soft law to adopt common "rules" for "human mobility in the 21st Century". However States proclaim their sovereignty on the subject. This instrument of soft law should serve as a reference for the exercise of sovereign competences in aspects that until now belonged to domaine reservé and for the adoption of a framework for the management of regular migration, although it also marks the reverse of the management of (un) safe, (un) ordered and irregular migration. It will also guide multilateral cooperation within the Organization of the United Nations and the International Organization of Migration.This article will deal with the scope and legal nature of this instrument and its capacity to trigger a model of management of migration while preserving human rights.

Pilar Pozo Serrano, "El Pacto Mundial sobre los refugiados: límites y contribución a la evolución del derecho internacional de los refugiados" , 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.03]

The Global Compact on refugees: limits and contribution to the development of international refugee law

The Global Compact on Refugees approved in 2018 aims to improve the response of the international community to large displacement of refugees and protracted refugee situations. The need for an equitable distribution of the burden and responsibility on refugees, present in the work of UNHCR for years lacked, however, explicit normative support. Despite an extensive state practice of according protection to individuals not covered by the refugee definition of the 1951 Convention and its 1967 Protocol, including large-scale displacements of refugees, positions assumed by the States prevented to recognize the existence of a customary norm. The adoption of the Global Compact provided an opportunity to fill these gaps. The political climate surrounding the negotiations and the adoption of the Pact, however, did not enable the adoption of an ambitious text. Several elements were excluded from the Pact during the negotiations. In the end, burden sharing and responsibility sharing were at the core of the Pact which devised novel mechanisms aimed to change the way that the international community respond to the situations of the refugees.

Jaume Ferrer Lloret, "La transparencia y el control internacional en el Acuerdo de París de 2015: ¿Un self contained regime? " , 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.04]

Transparency and international control in the 2015 Paris Agreement: A self contained regime?

With the arts. 13, 14 and 15 of the Paris Agreement of 2015 and the Decisions of the Conference of the Parties (CMA) which develop them, a complex institutional and procedural structure is established in order to ensure transparency and international control in the application and compliance with the provisions of this international treaty. In this sense, in art. 13 the so-called enhanced transparency framework is regulated, which must be made effective first through a technical expert review, and then through a facilitative and multilateral review of progress within the CMA. Art. 14 provides for the so-called global stocktake, aimed at assessing the compliance of all parties of the Paris Agreement. And in art. 15 a mechanism is established to facilitate the implementation and promote compliance with this international treaty. It remains to be seen if, given the urgency of the response to climate change, the working of this entire institutional and procedural structure will allow the goals set forth in art. 2 of the Paris Agreement to be met. As of today and as a provisional assessment, we can have a healthy dose of skepticism in this regard.

María Ángeles Sánchez Jiménez, "Plurinacionalidad y autonomía de la voluntad en el ámbito de la ley aplicable al divorcio", 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.05]

Multiple nationality and party autonomy concerning the applicable law to divorce

The aim of this paper is to analyse the impact caused by the applicability of the procedure established in the Regulation (EU) 1259/2010 for multiple nationals recital (22) in terms of the party autonomy regarding the choice of the applicable law to divorce introduced by art. 5 of the above-mentioned Regulation. To this end, this analysis begins by specifying the questions raised by multiple nationality in the field of the party autonomy (I). Such precision allows for a subsequent analysis of the response given by recital (22), with the objective of evaluating its scope and consequences (II). This constitutes the essential foundation upon which the impact of this solution for the different situations of multiple nationality will be considered. The results of this analysis allow to confirm the limitations of the choice of the applicable law to divorce on the basis of the connecting factor of nationality and, consequently, the limitations of the party autonomy (III). The evaluation of the consequences derivated from this development as well as the consideration of the appropriate solution for overcoming them is the main objective of the final considerations (IV).

Javier Maseda Rodríguez, "Procesos paralelos en materia de crisis matrimoniales: régimen de la litispendencia (y acciones dependientes) intracomunitaria" , 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.06]

Parallel judgments in matrimonial matters: EU lis pendens (and dependent actions) rules

This work analyses the EU lis pendens rule of art. 19 of Regulation (EC) 2201/2003 in relation exclusively to the parallel proceedings of legal separation, divorce and marriage annulment. Taking into account the future application of Regulation (EU) 2019/1111, repealing Regulation (EC) 2201/2003, the rigid nature of this rule is examined, valuing the flexibility possibilities of the prior tempore with special reference to the forum non conveniens in matrimonial matters. Likewise, the question of the identity of parties and cause of action in parallel matrimonial proceedings, paying special attention to the dependent actions and to the consequences for the goals of Regulation (EC) 2201/2003 derived from the equal weight given to legal separation, divorce and marriage

annulment. Determined the seising of a EU matrimonial court for lis pendens, specially, mandatory attemps for matrimonial reconciliation, the procedural exigences of the rule for the first and second seised court are studied, dedicating a section to the possibility and problems of transfer of parallel actions, especially with respect to the choice of law rule related to the action transferred, ending with a reference to the relationship between EU lis pendens and Spanish notarial divorce

Mariano J. Aznar, "The notions of 'preferential right' and 'interest' of States in the protection of the underwater cultural heritage", 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.07]

Las nociones de "derecho preferente" e "interés" en la protección del patrimonio cultural subacuático

The notions of preferential right and interest of states are not alien to general international law or the law of the sea and, as hypothesis, there is a subtle and plausible trend to prefer the later before the former when addressing the legal regime of global commons. Considering the underwater cultural heritage (UCH) as a possible component among these commons, this article discusses how to build up a legal regime protecting UCH progressively abandoning the presence of rights and its substitution by the notion of interest. A quest for the holders of this interest and their identification in casu through the revisited notion of verifiable link, the content and extent of their legal capacities and the responsibilities these stakeholders may have –particularly states–, and the legal regime governing all these issues are the purpose of these pages. This article will discuss first the notion of preferential right as used in international law and the law of the sea, in general, followed by the study of the presence and projection of that notion in current international legal texts governing UCH. The same scheme of analysis will be followed when addressing the notion of legal interest and its performance as an operative concept both at the general level of international law and the law of the sea and, later, how this notion may be creating a new legal and political canvas for the protection of UCH.

