the SPANISH YEARBOOK of INTERNATIONAL LAW

A farewell from the Editor

Mariano J. AZNAR*

Eight years ago, I had the privilege of being elected Editor-in-Chief of the *Spanish Yearbook of International Law* (SYbIL). This was just after the General Assembly of the 'Asociación Española de Profesores de Derecho Internacional y Relaciones Internacioanles' (AEPDIRI), held in September 2013, which renovated the Editorial Council of the *SYbIL*, but also endorsed some proposals for this new epoch of the Yearbook: to change its structure, to move it to the web with total free access, and to offer its pages to any scholar willing to work and publish with us.

Since then, I have been accompanied in this task by several colleagues and good friends whose efforts in this editorial endeavour have been indispensable: Elena Conde, Noe Cornago, Federico Garau, Iván Heredia, Guillermo Palao, Ángel Rodrigo, Ana Salinas, Ángel Sánchez-Legido and Marina Vargas. During the 2013-2020 period, professors Rodrigo and Sánchez-Legido have acted as Assistant Editors. Some other people have also helped with particular tasks, entrusted by the Editorial Board or myself, such as our dear colleagues Marta Abegón, Ana María Maestro and Beatriz Vazquez; or three graduate students from Universitat Jaume I —Lidón Cruselles, Hanan Laghrich and Santiago Bernabé— who assisted me. We have also counted with the help of Kari Friedenson —translating and revising English texts— and dozens of peer-reviewers who made a silent but unvaluable task of scientifically crediting the *SYbIL* among reliable publications in International Law, today included in several scientific quality indexes.

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The publication of several *Agorae* and *Fora* —echoing different scientific activities of our AEPDIRI's colleagues— gave us the additional opportunity to be assisted by Montse Abad, Laura Carballo, Yolanda Gamarra, Marzia Scopelliti, Esperanza Orihuela, José M. Sobrino, Carlos Jiménez, Xavier Pons, Joana Abrisketa and Enrique Martinez, all of them supervising these symposiums or colloquia, which discussed subjects such as the extraterritorial application of EU Law, the European arctic policy, the secession and self-determination in current International Law, EU asylum policies or the consequences of walls in International Law. Along with these activities, the SYbIL organized and published the result of other scientific activities focusing on Spanish practice on the universal

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jurisdiction, the use of force, its UN and EU membership, Spain's practice as UNCLOS state party, our Nation's practice regarding human rights' bodies or the domestic judicial decisions on the secession's attempt in Catalonia.

SYbIL has also nested several analyses of Spanish practice in more than a dozen of other contributions published, along with the review of almost 40 books published by Spanish authors; and, since its volume 22, the listing of the English abstracts of doctrinal contributions published by our sister journals in AEPDIRI: the *Revista Española de Derecho Internacional* and the *Revista Electrónica de Estudios Internacionales*, whose editors-in-chief kindly helped us during these years as well.

In these seven volumes since 2013 we have published 40 doctrinal essays, plus two special contributions by Carmen Martínez and Antonio Remiro, trying to discuss an array of theoretical studies, contemporary questions, fresh events and their legal consequences, but also classics approaches to core questions of Public and Private International Law and International Relations. The later were included in our "Classics' corner" section, opening each volume, and reproducing different papers —originally published in Spanish and now translated into English— written by Spanish masters of our disciplines years ago but still seminal. Hence, we welcome contributions by Antonio Truyol, Adolfo Miaja, Mariano Aguilar, Enrique Pecourt, Roberto Mesa, Gil Carlos Rodríguez Iglesias and Alejandro Rodríguez Carrión. To this impressive club of big names, our volume 20 devoted that Corner to the greatest hero of Spanish literacy: Miguel de Cervantes, and the place of International law and diplomacy in his writings.

To sum up, 206 contributions in seven volumes, which complete the previous collection published in volumes 1-17 with Brill, under the direction of my predecessors. Amongst them, I would like to thanks Carlos Jiménez-Piernas; as well as to Paz Andrés, Araceli Mangas and Jorge Cardona, who gave me their advices on how to smoothly perform the always complex task of editing a Yearbook. Last but not least, José M. Sobrino, Carlos Esplugues and Caterina García —AEPDIRI presidents during my term— who enthusiastically supported our job at SYbIL also deserve their mention here.

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Volume 24 —my last volume— is published in 2020, a terrible year. We all lost beloved people, including relatives, friends, and colleagues. The COVID19 pandemic has been a worldwide disaster which has transformed our way of life. It has also stressed some rules and international structures we were convinced they would provide early warning and rapid response to the effects of the lethal virus. Our developed countries have been beat but, as usual, undeveloped countries have received less attention and help than needed.

Besides the pandemic, unresolved migrations, the loss of human lives at sea, devastating endless wars, uncontrolled criminal networks trafficking with humans, arms, drugs or cultural objects, sea-level rising, oceans' acidification and other climate-change effects, or the vanishing into "trans-national" what was previously supervised as "international" are

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some of many concerns we have witnessed during these last years. Leadership in the big-three has not been very helpful, and Brexit has kidnapped the big-fourth (the EU) too many times, instead of being centred on what really matters.

Some of these questions have had a particularly effect in Spain: the pandemic is beating us too hard, too long and too irremediably; uncontrolled migration has increased, being used by our southern neighbour as a political tool; and, still in our south, Spain's shameful and illegal abandonment of the Sahrawis —do not forget: Spanish citizens in 1975— ease the path to end their legitimate right to self-determination, a path paved by universal and regional inaction and by the well-known hypocrisy of two western nuclear powers. One of them, at the end of 2020, crossed a red line of International Law when declaring Moroccan sovereignty over the Sahara.

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However, I don't like to end this farewell with sad comments only. I truly believe on the resilience of our planet if we react as soon as possible. I am confident on our colleagues fighting against the virus in their laboratories, using their best knowledge. I also do trust in "Politics" —capitalised— against populisms and "strong leaders", against fake-news and big corporations' market tyranny, and against disenchantment with democracy and the state-of-law, all of them terrible viruses of our current societies. As internationalists, we are not policy- or law-makers, but we do have the responsibility to educate them within the language and the purposes of International Law —particularly defending multilateralism and human rights. We have to be willing and able to criticize or applaud those decision-makers. I am sure that the *Spanish Yearbook of International Law* will continue to welcome these scientific criticisms and applauses, as it always did.

Mariano J. Aznar
on the last day of 2020

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International Law on the Threshold of the 21st Century

Alejandro J. Rodríguez Carrión*

(A) THE SUBJECTS OF INTERNATIONAL LAW

International law emerged as a legal system that exclusively regulated the relations between states, and states were its only accepted subjects. Its very name international law which was first formally used in 1780, points to an identification of states based on the concept of the nation-state. Other than states, no other entities were legally recognized. Even when the first forerunners of international organizations the river commissions and administrative unions emerged over the course of the 19th century, the need to consider their legal status, and the impossibility of considering that anything other than states could be regulated, led to the use of the legal fiction of treating them "as if they were states", a recourse that made it possible to solve problems in practice without the need for expansions that would break the theoretical mould.

Today, there is no longer any debate: whilst states are certainly the primary subject of international law, its logical prius in the understanding of the international system, new sociological realities have led not always peacefully to the legal acceptance of rights and obligations of emerging subjects of international law.

(1) The alleged crisis of state sovereignty

Internationalists have not generally been characterized by the excessive legal formalism of our analyses of state sovereignty. Hence, although the international legal system proclaimed the principle of sovereign equality of states, this principle was to be understood more as an aspiration for the establishment of an orderly international society than as a proclamation of an existing reality. Indeed, it is already a classic in internationalist scholarship to highlight how the international system itself discriminates between states depending on their status in the international pecking order. Some of this discrimination, as appalling as it might seem, is simply the attestation of an unequal distribution of political power in international society. For instance, in establishing the voting procedure for the adoption of decisions by the organization's Security Council, Article 27 of the Charter of the United Nations enshrines the right to veto of the five great powers to emerge from World War II. Correlatively, it is noted, it is not a question of granting them privileges over the other members of international society, but of attributing to them a special responsibility in the maintenance of international peace and security. As a result, the accusations levied against the great powers for the existing disorder in international society should not be regarded as demagogic, but rather the logical consequence of the fact that it is they who are vested

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with these special powers precisely to avoid falling prey to the perverse paradox of privatizing gains whilst socializing losses.

However, international legal norms also establish rules of positive discrimination for states, in light of their disadvantaged positions on the international socio-economic ladder. Thus, unequal levels of development give rise to special obligations for the best positioned and theoretical net benefits for the worst positioned in the struggle for economic development. Indeed, by the late 1960s, it was a commonplace to refer to the emergence of a social international law as opposed to the classical conceptions of liberal international law that had existed to date, akin to the construction in modern states of a social legal system to correct the inequalities that liberal conceptions had produced. For example, development strategies established the obligation for developed states to allocate 0.7% of their gross domestic product to meeting the needs of developing states; likewise, various, theoretically more advantageous obligations are established for states in geographically disadvantaged situations under the current law of the sea.

The drama in international law stems from the fact that, whilst the rules enshrining political discrimination are restrictive and binding on all members of international society, those establishing positive discrimination mechanisms are programmatic, soft-law, or prematurely established rules, whose legal effects are non-binding and which instead have a recommendatory value for states. The states have the final say on the possibility, advisability, or interest of complying with what these rules urge them to do, without there generally being any legal consequences for non-compliance. Furthermore, whilst in domestic societies the need to set limits on the welfare state is still open to debate, with sometimes dramatic consequences despite the relative internal cohesion of such societies, at the international level the consequences of the dominant ideology have outrageously perverse effects due to the lack of cohesion of international society as a whole. In other words, although in the 1960s the emergence of the first rules of this social international law was met with hope, by the 1980s and, more starkly, in the decade now ending and surely the one to come, we are witnessing the re-emergence of a liberal international law, with incalculable consequences given the already unacceptable levels of inequality found in international society at the turn of the 21st century.

Somewhat disingenuously, today the debate has begun to focus on an issue that, although undeniably important, may serve to camouflage the underlying problems: state sovereignty, it is claimed, is a model for building international society that no longer has the necessary means to achieve the goals it was created for. Sovereignty is blamed for much of the dissatisfaction with the current international order: the scant institutionalization of international society and the excessive atomization of political power amongst sovereign states are the explanatory causes of the distortions of international society. Hence, the proliferation of parties proposing its abolition or, at least, its dramatic limitation, given that state sovereignty is a serious impediment to the rational organization of international society. Furthermore, sovereignty is presented as a relic that conflicts with the new emerging realities of an international society in increasingly close interaction. Intensifying international relations, growing cross-border solidarity, and the inability of states to continue fulfilling the objectives for which state sovereignty was originally designed have even led some to assert that states are an abstraction and sovereignty an incongruity, a bulwark that works against the construction of a more orderly and just world.

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Referring to sovereignty, someone once wrote: "After a long time, these ideas are no longer indisputable. These stout pillars on which the edifice of international law has, to date, rested, giving the appearance of foolproof solidity, have begun to wobble. Under the continuous pressures of life, they threaten ruin. But abundant and rich materials have already been accumulated that enable the reconstruction of international law on new bases." These words are not new. They were penned by Politis in 1925. To support his position, he cited examples of international practice. The international regulation of rivers did not allow the division of powers amongst states on a territorial basis; the diplomatic protection of a state's nationals abroad by the state itself established a sort of limitation or subordination that the territorial sovereign had to accept; the minority protection regime, so dear to President Wilson and enshrined in the theory and practice of the League of Nations, was a new limit on the territorialist conceptions of sovereignty; with its patient construction of an international labour code, the Geneva-based International Labour Organization likewise signalled the gradual decline of sovereignty.

Whilst these assertions, however bold, could already be made in 1925, today we could advance down this path on surer footing. Any attempt to build an international order will certainly involve some limitation of state sovereignty; the question is whether the construction of international society is possible if the concept of state sovereignty does not persist. In my view, it is worth taking a moment to consider whether, at the threshold of the 21st century, there are sufficient factors to confirm the critical diagnosis of sovereignty. Furthermore, it is necessary to determine whether these factors are definitive, in the sense of decisive, or, on the contrary, could point to contradictory conclusions.

In 1952, Ramiro Rico wrote, "It is easy to see that, when the West starts speaking about sovereignty, it is to apply to human powers attributes previously reserved for God. It is likewise easy to see how each predicate of sovereignty is intended to be an exact replica of the attributes of God." He had previously written that "because of this transposition of politics and religion, sovereignty, the sovereign, although it is included in political theory, is less a topic of that theory than a subject of theology". The discussion of sovereignty thus becomes a meta-rational question, an affective, belief-related or ideological element, but we must try to move beyond the narrow bounds of these confines. A strictly functionalist analysis shows that, in an increasingly interdependent world, in which no state, not even the most powerful, can achieve autarky, state sovereignty is, to borrow an image formulated by Mao and imported by Chaumant, a paper tiger: cooperation is essential and subordination, in Reuter's classical scheme, is often necessary.

States are becoming more and more aware that achieving the objectives that drove their establishment is no longer so possible for them to do: in the contemporary world, to the extent that states are being debated at all, it is because of their growing proven ineffectiveness in meeting the social demands of their component groups. Other social actors are gradually starting to meet the demands whose fulfilment was previously attributed exclusively to the state. This peaceful dismantling of the state can be seen on at least three levels.

First, governmental international organizations, set up by state governments as an appropriate framework for solving problems that they cannot manage alone, are playing a growing role. The world of international organizations is certainly complex enough to warrant a quick outline, however impressionistic, of their political importance. Whilst organizations can differ in terms of the scope of their composition and vary considerably in terms of the generality or specificity of

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their objectives, they are all endowed, to a greater or lesser extent, with a certain decision-making capability. Consequently, although sometimes they are limited to trying to influence states' behaviour politically, other times their decisions are final and binding on their member states. Not only are international organizations capable of solving problems that states cannot tackle individually, they also often establish goals that would not be feasible for states alone. Thus, international organizations are a functional attack on state sovereignty, by means of elevation.

This situation is particularly clear in the case of international integration organizations, such as those that make up the European Union. In this case, these organizations' decision-making capability, along with their real ability to achieve policies impossible for individual states, leads to a transfer of loyalties from the state to the international organizations. The outcome itself need not pose a threat to the state as such, unless the transfer is accompanied by state decentralization procedures, in which case state nationalism can easily be replaced by nationalisms of a more limited scope, leading to what has come to be called localist or parochial nationalisms.

Second, the political limitations of both states and international organizations, rigidly linked to the achievement of their goals, have led to the increasing emergence of non-governmental international organizations, non-profit-making associations of private individuals that engage in transnational activities and highlight people's dissatisfaction with the failure of states and governmental international organizations to achieve the goals for which each association was created. Although these organizations lack international legal personality, nobody disputes the progressive importance they have acquired. For the purposes of the present analysis, the most important thing is to note that peoples' increasingly international actions — which cannot be constrained by strict political borders — entail a sort of transfer of loyalties from states to non-governmental organizations, to the extent that, in some cases, the state comes to be perceived as an obstacle to achieving the objectives of the associated individuals. At the same time, states, aware of this phenomenon, make considerable efforts to neutralize these organizations' actions or, at least, make them consistent with state objectives.

Third, and contrary to the old Marxist theses whereby the expansion of the international economy would end up triggering inter-imperialist wars, the concentration and centralization of capital has led to an unprecedented growth of transnational companies, which have set themselves up in the most modern form, albeit different from the old states, able to make decisions and impose policies that do not respect state policy, whilst at the same time emerging as a powerful rival of the state subject.

If these factors have any foundation, it would need to be concluded — as indeed it frequently is — that, in light of international law, sovereignty needs to be reformulated. Nobody can reasonably claim that such a fragile state should legally remain the primary subject of international law, the exclusive international lawmaker, and the party responsible for enforcing international rules. It is impossible to conceive of an international regulation of human rights, the configuration of the right of self-determination of peoples, even beyond the colonial context, or the establishment of rules to regulate an indivisible environment that knows no state borders without the establishment of rules limiting state sovereignty. Faced with these premises, any opposition to redefining sovereignty will be regarded as reactionary, contrary to social dynamics.

However, it should be noted that it may not be state sovereignty as a general concept that is ultimately being challenged, but rather certain forms by which sovereignty is manifested. If, as we

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have seen, the way that states have been classified by international law and reality entails the attribution of unequal rights and obligations, the consequence of the diversity of manifestations of sovereignty would be the consideration that not all states are sovereign equals, but rather that the affirmation of their sovereign powers is related to their ability to perform their functions to achieve objectives internationally defined as essential. In other words, it is not a question of saying, for example, that a great power no longer has the same sovereign rights it once enjoyed, and that the same is true of a micro-state, but rather that the exercise of sovereign powers is only legally acceptable when it is done in pursuit of internationally endorsed purposes and objectives.

This gives rise to extremely delicate questions: if the purposes and objectives are established by the community of states as a whole, then there would be nothing to object to in such a reformulation of sovereignty, except the fear that a limited number of states, well positioned on the social scale, would not allow redefinitions that would interfere with their interests. However, what if it is actually a small number of states — precisely those best positioned on the international stage — that are arrogating to themselves the right to establish the aforementioned purposes and objectives to which the performance of each state's sovereign powers must be subject? In that case, what would be being challenged is the alleged sovereignty of a large number of states that are states in formal name only, not that of states with actual power to act internationally.

From this perspective, a forceful defence of a classical understanding of sovereignty would make sense: any failure to do so would mean affirming the right of a few states to make the rules of the game by which all states must play and even the right to ensure that those rules are enforced. In other words, we would be witnessing the resurgence of two 19th-century ideas that are today entirely unacceptable: first, the establishment of a directory of powers with general interests that, like the old Concert of Europe that grew out of the Conference of Vienna in 1815, had the power to judge and enforce the level of compliance with the established objectives; and, second, the notion that this same group of states would define the objectives to be met at any given time, as well as the means needed to achieve them. From there, the return to the distinction between civilized, semi-civilized, and barbarian states would be just a step away and, with it, the direct rejection of any challenge to a sovereignty that, in reality, is but a discreet formula for dressing up an old idea in new clothes. That this is how things are turning out to be is quite different from claiming that it is how they should be.

(2) The unquestionable strength of international organizations

Whenever, in the drafting of an international regulatory text, the question of stating whether international organizations have international legal personality and capacity arises, states usually refrain from making general pronouncements. Instead, they make it dependent on the terms of the individual organization's constitutive treaty or, where there is no choice but to make exceptional statements in this regard, make sure to note that it does not prejudge the question of the international personality of international organizations in general. It is not a matter of categorically defending a privileged position that has come under threat but perhaps something much simpler: ultimately, a state feels safer, more equal, arguing with another state, no matter how superior that state may actually be, than with a conglomerate of states set up as an international organization whose potential can be overwhelming.

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Thus, from a strictly legal perspective, it is impossible to say whether international organizations have international legal personality in general. And yet it would be pointless to dispute their political or social importance. No one can fail to see that 20th-century international relations have stood out, amongst other things, for the irresistible process of creating international organizations and for the capacity of these organizations to decide on the most diverse aspects of international relations, as well as in the sphere of states' domestic policies. No state, no matter how powerful, can feel immune to these organizations' capacity to influence and even make decisions.

In the international law of the last few decades, this fact has been regarded as an irrefutable element for the understanding of international society. From the legal point of view, interest in the debate over the possible international legal personality of international organizations has waned. The rivers of ink spilt at the time regarding the advisory opinion of the International Court of Justice in the *Reparation for Injuries Suffered in the Service of the United Nations* case (1949), affirming the legal personality of the United Nations, have after a calculated discussion of the phenomenon of international personality in general and in relation to organizations in particular become a commonplace that the literature simply reiterates, virtually without debate, as the International Court of Justice itself has done on other occasions, such as in its advisory opinion in the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* case (1980).

But the Court's construction of case law has not been limited to affirming these organizations' legal personality. In its advisory opinion in the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* case (1996), the Court considered that international organizations "are subjects of international law which do not, unlike states, possess a general competence. International organizations are governed by the 'principle of speciality,' that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them." However, it rounded out its reasoning stating that "[t]he powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as 'implied' powers." The Court thus forged deeper down the path on which it first embarked in its advisory opinions in the *Reparation for Injuries Suffered in the Service of the United Nations* (1949) and *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (1962) cases.

This has been the case to such an extent that the constitutive treaties of some international organizations provide for mechanisms for reform and evolution that do not require the long and costly process, in political and legal terms, of reforming the treaty itself. Such is the case of Article 308 of the Treaty establishing the European Community, when it provides, "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures." Indeed, Article 5.2 of the same Treaty responded to the overly generous interpretations of this precept by introducing the limitation that "[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed

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action cannot be sufficiently achieved by the Member States and can therefore, by reasons of the scale or effects of the proposed action, be better achieved by the Community."

It almost seems like the unvarnished cry of a group of states fearful of a progressive assumption of powers by organizations, in detriment to their sovereign powers, aware that international organizations have become associations of states with a legal status and life of their own that can lead them to use powers beyond those strictly and expressly provided for in their constitutive treaties. They are something more than the sum of the individual wills that establish them, because, as the Court has had occasion to state in two judgments in diametrically different situations the *South-West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase* (1966) and *Military and Paramilitary Activities in and against Nicaragua* (1986) cases states cannot individually attribute to themselves the competences attributed to an organization as such.

As a result of all the above, international law theoreticians strive to highlight the importance of international organizations today, not only for understanding, but also for the development of international society. There are thus meticulous studies analysing the international organization phenomenon in detail and even differentiating between the types of international organizations, to clarify the capacity of each organizational model to influence the construction of international society. Briefly, a distinction has been made between universal and closed organizations, depending on whether they aim to bring together all existing states in the world or, on the contrary, their appeal is limited to groups of states characterized by their geographical location or their involvement in common ideas or objectives. Likewise, a distinction is drawn between general organizations, whose objectives include the wide range of issues affecting international relations, and particular or specialized ones, which specialize in a specific issue or set of issues, whether economic, military, social or of any other nature. Finally, depending on the powers with which they are endowed, a distinction is also usually drawn between cooperation organizations, whose essential objective is to be a medium or forum for the coordination of state policies and which do not have any real decision-making powers over the states, and integration organizations, which are invested with the necessary powers to implement the policies decided upon in order to achieve their goals.

In accordance with the specific type of organization we are dealing with, one could say that closed organizations (due to the more likely homogeneity of their members), specialized ones (i.e., those whose objectives are limited to specific issues rather than the full spectrum of aspects involved in international relations), and, finally, organizations that integrate the policies of their member states and have decision-making powers over them will be more influential in the construction of international society, more capable and decisive in shaping it.

However, no matter how broad and varied the chromatic ranges of international organizations, it is postulated that all of them, with greater or lesser strength, have made international society the world it is today. These achievements are especially striking given the relative youth of the international organization phenomenon, which did not effectively see the light until the 20th century, notwithstanding some important forerunners in the 19th century, yet has nevertheless experienced levels of development and success that were absolutely unforeseeable just a century ago.

And yet the reason for this may lie in the impression that, in the last two decades of the 20th century, the model has been working differently, and not exactly for the better, suggesting a

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considerable transformation in the roles assigned to organizations as change agents. At the threshold of the 21st century, a certain operation has been undertaken to discredit universal organizations that, moreover, have objectives spanning the full set of factors comprised by international relations. In other words, the adulation of the specific and the near seems to have eroded the prestige of organizations with general objectives and universal membership. Furthermore, one might perhaps point out that international organizations with democratic voting systems are being challenged more than those with weighted voting models or that require the unanimity of their member states to adopt decisions, which should come as no surprise given the aforementioned supposed challenge to state sovereignty.

I believe that, in effect, the democratization of international society peaked in the 1960s and 1970s with the international organization phenomenon. In the wake of the decolonization process, the number of states tripled. Nobody disputed that the new states, by virtue of the principle of sovereign equality, would participate in international organizations with equal rights and duties. Thus, the organizations not only welcomed the new states but, driven by the voting rules established in their own constitutive treaties, designed policies tailored to the needs of the states newly come to international society and whose basic problems were unquestionable. To cite just one example, no one was surprised when, on 1 May 1974, the UN General Assembly adopted Resolutions 3201 and 3202 (S-VI), seeking the establishment of a new international economic order, with even the date on which they were adopted being symbolic. The new international economic order reasonably considered that the world of states was riven by a fundamental gap between developed states and states benevolently referred to as "developing", with the logical consequence that the former should, in the sense of a legal duty, help fund the development of the latter with a contribution equal to, at first, 1% and, later, 0.7% of their GDP. This would be done in accordance with the application of strict criteria for repayment of what was owed, on the understanding that the current level of underdevelopment of many states was the result of the exploitation to which they had been subjected under colonialism.

Although at first the developed countries stoically bore the adoption of democratically made decisions at international organizations and the subsequent radicalization of the accusations levied against them for noncompliance with what the majority of states demanded, this permissive policy would come to a dramatic end due to the predominance of liberal ideas in the 1980s, first promoted by Mrs Thatcher and, then, by the Reagan administration. Situations were to be dealt with "one problem at a time, one step at a time, one country at a time", which unquestionably amounted to the affirmation of bilateralist criteria and the abandonment of multilateral forums of which international organizations are the preeminent example. This is basically the process taking place at all universal international organizations and that, in some extreme cases, has led prominent member states to leave certain organizations (e.g. UNESCO, the ILO) or to default on the payment of the organization's mandatory membership dues (e.g. the UN).

The situation has not become widespread due to the existence of a threefold corrective factor. First, when an international organization's core constitutional criteria match the prevailing liberal criteria, and it has established legal mechanisms for peaceful dispute settlement, as in the case of the World Trade Organization, states at the top of the social ladder are not scared by the existence of automatic majorities of the opposing side. Second, when an organization's operating mechanism is not based on the criterion of "one state, one vote", but rather establishes weighted

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voting systems (e.g. the World Bank Group or the International Monetary Fund), the voting majority ensures that the organization's policies will cater to the basic interests of the best positioned minority. Third, in some cases, organizations have established de facto mechanisms to prevent the use of the voting power. This third factor calls for some additional explanation.