Luis Pérez-Prat Durbán, "Trucco o Trato. La Sentencia de la Corte Internacional de Justicia de 1 de octubre de 2018 en el asunto de la obligación de negociar un acceso al Océano Pacífico (Bolivia C. Chile)" , 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.08]

Trucco-or-Treat. The Jugdment of the International Court of Justice of 1 October 2018 in case Obligation to Negotiate Access to the Pacific Ocean (Bolivia V. Chile)

The award of the International Court of Justice of October October 1 2018 has ruled in Chile's favour on the question of whether Chile should be given an obligation to negotiate with Bolivia for its sovereign access to the Pacific Ocean. The refusal to recognize the existence of this obligation has been made after the analysis of a considerable amount of acts, declarations and behaviours of the parties - bilateral agreements, unilateral declarations, acquiescence, estoppel, etc -, with the constant result of denying the possibility that Chile's intention to commit has emerged. The work of the Court gives rise to criticism, since it has been an exercise in formalism and voluntarism, which has ignored, as plausibly shows dissenting opinions, the crystallizing effect of the aforementioned obligation in some of the episodes of Chilean and Bolivian practice.

José Ignacio Paredes Pérez, "Una lectura de la teoría conflictual de Savigny desde la perspectiva del reconocimiento de los derechos adquiridos" , 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.09]

A reading of Savigny's choice-of-law theory from the perspective of recognition of acquired rights

The aim of this work is the analysis on the legal perspective of recognition in Savigny's choice-of-law theory and the important role of the protection of acquired rights. A deep of his work shows us the double function of this notion, as an objective and as principle for the interpretation and application of the model positivized by the author. Regarding the main purpose, the spatial continuation of acquired rights, Savigny takes in account this aspect at the beginning of the creation, given he does not only restrict himself to the determination of the limits of the existing law in a period. He goes beyond, he tackles it in the dynamic sense, emphasising the acquired individual right, as an object of the legal relationship, and always with the aim of spreading its effects in the frame of the community of law. The analogy found by the author between the spatial and temporal limit of the legal rules contributes to this dynamism. Savigny, though, does not stop with the creation of the legal relationship but tackles as well the phase of extraterritorial validity of acquired rights. This matter places us inside the legal thought of the author facing the recognition of the acquired rights because of a change of a formal element and from the recognition of acquired rights based on legal acts verified abroad.

Jonathan Pass, "World hegemony in question: the complexities & contradictions of China's 'passive revolution' in its global context " , 37 *Revista Electrónica de Estudios Internacionales* (2019) [DOI: 10.17103/reei.38.10]

La hegemonía mundial en entredicho: las complejidades y contracciones de la 'revolución pasiva' de China en su contexto global

China's unprecedented meteoric rise has dramatically altered the structure and functioning of the global order sparking debate about whether it may become a 'world hegemon'. The Neo neo-Gramscian perspective adopted here understands hegemony as a power relationship between state-society complexes, each determined by the social forces emergent from its particular class configuration. To enjoy world hegemony a state-society complex must, amongst other things, enjoy politico-cultural hegemony over its subordinate counterparts, manifested in intellectual and moral leadership, enabling it to remaking the world in its 'own image'. In order to assess China's 'hegemonic credentials' (and the kind of world order it would be) according to this criterion, this study examines the evolving and contradictory nature of the country's ongoing top-down social restructuring a passive revolution within the context of a changing global capitalist system. Contemporary China stands at a crossroads, its growth model "unstable, unbalanced and uncoordinated" and its society far from "harmonious". Against the backdrop of authoritarian Caesarism, we argue, a nascent hegemonic project has emerged under Xi Jinping, which seeks not just to carry out profound domestic social reform, but to extend Chinese hegemony internationally, as witnessed over the last few years. We conclude that for the foreseeable future Chinese world hegemony appears unlikely, amongst other reasons because its present societal model fails to inspire emulation abroad, a key requirement for intellectual and moral leadership.

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Climate Change as a Disrupter of the Notion of Border in International Law

Pau de VILCHEZ MORAGUES*

Abstract: Due to its global nature and effects, climate change is generating considerable tension in several fundamental concepts and principles of public international law, such as the principles of no harm and prevention, human rights, or the very physical basis on which the concept of territorial sovereignty is grounded. At a time when the fragility of the natural systems on which human civilization as we know it is based is becoming increasingly evident, with devastating consequences, International law must adopt an eco-centric perspective that enables it to move beyond the traditional State-centric vision, which is proving unable to provide solutions to the almost existential challenges of an era that some are already beginning to call the Anthropocene.

Keywords: climate change, border, jurisdiction, climate litigation, human rights, sovereignty, migration, Anthropocene.

(A) INTRODUCTION: ON BORDERS AND PLANETARY BOUNDARIES

Since the Peace of Westphalia in the 17th century and the emergence of modern international law, States have been the basis of the international legal system.[1] The nature of States as the fundamental subjects of international relations and, especially, of international law was maintained with the advent of contemporary international law, although during this period the international legal system has had to begin to adapt to the emergence of relations of interdependence due, amongst other things, to increased trade, communications and energy flows.[2]

However, climate change and the serious environmental crisis that the planet is experiencing —which has received an increasing attention from the international community, especially since the 1972 Stockholm Conference on the Human Environment[3]— are highlighting just how dependent human beings are on the natural environment. Little by little, international law has sought to develop mechanisms and concepts to reflect this new concern and facilitate adequate protection of these new legal rights. In the 1970s, notions such as "common heritage of humankind"[4] or "common concern of humankind"[5]began to

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1 M. Díez de Velasco, *Instituciones de Derecho Internacional Público* (Tecnos, Madrid, 2013), at 63-65, 282-284.

2 *Ibid.*, at 67-68.

3 UN General Assembly, *United Nations Conference on the Human Environment*, 15 December 1972, A/RES/2994.

4 A.-C. Kiss, 'La Notion de Patrimoine Commun de l'Humanité', 175 *Recueil des Cours* (Académie de Droit International, The Hague, 1982).

5 The UN General Assembly considered climate change a "common concern for humankind" as early as 1988 (UN General Assembly Resolution 43/53 on the protection of the global climate for present and future generations of mankind, UN

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take shape, whilst principles such as those of prevention,[6] precaution[7] or sustainable development[8] began to be articulated in the context of regimes such as the law of the sea[9] or the protection of the atmosphere.[10]

Since then, successive scientific studies on the environmental impact of the current economic system of mass production and consumption, as exemplified by the May 2019 Intergovernmental Science-Policy Platform for Biodiversity and Ecosystem Services (IPBES) report,[11] have revealed a hitherto often disregarded level of interdependence between species and ecosystems. It is therefore encouraging that such interdependence is being increasingly reflected in recent international case law.[12]

Climate change is one of the main challenges facing humankind, as highlighted by leading international organizations.[13] However, as the aforementioned IPBES study shows, it is not the only serious environmental problem we have to contend with. That is why the scientific community increasingly refers to the notion of *global change*, taking into account all the impacts of human activity at multiple levels on the natural environment.[14] Another recent concept is that of *planetary boundaries*, developed to illustrate the natural limits within which human life as we know it can thrive and which

Doc A/RES/43/53, GAOR 43rd Session Supp. 49, Vol. 1, 133). The formula was included in the United Nations Framework Convention on Climate Change (at recital one) (United Nations Framework Convention on Climate Change, 9 May 1992, 1771 UNTS 107 (UNFCCC)). See also: I. Feichtner, 'Community interest', in *Max Planck Encyclopedia of International Law* (electronic edition, Oxford University Press, 2007), accessed on 9 July 2019.

6 L.-A. Duvic Paoli, 'Principle 2: Prevention', in J.E. Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015).

7 A.A. Cançado Trindade, 'Principle 15: Precaution', in *The Rio Declaration on Environment and Development: A Commentary*, *supra* n. 6.

8 V. Barral and P.-M. Dupuy, 'Principle 4: Sustainable Development through Integration', in *The Rio Declaration on Environment and Development: A Commentary*, *supra* n. 6.

9 Article 136 of the UN General Assembly *Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397.

10 Vienna Convention for the Protection of the Ozone Layer, 1513 UNTS 323; 26 ILM 1529 (1987).

11 E.S. Brondizio *et al.* (eds), *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES Secretariat, Bonn, Germany, 2019).

12 In this regard, the Inter-American Court of Human Rights' 2017 Advisory Opinion on the environment and human rights is particularly important. In it the Court held, "The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right." Inter-American Court of Human Rights, *Environment and Human Rights* (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: interpretation and scope of Articles 4(1) and 5(1) in relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/17 of 15 November 2017, Series A No. 23, at §62.

13 On 10 September 2018, the UN Secretary General, Antonio Guterres, gave a speech on climate change with the following introductory remarks: "Dear friends of planet Earth. Thank you for coming to the UN Headquarters today. I have asked you here to sound the alarm. Climate change is the defining issue of our time – and we are at a defining moment. We face a direct existential threat." *Secretary-General's remarks on Climate Change*, United Nations Secretary General, 10 September 2018.

14 C.M. Duarte *et al.*, *Cambio global: impacto de la actividad humana sobre el sistema Tierra* (Los Libros de la Catarata, Madrid, 2009).

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underscores just how close we are as a species to exceeding them.[15] In fact, given the severity of the situation, more than a few voices have raised to propose a change in terminology that would more accurately reflect the serious threat looming over us. Rather than *climate change*, they suggest, it would be more appropriate to refer to the *climate crisis* (as the British newspaper *The Guardian* recently noted in its style guide).[16] Likewise, rather than a *global change*, one could speak of a *global* (environmental) *crisis*.

In any case, climate change, or the climate crisis, is deeply interconnected with many of the aforementioned planetary boundaries. It thus perfectly illustrates the extent to which the idea of an international law organized primarily around state sovereignty — one of the essential manifestations of which is the notion of borders, insofar as they define the space within which each State may exercise its prerogatives free of interference — has significant shortcomings when it comes to tackling the challenges facing humankind in an era so shaped by human activity that it may even give rise to a new geological age, i.e. the Anthropocene.[17]

(B) CLIMATE CHANGE: A GLOBAL PHENOMENON IN TERMS OF BOTH CAUSES AND CONSEQUENCES

Current global warming, caused by the accumulation of mainly anthropogenic greenhouse gas emissions, is a major challenge for the international community. Climate change is not a traditional environmental risk with a geographically limited origin and impact, such as river pollution or the loss of a given habitat. Instead, it has an undeniable global dimension. For one thing, it is caused by all the greenhouse gas emissions emitted throughout the world as a whole. For another, its impacts are already being felt around the planet, irrespective of borders. Furthermore, climate change exacerbates many other existing environmental problems, both global and local in scope, such as desertification, reduced availability of drinking water, the loss of biodiversity and ocean acidification, amongst others.