In earlier decades, when the voting power of the vast number of states to emerge from the decolonization process was obvious, political and scholarly appeals for reason were often made in the sense of preventing a tyranny of the majority in the adoption of new international instruments. A procedure based on consensus amongst the states was postulated, which was the logical consequence of the gradual and cautious way in which international law had developed: it was a matter of preventing the cord from being drawn so taut it wound up breaking, to which end it was advisable to use consensus-based techniques. Consider, for example, the mechanism for the negotiation and adoption of the 1982 Convention on the Law of the Sea. However, what was conceived of as a system to prevent the tyranny of the majority has given way to a tyranny of the minority, recalcitrant but entrenched in positions of privilege, as would be shown by the requirement to adopt Resolution 48/263, of 28 July 1994, including the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which amended the Convention to meet the demands of the more developed states with regard to seabeds and ocean floors. Furthermore, even when the demands of this minority are respected, there is no guarantee that they will ultimately accept the content of the agreement or concession, as evidenced by the fact that, despite the conciliatory effort entailed by the 1994 Agreement, the main state behind it, the United States, has yet to ratify the amended Convention.

These factors may show that we are witnessing a major failure of international organizations whereby the only international organizations or bodies of international organizations that can be said to be effective are those that either are not democratic in their decision-making processes, because they have weighted voting, vetoes, or unanimity-based systems, or are highly specialized in terms of the objectives, principles, and powers set out in their constitutive treaties, or are regional or similarly closed in their composition in a way that ensures homogeneity in the conceptions of their members. In other words, we would be witnessing a tendency to reject universalism and a reaffirmation of particularism, a situation that cannot be considered the most progressive for the construction of the 21st-century world. One can even look on undaunted as a specialized regional organization, NATO, reformulates its constitutional bases, on the occasion of its fiftieth anniversary, to the point of affirming its ability to act in geographical areas that are not its own and usurping the powers of the United Nations Security Council, as it did in the intervention in Yugoslavia. Likewise, it may seem pathetic that, in his September 1998 report on the organization's work, the current Secretary General of the United Nations, all but armed with resilience, centred much of the organization's success on the reduction of the number of its civil servants to fewer than 9,000 (recall that the European Communities have more than 30,000) and on the efforts to balance a budget hampered by foot-dragging on the part of the United States in paying its outstanding dues.

(3) The humanization of international law

Today, nobody disputes that international law has undergone a process of humanization that no one could have predicted just half a century ago. This humanization process can be seen in a

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variety of data. First, there is growing concern both for the fundamental rights and freedoms of individuals considered individually and for the progressive establishment of effective mechanisms to protect those fundamental rights and freedoms and internationally sanction violations thereof, such that states are no longer the exclusive intermediary and guarantor of their realization. Second, this humanization process is no less evident in the emergence and gradual delimitation of the concept of "people" and the establishment of the right of peoples to political self-determination and even to establish themselves as a new state, despite being part of a previously established state. Finally, third, this humanization is also on display in a global conception of what is human that has given rise to the idea of mankind or humankind and its halting enshrinement in texts of a strictly legal nature.

These three facts clearly show that states and international organizations are no longer the exclusive subjects of the international order and, even more importantly, that international law has to be understood based on this plurality of elements. This is true to such an extent that some might see in them the decline of the state, which is insufficient to control them and, even more tellingly, unable to meet their demands. International texts mention each of these things so many times, so expressly, and laying out such precise mechanisms for their fulfilment that any attempt to reflect on the matter is senseless, due to its obviousness. Nevertheless, at the threshold of the 21st century, we may be witnessing the emergence of a set of processes that, without disputing the reality or legal content of these entities, are opening them up to a certain political malleability.

In effect, it is a humanization due to the growing concern for the declaration of the individual rights and freedoms of human persons and, more importantly, for the establishment of effective protection mechanisms. This consideration would almost seem pointless were it not for the fact that barely half a century ago, human rights matters were considered to fall under the internal jurisdiction of states, which international law was not supposed to affect. Although on 10 December 1948 the United Nations General Assembly did adopt Resolution 217(III), containing the Universal Declaration of Human Rights, that declaration cannot be fully understood without reference to the context of the Cold War. Around that time, the United Nations had taken up the Spanish Question and, for the most part, come out in favour of the position that human rights were an internal matter of the Spanish state. So dramatically has the situation changed since then that today no state would dare invoke its domestic jurisdiction to exclude international concern regarding a human rights issue.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted on 19 December 1966, are just two of the major legal milestones reached since then. They are joined by such basic instruments today as the Convention on the Elimination of All Forms of Discrimination against Women, of 18 December 1979, or the Convention on the Rights of the Child, of 6 December 1990, together with many others specifically aimed at protecting groups of people in need of special protection or eradicating loathsome practices such as racial discrimination, slavery or torture, as well as a no lesser number of instruments drawn up in specific regional contexts, such as that of the Council of Europe. All these instruments have moreover been endowed with verification, control, and complaint mechanisms that, with varying degrees of effectiveness, serve to ensure that they are not merely programmatic proclamations, but instruments of effective protection.

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In a two-way operation, in recent times we are witnessing the affirmation of individual criminal responsibility of human persons for the commission of especially heinous international crimes and the stripping away both of any veil of personal immunity exempting individuals from the action of international justice and of the possibility of the all-powerful national interest serving as a protective mantle to insulate people who have individually committed international crimes. In this sense, the 17 July 1998 Statute of the International Criminal Court, which will quite likely be established in the very first years of the 21st century, is indicative of a key piece of the system, entailing a large step forward in the theoretical conceptions and practices of international law.

There is no need to reiterate that we are dealing with decisive advances in the field of international law that will have to be credited to the 20th century, even though they are establishing themselves as an essential element for understanding the 21st, which is nevertheless dawning under the threat of dark clouds that could degenerate into dangerous storms. Without aiming to artificially sustain a debate that has never been artificial, the first such cloud is an excessively lopsided emphasis on civil and political rights, which never results in much, except to the detriment of economic, social, and cultural rights. Ultimately, what really matters for international society and the law that governs it is not which of this set of rights should have primacy — a question that brooks no discussion in any way. Instead, it is the fact that if the pre-eminence tilts towards formal rights and freedoms — which would be logical given the specific weight of Western countries and their individualist tradition — then the debate over the adequacy of third countries' behaviours in relation to the issue of human rights will take place within a canon of legality formed by precisely these types of rights, leading the scale to tip even further away from the others. In other words: the aim is to ensure a form of political construction regardless of the underlying structural differences that any state society faces. As a result, countries must obtain endorsements of their democracies in order to attain international advantages. It may not be too bold to think that the issue of human rights, essentially understood from the perspective of civil and political rights, is today the new dividing line being sought to be established for the classification of states into civilized and uncivilized, with the terrible consequences this had in the 19th century and much of the 20th.

The second dark cloud would be the very existence of this dividing line. If the protection of human rights cannot in any way be considered a matter of the internal competence of states, but rather is a matter of legitimate and legal concern for the international community, it would be understandable if, in the event of gross and massive human rights violations occurring anywhere in the world, the international community as a whole or, where appropriate, the states especially concerned invoked a right of intervention to end the anomalous situations, as was indeed invoked — and as occurred — in Somalia and in Yugoslavia. Irrespective of the debatable issues raised by this alleged right, or even duty, to intervene, the fact of the matter is that it would only be being conceived of for civil or political human rights violations, and would be unlikely to be invoked in relation to violations of economic, social, or cultural rights. Insofar as the great challenges of the 21st century may result precisely from the economic collapse of some state societies — and Africa is a serious contender to remain at the top of that noxious ranking — the alleged right of intervention would simply be a tool of political domination rather than a mechanism materially aimed at achieving a higher degree of fulfilment of the aspiration of human rights.

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The humanization of the international order has been equally verifiable in the 20th century in the progressive formulation of the concept of people. Although the Preamble of the Charter of the United Nations does begin "We the peoples of the United Nations", the expression was simply the result of a recognition that peoples were constituted in states and represented by their respective governments, in a virtually irrebuttable presumption, rendering any subsequent reference to the conceptualization of the term "people" a waste of time. However, the Charter contained the seed for what would later be a powerful development. Although it was not intended to end the colonial system in force at the time, Article 73 referred to peoples who had "not yet attained a full measure of self-government", stating that their interests were "paramount", and establishing what, subsequently, as set forth in Resolution 1514 (XV), of 14 December 1960, would become the Declaration on the Granting of Independence to Colonial Countries and Peoples, a tool for the illegalization of any vestige of colonialism, albeit with the caveat that, under no circumstances, would the territorial integrity of already established sovereign and independent states be undermined.

In 1970, as a result of the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation amongst States in accordance with the Charter of the United Nations, contained in Resolution 2625 (XXV), of 24 October 1970, the organization took another step in the delimitation of the meaning of the term "people". It reiterated that the principle of self-determination of peoples "shall [not] be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity [...] of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples [...] and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

As small as the caveat was, it was clear that the territorial integrity of states was an ineluctable principle of the international order only as long as no discrimination was established within states in relation to peoples existing in their territory. Otherwise, in a modern version of a minority right, these peoples discriminated against in their own state would have a right to self-determination and to establish themselves as independent states. It is undoubtedly a remarkable advance, as it is the first clear legal case in which the idea of the state is given back seat to another international legal entity. It should even be hailed as a sign of progress in the construction of an international law closer to basic realities and less concerned with safeguarding a state that, in many cases, hinders the realization of human aspirations.

The content of the right of self-determination of peoples, going beyond the strict sphere of decolonization, was certainly progressive, but it was also dangerous, due to the elements of uncertainty that it cast, in particular, the indeterminacy with regard to what constitutes discrimination and, especially, the mechanisms and bodies to be responsible for making that determination. In a decentralized international society, there is a clear possibility that such a right would be recognized individually by third states based on considerations that each one is supposed to pronounce in good faith and that would give rise to obvious political manipulations. Legal reasoning is unlikely to be able to differentiate between the different international positions in cases such as Kosovo or Kurdistan, to cite examples not too far removed in time or geography.

Finally, this humanization was increasingly clear in the emergence of the term "mankind" as an autonomous idea of dubious legal scope. The earliest references were quite vague, such as the one

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contained in the Preamble of the Antarctic Treaty, of 1 December 1959, which states that it is "in the interests of all mankind" that "Antarctica should be used forever exclusively for peaceful purposes". This legal imprecision was maintained in the Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, of 27 January 1967, Article I of which provides, "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." However, Article 136 of the Jamaica Convention on the Law of the Sea, of 10 December 1982, helped define the concept, referring to the area of the seabed and ocean floor situated beyond national jurisdictions thusly: "The Area and its resources are the common heritage of mankind."

This succession of cases made it possible to affirm, apart from the literature, that mankind was being introduced as a new subject of international law, proposing revolutionary transformations, whether the recognition of mankind's status as a legal subject or the requirement that seabed and ocean-floor resources be exploited directly by an international institution.

However, the turn of the 21st century calls for a rethinking of these conceptions, which seem both idealistic and removed from what states want the reality of international practice to be. In effect, rather than rejecting the legal concept of mankind, which persists in the wording of Article 136, the states have rejected the possibility of an institutionalized exploitation of the seabeds and of a socialization of the possible benefits to be obtained, preferring instead, in consonance with the prevailing economic ideas, to privatize their management and exploitation. The 1982 Convention did not succeed in entering into force until the amendments that the developed states sought to make to it were accepted: on 28 July 1994, the General Assembly adopted Resolution 48/263, which included the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. Reading it, one might wonder what actually remains of the idea of the Area as the common heritage of mankind or, more specifically, what content the concept of mankind will retain, in the legal sense, beyond that of mere poetic licence that does not in any way diminish the powerful strength of the states, akin to when we refer to a place or a monument as the cultural heritage of humanity.

(B) THE RULES OF INTERNATIONAL LAW

Strictly speaking, in international law, there are no centralized mechanisms for creating rules; each legal obligation for each state arises, in principle, from its consent, with a dual implication. First, the legal obligations, the rules that bind each state, are the result of that state's consensual acceptance of those rules. On the other hand, international law is not particularly stringent, from a formal point of view, with regard to the requirements and demands this consent must meet; the express or tacit acceptance by a state, its actions, even its lack of action or silence can all be indicative of its acceptance of a legal obligation that will be binding on it in future. Without exaggeration, the will of the states is said to be the only source of international law. In this sense, and only in this sense, international law can be said to be the most democratically developed legal system, since, in principle, no subject of this law can be compelled by a legal rule in whose development or acceptance it did not participate. For others, this surfeit of democratic

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development is the greatest exponent of anarchy but, because of state sovereignty, is also the only way this system has managed to establish itself and offer projects to regulate international society. Second, insofar as state obligations are derived from rules and obligations that the states themselves have expressly or tacitly accepted, the limitations on state powers cannot be presupposed, but rather have to be clearly established by these obligations. As in a blissful Arcadia, a state is quite free to do anything not expressly prohibited by an international obligation in whose creation it has participated, and this maxim has to be understood in the sense that limitations on state powers cannot be assumed.

Obviously, this operating mechanism casts serious doubts on the international system's ability to regulate a progressively interdependent international society whose problems moreover increasingly clearly call for global or collective solutions for which autarkic actions will not suffice. The history and evolution of international law are, in sum, an attempt to progressively develop state obligations for the regulation of the community of problems. With this concern, the sources of international law have undergone significant changes in recent decades, which have already been assessed in their full extent and meaning. These solution mechanisms, which have important pros and cons, merit some attention.

In an international society of juxtaposed states, which was basically the case until the mid-20th century, characterized by an excessive atomization of power, the existence of essentially bilateral international relations, and a lack of international organizations that could generally and systematically serve as forums of discussion and consensus-building to solve common problems, international rules and obligations were developed either through bilateral treaties or by the customary procedure, as a result of a practice generally accepted by states as law. In essence, this development mechanism is slow and has proved inefficient for coping with the increased demands of the world of current international relations. Out of their own interest, states had to start using multilateral treaty-based mechanisms by means of which the states as a whole enabled automatic responses to new demands in the life of international relations.

The basic consequence has been that custom, in relation to treaties, has experienced a significant reversal in terms of its importance as a form of creating international law: whereas in the past most international rules were customary, today most rules are treaty-based. The requirements of generality, uniformity, duration of the practice over time, and that it be carried out under the psychological or spiritual requisite of being required by law did not exactly speed its formation. Although some have pointed to the existence of wild or instantaneous customs, i.e. those that can materialize in a short period of time or due to the reiteration of a small number of antecedents, doubts are always cast as to their real level of acceptance or their enforceability for states that did not participate in the process of their development and consolidation.

In the decades immediately following World War II, custom certainly seemed destined to decline for three reasons: first, its inadequacy for facing the new challenges; second, the increasingly vigorous practice of concluding multilateral treaties, some with general normative aspirations; and third, the growing regulatory power of international organizations.

(1) The growth of states' treaty practice

Solely for illustrative purposes, and with no claim to excessive conclusions, the Secretariat of the League of Nations registered and published 205 volumes of treaties concluded over the period

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from 1919 to 1939. From 1945 to today, the Secretariat General of the United Nations has published more than 1,200 volumes of treaties concluded since World War II. This is more than a mere quantitative increase in the number of treaties concluded, especially given the proliferation of the number of states in the international community today. A thorough examination of the volumes of both institutions reveals two especially important facts. First, in the period between the two world wars, the overwhelming majority of treaties were bilateral or barely multilateral, reflecting the existence of an atomized international society with a paucity of widespread interstate relations. In contrast, in the United Nations era the percentage of multilateral treaties has grown considerably, suggesting that states are increasingly aware that international issues require even if they cannot be fully addressed by the regulation of relations between peer states: many matters that are the subject of treaty-based relations affect all states equally, regardless of their geographical location, geostrategic importance, or specific problems.

The diversification of subjects covered by recorded and published treaties is equally illustrative. In the past, there was an almost limited set of issues that could be the subject of international agreements, restricted to a handful of matters in which it was considered that the power of state sovereignty could not be fully realized without some type of international cooperation. Today, in contrast, one could be forgiven for wondering whether there is a single issue that could be regulated from purely state-based perspectives. The direct consequence is that, whatever field we look at, we would be hard-pressed not to find some type of international regulation, condition, or interest. It is not that there has been some sort of imperialist expansion of international law, which still works based on state sovereignty, but rather states' sovereign needs have compelled them to coordinate their policies through international actions. Whereas once human relations practically ended at a state's borders, today's relational demands cannot be circumscribed to such narrow confines.

It is easy to see how states' growing interdependence requires regulatory means that can only be achieved through agile, rapid, virtually instantaneous procedures. In this regard, the customary procedure, slow to form and reliant on the parsimonious acceptance of states, was frankly inadequate, whilst the myriad forms of treaties can address difficulties and needs as they arise, with no further delay than states' willingness, or lack thereof, to solve them. Treaties, therefore, have proved to be the most suitable, albeit not the only, means of meeting pressing needs.

Moreover, insofar as problems of interdependence not only affect the relations between two states or a small number of states, but also highlight needs affecting all states, bilateral treaty solutions are either a partial response to these problems or refer to problems of interest to only two or a small number of states in particular. Hence, treaties have become more general, preventing partial solutions from simply diverting problems to an increasing number of alternative cracks.

States' certainty in establishing new rules of conduct to tackle the challenges of the present led to an acceleration of the codification process, although it was still a far cry from that which they showed in their own domestic laws throughout the 19th century. As the Charter of the United Nations had already provided for this function of the codification and progressive development of international law, all that remained was to create the body to do it, i.e. the International Law Commission, to witness a show the likes of which had been hitherto virtually unknown in international society. Currently made up of 34 members elected based on their competence in

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international law and representative of the world's various legal and political cultures, the Commission managed to create an extensive body of conventions that codified and, often, developed international law. Important draft articles thus saw the light on matters of diplomatic and consular law, the law of treaties, the succession of states, the law of the sea, non-navigational uses of watercourses, the personal status of natural persons, international criminal law, and jurisdictional immunities of states, to cite just a few prominent examples of the Commission's work. This work was accompanied by states' efforts to develop international law through plenipotentiary conferences on the most diverse and far-flung matters, ranging from space law, to the law of the sea, the legal regime for Antarctica, human rights and a long *et cetera*.

The legal landscape was so strongly impacted that the literature could not shake off a certain air of optimism, and discussion of cases of the repeal of the relative effect of treaties was increasingly common, that is, the assertion that some treaties, representing the management of common interests of mankind, generated objective effects even for states that were not parties to them, thereby resembling a procedure for creating legal rules that did not require states' consent to be binding on all states in the international community regardless of their position on the matter being regulated by the treaty. The phrase "general normative treaties" was thus coined in the literature, in reference to treaties concerning general rules of international law or referring to matters of general interest to all states.

The essential characteristics of these treaties would be to have been drafted in an almost universal collective environment, by means of consensus-based techniques capable of having certain effects for third parties, as provided for under Article 38 of the Vienna Convention on the Law of Treaties, that is, by the same mechanism through which customary rules become binding on states, and which would even prevent states parties from attaching reservations to them with the aim of excluding or modifying their provisions. It was confidently noted that we were dealing with an authentic mutation of international law whereby it was acquiring a nature not only previously unknown to it but also contrary to the usual bases for its construction, grounded in consensus.

However, this trend has undergone a noticeable change in the last decade, although the first symptoms were registered in the 1980s. In short, the system for the drafting of general normative treaties, of any codification and progressive development project, requires a formation process potentially involving almost 200 states. Obviously, in such an overwhelmingly collective environment, a text that satisfies each and every desire of each and every state can hardly be sought. Instead, states must be required to show a capacity to bargain and compromise, to cede on state interests, lest the treaty be limited to a list of principles or general and abstract rules entailing no specific legal undertakings. Furthermore, that needs to be done amongst a group of states that are not only heterogeneous in their stances and conceptions, but are also unevenly positioned on the international socio-economic scale, and in which the most disadvantaged states constitute the vast majority. If, as part of the gradual agreement process, the majority rules are to have any weight at all, the greatest demand for compromise will clearly have to be placed on the states in the minority, which are the best positioned on the social scale. From this perspective, it should come as no surprise that Western states have led the pack in rejecting, first, the objectivist aims of general normative treaties and, second, codifying efforts as a whole. The process undergone for the entry into force of the United Nations Convention on the Law of the Sea, concluded in Montego Bay on

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10 December 1982 and which, despite having been renegotiated to accommodate the demands of the United States, as noted earlier, has not yet been ratified by it, is significant. Unfortunately, other aspects of practice would likewise be illustrative of this trend. However, it may suffice to refer to the changing role of the International Law Commission, whose importance in the process of the codification and progressive development of international law was stressed above. Two important changes have taken place in how it works: the first is related to its composition; the second, to the matters it currently deals with.

With regard to the first aspect, states' eagerness to appoint people to the Commission who, regardless of their level of knowledge of the field of international law, have been, or still are, linked to their respective foreign affairs ministries is increasingly clear. Unlike the old lists of Commission members, which featured globally renowned internationalists, today's lists are more likely to include the names of people who have rendered important services to their respective governments. Accordingly, where once the Commission's reports were required reading for any international lawyer, today the approaches they take are more concerned with foreign policy issues, dragged down by an excessive legal realism, and tinged with all the demands of politics. Curiously, after several years of discussions concerning the Statute of the International Criminal Court, the instrument ultimately adopted at the Rome Conference by representatives of the states was less influenced by political considerations than that drawn up by a body composed of jurists of recognized competence who, in theory, are not hampered by albeit also not unaware of political concerns.

However, with regard to the question of the matters the Commission is currently dealing with which are, of course, decided by the United Nations General Assembly, although accepting the Commission's own suggestions and leaving aside those matters it has already been dealing with for years, such as the international responsibility of states, injurious consequences of acts not prohibited by international law, or objective international responsibility, it is doubtful whether matters relating to treaty reservations, the impact of state succession on nationality, unilateral acts, or diplomatic protection are issues in urgent need of codification and progressive development. As for more pressing issues, the Commission's most recent report suggested it was considering dealing with environmental issues. Of course, the Commission will only go where the states want it to.

Even in delicate matters, such as the Commission's current discussion concerning the issue of reservations, in which it would have to reach some sort of legal agreement on whether the ability to attach reservations to general multilateral treaties is unlimited, provided they respect the objects and purposes of the conventions and their reserved provisions, the discussion of who would be responsible for determining a reservation's compatibility with the object and purpose of the convention in question and the legal consequences of a reservation that would not be is showing that the Commission members from Western states hold the more consensus-based positions, the ones more clearly anchored in state voluntarism.

On another level, it might not be an exaggeration to say that we are witnessing a certain slowdown in the codifying process, due to the difficulties involved, although this statement requires some qualification. On the one hand, some areas requiring a codification effort seem to be absent from the states' agenda. Space law, for example, has not undergone significant changes since the 1970s; the discussion, especially with regard to geostationary orbits, remote sensing, and

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television broadcasting, has not budged. In other areas on which public opinion has had a greater impact, such as the environment, the Rio and Kyoto Conferences managed to conclude conventions that no one would hesitate to characterize as "soft law", due to the essentially recommendatory nature of their provisions and the lack of means of action and control mechanisms. In fields such as international economic law, the creation of the World Trade Organization has not been accompanied by substantive texts such as those intended in bygone times on economic matters.

Significantly, however, this sluggishness is not found in all geographical areas, pointing to the possible veracity of the aforementioned theses: not only have the codification and progressive development efforts of the Council of Europe, in Spain's most immediate environment, not shown any sign of slowing down, but in recent decades the rate of homogenization has increased, and it has done so despite the difficulty that the massive incorporation of countries from Central and Eastern Europe, which, in practice, has doubled the number of its members, might have entailed.

(2) The emergence of centralized authoritarian rules

International organizations were conceived as forums for coordinating state policies insofar as they might be of international importance. As such forums for state coordination or cooperation, international organizations were not usually endowed with the power to adopt legal instruments that would be legally binding on states. Instead, the content of their instruments was limited to recommending that states study, in good faith, the possibility of adapting their behaviour to whatever the recommendation requested of them. States fulfilled their international obligation when they considered, in good faith, the possibility of abiding by the recommendation's content. This good faith was to be assumed; states were not even required to justify the outcome of their consideration to the organization. Before sovereign entities, any other aim would have been exorbitant and contrary to the states' intentions in creating international organizations. Nineteenth-century practice, with the primitive administrative unions and many of the powers that international organizations still enjoy today, is based on this precarious attribution of powers to international organizations.

It is not particularly hard to see that this scheme would prove incapable of coping with the complexity of international relations, prompting at least some international organizations to begin to be invested with more binding powers with regard to states. Although still recommendatory in nature, the legal instruments of some international organizations require states to explain the measures adopted in accordance with the recommendation or, at least, to justify why the intended effect of the recommendation could not be achieved. In this highly subtle and seemingly innocent way, states are forced to publicly explain their courses of action, a considerable advance compared with other eras, with regard to the omnipotent state sovereignty. However, in some international organizations, the legal instrument's merely recommendatory nature is illusory: when a state is faced with an instrument of an apparently recommendatory nature, it either strictly complies with it or, in reality, may be left out of the organization's mechanisms and benefits, causing unendurable harm to states that have simply exercised their authority in matters of being bound by the organization's acts. In other organizations, even though no strict principles have been established regarding the legal value of their instruments, the absolutely mandatory nature of their bodies' decisions becomes clear in practice: when a state seeks aid from the International Monetary Fund

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or the International Bank for Reconstruction and Development, the award of that aid is contingent on its adherence to a specific economic policy. Current practice offers enough examples to obviate the need to explore these issues in greater detail. However, the basic general principle is that the legal instruments of international organizations are recommendatory in nature. It is thus neither surprising nor particularly shocking that states are slow to comply with their content, without incurring any sort of international legal responsibility as a result.

Sometimes, however, the organization is vested with more binding powers and may even force a state to achieve a certain outcome by a given deadline, although how to do so is left up to each state. In the field of European Community law, everyone is familiar with the mechanism used in the directives. The procedure is effective insofar as states are bound to be in strict compliance with the directive by an established deadline; otherwise, national judges or the Community bodies themselves will see to its enforcement.

Some organizations, due to the importance of their objectives or the coherence of their members, do not want or cannot afford the possibility of state behaviour that randomly conforms to what the legal instrument requires. For example, if the members of the international community have attributed the primary responsibility for maintaining international peace and security to the Security Council, the Security Council may recommend or decide on the necessary measures to achieve that goal. In the case of a decision, all states are legally bound to comply with its content, lest they incur international responsibility, which can only be excluded by the Security Council itself or on any of the grounds precluding wrongfulness provided for under international law. It is thus starting to become a familiar sight to find binding decisions published in the Official State Gazette with consequences for both public authorities and the people they govern, such as in the case of sanctions adopted against Libya, Iraq, Haiti, or Yugoslavia. The phenomenon is especially familiar in the field of Community law due to the Community regulations, which are directly and immediately binding from the moment they are published, taking precedence over Spain's domestic laws, and whose publication in the Official State Gazette is moreover excluded.