(C) AN INTERNATIONAL SYSTEM BASED ON CLEARLY INSUFFICIENT STATE COMMITMENTS

This poses a considerable challenge when it comes to organizing an effective response to climate change, as no amount of reductions in a single country's greenhouse gas emissions, no matter how large, can suffice to prevent global warming or even its consequences for that country. Therefore, any suitable response to global warming will require the consensus of the majority of States, which goes beyond purely state-based visions and interests. Accordingly, the phenomenon has been addressed in numerous international forums, especially those sponsored by the United Nations, where an international system has been set up over the last three decades, organized around the 1992 United Nations Framework Convention on Climate Change

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15 W. Steffen *et al.*, 'Planetary boundaries: Guiding human development on a changing planet', 347 (6223) *Science* (2015), 736-747 [doi: 10.1126/science.1259855].

16 D. Carrington, 'Why the Guardian is changing the language it uses about the environment', *The Guardian*, 17 May 2019.

17 W. Steffen *et al.*, 'The Anthropocene: Conceptual and historical perspectives', 369/1938 *Philosophical Transactions of the Royal Society* (2011) 842 [doi: 10.1098/rsta.2010.0327].

 DOI: 10.17103/sybil.23.36

(UNFCCC),[18] with the two major milestones of the Kyoto Protocol of 1997[19] and, much more recently, the Paris Agreement, adopted in 2015.[20]

The Kyoto Protocol included a global vision that translated to clear and specific obligations for the different states (at least for those states listed in Annex B of the Protocol, which are largely the same ones as those listed in Annex I of the UNFCCC). However, the wariness that many countries (the United States, Russia, Canada, etc.)[21] felt towards this approach significantly limited the Protocol's impact. As a result, the international community tried a different strategy with the Paris Agreement.[22] That Agreement defines a system based on voluntary contributions defined by the States parties themselves (the so-called Nationally Determined Contributions or NDCs), which are to be periodically revised to incorporate increasingly ambitious targets for the reduction of greenhouse gas emissions.[23] However, whilst this strategy resulted in near-universal ratification of the Agreement in record time (in fact, the Paris Agreement entered into force almost one year sooner than originally anticipated),[24] the scientific community constantly recalls that the sum total of the voluntary commitments presented by the States parties is wholly insufficient to achieve the temperature targets set in the Agreement itself, namely: "Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels".[25] Furthermore, many States are not even on track to reduce

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[18] *Supra* n. 5.

[19] Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, 2303 UNTS 148 (Kyoto Protocol).

[20] UNFCCC, Decision 1/CP.21, Adoption of the Paris Agreement FCCC/CP/2015/10/Add.1.

[21] The United States never ratified the Kyoto Protocol, Canada notified its withdrawal from the Protocol on 15 December 2011, and neither Russia nor Japan have committed to the Protocol's second commitment period, agreed in Doha in 2012 (Doha amendment to the Kyoto Protocol, 28 February 2013, FCCC/KP/CMP/2012/13/Add.1, Decision 1/CMP.8). See: L. Rajamani, 'The United Nations Framework Convention on Climate Change: a framework approach to climate change', in D.A. Farber and M. Peeters (eds), *Climate Change Law*, Elgar Encyclopedia of Environmental Law (Elgar, Cheltenham, 2016). On the Canadian government's notification, see United Nations Treaty Collection, Chapter XXVII Environment, 7. a Kyoto Protocol to the United Nations Framework Convention on Climate Change.

[22] J.E. Viñuales, 'The Paris Climate Agreement: An Initial Examination', 6 *C-EENRG Working Papers* (2015); P. de VilchezMoragues, 'The Paris Agreement: A Significant New Thread in the Legal Tapestry of Climate Change Domestic Litigation', in C. Cournil and L. Varison (eds), *Les Procès Climatiques. Entre le National et l'International* (Pedone, Paris, 2018), at 47-50. For a more detailed account of the negotiating process, refer to: J. Bulmer, M. Doelle and D. Klein, 'Negotiating History of the Paris Agreement', in D. Klein *et al.* (eds), *The Paris Agreement on Climate Change: Analysis and Commentary* (Oxford University Press, Oxford, 2017) 50-73.

[23] Article 4., *supra* n. 20.

[24] The Agreement was adopted on 12 December 2015. Less than one year later, on 5 October 2016, more than 55 countries accounting for more than 55% of global GHG emissions had ratified it, allowing it to enter into force 30 days later, in accordance with Article 21(1) of the Agreement, making it one of the fastest ratification processes of a multilateral environmental treaty. See UNFCCC, *Over 55 Parties Covering More Than 55 Per Cent of Global Greenhouse Gas Emissions Ratify the Paris Climate Change Agreement*, 5 October 2016.

[25] Article 2.1.(a) of the Paris Agreement, *supra* n. 20. As regularly underscored by the UNEP, in its yearly "Emissions Gap Report". According to its latest report, published in November 2018, "Current commitments expressed in the NDCs are inadequate to bridge the emissions gap in 2030. Technically, it is still possible to bridge the gap to ensure global warming stays well below 2°C and 1.5°C, but if NDC ambitions are not increased before 2030, exceeding the 1.5°C goal can no longer be avoided. Now more than ever, unprecedented and urgent action is required by all nations. The assessment of actions by the G20 countries indicates that this is yet to happen; in fact, global CO_2 emissions increased in 2017 after three years of stagnation." UNEP, *The Emissions Gap Report2018*. Executive Summary, at 4. This gap had already been included in Article 17 of the Decision 1/CP.21

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their emissions enough to meet the commitments they have voluntarily undertaken.[26] In this regard, it is worth asking whether a system built on a State-based approach, one that depends on the (good) will of States, is indeed the most suitable one to solve a global problem requiring global action.

(D) THE IMPACT OF CLIMATE CHANGE ON FUNDAMENTAL PRINCIPLES AND INTERESTS OF PUBLIC INTERNATIONAL LAW: THE NEED TO MOBILIZE AN EXTRATERRITORIAL PERSPECTIVE

(1) Principles of International Law

Given that neither the causes nor the consequences of climate change heed borders, it seems essential, from an international law perspective, to refer to those principles of a markedly cross-border nature. One key principle in this regard is the no-harm rule. Closely linked to the principles of good neighbourliness and the sovereign equality of States, it requires States to refrain from engaging in activities in their territory that might harm the territory of another State.[27] Beginning in the 1960s, as a result of the improved understanding of the relationships between ecosystems and the close connection between human beings and natural processes, the concept evolved also to encompass the protection of areas not under the territorial sovereignty of any state, thereby giving rise to the prevention principle.[28] This principle was included in the Stockholm Declaration on the Human Environment (Principle 21) in 1972[29] and, twenty years later, in the Rio Declaration on the Environment and Development (Principle 2).[30] It should thus come as no surprise that the UNFCCC of 1992 made specific reference to prevention in both Article 2, defining the Convention's objective, and Article 3, on the principles to guide States' actions to achieve that objective.[31] Underscoring the supranational dimension of global warming, the UNFCCC moreover

adopting the Paris Agreement, which emphatically states that the Conference of Parties "*Notes with concern* that the estimated aggregate greenhouse gas emission levels in 2025 and 2030 resulting from the intended nationally determined contributions do not fall within least-cost 2°C scenarios but rather lead to a projected level of 55 gigatonnes in 2030, and *also notes* that much greater emission reduction efforts will be required than those associated with the intended nationally determined contributions in order to hold the increase in the global average temperature to below 2°C above pre-industrial levels by reducing emissions to 40 gigatonnes or to 1.5°C above pre-industrial levels by reducing to a level to be identified in the special report referred to in paragraph 21 below".

[26] According to Climate Action Tracker, which analyses both countries' current policies and their medium- and long-term commitments, only seven countries in the world are implementing policies compatible with an increase in the global temperature of less than 2°C, whilst only two are implementing climate policies compatible with the target set in the Paris Agreement. See the analysis published by Climate Action Tracker at: https://climateactiontracker.org/countries/. According to the scientific consortium's analysis, which is available on its website, amongst the industrialized countries, which have contributed most to climate change, the policies defined by Canada or Australia, amongst others, are not consistent with the targets they themselves set in their respective NDCs.

[27] J. Brunnée, 'Sic uteretuoutalienum non laedas', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2010).

[28] *Supra* n. 6.

[29] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, UN DIC. A/CONF.48/14/Rev.1 ('Stockholm Declaration').

[30] Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26.Rev.1 ('Rio Declaration').

[31] Article 2 states, "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."

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explicitly refers to climate change as a common concern of humankind, a formulation that was also incorporated into the 2015 Paris Agreement.[32]

However, the extraterritorial ramifications of climate change go even further, making it possible to deepen the cross-border protection of other fundamental legal goods.

(2) Extraterritorial Application of Human Rights

A country's CO_2 and other greenhouse gas emissions contribute to global warming throughout the planet, and the effects of that global warming will be all the more serious the greater the atmospheric concentration of those gases. The literature on the impacts of climate change is extensive. One factor that no one seems to dispute is that the physical impacts of, or the impacts exacerbated by, climate change (such as extreme weather phenomena, rising sea levels, ocean acidification, heat waves or droughts) will have serious consequences for the human rights of the people subjected to them. Fundamental rights, recognized in both international, regional and domestic instruments, such as the rights to life, physical integrity and health, family and private life, food, drinking water, culture, property or even self-determination, will be seriously affected by climate change.[33] Furthermore, as noted, due to how the physical mechanisms responsible for global warming work, a country's greenhouse gas emissions will not affect only its own inhabitants, but rather will join the rest of the emissions present in the atmosphere, thereby contributing to generate impacts anywhere on the planet. To make matters worse, both the Intergovernmental Panel on Climate Change (IPCC) reports[34] and those of many other scientific institutions warn that the countries least responsible for climate change will be the ones most affected by its impacts, which adds a serious issue of fairness to the problem of human rights.[35]

Article 3 provides, "The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects." *Supra* n. 18. Notwithstanding the reference to the prevention principle in the core instrument regulating climate action at the international level, it is remarkable that this principle as well as other key principles in environmental law, such as the precautionary principle, which was also set forth in Article 3 of the Framework Convention, are completely absent from more recent climate change instruments, such as the Kyoto Protocol or the Paris Agreement.

[32] Recital 1 of the UNFCCC reads, "Acknowledging that change in the Earth's climate and its adverse effects are a common concern of humankind", whilst Recital 11 of the Paris Agreement acknowledges "that climate change is a common concern of humankind". *Supra* n. 20.

[33] O. Quirico and M. Boumghar (eds), *Climate Change and Human Rights: An International and Comparative Law Perspective* (Routledge, Oxon, 2016). The Human Rights Council and other human rights bodies have also dealt with the question, pointing out the human rights implications of climate change and how human rights should be integrated in the response to global warming in order to achieve a better outcome. See, for instance: *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61, 15 January 2009; and *Report of the Special Rapporteur on the issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Climate Change Report*, UN Doc. A/HRC/31/52, 1 February 2016.