This ability of international organizations to draft legal rules that can become binding for states explains why these rules are said to be centralized and authoritarian, in contradiction of the classical assertion that all international legal obligations are the result or exponent of state consent, given that this consent is not present in the instruments of international organizations. Although these organizations may be composed of states, and it is the states that drive their decision-making, they are nevertheless distinct and separate legal entities, not the mere sum of the member states that make them up.

On the other hand, it might be argued that although this conclusion is true, it should not be exaggerated, given the scant number of organizations that, in accordance with their constitutive treaty, have the ability to generate binding legal instruments; the instruments produced by the overwhelming majority of organizations are of a strictly recommendatory nature. Aside from the fact that when, in purely theoretical terms, reference is made to a given possibility, the number of cases generating binding effects would not change the phenomenon of the emergence of centralized authoritarian rules itself, there is another factor that should be taken into account to calibrate the full potential of international organizations' regulatory power. Indeed, even when an international organization's instruments are merely recommendatory in nature, the reiteration of instruments in the same sense, the widespread support of the member states for their adoption,

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and the clarity of their content can have consequences not initially intended by the constitutive treaty of the organization in question from a formal point of view: the possibility that the content of the instruments ends up being demonstrative of a conviction or opinion of the states as a whole, because what it requests of them is a legal obligation that has obtained its binding force through its transformation into a customary rule of international law, as the International Court of Justice would find in the 1986 judgment we will refer to later.

Even if we preliminarily accept these statements, however, we must not leap to conclusions regarding the importance of this process in the construction and consolidation of international law in recent decades or the immediate future. The world of international organizations is so complex, the types of organizations so varied, it would be illusory to reach conclusions that applied equally to them all. This possibility, in general, will depend on two factors. The first is the degree of homogeneity of the organization in question. The fewer the members an organization has, the greater the chances will be for closer cohesion between them and, thus, for them to reach more intense and specific agreements. In contrast, the broader an organization's membership, the more heterogeneous its members will be, which will lower the chances of cohesion, resulting in the reaching of less narrow and vaguer agreements and thus hindering its chances of affecting the customary process. Likewise, the more specific and concrete an organization's objectives and purposes are, and the more technical its nature, the more likely its instruments are to become customary rules. This stands in contrast to organizations with general and abstract objectives, often far removed from technical issues in an effort to push deeper into the complex world of politics, which are less likely to have a real impact on the customary process.

Second, however, how an international organization makes its decisions also influences the legal significance of its instruments: the more demanding the requirements to consider an instrument adopted, that is, the dearer it is to secure the necessary votes, the more jealous states will be of the value of their position. In contrast, at organizations in which decisions are made by simple majorities, more states will view the establishment of their positions as inconsequential or irrelevant. This is a paradoxical but verifiable statement: organizations with more democratic voting procedures tend to have less influence than organizations that require unanimity, establish a right to veto, or implement weighted voting systems. In these latter organizations, states are more aware of the consequences of their individual actions and weigh the meaning of their vote more carefully.

When these affirmations are taken to their practical conclusions, it is no surprise that NATO will always be able to do more than the United Nations, in their respective fields of action, that the Security Council is more powerful — if not more important — than the General Assembly of that organization, or that the executive powers of the International Monetary Fund or World Bank Group make Unesco or FAO green with envy, regardless of the relative importance of their respective goals. Likewise, it is understandable — if not justifiable — that a significant number of states, including Spain, have, at the threshold of the 21st century, redoubled their commitment to specialized regional organizations with voting procedures in which each state matters even as they flee from or undervalue universal international organizations with indeterminate general purposes and voting procedures that, they claim, give rise to automatic tyrannies of the majority. The importance of this situation is that we may be witnessing the birth of a schism in international law between universalism and particularism, which does not in itself pose an unacceptable challenge

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to the construction of an international order that takes global unity and interdependence into account, but which may lead to levels of struggle, conflict, or confrontation as a result of the imposition of particularism over universalism due to the indisputable fact that the particularist states are the best positioned, in all aspects of international relations, to end up imposing their particularism, as the turn of the century clearly seems to be showing.

(3) The resurrection of custom

In 1986, the International Court of Justice had to settle a question of profound political and legal significance in the suit brought by Nicaragua against the United States in the *Military and Paramilitary Activities in and against Nicaragua* case. In addition to the difficulty always involved in deciding on an issue with broad political connotations, the Court could not use the Charter of the United Nations as a regulatory framework because of the conditions of the declaration of recognition of its jurisdiction made by the United States. Whilst Article 2.4 of the Charter of the United Nations leaves no room for doubt as to the absolute prohibition of the use of force or the threat of force in international relations, because the Court could not use it, it had to determine whether this prohibition could be deduced from other rules of international law, such as the instruments of international organizations or the existence of a custom resulting from a practice generally accepted as law. In the first area, the recommendatory nature of the countless instruments of the United Nations General Assembly reiterating the prohibition of the use of force made the possibility of citing them as giving rise to legal obligations for the states dubious. However, the reiteration of the content could be demonstrative of a customary practice. To this end, the Court had to address two crucial questions: first, custom has to be general, uniform, and lasting, and practice seemed to offer enough examples of the use of force in international relations to cast doubt on the generality and uniformity of states' acceptance of the prohibition. The Court brilliantly reasoned that sometimes the violation of a rule does not necessarily entail a challenge to it, but curiously may be indicative of its level of acceptance, as when the states that have used force reiterate the existence of the prohibition even as they claim that the specific case is an exceptional situation allowed under international law or that it does not constitute a use of force prohibited by international law. No state, when using force, defends its right to do so. Instead, they excuse the use based on circumstances that preclude their responsibility in the specific situation, whilst reiterating the validity of the prohibition in general. This would demonstrate that the prohibition is fully valid, even if the scope of its content or its exhaustive nature can be disputed.

However, matters of custom require another element, namely, that states' behaviour be based on the conviction that the behaviour, or the obligation to refrain from it, is required by law and not by customs of another nature. In short, it is the requirement of a legal conviction or *opinio juris*. International case law has had few occasions to analyse the psychological or spiritual aspect of custom in depth. When it has done so autonomously, it has been possible to perceive a trend that, in the specific cases, states had not acted out of a belief in a legal obligation, but as a result of a custom or courtesy devoid of legal content. Now, however, the Court would have the opportunity to refer to in its entirety, and reaffirm, the psychological or spiritual aspect and to verify that the reiteration of the recommendatory instruments of the General Assembly could demonstrate as indeed they did the existence of a legal conviction regarding the prohibition of the use of force.

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It has generally been noted that the Court reiterated its construction regarding the *opinio juris* from the 1986 judgment in its advisory opinion in 1996 in the *Legality of the Threat or Use of Nuclear Weapons* case, requested by the United Nations General Assembly. This advisory opinion has been surrounded by deep, often meta-legal debate, as it was unable to conclude definitively whether the use of nuclear weapons in cases in which the very survival of the state that resorted to them in legitimate self-defence was at stake would be unlawful, causing some other legal approaches to lose force. Whilst the Court did reiterate, albeit tenuously, the importance of the *opinio juris*, it seems that in this case it was difficult to advance any further down the path it had begun in 1986, precisely in view of the minority, but consistent position of those states that have never renounced the possibility of using nuclear weapons as a last resort in legitimate self-defence. To some extent, we would be dealing with two legal convictions, in seemingly different matters, affecting the outcome of the same question: the legality or illegality, in any case, of the threat or use of nuclear weapons.

With these two cases, legal conviction, as an autonomous element shaping custom, would have emerged considerably reinforced, to the point where, in the event of a contradiction between actual state practice, sometimes in violation of the content of the supposed custom, and the unilateral statements made by states or groups in the sphere of international organizations affirming the validity of the rule despite the contradictions in practice, more importance could be given to the affirmations of validity than to the practice of violations. Consequently, custom would have demonstrated an unprecedented ability to survive, even though everything pointed to its gradual extinction as a mechanism poorly suited to the creation of international law today.

However, this resurrection of custom may be flawed, due to the presence of the two types of elements that must be present in custom, even if one wishes to assign them different weights. First, the importance of the element of legal conviction can be extracted from the unilateral declarations of the states or those made in international organizations. If, as noted earlier, a certain category of states is manifesting a tendency to abandon or relinquish the collective means provided by general universal international organizations in order to seek shelter in the safer world of the homogeneity of specialized regional organizations, it should come as no surprise that this group of states will generate legal convictions in that sphere more aligned with their approaches and needs or, at least, quashing claims of contrary convictions created in the former type of organization.

Second, however, custom is the expression of a practice generally accepted by states as law, which means that divergent practices could also be detected by groups of states, which would denote a deepening of particularism as opposed to universalism insofar as one group of states, because of its higher profile and greater international importance, has a greater capacity to create a practice generally accepted as law, in the absence of opposite or divergent practices. This reasoning is perhaps best illustrated by a pointed example, the content of which I will not go into here: in recent years, references to the existence of a so-called right — some even say duty — of humanitarian intervention in situations of massive human rights violations and the absence or inability of the territorial state to put an end to such regrettable situations have begun to be recurrent. If we were to analyse states' declarations on this matter, we might find vigorous affirmations, timid rejections of such a practice, and fearful silences amongst the group of states that make up the international community as a whole. However, were we to set such declarations aside, so as not to limit ourselves exclusively to the question of the *opinio juris*, and conduct the

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investigation strictly in the sphere of state practice, we would find that only a small number of states — all from the same geopolitical sphere — are actually able to carry out humanitarian interventions and would thus be drawing the profile of this institution, giving rise to the fear that not everything in their outline would be done for purely altruistic reasons.

In other words, subject to the qualifications of the foregoing considerations, we could be witnessing an interested resurrection of custom at the threshold of the 21st century, with the awareness that, today as in the 19th century, custom is the expression of a practice generally accepted as law by those states that actually have the ability to carry out actions of real international significance.

(4) The hierarchical organization of rules

When international lawyers speak of the sources of international law, more than using a metaphor about the origin of legal obligations, in reality we are engaging in a certain mimicry of domestic lawyers, who, in speaking of the formal sources of law, refer to the form in which the material sources are expressed, be it popular sovereignty, the laws passed by the legislative branch, the regulatory capacity of the executive branch, or the spontaneous action of the various subjects of law. For international lawyers, the only source of law, in theory, is the will or consent of the states, expressed in a variety of ways, although, as noted, the powerful emergence of international organizations has introduced significant changes in this classical conception. If we really want to teach our students about international legal rules, we should draw on their knowledge of civil law, when they study obligations and contracts, to show them that international rules are equivalent to what is usually studied as obligations in civil law. From this perspective, it would make no sense to try to establish a scale or hierarchy of the various obligations that might stem from different contracts: all of them oblige the contracting parties, who, in the event of a conflict between the various obligations, must decide to comply with some and accept responsibility for the breach of others, all in accordance with the principle of party autonomy enshrined in Article 1255 of the Spanish Civil Code.

In international law, at first and from a classical perspective, there could not be a legal hierarchy, but rather simply the assumption by states of a series of obligations, all of which were binding on them with the same weight and force. The situation changed, however, with Article 103 of the Charter of the United Nations, which provides, "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." This primacy of the Charter is nothing more than the result of a specific obligation voluntarily undertaken by the states, making it the exception to the principle of equality of the various legal obligations, but it led to the possibility of theoretically conceiving of the Charter as if it were a constitution, with its rules constituting the canon of legality for any other legal obligations.

The situation of exceptionality underwent an indisputable quantitative change as a result of Articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969, according to the first of which, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified

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only by a subsequent norm of general international law having the same character." Article 64 regulates the legal effects of the emergence of a new peremptory norm with regard to existing treaties, with the consequent effect of annulment. Thus, the principle of party autonomy, theretofore unquestioned in international law, was subjected to limits similar to those established in the Spanish Civil Code, when it refers to the law, morality, and good customs as limitations on the autonomy of the parties to a contract.

By that point, this trend seemed unstoppable in international law, evincing characteristics similar to those often pointed to in states' domestic laws, to the extent that, when, in the 1970s, the International Law Commission was developing the Draft Articles on State Responsibility, a task it is still working on today, it did not seem like overreach to seek to distinguish between crimes and delicts in international law, as Article 19 of the Draft Articles does. An internationally wrongful act constituting a breach of an international obligation, regardless of the subject matter of the obligation breached, would be a delict. In contrast, the breach of an obligation essential for the protection of fundamental interests of the international community as a whole would be an international crime. The article then provides a list of these interests so essential their breach could result in an international crime, as well as examples of such breaches, including aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, and apartheid, or massive pollution of the atmosphere or seas.

With this line of reasoning, not only did international law establish, for the first time, a hierarchical, albeit succinct, order for its rules based on their special importance, but the breach of certain ones could give rise to more dramatic consequences than the mere assumption of responsibility by the offender, giving rise to the possibility of establishing punitive or sanctioning measures depending on the seriousness of the breached obligation.

There can be few doubts that we are dealing with transformations in international law that for some amount to a true mutation of its traditional nature. However, worrying symptoms can be observed in recent practice that may indicate that some of the progress made is being undone. First, whilst NATO's intervention in Yugoslavia was a worrying violation of the provisions of the Charter in matters of maintenance of international peace and security and, especially, the competences of the Security Council in this area that no criterion of legitimacy can obviate, the fact that, on the occasion of its fiftieth anniversary, NATO also proceeded to a sort of re-founding at the 1999 Washington Conference, whereby it openly affirmed the possibility of acting outside or beyond the scope of the Charter of the United Nations, may be even more troubling, as it goes beyond a specific case. It challenges the Charter's constitutional nature, or the supra-legal, almost constitutional nature of the obligations arising thereunder.

Second, although it will not allow us to reach any final conclusions, within the context of the Sixth Committee of the United Nations, tasked with considering legal questions, and as a result of the examination of the International Law Commission's reports on the Draft Articles on State Responsibility, at least two important states, the United States and the United Kingdom, have stated that Draft Article 19, i.e. precisely the article establishing the distinction between crimes and delicts, contaminates the draft articles as a whole and have insinuated the desirability of omitting it, thereby reducing the draft articles to a classical approach to international responsibility. Whilst legal rules and their exact content can of course provide certainty and security for relations, they can also be viewed as rigid corsets impeding naturalness and freedom of movement: both

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sentiments are real reflections; each subject will accentuate one or the other for merely subjective reasons.

(C) THE FUNCTIONS OF INTERNATIONAL LAW

International law was originally an essentially jurisdictional law, that is, a legal system primarily concerned with the distribution and regulation of powers amongst its subjects, which were states and, thus, spatially configured. Broadly speaking, international law distinguished between states' internal powers and their international relations. International society was conceived of as a system of opposing states, and its legal system simply sought to regulate foreign relations. What happened within each state's borders was considered a matter of domestic or internal jurisdiction. Hence, international law confined itself to regulating the limits of states' powers abroad in order to prevent overlaps or clashes from becoming sources of international conflict. Needless to say, this was possible due to the conception of international society as a society of juxtaposition, equivalent to the idea that states were autarkic systems that only occasionally needed external action.

To the extent that there was a turning point where states increasingly needed to pursue foreign action to achieve their own national goals, there were two possible solutions. The first was to accentuate the juxtaposition of states, underscoring the clashes and confrontations between them and increasing the level of violence in international society, which has certainly happened over long periods in the history of international society. The second was to endeavour to increase the levels of cooperation between states, to make coexistence between them more bearable, and even enable some degree of peaceful coexistence amongst them. State cooperation did not eliminate the levels of juxtaposition absolutely, but it did tend to identify planes in which cooperation was possible and where juxtaposition was inevitable.

Each of these types of international society has a different form of constructing and conceiving of international law. In an international society of juxtaposition, legal rules are of a jurisdictional nature and tend to avoid external friction, whilst in a society of cooperation, even interested cooperation, legal rules are of an attributionist nature and tend to promote rules of conduct that ultimately involve limiting powers that, in principle, correspond to states by virtue of their sovereignty. The more advanced the areas of cooperation, the more evolved the legal rules for them must be and, thus, the more restrictive the possibilities for the sovereign behaviour of states.

This evolution explains why international law has seen a geometric growth of its rules, not so much in terms of the spatial areas with which it is concerned, but of the matters to be regulated. In the first regard, it is enough to cite the example of the progressive regulation of new spaces, such as outer space, the polar circles, or seabeds and ocean floors. Indeed, in the past, had the exploration and exploitation of these spaces been possible, the solution would have been a race for their control, with the consequent invocation of discovery, effective occupation, and intention as the decisive elements for the subsequent exercise of sovereign powers, as happened so many other times in the past with the *discovery* of new lands. In a non-interdependent international society, these races to conquer new territorial spaces would undoubtedly have resulted in bitter conflicts between states, the costs of which would possibly have outweighed the benefits to be obtained; hence, the cooperative regulation process witnessed in relation to these new realities today.

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However, in the second regard, it is not just a question of new spaces, but also new subject matters. On the one hand, there are problems that cannot be solved through the adoption of unilateral state policy measures. One need only look to the still recent and growing concern for the environment: if air is indivisible and threats to the environment are global, for solutions to be effective, they must necessarily be global and multilateral. Second, if a planetary conception of the human is beginning to emerge in the current global village, problems related to poverty, hunger, or human rights cannot be understood and solved from a hermetic perspective of state sovereignties, which, at most, can hope to clean and keep their own house in order. It is thus necessary for new legal rules to try to regulate the new demands of international society.

Hence, we are witnessing an unparalleled growth in international legal rules, not as a result of any sort of voluntarism, but as a conclusion or solution for new goals and new needs. Were we to compare the content of the old compendia of international law with the current ones, we would clearly see that jurisdictional conceptions have given way to albeit without being entirely replaced by attributionist ones, to protect interests and needs shared by all states. This is surely the current greatness of contemporary international law and what makes it quantitatively and qualitatively different from that of bygone eras.

This evolution is important, from both the point of view of international law and the point of view of states' domestic laws, insofar as the increase in international concern entails the expansion of domestic systems to keep up with the new developments. For example, today no one doubts that growing international concerns for the environment have driven this area of the law in the various domestic legal systems, even if it has developed differently, albeit with common basic elements, in each one. Likewise, and subject to the expression of each state's unique perspective, the regulation of human rights has seen exponential growth that would have been unthinkable until recently, with basic elements of assimilation and harmonization.

From this vantage point, assertions to the effect that domestic legal systems will someday be to international law what certain regional legal systems in Spain are to common law are understandable, although certainly still quite illusory. This exaggeration is no doubt due to the level of precariousness with which international law is still developing, in which the notes of juxtaposition and cooperation are not easily replaceable with that of the subordination of state interests to the achievement of common goals and interests, as is already beginning to happen in regional international societies, and as is clearly on display in the integration process of the Members States of the European Communities.

But from another perspective, it is real: international rules are achieving levels of harmonization of state legal conceptions in more and more areas. Of course, herein lies the first misfortune of international law: when international rules achieve their objective of permeating the internal conceptions of states and systematic and widespread compliance with them occurs, the domestic laws lose sight of their international origin, whilst the international system sets out to conquer new fields and spaces in which to achieve harmonization. Hence, the permanent sensation of international law as an incomplete, unfinished, frustrated, or unfulfilled system.

Throughout this process, and in the material content of the different regulations, the existence of contradictory national interests is clear. This works against the possibility of faster, more complete regulatory developments, even if it fails to spark outrage since it is the constitutional basis of operation of the international system. Sometimes, however, an excessive prioritization of

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state interests by those that already have a highly privileged position in international society is incomprehensible, as with the opposition of a prominent group of states to ratifying the United Nations Convention on the Law of the Sea unless it was reformed to ensure the increase in privileged positions that this large number of states already enjoyed.

What might cast serious doubts on the soundness of future developments is the fact that the substantive evolutions undergone have occurred because of the unprecedented impetus of the group of states that lead international society. In other words, the idea that major developments are achieved thanks to the interest of that select group of states, which obviously, due to their greater specific weight and considerable international influence, choose the matters that, in their view, require more and faster development. In contrast, in those areas of the system in which they feel more favoured and better equipped, development is slower and, in some cases, virtually non-existent. The entire area of the right to development and related matters, such as technology transfer or sharing in the benefits of development, suffers from a lack of legal regulation that seriously hampers the possibilities of peaceful co-existence between states in the 21st century and afflicts the international community, obliging it to live at levels of mere co-existence instead. It is precisely in these matters where a transformation in the functions of international law is most urgent and important, and yet it is in them where changes in the functions of the system are slowest, if they occur at all.

(D) THE APPLICATION OF INTERNATIONAL LAW

If we previously pointed to the quantitative and qualitative expansion of international law and the overcoming of jurisdictional criteria as what makes contemporary international law great, and to the perception of international law as an incomplete, unfinished, frustrated, or unfilled system as its first misfortune, we can now point to what may be the true great misfortune of international law: the conception of this system as the one for regulating states' foreign relations and encouraging the achievement of common goals and interests by means of permeating domestic legal conceptions. Ultimately, it is a system that drives, rather than deciding or controlling, the levels of compliance with its content, which remain in the hands of states' foreign policy action or of the domestic legal systems themselves. Not in vain are the states themselves responsible for verifying compliance with international rules. The paradox, the great misfortune, of international law is that it is deemed ineffective or incapable for what is actually the ineffectiveness or incapability of the political will of the states or their own domestic legal systems.

The most damaging part is that this accusation is made against a system that is not endowed because the states have not wished to endow it with real capacity to verify the levels of compliance with its rules and sanction any breaches accordingly. It is unacceptable and immoral to hope, as Ortega y Gasset said referring to international law, that things be magically done, without preparing the necessary means to achieve them. And the means for achieving international legal objectives fall within the scope of state powers.

Indeed, in international law the state is not only the primary and basic subject of the system, as well as the essential basis, via its consent, for the creation of legal rules, but also the party tasked with verifying, monitoring, and sanctioning in case of violation of its provisions, regardless of who breaches them. In the event of a specific legal violation, it is the affected state itself that, in

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principle, is called upon to establish the means to achieve the end of the violation, secure guarantees that it will not happen again, and, where applicable, ensure due satisfaction or compensation for the damage caused. The procedure for this is recourse to direct diplomatic negotiations with the party responsible for the violation or the application of retaliation or reprisal measures, excluding the use of force.

Only as a distant second option can centralized institutionalized means be used to achieve these goals, due to the essentially decentralized nature of the international community. These centralized means are usually provided for by international organizations and, as in many other aspects, the ability of such organizations to meet this requirement will depend on the homogeneity of their members and the specificity of their functions. Furthermore, in international society there are no jurisdictional mechanisms for settling disputes. Instead, international courts may have jurisdiction to settle them, in general, based on the consent given by the states to that end.

The only impression that international society can thus give is that of a loosely structured, disorganized society, which is powerfully striking in a context of historical circumstances in which states' interdependence requires more fluid procedures for verifying compliance with international obligations. Increasingly aware of this need, states have proven willing to establish control mechanisms in general, albeit consistently seeking to prevent them from being applicable to them in particular.

In any case, it is more and more common for international conventions to establish some type of monitoring body to ensure compliance with obligations, of a highly diverse political or legal nature. In some cases, states have a general duty to report to these bodies on the measures they have taken to effectively fulfil their obligations, which may prompt the body to request subsequent clarifications and, in some cases, make recommendations in a positive or negative sense. In others, the bodies may be competent to hear claims or complaints for non-compliance brought by other states, or even private individuals or groups of individuals, with the responsible body being able to make recommendations to the state in breach. On few occasions does the body's ability go beyond these possibilities, except in exceptional situations, such as the powers of the United Nations Security Council when, acting under Chapter VII of the Charter, it deems that a threat to the peace, a breach of the peace, or an act of aggression has occurred.

Only very rarely can international society be said to have jurisdictional mechanisms whereby, as in domestic legal systems, independent, previously established judicial bodies have the power, through a final judgment, to declare existing law and enforce it against a state. However, the situation seems to be experiencing significant levels of transformation in modern international law, although these transformations have both pros and cons.

Indeed, some treaties establish judicial bodies with jurisdiction to verify compliance by states simply because a state is party to the treaty in question. This is the case, for example, of the Court of Justice of the European Communities in relation to the constitutive treaties of the three European Communities or certain specific aspects of the Treaty on European Union. The European Court of Human Rights has likewise had this capacity in relation to the states parties to the European Convention of Human Rights and Fundamental Freedoms of 1950 since the entry into force, on 1 November 1998, of Protocol 11 to that Convention. Finally, it is the situation that will arise once the Statute of the International Criminal Court, signed in Rome on 17 July 1998, comes into force, as is expected to happen in the next few years. Somewhere in between would be

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the International Tribunal for the Law of the Sea, established under the Montego Bay Convention, of 1982, which, although it does provide that the states parties to the Convention are, in principle, bound by the court's case law, also allows them to exclude its jurisdiction in general or in relation to specific matters, even when they remain bound by a conciliation procedure whose result, in contrast, is not so legally binding.

The judicial body par excellence is the International Court of Justice, but this judicial body only has jurisdiction in relation to those disputes that states refer to it by agreement in the event of a dispute, when the Court's jurisdiction was established under a bilateral or multilateral treaty, either over the specific subject matter addressed by the treaty or, in general, when the treaty establishes general mechanisms for the peaceful settlement of disputes. The other alternative system, which would bring the Court closer to a truly jurisdictional function, is the mechanism provided for under Article 36 of the Charter of the United Nations, when states voluntarily accept the Court's jurisdiction to hear disputes that may arise, in relation to one or more other states that have also voluntarily accepted the Court's jurisdiction under similar conditions.