[34] The Intergovernmental Panel on Climate Change (IPCC) is the scientific advisory body created by the World Meteorological Organization and UNEP in 1988 to regularly assess the scientific knowledge on climate change. The IPCC reports reflect the highest degree of scientific and political consensus on global warming. They can all be found on the IPCC's web page.

[35] "Climate change will amplify existing risks and create new risks for natural and human systems. Risks are unevenly distributed and are generally greater for disadvantaged people and communities in countries at all levels of development";

 DOI: 10.17103/sybil.23.36

In this regard, it is interesting to note that some regional human rights systems have clearly affirmed the extraterritorial nature of state jurisdiction when acts committed in the territory of a State negatively impact the human rights of people located beyond its borders.[36] Even more interestingly, some regional human rights instruments have clearly recognized this extraterritorial nature of State jurisdiction when the actions or omissions of a State result in environmental degradation in a third state that interferes with the ability of persons in that third State to enjoy their human rights. In this regard, the Inter-American Court of Human Rights' Advisory Opinion of November 2017 is especially notable, as it analyses the links between respect for the environment and the enjoyment of human rights. In the Opinion, the Court states that there is an "undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights". It concludes that "to ensure the rights to life and integrity, States have the obligation to prevent significant environmental damage within and outside their territory".[37]

In a world in which just five countries are responsible for almost 60% of global greenhouse gas emissions[38] emissions that are already having serious impacts around the planet that will only grow exponentially if the Paris Agreement targets[39] are missed it seems clear that the principles of no-harm and prevention are being violated and that these countries are impacting the current and future enjoyment of the human rights of persons living not only within their own borders, but also in any other country in the

"Mitigation and adaptation raise issues of equity, justice and fairness. Many of those most vulnerable to climate change have contributed and contribute little to GHG emissions"; "Climate change exacerbates other threats to social and natural systems, placing additional burdens particularly on the poor (high confidence)". R.K. Pachauri and L.A. Meyer (eds), *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Geneva, Switzerland, 2014), at 13, 17 and 31.

36 For instance, Loizidou v. Turkey, ECHR (1995) No. 15318/89; Al-Skeini and others v. The United Kingdom, ECHR (2011) No. 55721/07; or Catan and others v. the Republic of Moldova and Russia, ECHR (2012) No. 43370/04.

37 *Supra* n. 12, at §47 and §242. Other passages of the advisory opinion, in which the Court examines the extraterritorial dimension of States' obligations concerning human rights and the environment in detail, are likewise of great interest. See, for instance, the following two: "§ 59 In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. (...) *a healthy environment is a fundamental right for the existence of humankind*" (emphasis added); and "§101 (...) when transboundary damage occurs that affects treaty-based rights, it is understood that the persons whose rights have been violated are under the jurisdiction of the State of origin, if there is a causal link between the act that originated in its territory and the infringement of the human rights of persons outside its territory."

38 According to data from EDGAR (Emission Database for Global Atmospheric Research), a European Commission initiative, these countries are China, the United States, India, Russia and Japan. If the European Union as a whole were counted as a country, it would be the third largest greenhouse gas emitter and, in all, the top five emitters would account for two thirds of global emissions. However, when the list is compiled based strictly on countries, the only EU country in the top ten emitters is Germany, which ranks sixth. When historical emissions, rather than just current ones, are used, the results in terms of the main emitting countries are quite similar. To give an idea of the extent to which emissions are concentrated in a minority of countries, just 18 countries are responsible for 80% of global emissions. All data are available in M. Muntean*et al.*, *Fossil CO_2 emissions of all world countries - 2018 Report*, EUR 29433 EN (Publications Office of the European Union, Luxembourg, 2018) [doi:10.2760/30158, JRC113738].

39 See, for example, the IPCC report published in October 2018, which compares the different consequences of global warming of 1.5°C versus 2°C. IPCC, 'Summary for Policymakers', in V. Masson-Delmotte*et al.* (eds), *Global warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (World Meteorological Organization, Geneva, Switzerland, 2018).

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world. Given this situation, the position taken by the Inter-American Court of Human Rights in its 2017 Advisory Opinion seems highly relevant. It remains to be seen whether the international or regional human rights protection mechanisms will be willing to apply such a perspective in cases calling for States to be held responsible for climate change, with the potentially ensuing consequences. To date, no judgment or decision delivered at the supranational level has examined the merits of the matter.[40] In contrast, a growing number of national courts judgments have recognized that the action or inaction of the respective government regarding climate change is causing or will cause serious harm to the plaintiffs' human rights. However, although the extraterritorial question has been raised in some of these cases, the courts involved have thus far preferred to leave it unanswered.[41]

(3) When Climate Change Threatens the Physical Existence of a State Itself

One of the main impacts of global warming is rising sea levels, which, if the increase in the global temperature is not contained, could cause the virtual disappearance of some low-lying Pacific island States.[42] The potential impact of climate change on the principle of State sovereignty and the right to self-determination is thus difficult to overstate.[43] That is why, in parallel with an intensive diplomatic activity in

[40] Within the scope of the European Union, in 2018, several families from various EU countries, Kenya and the Fiji Islands brought an action before the EU Court of Justice against EU regulations on fighting climate change arguing that they violate higher-order EU laws, the UNFCCC and the Paris Agreement, as well as based on torto law considerations. In May 2019, the EU General Court dismissed the case without ruling on the merits, due to the plaintiffs' lack of standing. Also in the month of May, a group of Torres Strait islanders lodged a complaint with the UN Human Rights Committee against the Australian government, alleging that it had violated their civil and political rights with its policies regarding climate change. The Committee has not yet issued an opinion on the matter.

[41] Some of the most important cases include: Urgenda Foundation v. The Netherlands, in the Netherlands, or Salamanca Mancera v. Presidencia de la República de Colombia, in Colombia. Both the appeals court in The Hague and the Colombian Supreme Court clearly acknowledged the infringement of the plaintiffs' human rights due to climate change caused or partially fuelled by the policies of their respective governments. In the Urgenda case, although the plaintiffs posed the question of the impacts of the government's policies on future generations or persons beyond the country's borders, the court ultimately decided that as "Urgenda's claim is already admissible insofar as it acts on behalf of current generations of Dutch nationals or people under the jurisdiction of the Netherlands" the state did not have an interest in this ground of appeal and, therefore, the Court did not need to consider the issue. *Urgenda Foundation et al. v. The State of the Netherlands* (Ministry of Infrastructure and the Environment), The Hague District Court, Judgment, C/09/456689 HA ZA 13-1396, 24 June 2015, at §37. *Salamanca Mancera et al. v. Presidencia de la República de Colombia et al.*, Corte Suprema de Justicia de Colombia, N° 110012203 000 2018 00319 01, 5 April 2018. For an analysis of the extraterritorial issue in two cases filed in Norway and Sweden, see: P. de VilchezMoragues, 'Extraterritoriality and judicial review of state policies on global warming: Some reflections following the 2016 Scandinavian climate lawsuits', 34 *RevistaElectrónica de EstudiosInternacionales* (2017) 1 - 27 [doi: 10.17103/reei.34.03].

[42] The fifth IPCC report (AR5), published between 2013 and 2014, estimated that sea levels could rise by around 90 cm by the end of the century. *Supra* n. 35, at 11, 13 and 16. More recent studies suggest that the rise could be even greater. See, for instance, J.L. Bamber *et al.*, 'Ice sheet contributions to future sea-level rise from structured expert judgment', 116(23) *Proceedings of the National Academy of Sciences of the United States of America* (2019), 11195 11200 [doi: 10.1073/pnas.1817205116].

[43] For a detailed and rigorous study of the issue, see: A. Torres Camprubí, *Statehood under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States* (Brill, Leiden, 2016) [doi: 10.1163/9789004321618].

the international climate fora,[44] at the end of the first decade of the 21st century and the start of the second, some States from the region seriously considered filing a complaint with the International Court of Justice (ICJ). The idea seemed to have been put on hold given the risk of a decision contrary to their interests,[45] but it would seem that the inability of the international community to provide an adequate response to climate change has led some countries threatened by the sea-level rise to consider again the possibility of submitting such a claim.[46] Additionally, given the more than likely rise in the sea level, some of these countries have considered purchasing land in other states to have somewhere to resettle their population if needed.[47] In view of this situation, some authors have raised the possibility of permanently "fixing" the maritime zones over which these States exercise some type of sovereignty (especially the EEZ), so as to ensure that they are not modified even if the islands which conform their territorial basis disappear, thus allowing these States to retain some form of jurisdiction and income, even in an extremely fragile situation.[48]

(4) Climate Change as a Factor Driving Migration Flows

In light of the various factors discussed thus far, it is to be expected that the inhabitants of these Pacific island States, as well as others that will be hit especially hard by climate change in vulnerable regions of Africa, Asia and the Americas (it must be recalled that the effects of climate change will be especially harsh for the poorest populations), will be displaced to other countries in search of minimum living conditions.[49]

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44 A. Pigrau, 'Calentamiento global, elevación del mar y pequeños estados insulares y archipelágicos: un test de justicia climática', in G. A. Oanta (coordinadora), *El Derecho del Mar y las personas y grupos vulnerables* (Bosch Editor 2018), at 255-274.

45 *Ibid.*, at 252-255. For a detailed analysis of this issue, see: C. Voigt, 'The potential roles of the ICJ in climate change-related claims', in D. A. Farber and M. Peeters (eds), *supra* n. 21, at 152-166.

46 See, among others, D. Drugmand, 'Pacific Islands Group Pushes for International Court Ruling on Climate and Human Rights', *Climate Liability News*, 13 August 2019, or T. Stephens, 'See you in court? A rising tide of international climate litigation', *The Interpreter*, 30 October 2019. Remarkably, more than forty prestigious scholars in the area of international and environmental law have publicly given support to an initiative by students from the Pacific Islands to bring such a case to the ICJ. Among the signatories, there are distinguished scholars from all around the world, like professors Philippe Sands, Jacqueline Peel, Michael Gerrard, Douglas Kysar or Jorge E. Viñuales, to name a few. See *Harvard, Cambridge, Yale, Melbourne, Auckland, Sydney Law Academics Support USP Students' Call to Take Climate Change to the ICJ*, Pacific Climate Resistance, 11 August 2019.

47 In 2014, the country of Kiribati purchased 2,000 ha of land in the Fiji Islands. *Supra* n. 43, at 107.

48 *Ibid.*, at 109, 112-114. See also: M.B. Gerrard, 'Maritime Boundaries, Sea Level Rise and Climate Justice', Climate Law Blog, Sabin Center for Climate Change Law, 25 March 2019, accessed 9 July 2019.