This mechanism, the closest to what should be a requirement of international society, nevertheless has some invidious aspects. First, acceptance of the Court's jurisdiction is not unconditional, but rather can be subject to temporary or substantive conditions, excluding its jurisdiction for certain types of cases or matters. Second, to date, fifty years after the Court was created, a total of 63 states have accepted its jurisdiction, equivalent to only about a third of the members of international society (19 from the group of Western European and other states; 6 Central and Eastern European ones; 13 Latin American ones; 18 African ones; and 7 Asian ones). Third, of the five great powers, only one, the United Kingdom, currently accepts the Court's jurisdiction. Furthermore, whilst the Russian Federation and China have never accepted it, France and the United States withdrew their acceptance of its jurisdiction after suffering respective defeats in judgments delivered by the Court: France, in the *Nuclear Tests* case, in 1974; and the United States, as a result of the suit brought by Nicaragua, in the *Military and Paramilitary Activities in and against Nicaragua* case, from 1984. To put it in a depersonalized way, this would suggest that the political interests of the great powers are unwilling to submit to jurisdictional pronouncements.

In any case, the scholarly literature approaches the recent proliferation of judicial bodies outlined earlier as a turning factor that may indicate a significant transformation in the international law of the near future, a conclusion with which I would agree to the extent that it ends up familiarizing states with jurisdictional procedures, even if sectoral ones. However, it is worth highlighting some aspects of this transformation that may not be positive. First, of the five existing courts (including the International Criminal Court), two the CJEU and the ECHR have limited jurisdiction, as their geographic scope is limited to Europe, suggesting that we are once again witnessing a process of regionalization or particularism in the face of the needs of universalism. Meanwhile, four are specialized and have limited jurisdiction in accordance with the objectives established by their constitutive treaties; only the International Court of Justice would have jurisdiction to hear any matter related to international law. Thus, we could also be witnessing a process of sectorization of international law that could ultimately mean that, whilst states are willing to accept legal rules of the game subject to judicial control for some matters, in the rest they prefer a freer game for political considerations. Additionally, and rejecting or setting aside the aforementioned objection, we could be witnessing a process of sectoral constructions of

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international law that would result in contradictions between the various sectors and with international law as a system, which, in turn, could cause significant cracks in the global construction of international law with unpredictable results.

Finally, it seems pertinent to refer briefly to certain extraterritorial trends that states are experiencing in the decentralized search for solutions to the problems of application of international law, which can be grouped in two specific mechanisms. First, some states are exhibiting a tendency to enact domestic laws intended to force third states to follow a certain line of conduct, which they consider to be required by international law, by means of sanctions, embargoes, and similar mechanisms. In principle, this aim can be considered in accordance with international law, provided it does not contravene international obligations of the state choosing this course of action, especially when it is manifested in areas in which each state is free to negotiate or not negotiate, to confer or not confer certain rights to third states. However, these laws would be contrary to international law should they aim to establish obligations that force third states to follow the same policy in relation to the state they are crafted against, as in that case they would contain a claim to an extraterritorial effect that would infringe on the freedom to conduct relations with third states. The popularly known Helms-Burton Act would be a prime example of this trend. Its contradiction with international law is apparent in that, through it, the United States aims to erect itself as the controller of the application of rules of international law that it has announced, by any other state in the international community, despite the decentralized and unilateral nature that constitutes the basis for operation of the international legal system in this field, except as provided by the existing international institutions with jurisdiction to do so.

Likewise, second, there is an increasingly clear trend by some legal systems, including Spain's, to establish themselves as international judicial bodies with jurisdiction to try violations of international law, beyond the requirements established in international conventions themselves, regardless of where the crime was committed and of how it affected the state in whose name the judicial authority is acting. If states are reluctant to accept the jurisdiction of international criminal courts created for the specific purpose of sanctioning the conducts of individuals who have committed ominous internationally recognized crimes, as the difficult process of drafting the Statutes of the International Criminal Court and the slow mechanism for its entry into force have shown, then certainly no state can claim, beyond the specific rights and duties established under international treaties, to be an international judge with jurisdiction to hear cases on matters occurring anywhere in the world.

These are simply specific examples of a trend that a prominent group of states is imposing on international society, whereby they offer themselves as guarantors of legal obligations that may not even be binding on some of the states being required to meet them. Witness the case of the pressure for some states to comply with the provisions of the Nuclear Non-Proliferation Treaty, of 1 July 1968, still in force through the extension agreed on 12 May 1995, to which they are not parties, or to adopt unilateral coercive measures, as was done against Sudan in relation to an alleged violation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, of 13 January 1993, which was not even binding on it at the time the events occurred.

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The placid breaking of the waves on the beach on a calm day fosters the fantasy that each wave is unique and unrepeatable and that there will never be another one exactly like it, no matter how many times the surf comes crashing in. We can play with them and with their illusion, but it takes no effort to accept that, in reality, it is always the same sea. In the social sciences, we sometimes also think that what we are living through is one of a kind and, indeed, strictly speaking, it is, creating the impression that it is difficult to classify and impossible to understand. The old repeats, whilst the new is mixed, preventing full knowledge of either one: every generation has always lived under the impression that its experiences are unique and unrepeatable, making it impossible to understand them until the cold judge of time offers distance, perspective, and dispassion.

At the start of this lecture, I promised to offer some reflections based on perplexity, the perplexity, no doubt, of one who sees processes he cannot fully understand or classify. Reflection ultimately allows us to express our doubts aloud, but it would be pretentious to reach for conclusions beyond one's own inability to integrate the content of those reflections in an orderly fashion. Furthermore, doubts are simply exponents of the value scheme and anxieties of the person who voices them, so that, at least in the social sciences, their subjective content, their anchoring in values and ideologies, is unavoidable. It is with these elements that I am going to dare to conclude my reflections on the state of international law at the threshold of the 21st century. In any case, I am not going to offer a select bouquet of the doubts that international law poses to me in light of the new century, as if the critical capacity of the recipient of these reflections needed hurried final summaries from me. Instead, I will try to conclude with some ideas that might synthesize the concerns that the current development of international law reflects.

We seem to be faced with a tendency to develop a particularist international law, overly attentive to the needs and demands of the few and less sensitive to the preoccupations and concerns of the many. It is a homogeneous international law at the regional or particular level that, however, is offered or imposed as a solution at the universal level, where it is dubiously suited to the basic structural problems of contemporary international society.

Perhaps we are witnessing an international law that is losing the challenge of solidarity only to accentuate unacceptable inequalities, inequalities whose very existence is denied or deemed solvable through the adoption of formulas that, in the first world, yielded obvious and optimal results. In international society, as in domestic societies, a sort of groupthink seems to have taken hold and established itself as a panacea for any tension.

One could be forgiven for thinking that current international law is experiencing a kind of *return to the future*, to a 19th-century, non-universal international society, in which states were classified as civilized, semi-civilized, or barbaric, and only those in the first category were entrusted with the sacred civilizing mission based on guidelines only they were in a position to suggest.

It is not a pessimistic view, but a matter of registering factors, whether positive or negative: the intellectual's mission should not be to offer a reassuring vision, but to shine a spotlight on the elements that threaten the future, not because they are the only ones, but because they are the ones that can most affect the future of the coming generations. Regression, stagnation, or historical progress are not the result of inexorable physical laws, but the product of human capabilities and, above all, human will. There is nothing written, except the page we write each day.

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The Declaration on Principles Turns Fifty: *Rondó* of Sly Power

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The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly Resolution 2625 (XXV)), adopted by consensus on 24 October 1970, is turning 50. Not only is it one of the handful of United Nations General Assembly resolutions worth remembering, it is probably the most remarkable, due its value and legal and political importance.

From the outset, the Declaration sparked extensive literature, and its interest has not waned over the years. It is considered the tabernacle in which the fundamental principles of the international order are preserved, i.e. the peremptory or *jus cogens* rules, the core of a system before which any rules that might dare to challenge them must yield on grounds of absolute nullity or irrevocable termination, the full measure for judging the behaviour of those who form part of international society.

Shall we recall these principles, as they are enshrined in that laconic declaration? The first one extends to all states the prohibition articulated in reference to members of the Organization in Article 2.4 of the Charter of the United Nations: the obligation to refrain, in their international relations, from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. The second does the same with regard to the obligation, previously recorded in Article 2.3 of the Charter, for states to settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered. The third is the principle of non-intervention in matters within the domestic jurisdiction of any state, and the fourth establishes the duty of states to cooperate with one another in accordance with the Charter. The fifth affirms the principle of equal rights and self-determination of peoples, and the sixth proclaims the sovereign equality of states. The seventh and final principle establishes that states shall fulfil in good faith the obligations assumed by them in accordance with the Charter. According to the Declaration, these principles are "interrelated and each principle should be construed in the context of the other principles".

When debating between the three worlds —capitalist, socialist and non-aligned— the members of the United Nations believed that by developing the principles of the Charter they would help to strengthen world peace and the rule of law by consolidating their universal application. Consequently, in the scholarly literature, there were some —such as myself— who considered the Declaration an

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excellent cornerstone of a concise and critical exposition of the rules that should govern international relations.

In evoking the fiftieth anniversary of the Declaration, I could not help but take down from a shelf in my library my copy of *Principios Fundamentales del Derecho Internacional Público* [Fundamental Principles of Public International Law], which I published in 1982 and rescued from a University expurgation. It was a somewhat melancholic gesture, akin to opening the tin box in which we once kept the faded photographs of our best memories, along with some petals and withered leaves.

The prologue began like this: "Due to the dialectical dance of principles that can support contradictory behaviours, the uncertainty regarding what is the *given* rule and what is the rule *still to be constructed*, the way in which the phenomena of power and domination are evidenced... in its constant restlessness, public international law encourages critical approaches and evaluative attitudes... Contributing to such approaches and attitudes is the first objective of this book, dedicated to examining the principles that should govern coexistence and cooperation amongst the members of international society today, with a claim to realism, commitment, dynamism and verification."

Over time, that claim settled into a sort of critical realism, and it would be welcome news indeed —let this be an invitation to others— were someone, using that same yardstick, to revisit the Declaration, fifty years after its adoption, analysing its (non)application or the contradictory set of principles, despite the paragraphs with which the Declaration itself sought to illustrate and specify them.

What better time than now to take up the defence of the principles, denouncing both the incomplete and perverted way in which they have been applied and the devastating efforts of their deniers? The planet we love —to the point where the vast majority of us only depart from it regretfully and under protest— reeks in the hands of foolish, ignorant, feckless, corrupt, greedy, criminal leaders... These derogatory remarks may be unfair to upstanding members of the political class, who also exist, like truffles; they may even be caricature, although caricaturing an image makes it possible to capture the salient features of a subject, an object, a situation. The truth is the *bad guys*, who think they are the *good guys*, are beating the *good guys*, who are labelled as *bad*. Concepts such as *humanity*, *international community* and *common heritage* are hollow shells, shamelessly bandied about by all manner of factions.

Today, as yesterday, the capacity for contradiction of the fundamental principles is exploited in support of antinomic interests of powers with the necessary ability to influence and determine the position of others — whether with regard to sovereignty and self-determination, non-intervention and protection of human rights, or the prohibition of the use of force and countermeasures. Instrumentalized to attack and defend, the principles are used tactically, according to the playing field. As a weapon to attack, as a shield to defend. This state of affairs is due to the fact that the supposed regulatory advances have not been accompanied by the strengthening of the multilateral institutions that should watch out for them. When principles advance without maintaining the chain of intendancy, they end up becoming mere rhetorical tools at the service of all kinds of causes, many of them base.

In 1989, when the socialist bloc collapsed and the Cold War ended, we were blinded by the shining promise of an order in which, to paraphrase Álvaro Mutis, time had lost the deceptive condition of its powers. Was it an illusory hope, a dream that has gnawed away at its own garments, because of vain people, given to lies, used to continue the dance of fertile misery in regions where every voice is an order, where insects are guardians of the sown fields? Freely drawing on Mutis, I articulated the

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rubrics of a text in which, at the end of the century, I expressed my disappointment at the wretched ashes of the lost years, the irretrievable opportunity to arrive at the ecumenical city where abundance was to have reigned, the abandonment in an inhospitable wasteland where antediluvian jackals rule and the innocent never know the grace of the chosen ones, lords of the night, where a miracle is awaited that never comes.

Compare the annual reports of the Secretary-General of the United Nations on the organization's work. Then and now, they reflect a catalogue of calamities that can hardly be faced. The very words used in an attempt to give hope are like the tolling of a bell calling people to honour the dead. The reality is grim: wars, border conflicts, armed interventions, genocides and massive human rights violations, terrorism, organized crime, mass migrations to flee from violence, hunger and misery, natural disasters in which humans all too often have a hand, the arms race, hundreds of thousands of refugees and displaced persons, outrageous social inequalities between and within states, global warming and climate change, rising sea levels with Moses wandering somewhere in the Sinai...

The examination and assessment of the fundamental principles contained in the Declaration is caught in the web of an international society incapable of advancing its institutionalization. Many of those who speak of promoting *multilateralism* fail to mention that there can be no multilateralism without representative institutions endowed with the necessary powers to achieve their objectives. I fear it is useless to advocate strengthening the United Nations —the UN and its extensive family of specialized agencies— which is the universal structure available to us rather than blowing it up to the benefit of rival blocs shepherded by great powers, classified as leagues of democratic states and similar labels, which serve only to heighten the perverse way in which the universal principles are used.

Let's take a closer look at a sample of them. The first principle prohibits the threat or use of force in international relations against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. The Declaration is exemplary in its development, to which it devotes 13 paragraphs. I do not believe that a single one of them has emerged unscathed from subsequent practice, which includes wars of aggression, considered "a crime against the peace, for which there is responsibility under international law" under the second paragraph, which has found in successive US administrations its most conspicuous —albeit not its sole— offender. A paradigmatic example was the armed attack and occupation of Iraq by the armed forces of Commander-in-Chief Bush Jr. in 2003, based on a string of fake news —of *false positives*, as they say in parts of Latin America, borrowing the language of serological diagnoses— a breeding ground for pests that have been plaguing us ever since.

But who said it was an aggression? The Security Council simply covered up its consequences, giving the actor (or offender) everything it needed to continue its tragic performance. From this perspective, it was thus a crime that never existed and which, of course, did not result in a demand for any sort of accountability. True, academia and the fine arts responded, with powerful independent denunciations that often-roused public opinion and sparked protest and social rejection. But not the institutions, which proved unable to assume a response, corroded as they are statutorily due to the positions that the most dangerous potential criminals hold within them, sure of their impunity.

I urge the reader to go to the Declaration. Take half an hour to read it at your leisure. If only those who signed it were loyal to fulfilling in good faith, as the last principle states, the obligations they assumed in accordance with the Charter! But the principles' sociological validity is so precarious it is barely enough to sustain their normative validity. Thus, when you write or speak about them for this purpose, you are nagged by the irritating feeling that disbelieving readers and listeners are looking at

you, judging the extent of your foolishness. I am reminded of an anecdote, which I witnessed, that took place at a lecture given by Professor Juan Antonio Carrillo Salcedo, whose brilliant speech exuded faith and hope for the principles that were to illuminate the world to be built. At the subsequent discussion, an audience member asked him: did you tell us everything you just explained because you actually believe it or because you want to sleep easy at night?

We must not be intimidated. We must not give an inch in our positions in defence of the principles' normative value before those uncritical realists who call for us to accept as normative a practice built on all kinds of violations. The principles are what allow us to judge behaviours rather than merely chronicling them. As long as the yearned-for institutions come from the planet Utopia, the scholarly literature, in stimulating public opinion, must assume a sort of dual function.

Earlier, I mentioned what it means to transfer the *commitment* to ethical options to the legal system. We must not allow it to bother us when we are dismissed as *activists* —as happens in the establishment stables— with a view to discrediting us when we provide a legal basis for progressive policies to which others have paid only lip service, and we have the necessary tools for that. We must not confuse objectivity with equidistance, nor impartiality with neutrality. Not only is taking a position after an unbiased review of the facts legitimate, it is mandatory for academics and institutions, although in the latter case, always within —not beyond— the scope of their competencies.

Unmasking those who would deny a type of international relations subject to rules, to the principles contained in the Declaration, exposing those who wield an *arrogant* power, which they use to put their interests ahead of any other consideration and destroy any notion of order, is relatively easy. Such people clash head-on with the last of the principles set out in the Declaration, which, in accordance with another principle —this time, evangelical— will be the first: fulfilment in good faith of the obligations assumed by states in accordance with the Charter of the United Nations.

However, the task is anything but easy when the power is *sly*, i.e. when it twists the principles in unfair service to its cause. In a decentralized society, the relationship between the basic or fundamental principles and the interpretation of each one in the context of the others is often used to sow confusion and weaken or break the scope of some principles by invoking others.

Thus, with regard to the prohibition of the threat and use of force, beyond the debate over whether it is limited to armed force or includes all types of force, some have sought to point to the last sentence of the principle (and of Article 2.4 of the Charter) as proof that certain cases of the threat and use of force are allowed, as they are consistent with the purposes of the United Nations.

Likewise, the principle of non-intervention has been shaken up with the Charter provisions concerning the maintenance of international peace and security and the protection of human rights in cases of mass violation: rather than non-intervention, *humanitarian* intervention in keeping with the *responsibility to protect*.

There are those who, whilst they are at it, propose intervening in third countries to protect their particular version of *democracy*, denying states, on behalf of peoples, their "inalienable right", according to the Declaration, "to choose [their] political, economic, social and cultural systems, without interference in any form by another state". Needless to say, those who make such proposals take it for granted that the relationship between peoples and states is adversarial.

And as long as we are on the topic of peoples, what about the manipulation of the principle of self-determination, invoked to further the separatism of those who are not holders of this right? Is there no one who speaks about the right of remedial secession in situations of serious discrimination against a dominant minority in part of a state's territory? Referring to the population as a whole, the principle

proclaims. "Every state has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter." It follows that a democratic principle is the goal of self-determination, which legitimizes the principles of non-intervention and sovereign equality, which, in turn, should govern state cooperation in the economic, social, cultural, technical and trade fields.

Finally, what about *justice*, the *ugly duckling*, often put off when, doing more harm than good, the principle of peaceful settlement of international disputes is applied "in such a manner that international peace and security and" —now, the *duckling*— "justice are not endangered"?

Those who adopt a critical realism with regard to the acts and behaviour of states cannot, at first, rule out the existence of a third expression of power —a power *based on solidarity*— wielded to protect common public goods in the broad range spanning from fundamental rights and freedoms to a planet threatened by a nature defiled by human activity.

That power, however, seems to show itself more in social circles than government ones, and those circles could come to be manipulated by the *sly powers* as a channel for their policies, turning the *idealists* who generously feed them into guileless tools in the service of interests that have little to nothing to do with the goals they advocate.

True *solidarity-driven* power can only reside in universally or regionally representative multilateral institutions, invested with the necessary powers to achieve their purposes. States whose governments pursue such policies are on the right track and civil society at this stage of globalization can breathe wind into their sails.

Unfortunately, the facts suggest that we are on the wrong course. Are we not bombarded, day after day, by talk of the *crisis of multilateralism*? This phrase, accessible only to the initiated, masks the much more serious reality of the systematic violation of the fundamental principles laid out in the Charter of the United Nations, and echoed and developed in the Declaration, by those who wield power, in some cases *arrogant*, and in many others *sly*. Although this is hardly new, it has taken on a more and more alarming character, especially since the turn of the century. *Sly* power, in particular, in keeping with its very nature, seeks to *pass off* as *multilateralism* things that are not. Number alone is not enough to define this concept. Acting as a group, gang or pack is not an expression of multilateralism. The number must be complemented by a certain quality: respect for (international) law and the channelling of collective action through the representative institutions I referred to earlier.

At a recent conference held in The Hague on 2 and 3 September 2019, I heard a speaker say that international law is part of the DNA of multilateralism. It was a timely phrase that should be framed in neon lights. One cannot evoke multilateralism to bury respect for principles, rules and institutions, forging coalitions that interpret the law *pro domo sua*. In short, there can be no genuine multilateralism without respect for the rule of (international) law, and there is no better multilateralism than that which translates to open collective institutions, whether universal or regional, governed by rules that ensure a certain balance between the powerful and the many in their various combinations.

Multilateralism has always been threatened by unilateralism, i.e. the temptation to exercise power —whether *arrogant* or *sly*— against or in abuse of the rules when, if properly interpreted, they would not safeguard the interests of the great powers —and their clients— in an unequal relationship that ensures the offenders go unpunished.

Let us therefore warn, out of an excess of academic caution, that not all unilateral action qualifies as unilateralism. *Self-defence*, i.e. the right of a state to defend its interests with the backing of

international law, is legitimate. *Promises* are a way of unilaterally undertaking a binding commitment, even though the International Court of Justice's most recent case law (in 2018, *Obligation to Negotiate...*) refused to confirm this notion after its improvised baptism (in 1974, *Nuclear Tests*).

In the current century, in the capitalist *first world*, it has been the Republican presidents of the United States, George W. Bush and Donald Trump, who have best embodied *arrogant* power, although both, the Republican and the Democratic presidents, and State Department, under any administration, have responded better to *sly* power. Of course, incarnations of these powers, like evil lamas, can also be found in other worlds, but this one, supposedly led by the United States, is the one we live in and the one in which our governments —the European ones— can either *do the wave* as part of a *group* unilateralism or surf it, more or less skilfully, taking care to nurture and cultivate any outbreaks of *solidarity-based* power.

Certainly, the unilateralism of the United States, as an *arrogant* power, has been particularly intense since Mr Trump became president, and the desired extraterritoriality of its (internationally wrongful) decisions is quite troubling. A good number of governments, banks and companies submit to these decisions when faced with the warning and fear of paying the consequences for non-compliance in the markets the great power directly or indirectly controls.

In the evolutionary process of the principles set forth in the Declaration, policies have been promoted that, when pursued by a *solidarity-based* power, are unobjectionable. Such is the case of the assertion of the right of third parties to decide and apply *countermeasures* in response to violations of peremptory, *jus cogens* rules that they would not be the direct victims of. Witness, too, the endorsement of humanitarian interference, under the recycled concept of the *responsibility to protect* populations whose (undemocratic) governments massively and systematically mistreat them to the point of making them the alleged perpetrators of international crimes.

Those are just two examples.

However, in a decentralized and hugely unequal society, such as the international one, these policies, although conceptually felicitous, are a source of Manichaeism and arbitrariness. In other words, they end up providing cover for wrongful acts, interventions that are at odds with the sovereignty and formal equality of states, due to interested categorizations of certain situations or the creation of those *false positives* referred to earlier, without any sort of institutional check.

This gives rise to a sort of *seizure* of the fundamental principles of international law by those who apply a *double standard* of conduct, to further their own interests, wielding a *sly* power under the guise of progressive proposals at the regulatory level that lack the essential institutional complement. Hence, even at the risk of being misunderstood, there are those who, recognizing the pernicious manipulation of the rules, refuse to get involved in a form of preaching that would render them accomplices of this *sly* power. After all, it already has numerous think tanks at its service.

It is not admissible for the United States and/or the European Union with its Members States to claim to speak on behalf of a —today non-existent— *international community*, as they do, for example, when presenting as *sanctions* the coercive measures they apply to third parties, assuming a role of supremacist verticality. *Arrogant* or *sly*, they are simply breaching the rules, the fundamental principles of international law.

Sly power is the more dangerous because, far from submitting to the rule of law, it tries to submit the law to its rule. One of its most perverse expressions can be found in the international institutions under the control of a hegemon that denatures their multilateral condition, turning them into tools for its own ends, in collusion with the clientelist regimes —the *coteries*— established in countries that

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like to call themselves *allies*. Regional organizations such as the OAS or military alliances such as NATO are the kinds of intergovernmental organizations that try to cloak the practice of unilateral group enforcement action in the guise of organic resolutions. In these formally multilateral institutions, group unilateralism finds an excellent tool to present wrongful acts as *sanctions*.

This action often has harmful effects for the population it is supposedly intended to protect, seeking to encourage insurrection against a hostile government —treated as a criminal organization— and laying the groundwork for a destabilization that will culminate in a situation meriting categorization as a threat to regional peace and security, with the naturally ensuing consequences. By then, Chapter VIII of the Charter and, in particular, Article 53.1 thereof, which requires the authorization of the Security Council for the undertaking of enforcement action, would seem more an inconvenient witness, best ignored.

Is might right? Legal *activists* for a fairer system must enlist in the effort to reverse the order of these factors in order to dramatically transform the result. But law will be power —right will be might— only when power is based on *solidarity*, which requires institutional advances to accompany the regulatory ones. Blindly barrelling ahead with just principles can cause only fleeting pleasure, until we inevitably fall prey to *sly* power.

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"Super-Robust" Peacekeeping Mandates in Non-International Armed Conflicts under International Law

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Abstract: Since 2013, the United Nations Security Council has tasked some peacekeeping forces with combat operations against armed groups in the context of non-international armed conflicts. In the framework of their mandates, peacekeepers' main responsibilities are to protect civilians and support the local central government in regaining full control over its territory, while launching offensive military operations against armed groups that go well beyond self-defence or the defence of civilians. Due to their offensive features, these mandates are called here "super-robust mandates" in order to emphasize the increased armed force that they can employ in comparison to traditional robust mandates. These super-robust mandates raise several concerns regarding their compatibility with the principles at the basis of peacekeeping operations and their effectiveness. After briefly outlining the evolution of peacekeeping, this article explores the compatibility of super-robust mandates with the principles of peacekeeping, their characterization as forcible interventions of the Security Council in non-international armed conflicts, and their suitability to reach a just and stable post-conflict arrangement. This article relies on case studies involving the practice of missions currently deployed in the Democratic Republic of Congo, in Mali, in Central African Republic, and in South Sudan.

Keywords: peacekeeping – protection of civilians – authorization to the use of armed force – MINUSCA – MINUSMA – MONUSCO –UNMISS

[C]onsent, neutrality/impartiality and the use of force in self-defence oscillate between legal fiction and legal reality. Even as a fiction, they are important ontological myths.[1]

(A) INTRODUCTION

This article explores certain controversial international law issues[2] pertaining to some recent United Nations (UN) peacekeeping mandates that are characterized by the authorization of the use of unprecedented offensive armed force. This article focuses on the United Nations

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1 N. Tsagourias, 'Consent, Neutrality/Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension', 11 *JCSL* (2006) 465-482, at 482 [doi:10.1093/jcsl/krl016].

2 For different perspectives, see C.T. Hunt, 'All Necessary Means to What Ends? The Unintended Consequences of the "Robust Turn" in UN Peace Operations', 24 *International Peacekeeping* (2017) 108-131 [doi:10.1080/13533312.2016.1214074]; L.M. Howard and A.K. Dayal, 'The Use of Force in UN Peacekeeping', 72 *International Organizations* (2018) 71-103 [doi:10.1017/S0020818317000431].

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Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO), the most robust peace mission so far, the United Nations Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), and the United Nations Mission in South Sudan (UNMISS). Due to the degree of force employed by these missions, this article assesses whether they still fall into the legal category of peacekeeping and whether they are effective to protect civilians.

At a terminological level, these mandates are called here "super-robust" to emphasize that the use of armed force authorized therein is unprecedented, extremely proactive, and clearly offensive in nature. The expression "stabilization mandates", that is sometimes employed in relation to MONUSCO, MINUSMA, and MINUSCA,[3] is not used here since it is not helpful to better understand the legal problems explored by this article. Due to space constraints, this article does not specifically address peacekeeping missions established by regional organizations, whether authorized by the UN Security Council (UNSC) or not.[4]

In order to understand the novelty posed by super-robust mandates, the article needs to describe the evolution of peacekeeping from its traditional understanding to robust mandates and beyond. Accordingly, firstly, this article briefly describes the genesis of peacekeeping and its evolution, analysing the original model under the three basic principles of peacekeeping (non-use of armed force, consent, and neutrality/impartiality) and the changes to that model leading towards robust mandates around the 1990s (Section 2). Section 3 explores the concept of robust mandates and how the UNSC and other UN bodies have interpreted extensively the three basic principles of peacekeeping in order to adapt them to new needs. In Section 4, the rules on the use of armed force under super-robust mandates (MONUSCO, MINUSMA, MINUSCA, and UNMISS) are analysed in order to ascertain their difference with robust mandates and their compatibility with the principles of peacekeeping, even in their broader later interpretation. Section 5 compares super-robust mandates to operations under Article 42 of the UN Charter and to UNSC's authorizations of the use of armed force, concluding that these missions do not fall into these categories, but rather, should be seen as forcible UNSC's interventions in non-international armed conflicts (NIACs). The success of MONUSCO, MINUSMA, MINUSCA, and UNMISS in relation to the protection of civilians and the attainment of a fair transition from a NIAC to peace is questioned in Section 6. Finally, Section 7 summarizes the conclusions reached

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[3] See A. Gilder, 'The Effect of "Stabilization" in the Mandates and Practice of UN Peace Operations', 66 *NILR* (2019) 47-63 [doi:10.1007/s40802-019-00128-4].

[4] On this topic, see, e.g., U. Villani, 'Les rapports entre l'ONU et les organisations régionales dans le domaine du mantien de la paix', 290 *RCADI* (2001) 225-436 [doi:10.1163/1875-8096_pplrdc_A9789041116116_02]; M.A. Plana, La regionalización de las Operaciones de la Paz. África y Oriente Medio, 5 *REEI* (2002) 1-26; A.M. de Luna Barrios, *Las operaciones de mantenimiento de la paz de las organizaciones internacionales de carácter regional* (Dykinson, Madrid, 2013); G. Cellamare, *Le operazioni di peacekeeping delle organizzazioni regionali* (Cacucci, Bari, 2015); E. Cimiotta, *L'uso della forza nei rapporti tra Nazioni Unite e organizzazioni regionali e sub-regionali* (Jovene, Napoli, 2018).

by this article, emphasizing that super-robust mandates are not in line with the principles of peacekeeping and are not an effective tool to protect civilians and reach a just and durable peace.

(B) THE EARLY EVOLUTION OF PEACEKEEPING OPERATIONS

(1) Preliminary Remarks

UN peacekeeping missions are often dispatched by the UNSC to protect civilians and lead the transition from a situation of NIAC to peace. Over time, peacekeeping missions have evolved significantly, raising a number of legal issues along the way.[5] The UN Charter does not explicitly refer to peacekeeping missions, but rather, they are an invention of the UN General Assembly (UNGA), which was quickly endorsed by the UNSC. States have accepted as lawful the deployment of peacekeeping missions, which are seen as grounded in the powers conferred to the UNSC and to the UNGA in the field of the maintenance of international peace and security.[6] As a result of the lack of an explicit legal basis in the UN Charter, peacekeeping missions, although subject to the international law rules and principles binding upon the UNSC and the UN generally,[7] are mainly governed, case-by-case, by their mandates and by the agreements concluded between the UN and the States on whose territory the missions are deployed. As a result, peacekeeping missions are an extremely flexible tool that can be employed to address a variety of different scenarios. For instance, the UN has dispatched peacekeepers to monitor elections, to maintain buffer zones between belligerents, to support peace processes after armed conflicts, to disarm armed groups pursuant to peace agreements, etc. Although this article focuses mainly on the military components of some super-robust missions, MONUSCO, MINUSMA, MINUSCA, and UNMISS also undertake a number of responsibilities unrelated to the use of military force.

The governance of transitions and post-conflict situations through UN institutional processes is clearly one of the goals of the organized international community. UN peacekeeping missions

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5 See D.W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (Stevens, London, 1964); J. Ballaloud, *L'ONU et les opérations de maintien de la paix* (Pedone, Paris, 1971); P.A. Fernández Sanchez, *Operaciones de las Naciones Unidas para el mantenimiento de la paz* (Universidad de Huelva, Huelva, 1998); L. Pineschi, *Le operazioni delle Nazioni Unite per il mantenimento della pace* (Cedam, Padova, 1998); G. Cellamare, *Le operazioni di peace-keeping multifunzionali* (Giappichelli, Torino, 1999); P. Gargiulo, *Le Peace Keeping Operations delle Nazioni Unite* (Editoriale Scientifica, Napoli, 2000); A.J. Bellamy and P.D. Williams, *Understanding Peacekeeping* (2nd ed., CUP, Cambridge, 2010); M. Frulli, *Le operazioni di peacekeeping delle Nazioni Unite: continuità di un modello normative* (Editoriale Scientifica, Napoli, 2012); T. Gill et al. (eds), *Leuven Manual on the International Law Applicable to Peace Operations* (CUP, Cambridge, 2017); P.A. Fernández-Sánchez (ed.), *Peacekeeping: Global Perspectives, Challenges and Impacts* (Hauppauge, New York, 2018).

6 For an overview on the different theories on the legal basis of peacekeeping operations, see A. Orakhelashvili, 'The Legal Basis of the United Nations Peace-Keeping Operations', 43 *Virginia Journal of International Law* (2003) 485-524; A.J. Iglesias Velasco, 'El marco jurídico de las operaciones de mantenimiento de la paz de Naciones Unidas', *Foro, Nueva época* (2005) 127-177 [doi:10.5209/FORO]; R. Higgins et al. (eds), *Oppenheim's International Law: United Nations* (OUP, Oxford, 2017), at 1039-1055.

7 Appeals Chamber, *Prosecutor v. Dusko Tadić*, Case no. IT-94-1, Judgment of 2 October 1995, para. 28.

allow the UN to exercise very flexible forms of assistance and even governance in relation to transition, State-building, and post-conflict governance.[8] As a result of peacekeeping flexibility and of their involvement in NIACs with State-building responsibilities, peacekeeping missions today are very different and barely resemble the first mandates created more than seven decades ago. Simply put, peacekeeping has evolved, free from the constraints of written legal basis, to respond to the needs of different scenarios and different historical moments.

This reality of the flexibility of peacekeeping, and the actual variety of mandates that have been adopted, adjusted, *de jure* or *de facto* modelled on specific situations, make it difficult to identify the boundaries of peacekeeping. As a result, authors have suggested that different kinds of operations should be labelled and treated in a different way, acknowledging that most proactive and militarized mandates cannot be reconciled with the idea of peacekeeping.[9] However, there is still today a minimum common denominator that can be identified in the ongoing relevance of the consent of the host State(s).[10] Whether this is enough to define a coherent legal model,[11] or whether that minimum common denominator has been so watered down that today almost everything under a UN flag can be classified as peacekeeping[12] is a matter of debate.

The lack of written basis in the UN Charter, the huge degree of flexibility of mandates, and the deployment of peacekeeping operations in different scenarios are reflected by a number of official documents adopted by the UN Secretary-General or under his mandate to monitor and guide the evolution of peacekeeping.[13] These internal administrative acts of the UN mix legal and policy elements, partially acknowledging the UNSC's practice on peacekeeping, partially trying to direct the UNSC in its future actions. Although these documents do not create legal obligations,

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[8] Generally, on the role of the UN in post-conflict situations, see Y. Daudet, 'L'action des Nations Unies en matière d'administration territoriale', 6 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (2002) 459; S. Chesterman, *You, The People. The United Nations, Transitional Administrations, and State-Building* (OUP, Oxford, 2004); P. Picone, 'Le autorizzazioni all'uso della forza tra sistema delle Nazioni Unite e diritto internazionale generale', 88 *RDI* (2005) 5, at 45-56; M. J. Aznar, *Administración internacionalizada del territorio* (Atelier, Barcelona, 2008); I. Ingravallo, *Il Consiglio di sicurezza e l'amministrazione diretta dei territori* (Editoriale Scientifica, Napoli, 2008); C. Stahn, *The Law and Practice of International Territorial Administration* (CUP, Cambridge, 2008); R. Wilde, *International Territorial Administration* (OUP, Oxford, 2008).

[9] T. Gill, 'Peace Operations', in T. Gill and D. Fleck (eds), *The Handbook of the International Law of Military Operations* (2nd ed., OUP, Oxford, 2015) 153.

[10] The element of consent is assayed in particular *infra*, Section 3.3.

[11] As argued by Frulli, *supra* n. 5.

[12] P. Picone, 'Il peace-keeping nel mondo attuale: tra militarizzazione e amministrazione fiduciaria', 79 *RDI* (1996) 5-34.

[13] See, among others, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping, A/47/277–S/24111, 17 June 1992; Supplement to an Agenda for Peace, A/50/60–S/1995/1, 25 January 1995; Report of the Panel on United Nations Peace Operations, A/55/305–S/2000/809, 21 August 2000 (hereinafter: 'Brahimi Report'); A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, A/59/565, 2 December 2004; UN Department of Peacekeeping Operations, *United Nations Peacekeeping Operations Principles and Guidelines* (UN, New York, 2008) (hereinafter: 'Capstone Doctrine'); UN Department of Peacekeeping Operations, *New Partnership Agenda: Charting a New Horizon for UN Peacekeeping* (UN, New York, 2009); Report of the High-Level Independent Panel on Peace Operations on Uniting our Strengths for Peace: Politics, Partnership and People, A/70/95–S/2015/446, 17 June 2015 (hereinafter: 'HIPPO Report').

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they are crucial to understanding the evolution of peacekeeping.

(2) Genesis and Crisis of the Traditional Model

Usually, scholars consider the United Nations Emergency Force (UNEF I), which was deployed in 1956 by the UNGA in the aftermath of the Suez Crisis,[14] to be the first true peacekeeping operation.[15] According to the UNGA's mandate, UNEF I's peacekeepers could use armed force only in personal self-defence,[16] the mission should have been conducted neutrally with regard to the parties of the armed conflict in the context of which the mission was dispatched,[17] and the consent of the belligerents was at the basis of the deployment of the UN troops.[18] Lacking enforcement powers, these operations could have been effective only with the co-operation of the parties that had agreed to their deployment.[19] The UNSC soon realized that the UNGA had found a good stratagem for the monitoring and settlement of international disputes concerning potentially explosive situations for international peace and security.[20] As a result, the UNSC was quick at appropriating the UNGA's idea, basing the future mandates on the UNEF I model.

Since then, the limitation on use of armed force to situations of self-defence, the consent of the territorial States, and the neutrality of the mission have been considered the so-called basic principles or pillars of peacekeeping, which have guided the creation of future UN peacekeeping missions.[21] These principles were particularly suitable for peacekeeping operations tasked with the monitoring of ceasefires, the support for peace processes at the end of international armed conflicts, and the implementation of peace treaties. The missions were seen as "exclusively international in character in that they relate to armed conflict among State".[22] This model proved sufficiently versatile to address issues arising from "multidimensional" peacekeeping, that is, when the UN missions were requested to perform a number of military, police, and civil tasks in order to improve the security of civilians involved in armed conflicts and the building of a safe institutional environment.[23]

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14 GA Res. 1001 (ES-I), 7 November 1956.

15 Earlier UN missions with purely observer functions usually are not considered to be peacekeeping missions (C. Henderson, *The Use of Force and International Law* (CUP, Cambridge, 2018), at 176).

16 See Summary Study of the Experience Derived from the Establishment and Operation of the Force, A/3943, 9 October 1958, para. 179.

17 *Ibid.*, at para. 149.

18 *Ibid.* para. 132.

19 F.-T. Liu, 'United Nations Peacekeeping Operations: their Importance and their Limitations in a Polarized World', 201(1) *RCADI* (1987) 385, at 391-392 [dx.doi.org/10.1163/1875-8096_pplrdc_A9789024737000_03].

20 The UNGA had already claimed a complementary role in the maintenance of international peace and security through the Uniting for Peace, GA Res. 377(V) A, 3 November 1950.

21 See Henderson, *supra* n. 15, at 173-176.

22 Summary Study, *supra* n. 16, at para. 13.

23 See UN Department of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations* (UN, New York, 2003).

However, the traditional peacekeeping principles shaped on inter-State conflicts proved inadequate to guarantee the fulfilment of the mandate and, in particular, the protection of civilians from attacks conducted by armed groups when missions were deployed in territories torn by NIACs. These groups usually do not cooperate with the UNSC, which is a forum mainly for inter-State relations, and their voices have significantly less weight for the UNSC than those of the governments against which the armed groups are fighting.

This factual situation put the principles of peacekeeping under an enormous strain since the need to protect civilians from armed groups resulted in the necessity to employ armed force beyond individual self-defence. As the UN troops were mainly deployed thanks to the consent of the government against which these groups were fighting, the peacekeepers were often perceived as obstacles to the attainment of the armed groups' goals, and, thus, their safety and freedom of movement were severely impaired.

For instance, the UN mission deployed in the Congo in the 1960's to assist the consolidation of the Congolese government's authority (the United Nations Operation in the Congo, ONUC)[24] tested the limits of the traditional model. Although the UNSC had increased the degree of force authorized beyond the traditional model due to the volatile situation on the ground,[25] the mission had to adopt a very proactive stance when some armed groups decided to reduce the ONUC freedom of movement without directly threatening UN troops, in order to attack the civilian population without ONUC's interference. As a result, ONUC decided to use armed force to preserve its own freedom of movement, even if this was not strictly in line with the mandate of the mission.[26]

Again, between 1992 and 1995, the United Nations Protection Force (UNPROFOR) deployed in former Yugoslavia faced significant difficulties in protecting civilians because it was trying to use armed force only in self-defence. Despite the Secretary-General's claim that the mission was governed by the traditional principles of peacekeeping,[27] the UNSC authorized the use of armed force to guarantee the freedom of movement of the peacekeepers.[28] However, the subsequent authorisation to use armed force was limited to responding to threats,[29] and the mandate proved tragically unable to prevent genocide and other mass atrocities against the civilian population.

Similarly, in 1993, after the failure of two previous missions, the UNSC conferred enforcing powers on the United Nations Operation in Somalia II (UNOSOM II). The mission was tasked with establishing a secure humanitarian environment in Somalia, which was, at that time, in a

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[24] ONUC was established by SC Res 143 (1960), 14 July 1960.
[25] See SC Res. 161 (1961), 21 February 1961; SC Res. 169 (1961), 24 November 1961.
[26] See S/5078 (1962), 16 February 1962; G. Abi-Saab, *The United Nations Operation in the Congo 1960-1964* (OUP, Oxford, 1978), at 174-176.
[27] S/23592, 15 February 1992, 6.
[28] SC Res 807 (1993), 19 February 1993, para. 4.
[29] SC Res. 836 (1993), 4 June 1993, para. 5.

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prolonged NIAC.[30] As in relation to ONUC, the creation of this safe environment through the proactive use of armed force was not the direct response to attacks against the members of the mission.

Likewise, the United Nations Assistance Mission for Ruanda (UNAMIR) illustrates the inadequacy of traditional peacekeeping in NIACs. Since the mission was originally tasked with the monitoring of a cease-fire 1993,[31] it was unable to prevent the genocide of Tutsis in 1994, notwithstanding the attempts of the UNSC to adjust its mandate to include both "act[ing] as an intermediary between the parties"[32] and taking "action in self-defence against persons or groups who threaten" civilians and UN personnel.[33] The limitation of the use of armed force to self-defence rendered the peacekeepers unapt to protect civilians.[34]

These four examples are sufficient to demonstrate that the principles of peacekeeping established under UNEF I were unable to address NIACs where hot hostilities occur. As a result, these same principles evolved and the UNSC decided to apply them very differently from the traditional model.

(c) Robust Mandates and the Principles of Peacekeeping

(1) The Emergence of the Concept of Robust Mandates

"Robust mandates" can be defined as "operations where, strictly speaking, use of force [is] authorized beyond self-defence".35 They are the product of a significant debate that occurred during the 1990s, which focused on the protection of civilians by peacekeeping forces, on the limits of the traditional model, and on the need to reshape the principles of peacekeeping.

Following the dramatic experiences in Somalia, Bosnia, and Rwanda, the UN openly acknowledged the need to focus on a proactive strategy for the protection of civilians. For instance, in 1999, in relation to the United Nations Mission in Sierra Leone (UNAMSIL), the UNSC, "[a]cting under Chapter VII" of the UN Charter, decided that UNAMSIL could "take the necessary action to ensure the security and freedom of movement of its personnel and [...] to afford protection to civilians under imminent threat of physical violence".36 Notwithstanding the failure of UNAMSIL to protect civilians,37 this shift to more proactive mandates, wherein

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30 See SC Res. 814 (1993), 26 March 1993; SC Res. 837 (1993), 6 June 1993. For an evaluation of the peacekeeping experience in Somalia, see R. Murphy, *UN Peacekeeping in Lebanon, Somalia and Kosovo: Operational and Legal Issues in Practice* (CUP, Cambridge, 2007), at 48-63 and 93-95.

31 SC Res. 872 (1993), 5 October 1993, para. 3.

32 SC Res. 912 (1994), 21 April 1994, para. 8(a).

33 SC Res. 918 (1994), 17 May 1994, para. 4.

34 See the reconstruction offered by the fictional movie directed by M. Caton-Jones, *Shooting Dogs* (2005).

35 M. Bothe, 'Peacekeeping Forces', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law online*, (OUP, Oxford, 2016), para. 19.

36 SC Res. 1270 (1999), 22 October 1999, para. 14.

37 See S.W. Lyons, 'New Robust Peacekeeping', 112 *Proceedings of the ASIL Annual Meeting* (2018) 109, at 110

peacekeepers were explicitly authorized to use force beyond self-defence, has become commonplace today.

As a result, the 2001 Brahimi Report acknowledged that peacekeepers "must be capable of defending themselves, other mission components, and the mission's mandate."38 The Report went on to affirm that "[r]ules of engagement should be sufficiently robust and not force [UN] contingents to cede the initiative to their attackers".[39] Accordingly, the expressions "robust peacekeeping missions" became commonplace in the language of international relations as well as in academic literature.[40]

So far, the UNSC has dispatched robust mandates mainly in contexts of NIACs, where the protection of civilians was a particularly difficult task. These mandates can be seen as a necessary step to adjust the UNEF I model, created to deal with inter-State conflicts, to the realities of NIAC. To this end, as it is discussed in the following subsection, since 1999, the UNSC has employed the traditional language of authorisations to the use of armed force under Chapter VII of the UN Charter to protect civilians.41 Nonetheless, at the same time, the UN has maintained that the evolution of UN peacekeeping entails a reshaping — rather than an abjuration — of the traditional principles of peacekeeping, which are still in principle valid and applicable.[42]

Since robust mandates differ from the original model based on the experience of UNEF I and subsequently followed by the UNSC, it is necessary to understand how the basic principles of peacekeeping have been interpreted and adjusted when peacekeepers have been authorized to use armed force beyond self-defence. This is the necessary mid-step before assessing whether these principles, even in light of their reshaping to accommodate robust mandates, are applicable to most recent super-robust mandates.

(2) The Use of Armed Force in Robust Mandates

With regard to the issue of the use of armed force, as already mentioned, peacekeepers were originally authorized to use armed force in personal self-defence. Without entering the debate of

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[doi:10.1017/amp.2019.12].

38 Brahimi Report, *supra* n. 13, at x.

39 *Ibid.*

40 See, e.g., the discussion in J. Sloan, *The Militarisation of Peacekeeping in the Twenty-First Century* (Hart, Oxford/Portland, 2001); T. Findlay, *The Use of Force in UN Peace Operations* (OUP, Oxford, 2002); F. Vacas Fernández, *El régimen jurídico del uso de la fuerza por parte de las operacines de mantenimiento de la paz de Naciones Unidas* (Marcial Pons, Madrid, 2005); L. Pineschi, 'L'emploi de la force dans les opérations de maintien de la paix des Nations Unies "robustes": conditions et limites juridiques', in M. Arcari and L. Balmond (eds), *La sécurité collective entre légalité et défis à la légalité* (Giuffrè, Milano, 2008) 139; N. White, 'Peacekeeping or War-fighting?', in N. White and C. Henderson (eds), *Research Handbook on International Conflict and Security Law* (Edward Elgar, Cheltenham, 2013) 572;.

41 See, e.g., SC Res. 1270 (1999), 22 October 1999, para. 14.

42 See Brahimi Report, *supra* n. 13, at para. 48. On the ongoing role of the basic principles of peacekeeping in relation to recent mandates, see Tsagourias, *supra* n. 1.

the legal ground of this entitlement,43 suffice it to note that every person whose life is under threat has the right to self-defence under international law.44 As stated by the Secretary-General in relation to UNEF I, "men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms".45 However, the concept of personal self-defence has been extended to include also the protection of civilians, in line with the police officers' entitlement to use armed force to protect persons under their responsibility pursuant to international human rights law.46 The Brahimi report employs a wider reference to the use of armed force to "protect the mandate", which means that peacekeepers may use force not only as a response against direct violence, but also to protect civilians.[47]

Furthermore, in recent robust mandates, the UNSC has authorized the use of *any means or measures necessary* to fulfil the mandate.[48] These expressions resonate the practice of authorizing enforcement missions under Chapter VII of the UN Charter, where "any necessary means" and "any necessary measure" encompass the possibility to use armed force, as in the cases of the operations in Kuwait and Libya.[49] However, the UNSC does not invoke directly Article 42 of the UN Charter in relation to these missions. Accordingly, the indication of Chapter VII could also be interpreted as a reference to the power of the UNSC to adopt non-forcible measures to maintain international peace and security under Article 41.

Taking into account the experience of ONUC, UNPROFOR, and other missions, the authorization to take any necessary means and any necessary measure to protect civilians is wide enough to cover the use of armed force in some situations where, prima facie, there is no direct threat against the peacekeepers or the civilians under their responsibility. For instance, the use of armed force to guarantee freedom of movement of peacekeepers is often expressly recognized or is implicit in the notion of "every necessary means" to protect civilians.[50] However, there is a general understanding that "peacekeeping operations should only use force as a measure of last resort, when other means have failed".[51]

The progressive involvement of peacekeepers in actual hostilities has led the Secretary-General to deal with the applicability of the rules of international humanitarian law to peacekeepers.[52]

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43 See the brief discussion in B. Oswald, 'Robust Peacekeeping and Self-Defense', *112 Proceedings of the ASIL Annual Meeting* (2018) 117-120 [doi:10.1017/amp.2019.15].

44 See Gill et al. (eds), *supra* n. 5, at 147.

45 Summary Study, *supra* n. 16, at para. 179.

46 See, e.g., Art. 2(2)(a) of the ECHR.

47 See Brahimi Report, *supra* n. 13, at para. 49.

48 See, e.g., SC Res. 1270 (1999), 22 October 1999, para. 14; SC Res. 1975 (2011), 30 March 2011, para. 6; SC Res. 2100 (2013), 25 April 2013, para. 17; SC Res. 2155 (2014), 27 May 2014, para. 4; SC Res. 2295 (2016), 29 June 2016, para. 17; SC Res. 2304 (2016), 12 August 2016, paras. 5 and 10.

49 See SC Res. 678 (1990), 29 November 1990, para. 2; SC Res. 1973 (2011), 17 March 2011, para. 4. See, generally, Pineschi, *supra* n. 40, at 165-167.

50 See, e.g., SC Res. 1270 (1999), 22 October 1999, para. 14.

51 Trial Chamber, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Case no. SCSL-04-15), Judgement, No. SCSL-04-15-T, 2 March 2009, para 228.

52 See, e.g, R. Kolb, *Droit humanitaire et opérations de paix internationales* (2nd ed., Bâle, Helbing & Lichtenhan,

Taking into account some scholarly suggestions,[53] in 1999 the Secretary-General adopted the bulletin "Observance by United Nations Forces of International Humanitarian Law", which prescribes the observance of the law of armed conflict by UN troops involved in hostilities, even when they are deployed in the context of a peacekeeping mission.[54] In the same fashion, the 1994 Convention on the Safety of United Nations and Associated Personnel provides that its legal protection does not apply to peacekeepers who are involved in actual hostilities,[55] whatever they occur in the framework of self-defence actions and offensive operations.[56]

However, until 2013, robust mandates have interpreted the principle of non-use of armed force as limiting the activities of the peacekeepers to their own protection, the protection of civilians, and the protection of the mandate. The practice of the UNSC, mainly through the invocation of Chapter VII, has also considered covered by this principle other connected operations, such as those launched to guarantee the freedom of movement of the mission. Nonetheless, any decision of peacekeepers to use armed force was framed as defensive.

(3) Consent in Robust Mandates

Consent has long been considered to be the main legal basis that makes the deployment of peacekeepers lawful.[57] Traditionally, the UNSC has sought the consent of the internationally recognized governments of the territory(ies) in which a mission was to be dispatched. As a result, the lack of consent of the territorial State in relation to the deployment of a mission can result in a severe impairment to its operability, as demonstrated by the Croatian withdrawal of consent to the presence of UNPROFOR on its own territory, which has led to the replacement of the

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2006); A. Segura Serrano, *El derecho internacional humanitario y las operaciones de mantenimiento de la paz de Naciones Unidas* (Plaza y Valdes, Madrid, 2007); T. Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces', 95 *IRRC* (2013) 561-612 [doi:10.1017/S181638311400023X]; E. Nalin, *L'applicabilità del diritto internazionale umanitario alle operazioni di peace-keeping delle Nazioni Unite* (Editoriale Scientifica, Napoli, 2018).