49 According to the IPCC's AR5, "Climate change over the 21st century is projected to increase displacement of people (medium evidence, high agreement). Displacement risk increases when populations that lack the resources for planned migration experience higher exposure to extreme weather events, in both rural and urban areas, particularly in developing countries with low income. Expanding opportunities for mobility can reduce vulnerability for such populations. Changes in migration patterns can be responses to both extreme weather events and longer-term climate variability and change, and migration can also be an effective adaptation strategy. There is low confidence in quantitative projections of changes in mobility, due to its complex, multi-causal nature. [9.3, 12.4, 19.4, 22.3, 25.9]." C.B. Field *et al.*(eds), *IPCC: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, Cambridge, United Kingdom and New York, 2014), at 73. Additionally, recent studies show that, between 1980 and 2015, climate change had a greater impact on migratory movements towards OECD countries than income or political freedoms in the country of origin. D. Wesselbaum

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They are what is known as climate migrants or climate refugees. Beyond the question of how to designate them, these migratory movements pose a whole series of challenges, ranging from the humanitarian problems these people suffer to identifying the most suitable legal regime to ensure their protection.[50] Additionally, the potential impact of these migratory movements on other States' border systems is worth examining, especially in the current context, marked by the gradual pullback of many industrialized countries, in the form of the growing construction of walls separating countries of the global north and south.[51] Given the fragility shown by Europe's political systems in the face of the arrival of refugees from the war in Syria, with their increasingly restrictive migration and asylum policies and the rise in xenophobic discourse and actions, it is worth asking whether the current system will be able to cope with the more than likely increase in migration flows caused by climate change.

(5) A Transnational Legal Conversation in the Context of Climate Litigation

Finally, it is worth noting that, in the context of the growing trend towards climate litigation at the national level against State action or inaction, the proliferation of complaints around the world is based on, but also encourages, a fruitful legal exchange (dialogue) that transcends national borders and legal systems (common law, civil law, mixed systems). Indeed, it takes place between both the lawyers of the various parties (with the creation of global support networks)[52] and, perhaps more surprisingly, and also more importantly from a legal point of view, between courts from different countries.[53] The extent to which this exchange can give rise to the emergence of common interpretations or even legal "loans" in the emerging field of State (and corporate) responsibility in relation to climate change remains to be seen.

(E) CONCLUSION

and A. Aburn, 'Gone with the wind: International migration', 178 *Global and Planetary Change* (2019) 96-109 [doi: 10.1016/J.GLOPLACHA.2019.04.008]. Furthermore, according to a recent World Bank report, by 2050, there could be 140 million internal climate migrants in sub-Saharan Africa, Latin America and South Asia. K. Rigaud *et al.*, *Groundswell: Preparing for Internal Climate Migration* (The World Bank, Washington DC, 2018).

50 See, forexample, B. Felipe, 'Una propuesta de marco de protección jurídica para las migraciones climáticas forzadas de carácter internacional', in R. Giles Carnero (ed), *Desafíos de la acción jurídica internacional y europea frente al cambio climático* (Atelier, Barcelona, 2018) at 331-341.

51 The most significant example would be the wall between the US and Mexico promoted by the Trump administration, but other important walls have also been built in recent decades, such as the wall between Israel and the Palestinian Territories, the wall between India and Pakistan, or the wall built by the Moroccan authorities that divides the Western Sahara in two. At the conference at which the paper on which this article is based was presented, several authors referred to these cases in detail. See, for instance, the contribution by Dr Salinas de Frías in this same volume of the *Spanish Yearbook of International Law*.

52 Here one could cite, for instance, the Climate Litigation Network, promoted by the Urgenda Foundation, or the support work carried out by the US NGO Our Children's Trust with youth organizations from other countries seeking to undertake legal actions to demand greater commitment on the part of their governments.

53 For example, in *Juliana v. The US*, Judge Coffin expressly referred to the first-instance judgment in Urgenda, delivered by the District Court of The Hague. *Juliana et al. v. The United States of America et al.*, District Court of Oregon No. 6:15-cv-01517-TC, *Order and Findings & Recommendation*, 8 April 2016, at 11.In the case *Sarah Thomson v. The Minister for Climate Change Issues*, in New Zealand, the judge provided a detailed analysis of five cases from four different countries (*Massachusetts v. EPA*, *Juliana v. The US*, *Friends of the Earth v. Canada*, *Client Earth v. Secretary of State*, *Urgenda v. The Netherlands*).*Sarah Lorraine Thomson v. the Minister for Climate Change Issues*, High Court of New Zealand, Wellington Registry, Decision, CIV 2015-485-919 [2017] NZHC 733, 2 November 2017, at §§105-134.

This article has offered a concise overview of how climate change is generating a series of tensions around the traditional concept of border, not only because the emissions responsible for global warming originate in multiple countries and have impacts that go well beyond the territorial space in which they are generated, but also because climate change affects fundamental notions, categories and principles of international law, which, since the 17th century, has been primarily based on the notion of sovereign States. In fact, the current legal system developed to tackle climate change, as reflected in the recent Paris Agreement, is based on States' latitude to set their own targets at the national level. Thus far, at least, this system has failed to generate the level of commitment needed to achieve the scientifically defined emission levels that would make it possible to meet the temperature target set in the Agreement itself.

Whether due to the violation of basic principles such as the no-harm rule or the principle of prevention, because the decisions taken in one country impact the enjoyment of human rights in others, because of the erosion this causes on the very notion of sovereignty due to rising sea levels, because of the migrations that it fuels and intensifies, or because of the transnational legal dialogue it is generating in the context of the global climate litigation movement, climate change is a disruptive factor with regard to the nation state's essential nature as the backbone of contemporary international society and the resulting legal system.

In the face of a challenge of these dimensions and characteristics, there is a clear need to advance towards a transformation of international law that moves beyond the current overly State-centric vision and replaces it not with an anthropocentric vision, in which human beings are protected as the fundamental legal interest of that system, but an eco-centric one that recognizes the balance of natural systems —essential to ensure the life of both humans and all other living beings on the planet— as a fundamental pillar of the 21st century legal order.

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