53 Before the adoption of the Bulletin, this possibility has been discussed e.g. by L. Condorelli, 'Le Statut des forces de l'ONU et le droit international humanitaire', 78 *RDI* (1995) 881-906.; Emanuelli, *Les actions militaires de l'ONU et le droit international humanitaire* (Wilson & Lafleur Itée, Montréal, 1995).

54 ST/SGB/1999/13 (1999), 6 August 1999, Section 1.1. On the bulletin, see L. Condorelli, 'Le azioni dell'ONU e l'applicazione del diritto internazionale umanitario: il bollettino del Segretario generale del 6 agosto 1999', 82 *RDI* (1999) 1049-1053; P. Benvenuti, 'Le respect du droit international humanitaire par les forces des Nations Unies: La circulaire du Secrétaire Général', 105 *RGDIP* (2001) 335-372.

55 See Art. 2(2), Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363. See, also, Nalin, *supra* n. 52, at 127-142.

56 On the different rules applicable in law-enforcement operations, see S. Wills, 'Use of Deadly Force by Peacekeepers Operating Outside of Armed Conflict Situations: What Laws Apply?', 40 *Human Rights Quarterly* (2018) 663-702 [doi:10.1353/hrq.2018.0036].

57 See A. Di Blase, 'The Role of the Host State's Consent with Regard to Non-Coercive Actions by the United Nations', in A. Cassese (ed.), *United Nations Peace-Keeping* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1978) 55; Gargiulo, *supra* n. 5, at 336; Iglesias Velasco, *supra* n. 6, at 144-145; J. Cardona Llorens, 'Universalismo y regionalismo en el mantenimiento de la paz a inicios del siglo XXI', in *Universalismo y Regionalismo a Inicios del Siglo XXI* (OAs, Washington, DC, 2010) 47, at 98; Frulli, *supra* n. 5, at 73; Y. Dinstein, *War, Aggression and Self-Defence* (6th ed., CUP, Cambridge, 2017), at 356; C. Gray, *International Law and the Use of Force* (4th ed., OUP, Oxford, 2018), 316; Handerson, *supra* n. 15, at 195.

mission.[58]

In relation to robust mandates, the practice of the UNSC has evolved so that today not all the belligerents are required to consent to the deployment of peacekeeping missions. Although the consent of the territorial State(s) is still considered to be crucial, the UNSC has considered it to be politically desirable and appropriate — but not legally mandatory — to request the consent of *some* armed groups involved in the armed conflict, in order to enhance the success of the mission,[59] "not out of legal obligation, but rather to ensure the effectiveness of the peacekeeping operation".[60] On the other hand, the UNSC has decided not to seek the consent of other armed groups considered to be insurmountable obstacles to the reconciliation process, who are usually labelled as "local spoilers" and are often targeted by UN sanctions.[61] According to the Capstone doctrine, "[u]niversality of consent becomes even less probable in volatile settings, characterized by the presence of armed groups not under the control of any of the parties, or by the presence of other spoilers".[62]

This differential approach regarding the consent of the belligerents involved in a NIAC may be justified under practical reasons. Since robust mandates are deployed in order to support the central government in the reconciliation process, and peacekeepers likely are to fight against local spoilers, it would be unrealistic for the UNSC to seek and obtain the consent of those same armed groups that the mission is supposed to fight.

(4) Neutrality / Impartiality of Robust Mandates

The evolution faced by the rules on the use of armed force and consent has had a significant impact on the neutral character of the missions, the third principle of peacekeeping. In robust mandates, peacekeepers are no longer considered to be prevented from taking sides in the conflict in every circumstance. Accordingly, the understanding of this principle has evolved to take into account the robustness of some new mandates.

Peacekeepers operating on the basis of robust mandates can employ limited armed force against threats to their security and to the civilians under their protection. Although whether this is sufficient evidence of lack of neutrality is case-specific, the very fact that some of the belligerents are not required to consent to the deployment of the mission runs against the neutral character as envisaged by UNEF I. To solve the conundrum of the ongoing relevance of this principle, mainly three arguments have been offered, all of them switching the attention from neutrality to impartiality.

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[58] Gray, *supra* n. 57, at 316.

[59] *Ibid.*, at 318.

[60] *Sesay, Kallon and Gbao* case, *supra* n. 51, at. para. 226.

[61] G. Gaja, 'Use of Force Made or Authorized by the United Nations', in C. Tomuschat (ed.), *The United Nations at Age Fifty: A Legal Perspective* (Brill, Leiden, 1995) 39, at 51; Iglesias Velasco, *supra* n. 6, at 144-145; Cardona Llorens, *supra* n. 57, at 98; I. Johnstone, 'Managing Consent in Contemporary Peacekeeping Operations', 18 *International Peacekeeping* (2011) 168, at 171-172 [doi:10.1080/13533312.2011.546091]; Frulli, *supra* n. 5, at 72-79.

[62] Capstone Doctrine, *supra* n. 13, at 32. See, also, HIPPO Report, *supra* n. 13, at para. 127.

The first argument dilutes the principle so that its actual legal meaning risks being lost. The Brahimi report considers that impartiality means "adherence" of the mission "to the principles of the UN Charter and to the objectives of a mission mandate that is rooted in Charter principles".[63] This reference to the adherence to the principles of the UN Charter is problematic since its actual meaning is rather obscure: the only possible interpretation is that mandates adopted following the UN rules and goals are *per se* impartial. However, this interpretation results in confusion between the *legality* of the mandates in their entirety and their impartiality, which is only one of the principles governing the legality of peacekeeping. Moreover, since non-State belligerents have no means to challenge the mandate because of a lack of adherence to the principles of the Charter, constructing impartiality as adherence to the principles of the Charter is ultimately an exercise of faith in the respect for UN procedures and goals by the UNSC.[64]

A second line of argument takes a more practical approach and considers that the neutrality of the mandate is no longer a requirement for the *legality* of the mission, but rather, the UN should pursue the *political* goal of dispatching missions that are perceived as impartial by all the relevant stakeholders.[65] In the case of robust mandates, the missions simply do *not* have a neutral or impartial nature, as clearly demonstrated by the role they play against some armed groups. However, due to the political nature of the principle at hand, any violation is not a source of illegality for the mandate. Lamentably, this idea conflicts with the well-established belief that the three principles of peacekeeping are relevant for the legality of the missions.

A third and more persuasive argument shifts the focus of this principle from the UN involvement in the conflict to the equal treatment of the parties. As noted by the Capstone Doctrine, whereas in principle peacekeeping forces should have been *neutral*, that is, they should not been involved in the conflict in any way, recently, the emphasis of the discourse has been on *impartiality*, that is, dealing without favour or prejudice to any party to the conflict.[66] Accordingly, peacekeepers "should not condone actions by the parties that violate the undertakings of the peace process or international norms and principles".[67] More recently, the HIPPO Report concluded that the impartiality of UN missions "should be judged by its determination to respond even-handedly to the actions of different parties based not on who has acted but by the nature of their actions. Missions should protect civilians irrespective of the origin of the threat".[68]

It is possible to conclude, therefore, that the principle of neutrality has been replaced by the principle of impartiality. Accordingly, peacekeepers should protect civilians from any threats,

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[63] Brahimi Report, *supra* n. 13, at para. 50.

[64] For some critical remarks on the Brahim Report's idea of impartiality, see H. Yamashita, '"Impartial" Use of Force in United Nations Peacekeeping', 15 *International Peacekeeping* (2008) 615-630 [doi:10.1080/13533310802396152].

[65] Frulli, *supra* n. 5, at 62.

[66] Capstone Doctrine, *supra* n. 13, p. 33.

[67] *Sesay, Kallon and Gbao* case, *supra* n. 51, para. 227.

[68] HIPPO Report, *supra* n. 13, para. 126.

irrespective of whether they come from governmental forces or armed groups.

(D) THE CHALLENGES SUPER ROBUST MANDATES POSE TO THE PRINCIPLES OF PEACEKEEPING, WITH SPECIFIC REFERENCE TO THE USE OF ARMED FORCE

(1) Preliminary Remarks

This Section explores the degree of armed force authorized by the UNSC in recent super-robust mandates which show an unprecedented offensive stance. The prototype of these mandates is MONUSCO after 2013, when the UNSC created an offensive unit (the Intervention Brigade) within the mission and tasked it with neutralizing certain armed groups in the Democratic Republic of the Congo (DRC). Moreover, three other recent peacekeeping missions, MINUSMA, MINUSCA, and UNMISS, involve the use of armed force beyond what had been so far authorized in relation to peacekeeping missions. The degree of armed force that peacekeepers can employ in these missions plummeted after the creation of the Intervention Brigade within MONUSCO, consolidating a trend towards super-robust mandates.[69] All these mandates are therefore problematic in relation to the compatibility between the armed force authorized by the UNSC and the principles of peacekeeping as crystallized in UN practice at the beginning of the new millennium.

(2) The Use of Armed Force by MONUSCO

The United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) was established in 1999 by the UNSC Resolution 1279, which authorized to use armed force only in self-defence.[70] However, since then, the UNSC has increased the degree of armed force that peacekeepers were authorized to employ, following a progressive intensification of the hostilities against civilians and against the mission. In 2000, the UNSC authorized the mission to take the necessary action to protect UN personnel, ensure their security and freedom of movement, and protect civilians under imminent threat of physical violence.[71] Moreover, in 2003, the UNSC further authorized MONUC to take all necessary measures to fulfil its mandate,[72] while, in 2008, the UNSC stressed that MONUC was authorized to use all necessary means[73] *inter alia* to deter any attempt at the use of force to threaten the peace process, "undertaking all necessary operations to prevent attacks on civilians and disrupt the military capability of illegal armed

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[69] On the precedential value of the Intervention Brigade, see D. Kearney, 'The Slippery Slope of UN Peacekeeping: Offensive Peacekeeping in Congo and Beyond', 19 *MPUNYB* (2016) 100-141 [doi:10.1163/18757413-00190005].

[70] SC Res. 1279 (1999), 30 November 1999, para. 5.

[71] SC Res. 1291 (2000), 24 February 2000, para. 8.

[72] SC Res. 1493 (2003), 28 July 2003, paras. 25-26.

[73] SC Res. 1856 (2008), 22 December 2008, para. 5.

groups".[74] When, in 2010, MONUC was renamed MONUSCO,[75] its mandate was already significantly robust and it involved the use of armed force beyond self-defence.[76]

Nonetheless, due to the ongoing threats to civilians in the eastern regions of DRC and to peacekeepers deployed therein, in 2013, upon recommendation of the Secretary-General,[77] the UNSC created the Intervention Brigade within the MONUSCO, which was tasked with offensive combat functions. According to Resolution 2098 (2013), the Intervention Brigade consisted in three infantry battalions, one artillery and one Special force and Reconnaissance company with the responsibility of neutralizing armed groups and the objective of contributing to reducing the threat posed by them to State authority and civilians.[78] The UNSC described the IB's mandate to neutralize armed groups as comprising "support of the authorities of the DRC [...] to carry out targeted offensive operations [...] either unilaterally or jointly with [the DRC army], in a robust, highly mobile and versatile manner".[79] Although the UNSC affirmed that the creation of the Intervention Brigade was intended "on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping",[80] the existence of such a unit has been confirmed between 2014 and 2019.[81] Despite the UNSC's reiteration that the Intervention Brigade should pursue a rapid exit strategy to return its responsibilities to the DRC government,[82] the Secretary-General acknowledged slow progress by the DRC to facilitate it.[83]

The UNSC's decision to task MONUSCO with neutralizing armed groups through robust military operations has raised criticism regarding MONUSCO's actual compliance with the basic principles of peacekeeping.[84] The answer to this question needs to take into account seven years

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[74] *Ibid.* para. 3(d).

[75] SC Res 1925 (2010), 28 May 2010.

[76] For an account of the degree of force employed by MONUC in that period, see R. Murphy, 'UN Peacekeeping in the Democratic Republic of the Congo and the Protection of Civilians', 21 *JCSL* (2016) 209, at 220-222 [doi:10.1093/jcsl/krv030].

[77] S/2013/119, 27 February 2013, paras. 60-64.

[78] SC Res. 2098 (2013), 28 March 2013, para. 9.

[79] *Ibid.* para. 12(b).

[80] *Ibid.* para. 9.

[81] SC Res. 2147 (2014), 28 March 2014, para. 1; SC Res. 2211 (2015), 26 March 2015, para. 1; SC Res. 2277 (2016), 30 March 2016, para. 24; SC Res. 2348 (2017), 31 March 2017, para. 26; SC Res. 2409 (2018), 27 March 2018, para. 29; SC Res. 2502 (2019), 19 December 2019, para. 22.

[82] SC Res. 2098 (2013), 28 March 2013, para. 10; SC Res. 2147 (2014), 28 March 2014, para. 3; SC Res. 2211 (2015), 26 March 2015, paras. 40-41; SC Res. 2277 (2016), 30 March 2016, paras. 47-48; SC Res. 2409 (2018), 27 March 2018, paras. 56 and 59 (IV); SC Res. 2502 (2019), 19 December 2019, paras. 46-48.

[83] See e.g. S/2014/450, 30 June 2014, para. 89; S/2015/172, 10 March 2015, para. 63; S/2016/233, 9 March 2016, para. 74; S/2016/579, 28 June 2016, para. 77.

[84] See e.g. P. Fet, 'Tudo de novo no front: MONUSCO, uma nova era nas peacekeeping operations?', 10 *Revista de Dereito International* (2013) 169-183 [doi:10.5102/rdi.v10i2.2720]; M. Longobardo and F. Violi, '*Quo vadis* peacekeeping? La compatibilità dell'*Intervention Brigade* in Congo con i principi regolanti le operazioni di pace alla prova dei fatti', 70 *Comunità Internazionale* (2015) 245-272; O. Spijkers, 'The Evolution of United Nations Peacekeeping in the Congo From ONUC, to MONUC, to MONUSCO and its Force Intervention Brigade', 19 *Journal of International Peacekeeping* (2015) 88-117 [doi:10.1163/18754112-01902004]; D.M. Tull, 'The Limits and Unintended Consequences of UN Peace Enforcement: The Force Intervention Brigade in the DR Congo', 25 *International Peacekeeping* (2018) 167-190 [doi:10.1080/13533312.2017.1360139].

of practice, where the Intervention Brigade and the entire MONUSCO have acted in a very proactive way to deter and respond to attacks by armed groups.

In 2015, I affirmed that the Intervention Brigade *per se* did not increase drastically the force employed by the already significantly robust MONUSCO, but instead, it appeared as reorganization in one specific unit of those military tasks that were already performed by MONUSCO.[85] However, this conclusion – which was tributary to a naïve trust in the UNSC's pledge that the mission was created on exceptional basis – is no longer correct after seven years of activity of the IB. Indeed, the proactive involvement of this unit and of other military components of MONUSCO in the hostilities against armed groups in DRC is demonstrated by a significant deployment of means and methods of warfare. For instance, the Secretary-General acknowledged MONUSCO's participation in actual military operations involving the employment of ground troops, attack helicopters, and artillery fire.[86]

Such unprecedented and reiterated involvement in the hostilities unequivocally demonstrates that the mission cannot be considered neutral at all, since it is fighting alongside the government and against some of the belligerents involved in the armed conflict in DRC.[87] The mission cannot even be considered to be impartial under the most recent understating of this principle, since it is tasked to target only some belligerents. Accordingly, MONUSCO should be considered a party to the ongoing conflict in DRC,[88] and as such, should apply international humanitarian law.89 The HIPPO Report, envisaging this possibility, expressed serious concerns regarding the impact of such an extraordinarily robust mission on the very concept of peacekeeping.[90]

In conclusion, the degree of armed force authorized by the UNSC and actually employed by MONUSCO is unprecedented and goes well beyond concepts such as personal self-defence, defence of civilians, defence of the mandate, and others previously employed by the UNSC. Accordingly, it is impossible to reconcile MONUSCO and the Intervention Brigade with the principles of peacekeeping, even taking into account the evolution of their interpretation related to robust mandates.

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85 Longobardo and Violi, *supra* n. 84, at 252-254.

86 See e.g. S/2013/581, 30 September 2013, para. 37; S/2013/757, 17 December 2013, para. 40; S/2014/157, 5 March 2014, para. 39; S/2014/450, 30 June 2014, para. 54; S/2014/698, 25 September 2014, paras. 55-57; S/2015/172, 10 March 2015, paras. 35-36 and 38-39; S/2015/486, 26 June 2015, paras. 18-19 and 43; S/2016/233, 9 March 2016, paras. 24, 27, 29, and 41; S/2016/579, 28 June 2016, paras. 26, 32, and 33; S/2017/206, 10 March 2017, para. 59; S/2017/826, 29 September 2017, para. 42.

87 Longobardo and Violi, *supra* n. 84, at 256-257; Spijkers, *supra* n. 84, at 104.

88 Longobardo and Violi, *supra* n. 84, at 257-265; Nalin, *supra* n. 52, at 116; B. Maganza, 'From Peacekeepers to Parties to the Conflict: An IHL's Appraisal of the Role of UN Peace Operations in NIACs', 25 *JCSL* (2020, online advance access) 1, at 14-15 [hdoi:10.1093/jcsl/krz032].

89 See, generally, D. Whittle, 'Peacekeeping in Conflict: The Intervention Brigade, MONUSCO, and the Application of International Humanitarian Law to United Nations Forces', 46 *Georgetown JIL* (2015) 837-875.

90 HIPPO Report, *supra* n. 13, at para. 122.

(3) The Use of Armed Force by MINUSMA

The UNSC has provided MINUSMA with a robust mandate since its creation in 2013, when MINUSMA has been authorized to use all necessary means to carry out all the components of its mandate, rather than the protection of civilians only.[91] Since 2016, the UNSC has tasked MINUSMA with a super-robust mandate as demonstrated by some additional textual elements embodied in the relevant resolutions. On a number of occasions, the UNSC requested MINUSMA to "achieve its more proactive and robust posture to carry out its mandate"[92] and to "carry out its mandate with a proactive, robust, flexible and agile posture".[93] Moreover, the UNSC has emphasized that MINUSMA should not only respond and prevent attacks against civilians, but also should "take active steps to anticipate" them.[94] The UNSC tasked MINUSMA with actions "in support of the Malian authorities [...] to anticipate, deter and counter threats, including asymmetric threats, and to take robust and active steps to protect civilians [...] engaging in *direct* operations".[95] Moreover, MINUSMA has to act in "active defence of its mandate, to *anticipate and deter threats* and to *take robust and active steps* to counter asymmetric attacks [...], to ensure prompt and effective responses to threats of violence against civilians and *to prevent a return of armed elements to those areas*, engaging in *direct operation*".[96] In 2019, the UNSC commended MINUSMA's efforts "to adopt *a more robust posture* over the past months as well as the *intensification of the frequency and scale of its operations*."[97] This terminology reinforces the offensive nature on the mission.

Contrary to any other antecedent practice, MINUSMA is openly deployed as an instrument to combat international terrorism. For instance, the UNSC expressed its concern over "the expansion of terrorist and other criminal activities into central and southern Mali"[98] and over "the transnational dimension of the terrorist threat in the Sahel region".[99] Moreover, in furtherance of MINUSMA's implementation of the Agreement on Peace and Reconciliation in Mali,[100] the UNSC has drawn attention to the need "to forestall attempts by terrorist groups to derail the implementation of the Agreement".[101]

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[91] SC Res. 2100 (2013), 25 April 2013, para. 17; SC Res. 2164 (2014), 25 June 2014, para. 12; SC Res. 2227 (2015), 29 June 2015, para. 12; SC Res. 2295 (2016), 29 June 2016, para. 17; SC Res. 2364 (2017), 29 June 2017, para. 18; SC Res. 2480 (2019), 28 June 2019, para. 19.

[92] SC Res. 2295 (2016), 29 June 2016, para. 18; SC Res. 2364 (2017), 29 June 2017, para. 19.

[93] SC Res. 2480 (2019), 28 June 2019, para. 22.

[94] See, e.g., SC Res. 2295 (2016), 29 June 2016, para. 19(c)(2); SC Res. 2480 (2019), 28 June 2019, para. 28(c)(2).

[95] SC Res. 2295 (2016), 29 June 2016, para. 19(c)(ii) (emphasis added); SC Res. 2364 (2017), 29 June 2017, para. 20(c)(2) (emphasis added).

[96] SC Res. 2295 (2016), 29 June 2016, para. 20; SC Res. 2364 (2017), 29 June 2017, para. 20(c)(2) (emphasis added).

[97] SC Res. 2480 (2019), 28 June 2019, preamble (emphases added).

[98] SC Res. 2295 (2016), 29 June 2016, preamble; SC Res. 2364 (2017), 29 June 2017, preamble.

[99] SC Res. 2295 (2016), 29 June 2016, preamble; SC Res. 2364 (2017), 29 June 2017, preamble. See also SC Res. 2480 (2019), 28 June 2019, preamble.

[100] SC Res. 2295 (2016), 29 June 2016, para. 16; SC Res. 2364 (2017), 29 June 2017, para. 17.

[101] SC Res. 2295 (2016), 29 June 2016, preamble; SC Res. 2364 (2017), 29 June 2017, preamble.

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In addition, the UNSC has labelled some of the armed groups involved in the armed conflicts in the region as terrorist groups. For instance, the UNSC made a distinction between *good* armed groups and *terrorist* armed groups, referring to "the primary responsibility of the Government of Mali, the Plateforme and Coordination armed groups to accelerate the implementation of the Agreement in order to [...] forestall attempts by terrorist groups".[102] The same resolutions list some belligerents as terrorist groups[103] and condemn their operations against Malian armed forces as terrorist attacks.[104]

The employment of peacekeepers to combat terrorism is quite a novelty in international law since, normally, States are required to combat terrorism through law-enforcement operations conducted at the national level. The issue here is not whether the relevant armed groups can be characterized as "terrorist groups" under other areas of international law, but whether doing so in the context of a peacekeeping operation is in line with the principles of peacekeeping. These references to terrorism are not a common occurrence in the mandate of peacekeeping operations, but instead, they characterize the mandate of MINUSMA alone. The word "terrorism", as such, is commonly employed in a sense that lacks impartiality, and involves a legal and ethical negative judgment[105] over some of the belligerents involved in the conflict. Indeed, the stigma attached to the expression "terrorist" is at the basis of the fact that international humanitarian law does not recognize terrorism as a status of individuals involved in hostilities, but rather, prohibits acts aiming at spreading terror among the population.[106]

MINUSMA's mandate is a precedent conflicting with the HIPPO Report, which emphasized that "UN peacekeeping missions, due to their composition and character, are not suited to engage in military counter-terrorism operations. They lack the specific equipment, intelligence, logistics, capabilities and specialized military preparation required".[107] The Secretary-General also stressed that "a robust peacekeeping mandate does not equal a counter-terrorist mandate",[108] while Uruguay noted that "peacekeeping operations, owing to their composition and character, are not suited to engage in military counter-terrorism operations."[109] Likewise, most scholars have criticized the UNSC for having created MINUSMA as an instrument to conduct militarily counterterrorism operations.[110] Accordingly, it is possible to conclude that, by embodying

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[102] SC Res. 2295 (2016), 29 June 2016, preamble; SC Res. 2364 (2017), 29 June 2017, preamble.

[103] SC Res. 2295 (2016), 29 June 2016, preamble; SC Res. 2364 (2017), 29 June 2017, preamble.

[104] SC Res. 2295 (2016), 29 June 2016, preamble; SC Res. 2364 (2017), 29 June 2017, preamble; SC Res. 2480 (2019), 28 June 2019, preamble.

[105] See S. Nathanson, *Terrorism and the Ethics of War* (CUP, Cambridge, 2010), at 11-23; C. Wellman, *Terrorism and Counterterrorism: A Moral Assessment* (Springer, Dordrecht, 2013), at 6.

[106] See M. Pertile, 'Fighting Terror within the Law? Terrorism, Counterterrorism and Military Occupations', in F. Pocar, M. Pedrazzi and M. Frulli (eds), *War Crimes and the Conduct of Hostilities* (Edward Elgar, Cheltenham, 2013) 276.

[107] HIPPO Report, *supra* n. 13, at para. 116. See, also, Gill et al. (eds), *supra* n. 5, at 146.

[108] UN Press Release, 'Calling Additional Peacekeepers "Force Multipliers" in Mali, Secretary-General Urges New Contributions to Reinforce Mission's Protection Mandate', 23 May 2017.

[109] S/PV.7727, 29 June 2016, 3.

[110] See J. Karlsrud, 'The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN

counter-terrorism language and tasks in the MINUSMA's mandate, the UNSC has renounced the impartiality of the mission, creating a dangerous shortcut between different areas of intervention of the UNSC.[111]

It is worth noting that Mali has requested the UNSC to create an offensive unit on the model of the Intervention Brigade deployed in DRC,[112] which clearly had a precedential value notwithstanding the reassurances offered by the UNSC.[113] The UNSC, however, decided to authorize the French troops already deployed in Mali in support of MINUSMA,[114] to try to keep a formal separation between peacekeepers (MINUSMA) and belligerents (France).[115]

(4) The Use of Armed Force by MINUSCA

When the UNSC created MINUSCA in 2014, the mission was authorized to "take all necessary means" to carry out is mandate, primarily concerned with the protection of civilians.[116] This robust mandate was subsequently reinforced when the UNSC clarified that MINUSCA, "in support of the CAR authorities, [has] to take active steps to *anticipate*, *deter* and *effectively respond* to serious and credible threats to the civilian population".[117] The UNSC went on to affirm that "MINUSCA's strategic objective is to support the creation of conditions conducive to the sustainable reduction of the presence of, and threat posed by, armed groups through a comprehensive approach and proactive and robust posture without prejudice to the basic principles of peacekeeping".[118]

Notwithstanding the invocation of the basic principles of peacekeeping, in fact, MINUSCA has been significantly involved in hostilities on the side of the government. For instance, it assisted the Central African government to disarm and arrest people involved in organized crime in the framework of an operation where live fire was exchanged and a number of peacekeepers

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Peacekeeping Operations in the CAR, the DRC and Mali', 36 *TWQ* (2015) 40, at 45-47 [doi:10.1080/01436597.2015.976016]; M. Sossai, 'Il mandato delle operazioni di peacekeeping e il contrasto a gruppi terroristici', in I. Caracciolo and F. Montuoro (eds), *L'evoluzione del peacekeeping: il ruolo dell'Italia* (Giappichelli, Torino, 2017) 89; J. Karlsrud, "Towards UN Counter-Terrorism Operations?", 38 *TWQ* (2017) 1215-1231 [doi:10.1080/01436597.2016.1268907].

111 Gilder, *supra* n. 3, At 64; See L. Attree and J. Street, 'U.N. Peace Operations Should Get Off the Counter-Terror Bandwagon', *Just Security*, 4 September 2018.

112 S/PV.7355, 6 January 2015, 7.

113 See Maganza, *supra* n. 88, at 18.

114 See, e.g., SC Res. 2295 (2016), 29 June 2016, para. 35.

115 See the very critical remarks by K. Bannelier and T. Christakis, 'Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict', 26 *LJIL* (2013) 855, at 870-873 [doi:10.1017/S0922156513000447].

116 SC Res. 2149 (2014), 10 April 2014, paras. 30 and 30(a). See, also, SC Res. 2217 (2015), 28 April 2015, paras. 31-32; SC Res. 2281 (2016), 26 April 2016, para. 2; SC Res. 2301 (2016), 26 July 2016, paras. 32-33; SC Res. 2387 (2017), 15 November 2017, paras. 41-42; SC Res. 2448 (2018), 13 December 2018, paras. 38-39; SC Res. 2499 (2019), 15 November 2019, paras. 31-32.

117 See, e.g., SC Res. 2499 (2019), 15 November 2019, para. 32(a)(ii).

118 SC Res. 2387 (2017), 15 November 2017, para. 39; SC Res. 2448 (2018), 13 December 2018, para. 36; SC Res. 2499 (2019), 15 November 2019, para. 29.

were killed.[119] The use of armed force by MINUSCA in this situation is not justified in self-defence or in defence of civilians, but rather, it was grounded in the MISUSCA's broad authorization to detain enemy fighters and criminals,[120] which is unusual for a peacekeeping force.[121]

More significantly, in 2017 MINUSCA used its armed helicopters to engage members of armed groups as they attempted to infiltrate Bambari in violation of a previously communicated line,[122] even in the absence of any actual attacks.[123] The very commander of the operation acknowledged that this episode put under significant strains the principle of peacekeeping, by affirming that the operation "succeeded because we bent various administrative rules, challenged some limiting agreements with troops and changed morale where the use of force was involved",[124] and by "apologizing for perhaps bypassing some of the rules".[125] On other similar occasions, MINUSCA has demonstrated this proactive stance to the use of armed force, taking part in several offensive operations alongside the Central African government.[126]

Accordingly, on the basis of the anticipatory nature of the mandate of MINUSCA and of its open support of the Central African government in law-enforcement activities and hostilities against armed groups, the impartiality of this mission should be questioned.[127] Moreover, due to the level of hostilities in which MINUSCA is currently involved, it is possible to conclude that the MISSION has become a party in the local armed conflict.[128]

Furthermore, as in relation to MINUSMA, it is possible to argue that the mandate of MINUSCA and its offensive stance is a consequence of the MONUSCO's precedent.[129] The UN Independent Expert on the situation of human rights in the Central African Republic called for the deployment of a mission tasked with the neutralization of armed groups,[130] thus echoing the mandate of the IB. Moreover, the UNSC stressed that the authorization of a very proactive use of armed force by MINUSCA is "without prejudice to the basic principles of peacekeeping",[131] as it was in relation to the IB,[132] and emphasized that the unprecedented detention powers

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[119] S/2018/611, 18 June 2018, paras. 16-17.

[120] See, e.g., SC Res. 2387 (2017), 15 November 2017, para. 43.

[121] See É. Vanspranghe, 'Advancing the Rule of Law through Executive Measures: The Case of MINUSCA', 9 *GoJIL* (2019) 331-365.

[122] S/2017/473, 2 June 2017, para. 11.

[123] See also T. Ruys, L. Ferro and C.V. Maelen, 'Digest of State Practice: 1 January–30 June 2017', 4 *JUFIL* (2017) 371, at 383 [doi:10.1080/20531702.2017.1385347].

[124] S/PV.7947, 23 May 2017, 8.

[125] *Ibid.*, at 9.

[126] See A. Gilder, 'Human Security and the Stabilization Mandate of MINUSCA', 27 *International Peacekeeping* (2020, online advance access) 1, at 15-16 [doi:10.1080/13533312.2020.1733423].

[127] *Ibid.*, at 24.

[128] See P. Labuda, 'The UN Goes to War in the Central African Republic: What Are the Limits of Peacekeeping', *Just Security*, 23 March 2017; Maganza, *supra* n. 88, at 19-20.

[129] *Ibid.*, at 18; Gilder, *supra* n. 126, at 16.

[130] UN Expert Calls for Calm, Protection of Civilians in Central African Republic, 3 May 2018.

[131] SC Res. 2387 (2017), 15 November 2017, para. 39; SC Res. 2448 (2018), 13 December 2018, para. 36; SC Res. 2499 (2019), 15 November 2019, para. 29.

[132] See, e.g., SC Res. 2098 (2013), 28 March 2013, para. 9.

attributed to MINUSCA are bestowed "on an exceptional basis and without creating a precedent and without prejudice to the agreed principles of peacekeeping operations"[133] – again, using exactly the same wording employed to create the IB.[134]

(5) The Use of Armed Force by UNMISS

Since 2016, UNMISS has been characterized as a robust mission, where the peacekeepers were authorized to "use all necessary means" to achieve the goals of the mission.[135] The main aim of UNMISS is the protection of civilians,[136] in light of the very dangerous and volatile situations of South Sudan, still torn by a brutal NIAC.[137] The UN has therefore considered necessary a very robust and proactive approach to the use of armed force.[138]

However, a number of attacks from armed groups against UNMISS personnel and facilities has significantly hampered the effective protection of civilians in South Sudan, limiting the action of the mission to the defence of some civilians protection sites established by UNMISS.[139] In order to allow UNMISS to carry out its mandate also outside these locations as well and to respond against the armed groups' attacks, in 2016, the UNSC created a specific unit within UNMISS, called the Regional Protection Force (RPF). This unit was established under pressure of the main troop-contributing States, which were worried about the safety of their personnel.[140] According to its mandate, the RPF must use "all necessary means, including undertaking robust action", to achieve "safe and free movement" and to engage "any actor that is credibly found to be preparing attacks, or engages in attacks" against civilians and UN personnel.[141] After some initial difficulties in creating the RPF,[142] this unit was deployed and its mandate was renewed in 2018 and 2019, with a wider territorial scope, and the authorization to undertake "robust action where necessary".[143] In relation to the equipment available for the RPF, the Secretary-General has confirmed that the unit comprises also attack helicopters and one unmanned aerial vehicle unit.[144]

The creation of such a super-robust unit, which is reminiscent of the Intervention Brigade of MONUSCO, is considered an unprecedented step towards further robustness of peacekeeping missions,[145] and for this reason, its deployment has been initially opposed by the government of

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133 See, e.g., SC Res. 2387 (2017), 15 November 2017, para. 43.

134 See, e.g., SC Res. 2098 (2013), 28 March 2013, para 9. See, also, Vanspranghe, *supra* n. 121, at 338.

135 See SC Res. 2327 (2016), 16 December 2016, para. 7; SC Res. 2392 (2017), 14 December 2017, para. 1; SC Res. 2406 (2018), 15 March 2018, para. 7; SC Res. 2459 (2019), SC Res. 2459 (2019), 15 March 2019, para. 7.

136 SC Res. 2327 (2016), 16 December 2016, para. 7(a); SC Res. 2406 (2018), 15 March 2018, para. 7(a); SC Res. 2459 (2019), 15 March 2019, para. 7(a).

137 See UNMISS, OHCHR, Indiscriminate Attacks Against Civilians in Southern Unity, April - May 2018.

138 See, e.g., S/2018/143, 20 February 2018, paras. 10-20.

139 *Ibid.*, at para. 15.

140 S/2018/143, 20 February 2018, para. 19.

141 SC Res. 2327 (2016), 16 December 2016, para 9. (emphasis added).

142 See S/2017/224, 16 March 2017, para. 49.

143 SC Res. 2406 (2018), 15 March 2018, para. 9; SC Res. 2459 (2019), 15 March 2019, para. 10.

144 S/2018/143, 20 February 2018, para. 19.

145 See R. Murphy, 'The United Nations Mission in South Sudan and the Protection of Civilians', 22 *JCSL* (2017)

South Sudan and some members of the UNSC.[146] Moreover, the active role in the hostilities of the RPF, well beyond personal self-defence or defence of the civilians, along with the political pressures of the UNSC against the government to accept the unit, raise concerns regarding the impartiality of the entire mission.[147]

Accordingly, at the moment, the UNSC has deployed in South Sudan an already robust mission with the task to protect civilians from attacks of armed groups, and a specific super-robust unit within that mission to protect the entire UNMISS from attacks and to guarantee the mission freedom of movement. It seems that the protectors of civilians need some protectors themselves, and that the latter have been equipped and instructed to act as proactive hostile parties rather than as peacekeepers.

(6) Interim Conclusions

From the overview of the practice concerning MONUSCO, MINUSMA, MINUSCA, and UNMISS, it is possible to conclude that these missions are not in line with the basic principles of peacekeeping. However broadly one may interpret these principles in light of the practice developed by robust mandates, the new mandates developed after the adoption of the Intervention Brigade represents a qualitative leap that it is impossible to reconcile with the common understanding of peacekeeping. Whereas in robust mandates the use of armed force is incidental and functional to the protection of civilians rather than the main scope of the mission,[148] offensive units such as the Intervention Brigade are *primarily* tasked with the neutralization of armed groups. Accordingly, it is not possible to reconcile these super-robust missions with the robust mandates that have emerged between the '90s and the first decade of the new millennium.

(E) ARE SUPER ROBUST MANDATES STILL PEACEKEEPING OPERATIONS OR SHOULD THEY BE CLASSIFIED DIFFERENTLY?

Since some features of MONUSCO, MINUSMA, MINUSCA, and UNMISS are not in line with the basic principles of peacekeeping, it is worth investigating whether super-robust missions dispatched after 2013 should be considered outside the notion of peacekeeping. In particular, this Section explores whether they could be considered authorizations to the use of armed force under Chapter VII or UNSC's interventions by invitation of the host State.

The boundaries of categories of operations under the UNSC's powers are not very well-defined

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367, at 385 [doi:10.1093/jcsl/krx016].

146 *Ibid.*, at 385-387. See, also, Gray, *supra* n. 57, at 320.

147 See J. Hansohm and Z. Yihdego, 'The South Sudan Crisis: Legal Implications and Responses of the International Community', 1 *Ethiopian YBIL* (2016) 223, at 233-234 [doi:10.1007/978-3-319-55898-1_10].

148 Tsagourias, *supra* n. 1, at 471-472; N. Ronzitti, *Diritto internazionale dei conflitti armati* (6th ed., Giappichelli, Torino, 2017), at 72.

since the use of armed force by the UNSC is often based on practice rather than on written law.[149] The original design of the UN Charter involved the creation of a UN army at disposal of the UNSC, through agreements between the UNSC and contributing States that, in fact, have never been concluded. This army would have been employed by the UNSC to exercise its responsibility under Article 42 to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security". Since it is impossible to exercise the powers under Article 42 in the absence of these special agreements, the UNSC has circumvented the problem by *authorizing* States to use armed force, rather than by using armed force itself, as in the cases of Kuwait in 1990 and Libya in 2011.[150] This practice has instigated a significant legal debate on the legal basis of these authorizations adopted by the UNSC.[151] The two main views followed by scholars are that either authorizations of the use of armed force emerged in State practice in the context of Chapter VII,[152] or are linked directly to Article 42 powers (alone or in conjunction with other provisions of the UN Charter).[153] Although Article 42 operations and authorizations to the use of armed force are in principle different because the former should be conducted directly by UNSC,[154] there is limited opposition on the legality of the authorization of the use of armed force

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[149] This variety has led scholars to try to systematize them. One author envisages *three* different kinds of operations under the UNSC egis: peacekeeping operations, peace enforcement operations (here referred to as "robust mandates"), and purely enforcement operations (T. Gill, 'Enforcement and Peace Enforcement Operations', in Gill and Fleck (eds), *supra* n. 9, at 95). Another scholar classifies UNSC's operations in *four* groups: traditional peacekeeping, robust peacekeeping, peace enforcement, and Chapter VII enforcement (P.I. Labuda, 'Peacekeeping and Peace Enforcement', in Wolfrum (ed.), *supra* n. 35, at paras. 35-36). These partitions run contrary the aforementioned UNSC's pledge that robust and super-robust mandates are all based on the principles of peacekeeping. Moreover, I am reluctant to employ the expression "peace enforcement" to avoid confusion: whereas "peace enforcement" is used by some authors in relation to robust peacekeeping missions (e.g., *ibid.*; F. Salerno, *Diritto internazionale* (4th ed., Cedam, Padova, 2017), at 256; E. Cannizzaro, *Diritto internazionale* (4th ed., Giappichelli, Torino, 2018), at 78-79), some UN documents employ peace enforcement as synonymous with authorizations of the use of force similar to Kuwait in 1990 and in Libya in 2011 (e.g., Capstone Doctrine, *supra* n. 13, at 34).

[150] For an overview on other relevant instances of state practice, see P. Gargiulo, 'Sicurezza Collettiva', *Enciclopedia del Diritto, Annali IX* (2015) 880, at 944-948.

[151] See, e.g., D. Sarooshi, *The United Nations and the Development of Collective Security* (OUP, Oxford, 1999); N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by "Coalitions of the Able and Willing"', 11 *EJIL* (2000) 541-468 [doi:10.1093/ejil/11.3.541]; Picone, *supra* n. 8; L.-A. Sicilianos, 'Entre multilatéralisme et unilatéralisme: l'autorisation par le Conseil de sécurité de recourir à la force', 339 *RCADI* (2009) 9-436 [dx.doi:10.1163/1875-8096_pplrdc_A9789004172944_01]; M. Arcari, 'Autorizzazioni all'uso della forza [dir. int.]', *Treccani Online* (2014), para. 2.

[152] See e.g. G. Gaja, 'Il Consiglio di sicurezza di fronte all'occupazione del Kuwait: il significato di una autorizzazione', 73 *RDI* (1990) 696, at 697; Sicilianos, *supra* n. 151, at 165-166; B. Conforti and C. Focarelli, *The Law and Practice of the United Nations* (5th ed., Brill, Leiden, 2016), at 311-12; Dinstein, *supra* n. 57, at 359; Henderson, *supra* n. 15, at 112-113.

[153] See, for different formulations, R. Higgins, *Problems and Process: International Law and How We Use It* (OUP, Oxford, 1994), at 266; E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart, Oxford/Portland, 2004), at 260-261; T. Gazzini, *The Changing Rules on the Use of Force in International Law* (MUP, Manchester, 2005), at 55-56; U. Villani, *L'ONU e la crisi del Golfo* (Cacucci, Bari, 2005), at 84; O. Corten, *The Law against War* (Hart, Oxford/Portland, 2010), at 315-316; N. Krisch, 'Article 42', in B. Simma et al. (eds), *The Charter of the United Nations: A Commentary* (3rd ed., OUP, Oxford, 2012) 1330, at 1337; White, *supra* n. 40, at 574; Higgins et al, *supra* n. 6, at 1002-1003; J. Crawford, *Brownlie's Principles of Public International Law* (9th ed., OUP, Oxford, 2019), at 739-740.

[154] See Gaja, *supra* n. 152, at 697; Picone, *supra* n. 8, at 11-33; Gargiulo, *supra* n. 150, at 948. However, the lack

in the context of Chapter VII, at least in principle.[155] As affirmed by the International Court of Justice, "[i]t cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded".[156]

Since this expression "authorization to take all necessary means" is embodied in most robust mandates, it could be possible to consider robust and super-robust mandates as authorizations of the use of armed force. However, there are some problems in relation to this characterization. First, super-robust missions, as every peacekeeping operation, are formally placed under the command of the UNSG, whereas, traditionally, authorizations to the use of armed force are controlled by the contributing States. [157] Second, considering super-robust mandates as authorizations to the use of armed force would conflict with the steady view of the UNSC and of its member States, according to which these missions are adopted in the framework of peacekeeping whereas authorizations of the use of armed force are coercive in nature and were created to replace operations under Article 42.

In this author's view, the main legal partitions of UNSC's operations are between Article 42 operations, in fact replaced by authorizations of the use of armed force, and peacekeeping missions. In the first instance, the UNSC decides to employ armed force but troops are controlled by the sending States, which conduct military operations without the consent of the State on whose territory the troops are deployed and operate (which is often the target of the action). In the second case, troops are deployed by the UNSC under the command of the UNSG, with the consent, at least, of the territorial State. It would be incorrect to consider in the same way operations undertaken against one State and operations undertaken with the consent of that State,[158] despite the fact that the expression "authorization to take all necessary means" may be present in both scenarios.[159]

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of control exercised by the UNSC does not mean that the authorized operations, in principle, would have been outside the remits of Art. 42 of the UN Charter, but rather, the UNSC should find a way to assert control over such operations in order to strengthen their legality and legitimacy (cf. T. Treves, *Diritto internazionale: problemi fondamentali* (Giuffrè, Milano, 2005), at 461-462, with A. Cassese, *International Law* (2nd ed., OUP, Oxford, 2005), at 349). In practice, the UNSC has exercised its responsibility under Art. 42 of the UN Charter through *some* authorizations of the use of armed force (see F.L. Kirgis, 'The Security Council's First Fifty Years', 89 *AJIL* (1995) 506, at 521 [doi:10.2307/2204171]; Sarooshi, *supra* n. 151, at 148, both referring to the consonance between the authorizations and the purpose of Art. 42). In particular, episodes such as the intervention in Kuwait in 1990 and in Libya in 2011 appear to fall within the remits of the actions that the UNSC would have undertaken under Art. 42, even though the UNSC failed to provide any control over the operations launched by the concerned States. Indeed, the UNSG, after having surveyed the practice of authorizations, invited the UNSC to revitalize the system created under Arts. 42 ff. to reach the same objectives pursued by the authorizations (An Agenda for Peace, *supra* n. 13, at paras. 42-43).

[155] Note the articulated view of Cannizzaro, *supra* n. 149, at 91-92, who differentiates between legality under UN law and under general international law.

[156] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports (1962) 151 at 167.

[157] See *supra* n. 154, on this issue in relation to the differences between authorizations and Art. 42 operations.

[158] Vacas Fernández, *supra* n. 40, at 213-215; Picone, *supra* n. 8, at 73; Corten, *supra* n. 153, at 314.

[159] Indeed, since the expression "authorization to take all the necessary measures/means" is employed by scholars to describe very different realities, the most correct approach should be analysing the legal basis of UNSC's authorizations of the use of armed force on a case-by-case basis (Picone, *supra* n. 8, at 9-10; Arcari, *supra* n. 151, at

Accordingly, this author considers the consent or lack of consent of the territorial State to be the determining factor. Although the creation of the Intervention Brigade within MONUSCO, and the super-robust mandates of MINUSCA, MINUSMA, and UNMISS, have blurred significantly the difference between purely enforcement actions under Article 42 (*rectius*, the available mechanism of authorization to replace it) and peacekeeping far more than the robust mandates in the '90s,[160] it is not possible to equate these mandates with authorizations of the use of armed force. The fact that super-robust mandates are ultimately based on the consent of the territorial government and the operations are placed under the command of the UNSG bar such an equation.

Taking into account the most recent practice, this author believes that super-robust mandates should be considered as UNSC's interventions in NIACs, with the consent of the local government.[161] Indeed, among many other responsibilities, MONUSCO, MINUSMA, MINUSCA, and UNMISS are acting alongside the government against some armed groups in ways that, if conducted by States outside the UN framework, would be considered as cases of intervention in a NIAC upon invitation.[162]

The idea that the UNSC takes part in NIACs on the side of the government thanks to that government's consent could appear in conflict with the fact that super-robust mandates are based on the consent *and the invocation of Chapter VII*. If the consent of the State is the primary legal basis of peacekeeping operations, even in super-robust mandates, one could wonder why the UNSC has felt the need to invoke also Chapter VII. Indeed, the ICJ considered the fact that UNEF I was based on the consent of the State as evidence of the non-forcible character of the mission.[163] One may argue that Chapter VII is mentioned to circumvent the limits posed by Article 2(7) of the UN Charter, according to which the UN can intervene in matters within the domestic jurisdiction of a State only in the application of Chapter VII enforcement measures. However, this rule would not apply to forcible actions deployed with the consent of the government, which is free, under international law, to invite foreign troops to fight over its own territory.[164] Indeed, in traditional peacekeeping, the consent is legally necessary exactly to overcome the barrier created by Article 2(7) of the UN Charter without the need to invoke

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para. 2).

[160] See Labuda, *supra* n. 149, at para. 19

[161] See Y. Dinstein, *Non-International Armed Conflicts in International Law* (CUP, Cambridge, 2014), at 93-94. See, also, E. Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge, Abingdon, 2013), at 2.

[162] See M. Bennouna, *Le consentement à l'ingérence militaire dans les conflits internes* (LGDJ, Paris, 1976); V. Grado, *Guerre civili e terzi Stati* (Cedam, Padova, 1998); Lieblich, *supra* n. 161; P. Pustorino, *Movimenti insurrezionali e diritto internazionale* (Cacucci, Bari, 2018), at 227-262.

[163] *Certain Expenses* opinion, *supra* n. 156, at 170-171.

[164] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986) 14, at para. 246. See, also, Lieblich, *supra* n. 161, at 32.

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Chapter VII.[165] Considering a reference to Chapter VII as *legally* needed[166] for robust and super-robust mandates under the rules governing the action of the UN is also problematic since the UNSC has dispatched some robust missions without invoking it.[167] Accordingly, one author has considered the invocation of Chapter VII just as "a safety belt" in relation to operations already based upon consent.[168]

Another explanation for the invocation of both consent and Chapter VII reinforces the view that these mandates are forms of UNSC's interventions in NIACs. It may be the case that Chapter VII has been invoked because the missions have to be deployed in situations of NIACs where the government had partially lost control over some portions of its territory. According to an interpretation of the principles of non-intervention and self-determination of peoples particularly supported during the Cold War, a government loses its power to invite foreign troops over its territory if the NIAC has reached the level of a full-fledge civil war.[169] Following the idea that the consent to the presence of peacekeeper is akin to the consent of the presence of foreign troops without UN mandate, it is possible to conclude that the UNSC prefers to invoke Chapter VII along with the consent of the State to justify the deployment of peacekeepers in situations where the effectiveness of the local government is doubtful.

Admittedly, this conclusion is devoid of consequences as per the legality of these missions, which is guaranteed by two solid legal grounds. Nevertheless, severing the link between super-robust mandates and peacekeeping would be useful to guarantee the integrity of the very idea of peacekeeping.[170] Simply put, these super-robust missions are acting as those States that are intervening upon request of the government, often fighting armed groups together with the government and other States. Accordingly, they have a double character: they are consensual missions in relation to the host State and coercive missions in relation to some of the armed groups involved in the NIAC. This is not a novel scenario in the history of international maintenance of peace and security since, in the past, the UNSC has authorized coalitions of States or some international organizations to undertake similar operations, outsourcing the exercise of these coercive powers.171 However, it would be better if the UNSC renounced the label of peacekeeping in order to preserve the integrity of the very concept of peacekeeping

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[165] See, generally, F. Vacas Fernández, *Las operaciones de mantenimiento de la paz de Naciones Unidas y el principio de no intervención. Un estudio sobre el consentimiento del Estado anfitrión* (Tirant lo Blanch, Valencia, 2003); C.M. Díaz Barrado, F. Vacas Fernández, 'Fundamentos jurídicos y condiciones para el ejercicio de las operaciones de mantenimiento de la paz de Naciones Unidas', 21 *AEDI* (2005) 273, at 283-288.

[166] Clearly, it is possible to consider the reference to Chapter VII as a measure to advance the legitimacy of an operation rather than as a source of its legality (see, e.g., I. Ingravallo, 'L'azione internazionale per la ricostruzione dell'Afghanistan', 59 *Comunità Internazionale* (2004) 525, at 543).

[167] SC Res. 1701 (2006), 11 August 2006.

[168] A. Paulus, 'Article 29', in Simma et al. (eds), *supra* n. 153, 539, at 554.

[169] See L. Doswald-Beck, 'The Legal Validity of Military Intervention by Invitation of the Government', 56 *BYBIL* (1985) 189-252 [doi:10.1093/bybil/56.1.189]; Henderson, *supra* n. 15, at 360-368.

[170] See HIPPO Report, *supra* n. 13, at para. 116.

[171] For an overview on these operations, see Gargiulo, *supra* n. 150, at 945-947.

(F) SUPER ROBUST MANDATES, PROTECTION OF CIVILIANS, AND THE ATTAINMENT OF A JUST TRANSITION FROM CONFLICT TO PEACE

(1) General Criticisms

Peacekeeping – through robust mandates, super-robust mandates, and the concept of stabilization – is one of the main tools employed by the UN to guide and govern the transition from a NIAC into peace. However, it is questionable whether an increase in the robustness of the mandates deployed in situations of NIACs contributes to achieving a lasting peace.[172]

The increased involvement of the UN and other international organizations in the transition from NIAC to peace has opened a significant debate on the legal principles that should guide such transition. A number of international rules, originating in international humanitarian law, international human rights law, UN law, and other branches of international law, concur with domestic law in the regulation of post-conflict situations so that the relevant legal framework is usually case-specific. Although some authors have suggested that a number of common trends are crystallizing into a corpus of rules often labelled as *jus post bellum*,[173] this article prefers to refer to these principles as a set of objectives usually pursued by the UN in relation to post-conflict situations.[174] A just transition from a situation of NIAC into peace requires the fairness and inclusiveness of the peace settlements, involving a just hearing of the interests of all parties to the conflict, the need to spare the civilian population in relation to the negative effects of UN involvement in the transition, and accountability for mass atrocities.[175]

The offensive nature of these super-robust mandates and the involvement of UN forces as parties in NIACs against armed groups make the attainment of the aforementioned principles problematic. MONUSCO, MINUSMA, MINUSCA, and UNMISS explicitly target some armed groups which are not meant to be included in post-conflict reconciliation. Rather, the UNSC decides which armed groups are to be considered potential partners in the peace process, and which ones are labelled as spoilers and quickly dismissed (sometimes after having been qualified as terrorist, as in the case of MINUSMA). Although this practice may be reasonable in certain circumstances in which some armed groups resort to heinous indiscriminate attacks against civilians in order to disrupt any attempt to achieve the peace, these missions are very likely to be

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[172] These considerations develop some of the arguments I have advanced in M. Longobardo, 'Robust Peacekeeping Mandates: An Assessment in Light of *Jus Post Bellum*', in C. Stahn and J. Iverson (eds), *Just Peace After Conflict:* Jus Post Bellum *and the Justice of Peace* (OUP, Oxford University Press, 2020) 165, at 181-182.

[173] See C. Stahn and J. Kleffner (eds), Jus Post Bellum *Towards a Law of Transition from Conflict to Peace* (TMC Asser, The Hague, 2008); L. May and A.T. Forcehimes (eds), *Morality,* Jus Post Bellum*, and International Law* (CUP, Cambridge, 2012); C. Stahn, J. Easterday and J. Iverson (eds), Jus Post Bellum*: Mapping the Normative Foundations* (OUP, Oxford, 2014); Stahn and Iverson (eds), *supra* n. 172.

[174] E. De Brabandere, 'International Territorial Administrations and Post-Conflict Reforms: Reflections on the Need of a *Jus Post Bellum* as a Legal Framework', 44 *RBDI* (2011) 69-90.

[175] C. Stahn, "*Jus ad bellum*, *jus in bello* . . . *jus post bellum*? – Rethinking the Conception of the Law of Armed Force", *EJIL* (2016) 921, at 938-240 [doi:10.1093/ejil/chl037]; D. Fleck, "*Jus Post Bellum* as a Partly Independent Legal Framework", in Stahn, Easterday and Iverson (eds), *supra* n. 173, 43, at 55.

perceived, at the best, as guests of the government that has consented to their deployment. In the worst scenario, armed groups may perceive peacekeepers as enemy, especially when troops from MONUSCO, MINUSMA, MINUSCA, and UNMISS support directly or indirectly the military operations of the government against those same armed groups. For instance, the Intervention Brigade appears to have been employed to pressure armed groups to discuss the terms of their surrenders,[176] so that one may question the authenticity of these armed groups' consent to participate in the peace process.

The concerns regarding the cooperation of super-robust mandates with the local governments are particularly serious in relations to situations where peacekeepers side with forces that do not aim at reaching an inclusive peace or do not respect human rights. For instance, the Secretary-General reported that the Congolese government was preventing the political participation of several groups[177] and the UN faced certain embarrassment in supporting military operations led by Congolese armed forces under allegations of human rights abuses.[178] Similarly, some human rights abuses related to military operations have been reported also in relation to the conduct of some governmental partners of MINUSCA.[179] In order to avoid complicity in these violations, peacekeeping missions are following the Human Rights Due Diligence Policy on UN Support to Non-UN Security Forces, according to which UN support cannot be provided where there are grounds to believe that the receiving entities could commit grave violations of international law and where the relevant authorities fail to investigate them.[180] Consequently, in 2015, MONUSCO refused to join a DRC operation due to allegations of human rights violations against recently-appointed generals,[181] even though the government launched that operation and did not remove those officials.[182]

In conclusion, super-robust mandates are not themselves in conflict with the attainment of a just transition from NIAC to peace in every circumstance. However, there is room to argue that proactive and offensive military operations by peacekeepers may contradict or endanger the goals of the UN.

(2) The Effectiveness of Super-Robust Mandates

This Section explores the effectiveness of super-robust mandates. A closer look into the situations affected by these mandates demonstrates that taking an offensive and proactive side with the local governments, in a way potentially incompatible with the principles of peacekeeping, does

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[176] S/2014/157, 5 March 2014, para. 18.
[177] See, e.g., S/2015/172, 10 March 2015, paras. 4 and 57.
[178] S/2016/579, 28 June 2016, para. 41. See also S/2016/833, 3 October 2016, para. 73.
[179] S/2018/922, 15 October 2018, para. 21.
[180] A/67/775–S/2013/110, 5 March 2013, para. 1. On the policy, see H.P. Aust, 'The UN Human Rights Due Diligence Policy: An Effective Mechanism against Complicity of Peacekeeping Forces?', 20 *JCSL* (2015) 61-73 [doi:10.1093/jcsl/kru011].
[181] S/2015/172, 10 March 2015, para. 37.
[182] *Ibid.*; S/2016/233, 9 March 2016, para. 25.

not enhance the achievement of the missions' goals.

Preliminarily, it is necessary to make a distinction between short-term and long-term goals of these missions. For instance, the action of all military components within MONUSCO, including the IB, achieved some important immediate goals, as the defeating of the armed group Mouvement du 23 mars.[183] Similarly, UNMISS successfully secured the area of Juba from attacks launched by armed groups against the members of the mission and civilians alike.[184]

However, as for the long-term, MONUSCO proved unable to neutralize all the armed groups destabilizing the DRC. Rather, these groups are still active, and after several years of deployment of the IB, the situation of human rights and individual security in east DRC is still volatile.[185] Moreover, in 2016 the Secretary-General reported that MONUSCO failed to implement an effective exit strategy, and its military components were still necessary to support the governmental authority against armed groups in certain areas.[186] MONUSCO strengthened DRC governmental authority with its action, but failed to support military reforms that would have allowed the UN to give back to the Congolese government its responsibilities regarding the protection of civilians. From the aforementioned complaints of the Secretary-General about the lack of serious efforts by DRC regarding MONUSCO exit strategy (Intervention Brigade included), one might wonder whether such a super-robust support produced a tardiness in the DRC development of its own structures. Indeed, in 2016, the Secretary-General emphasized that MONUSCO's mandate (military components included) should have been renewed since it was vital for the protection of civilians and the fight against armed groups[187] — demonstrating that after several years of MONUSCO's super-robust engagement, DRC is far from being pacified. The situation, however, improved by 2019.[188]

The counter-terrorism mandate of MINUSMA has not been effective in stabilizing the region, but rather, the Secretary-General has reported that the security situation in Northern and Central Mali is still problematic.[189] Similarly, MINUSCA proved unable to stabilize the Central African Republic, as noted by the Secretary-General in 2018.[190] Only after the conclusion of the 2019 Political Agreement for Peace and Reconciliation, was the Secretary-General able to report some improvement in the security situation.[191]

Furthermore, the lack of impartiality of missions such as MONUSCO, MINUSMA, MINUSCA,

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[183] S/2013/757, 17 December 2013, paras. 2 and 97; D. Tull, 'UN Peacekeeping Missions During the Past Two Decades. How Effective Have They Been?', in J. Krause and N. Ronzitti (eds), *The EU, the UN and Collective Security* (Routledge, Abingdon, 2012) 117, at 182.

[184] S/2017/328, 17 April 2017, 2-3.

[185] See, e.g., S/2016/579, 28 June 2016, para. 21; S/2017/206, 10 March 2017, paras. 28-34; S/2019/905, 26 November 2019, paras. 13-21.

[186] See, e.g., S/2016/233, 9 March 2016, para. 74.

[187] *Ibid.*

[188] S/2019/905, 26 November 2019, para. 55.

[189] S/2019/983, 30 December 2019, para. 43

[190] S/2018/922, 15 October 2018, para. 4.

[191] S/2020/124, 14 February 2020, paras. 3 and 89.

and UNMISS might have worsened the safety and security conditions of UN troops. In relation to MONUSCO, immediately after the creation of the IB, the Secretary-General feared an escalation of threats.[192] However, subsequently he reported that there was no general increase in danger,[193] but, rather, armed attacks only became more frequent in certain areas.[194] Nonetheless, in December 2017, MONUSCO suffered the most serious attack ever in the history of UN peacekeeping.[195]

Likewise, in relation to MINUSCA, the Secretary-General confirmed that the security of the mission is still in danger,[196] expressing concerns over risks linked to the mission's support to the government.[197] In Mali, the very robust approach of MINUSMA to terrorist treats has resulted in a perverse competition between local security forces and peacekeepers, who are perceived as competitors in relation to the maintenance of public order.[198] Indeed, in recent years, MINUSMA has been progressively targeted by armed groups on a number of occasions.[199] From a wider perspective, the case of UNMISS shows that super-robust mandates do not guarantee the safety and security of the UN troops, since the UNSC had to modify the already robust mandate of UNMISS in 2016 to create a specific unit with the task to protect the entire mission.

A 2017 UN report on Improving Security of UN Peacekeepers, drafted by a former MONUSCO's commander, acknowledged that most casualties in peacekeeping occurred in the framework of MINUSMA, MINUSCA, and MONUSCO.[200] This is an obvious consequence of the involvement of these peacekeepers as parties to the relevant armed conflicts, where they could be lawfully targeted by armed groups as combatants pursuant to international humanitarian law.[201] Indeed, the 1998 Rome Statute of the International Criminal Court criminalizes direct attacks against peacekeepers only "as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict".[202] Although whether the authorization of the use of force embodied in super-robust mandates has changed the civilian nature of peacekeepers is an issue that should be analysed case-by-case,[203] it is significant that

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[192] S/2013/581 (2013), 30 September 2013, paras. 66-68; S/2017/206, 10 March 2017, para. 64.

[193] See, e.g., S/2014/698, 25 September 2014, para. 84; S/2016/233, 9 March 2016, para. 64.

[194] S/2014/956 (2014), para. 34; S/2015/172 (2015), para. 45. See, also, S/2017/206, 10 March 2017, para. 51.

[195] See UN Press Release, 'At Least 71 United Nations Associated Personnel Killed in Malicious Attacks against Peacekeeping Operations during 2017', 21 January 2018.

[196] S/2018/922, 15 October 2018, para. 83.

[197] S/2020/124, 14 February 2020, para. 91.

[198] S/2019/983, 30 December 2019, para. 51.

[199] See, e.g., UN Press Release, 'At Least 51 United Nations Personnel Killed in Deliberate Attacks against Peacekeeping Operations in 2015', 21 January 2016; UN Press Release, *supra* n. 195; S/2019/983, 30 December 2019, para. 94.

[200] C.A. Santos Cruz, *Improving Security of UN Peacekeepers: We Need to Change the Way We Are Doing Business* (UN, New York, 2017), at 5.

[201] M.A. Khalil, 'Robust Peacekeeping—Not Aggressive Peacekeeping', 112 *Proceedings of the ASIL Annual Meeting* (2018) 114, at 116 [doi:10.1017/amp.2019.14].

[202] Art. 8(2)(b)(iii) and Art 8(2)(e)(iii), Rome Statute of the International Criminal Court, 2187 UNTS 90.

[203] See ICC, *Prosecutor v. Bahar Idriss Abu Garda* (Case no. ICC-02/05-02/09), Decision on the Confirmation of Charges, No. ICC-02/05-02/09-PT, 8 February 2010, para. 83.

international criminal tribunals have acknowledged that these mandates have diluted the basic features of peacekeeping, impairing the legal protection of the peacekeepers.[204] Surprisingly, the aforementioned 2017 report recommends an even more robust military response to armed threats, including the launching of offensive strikes to get rid of the "Chapter VI Syndrome" and self-defence concerns.[205] This stance, if followed by the UNSC, would dangerously shift the main focus of peacekeeping from protection of civilians to protection of the force itself.[206]

Although super-robust mandates may have some immediate positive effects on communities that are striving to emerge from an internal armed conflict, in the long term, they may not be effective at addressing the roots of the conflict, but rather, peacekeepers may become just additional actors involved therein. This is the consequence of the perception of these mandates by those same armed groups that are to be neutralized or treated as terrorists by the peacekeepers, which engages the UN troops exactly with the same hostile stance as they engage the enemy governmental force.

(G) CONCLUSIONS

The need for robust mandates to protect civilians does not imply a need for aggressive mandates.[207] The increasingly popularity of super-robust mandates after the creation of the Intervention Brigade in 2013 poses significant challenges to the legal understanding of peacekeeping, due to the impossibility to consider these missions as impartial and as a result of the unprecedented degree of offensive armed force that they can employ. However, these mandates do not fall within the traditional understanding of Article 42 operations or of authorizations of the use of armed force, since they are still based on the consent of the territorial government and are placed under the command of the UNSG. Their effectiveness is questionable in light of the surge of attacks faced by MONUSCO, MINUSMA, MINUSCA, and other missions after the UNSC has attributed them offensive mandates. Rather, often these mandates further complicated the already blurred divide between peacetime and wartime in international law, endangering the safety of civilians and non-offensive military components of peacekeeping missions around the world.

This article does not advocate for more authorizations to the use of armed force, à la Libya in 2011, which dramatically increased the chaos in the country and worsened the life conditions of the civilian population.[208] Additionally, non-legal considerations – e.g. those related to the reluctance of individual States or international organizations to lead authorized coalitions – may influence the decision to dispatch a super-robust mandate allegedly in the framework of

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[204] See *Sesay, Kallon and Gbao* case, *supra* n. 51, at para. 223.
[205] Santos Cruz, *supra* n. 200, at 11.
[206] See Lyons, *supra* n. 37, at 110.
[207] Khalil, *supra* n. 201, at 116.
[208] See, e.g., A.J. Kuperman, 'Obama's Libya Debacle: How a Well-Meaning Intervention Ended in Failure', 94 *Foreign Affairs* (2015) 66-77.

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peacekeeping. However, it is not even possible to accept the characterization as peacekeeping of every mission, irrespective of its compliance with the principles of peacekeeping, on the basis of an act of faith in the words of the UNSC.

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Brexit and Private International Law: Looking Forward from the UK but Actually Going Backward

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Abstract: International judicial cooperation for civil matters between Member States of the EU and the United Kingdom can be severely curtailed as a consequence of Brexit if upon the end of the transitory period, 31 December 2020, no new partnership between the UK and the UE has been approved including agreements on civil judicial cooperation. Other multilateral solutions are possible within the framework of The Hague Conference on Private International Law, such as the accession by the UK in its own right to The Hague Convention 2005 on choice of court agreements or the ratification of The Hague Convention 2007 on child support, or via the UK's accession to the Lugano II Convention 2007. A unilateral approach (modified unilateral transposition) is also possible with regard to EU legislation retained by the *European Union (Withdrawal) Act 2018* determining in each case what piece of the EU legislation is effectively retained, modified or dismissed (pick and choose). In any case, the future outlook of civil judicial cooperation with the UK seems more like a leap back into the past than a step forward into the future. The situation for Gibraltar could be different if a new partnership agreement between the EU and UK includes a separate agreement in relation to Gibraltar where a sufficient repertory of EU cooperation instruments is bilaterally kept in force in order to safeguard the application of EU Private International Law applicable in Gibraltar to date.

Keywords: Brexit – International Judicial Cooperation for Civil Matters – International Civil Procedure Law – Conflict of Laws – Hague Conference On Private International Law – Lugano Convention – European Union – United Kingdom – Gibraltar

(A) THE WITHDRAWAL AGREEMENT BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION: TRANSITORY PROVISIONS FOR MATTERS OF CIVIL JUDICIAL COOPERATION

The Withdrawal Agreement between the United Kingdom and the European Union entered into force on 1 February 2020,[1] with hardly any changes on matters of civil judicial cooperation with regard to the previous version of the Withdrawal Agreement negotiated by Theresa May's government. Actually, the new Withdrawal Agreement negotiated by Boris Johnson included only minor changes, with the notable exception of a new solution to the backstop clause with regard to Northern Ireland.

The general transition period will end on 31 December 2020 (Article 126 Withdrawal Agreement). A possible extension of the transition period for one or two additional years was

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[1] *OJEU* L 29, 31.1.2020. From the perspective of the UK's dualistic legal order this piece of legislation is the *European Union (Withdrawal Agreement) Act* 2020 (P. R. Polack, "The Road to Brexit: Ten UK Procedures towards Leaving the EU", 3 *Cuadernos de Gibraltar–Gibraltar Reports* (2018-2019) 1-23 [doi: 10.25267/Cuad_Gibraltar. 2019.i3.1303].

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always seemed as highly unlikely. The deadline for a time extension request (1 July 2020) is now well passed and only extraordinary circumstances might lead both the United Kingdom and the European Union to agree on a further extension. During the transition period the law of the European Union will be applicable and will be interpreted by the United Kingdom in conformity with the same methods and general principles applicable within the European Union (Article 127.3 Withdrawal Agreement). In particular, the European Court of Justice will retain its jurisdiction in conformity with the Treaties (Article 131 Withdrawal Agreement).

In addition to the general transition period, the Withdrawal Agreement contains a Title (Sixth) exclusively dealing with transitory issues of civil judicial cooperation (Articles 66 to 69), since the existing EU Regulations will cease to be applied from 1 January 2021, but specific transitory provisions are necessary to be applied to situations already in progress before the end of the transitory period and that will be completed when these EU Regulations are no longer applicable in the UK.

Of course, the UK has a particular position in EU law with regard to civil judicial cooperation and is bound only by some EU instruments of private international law: this only happens where it has expressed to the EU its intention to be bound (opting in mechanism), according to the conditions set out in Article 3 of its Protocol of accession to the TEU and the TFEU.[2] The UK has not opted-in and remains outside the binding effect of Regulation (EU) 650/2012 on international successions and Regulation (EU) 655/2014 on the European order for retention of bank accounts. Needless to say that the UK is not bound by EU Regulations for enhanced cooperation: Regulation (EU) 1259/2010 on the law applicable to divorce and judicial separation (Rome III), Regulation (EU) 2016/1103 on matrimonial property regimes, and Regulation (EU) 2016/1104 on the property consequences of registered partnerships.

For matters of jurisdiction, recognition and enforcement of judicial decisions and related cooperation issues between central authorities, Article 67 Withdrawal Agreement sets out that in the United Kingdom, and in the Member States, for situations concerning the United Kingdom, with respect of judicial procedures initiated before the end of the transitory period, and with respect of procedures and actions connected with such judicial procedures under Articles 29, 30 and 31 Regulation (EU) 1215/2012, Art. 19 Regulation (EC) 2201/2003, or Articles 12 and 13 Regulation (EC) 4/2009, the rules on international jurisdiction, *lis pendens*

[2] Therefore, the situation of the UK is not equal to that of the rest of Member States, with the exception of Ireland which has a similar protocol and has made analogous usage thereof, opting to remain outside the scope of the same instruments. On the contrary, Denmark is completely outside the scope of application of EU instruments on civil judicial cooperation and only through a bilateral agreement between the EU and Denmark it has been possible to extend the application of Regulation Brussels I *bis*, Brussels III and the Regulation on service of documents abroad. In this sense, the UK has not been the only country responsible for lack of uniformity in the Private International Law of the EU, but certainly it is the most notable exception (P. J. Cardwell, "The end of exceptionalism and a strengthening of coherence. Law and legal integration in the EU Post-Brexit", 57 *Journal of Common Market Studies* (2019) 1407-1418 [doi: 10.1111/jcms.12959]; N. Walker, "Sovereignty and Differentiated Integration in the European Union", 4 *European L. J.* (1998) 355-388 [doi: 10.1111/1468-0386.00058]).

and related actions contained in each of those EU Regulations will remain being applicable. The transitory application of existing *lis pendens* rules also includes the primacy rule under Art. 32.1 Regulation 1215/2012 that should be given to choice of court agreements in situations of parallel proceedings.

Nevertheless, and without prejudice to the foregoing exception for *lis pendens* cases, the transitory rules do not include a general validity clause for choice of court agreements concluded before the end of the transition period in cases where the judicial procedure might be opened after the end of such transition period, as was advocated by the United Kingdom at earlier stages of the negotiations. The consequence is that, in the absence of a new agreement on judicial cooperation for civil matters, ascertaining the exclusive effect of a choice of English courts where the case has been brought before the Courts of a Member State will depend on the international jurisdiction domestic rules of that particular Member State.

For matters of recognition and enforcement of judicial decisions, in the United Kingdom and in the Member States for situations involving the United Kingdom, Article 67.2 Withdrawal Agreement sets out that the main temporal factor of application of recognition rules under EU Regulations is the initiation of the original judicial procedure, usually by the filing of the initial claim, of course always prior to the end of the transition period, and not the date of the judicial decision to be recognized or enforced, which may well be subsequent to the end of the transition period; however, in relation to public acts, agreements and judicial transactions the relevant date will be that of execution, registration or approval, as the case may be. In this sense, Regulations (EU) 1215/2012, (EC) 2201/2003, and (EC) 4/2009 will be applicable to the recognition and enforcement of judicial decisions rendered as a consequence of a judicial procedure initiated before the end of the transition period, and also to public documents officially executed or registered and to judicial transactions approved or executed before the end of the transition period; however, in the case of Regulation (EC) 805/2004, this Regulation will only be applicable if the certification as European Enforcement Order for uncontested claims has been requested before the end of the transition period.

Additionally, Article 67.3 Withdrawal Agreement sets out that: a) Chapter IV Regulation (EC) 2201/2003 will be applicable to requests received by the central authority or any other competent authority in the requested State before the end of the transition period; b) Chapter VII Regulation (EC) 4/2009 will be applicable to requests received by the central authority of the requested State before the end of the transition period; c) Regulation (EU) 2015/848 will be applicable to insolvency proceedings, and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period; d) Regulation (EC) 1896/2006 will be applicable to European payment orders applied for before the end of the transition period; where, following such an application, the proceedings are transferred according to Article 17(1) of that Regulation, the proceedings shall be deemed to have been instituted before the end of the transition period; e) Regulation (EC) 861/2007 will be applicable to small claims procedures for which the application was

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lodged before the end of the transition period; f) Regulation (EU) 606/2013 on mutual recognition of protection measures in civil matters will be applicable to certificates issued before the end of the transition period.

With regard to conflict of laws issues, Art. 66 Withdrawal Agreement sets out that the temporal factor that will determine the applicability in the United Kingdom of Regulation 593/2008 (Rome I) on the law applicable to contractual obligations will be the date of conclusion of the contract which must be prior to the end of the transition period. In similar terms, Regulation 864/2007 (Rome II) on the law applicable to extra contractual obligations will be applicable in relation to events giving rise to damage, where such events occurred before the end of the transition period. The prospective application in the United Kingdom of Regulation 593/2008 to contracts concluded after the end of the transition period and the application of Regulation 864/2007 to events occurring after the end of the transition period will depend on their status as UK retained EU legislation in the *European Union (Withdrawal) Act 2018* and subsequent secondary legislation. On the contrary, for EU Member States, the universal scope of application of Rome I and Rome II Regulations means that these Regulations will remain applicable as EU legislation also in cases in which the applicable is English law or in cases connected with the UK (although the United Kingdom will be considered a third country after the end of the transition period, with relevant effects under Articles 3.4, and 7 Rome I Regulation, or Art. 14.3 Rome II Regulation).[3]

Judicial cooperation procedures will keep being governed by EU Regulations in the UK, and in EU Member States in cases concerning the UK, depending on the moment of reception of cooperation requests: a) Regulation (EC) 1393/2007 on judicial and extrajudicial notifications will be applied to all documents received for their notification before the end of the transition period, by a receiving agency, a central body of the State where the service is to be effected, or diplomatic or consular agents, postal services or judicial officers, officials or other competent persons of the State addressed, as referred to in Articles 13, 14 and 15 of that Regulation; b) Regulation (EC) 1206/2001 on obtaining evidence will be applicable to requests received before the end of the transition period by a requested court, a central body of the State where the taking of evidence is requested, or a central body or competent authority referred to in Article 17(1) of that Regulation.

[3] P. de Miguel Asensio, "El borrador de Acuerdo de Retirada del Reino Unido y los litigios en materia mercantil", 58 *La Ley Unión Europea*, 30 April 2018, 1-6.

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(B) A NEW MODEL OF CIVIL JUDICIAL COOPERATION BETWEEN THE UNITED KINGDOM AND THE EUROPEAN UNION

(1) A New Agreement on a Future Relationship between the United Kingdom and the European Union

Uncertainty has characterized the evolution of Brexit from the beginning and the same is still happening in the months leading up to Brexit effective day on 1 January 2021. The Withdrawal Agreement has managed to avoid a chaotic or disorderly Brexit (wild Brexit) but it is still to be seen whether Brexit will be soft (in case an agreement on a new relationship is reached) or hard (in the absence of a new agreement developing a new bilateral relationship between the UK and the EU). Everything until now shows that a new comprehensive framework or new relationship cannot be taken for granted by the end of 2020, although some agreements on specific areas are possible and negotiations will be stretched until the last minute. The goals expressed by both negotiating parties from the beginning of negotiations cannot be more contradictory. The UK Government insisted (Boris Johnson speech entitled "Unleashing Britain's Potential" of 3 February 2020) that its goal was to reach a free trade agreement modelled on the existing one between the EU and Canada. On the contrary, the EU is proposing, or some also would rather say requiring, a more ambitious free trade agreement (without tariffs or quotas) but where the regulations on both sides of the Channel should be aligned (level-playing field) on a wide variety of sectors (tax, social, State aids, environmental, etc.).

The hypothesis of political failure in the negotiations cannot be excluded. The United Kingdom has explicitly expressed its opposition to a regulatory alignment with EU law after Brexit, and also has threatened to leave negotiations prematurely if no preliminary agreements or improvements are reached. The UK also insists in declaring that a new extension is not possible. This means that there is high risk that by the end of the transitory period there will not be a new model or relationship between the UK and the EU or, even if there is a short-range new partnership agreement, it is rather possible that no agreements for matters of civil judicial cooperation are reached, meaning that some UK regulations (secondary legislation) designed for the no-deal horizon will have to be activated.

The United Kingdom made clear from the start of Brexit negotiations, and in more than one occasion, its interest in reaching an agreement for a new model of relationship with the EU that would include a new framework for judicial cooperation for civil matters, dealing with issues of international jurisdiction, applicable law, and recognition and enforcement of foreign judgments, in conformity with the principles and instruments of the EU for these matters which are currently applicable.[4] This was an expression of willingness to safeguard

[4] HM GOVERNMENT: *Providing a cross-border civil judicial cooperation framework: A future partnership paper*, August 2017; ID., *Framework for the UK-EU partnership: Civil Judicial Cooperation*, June 2018; ID., *The future relationship between the United Kingdom and the European Union*, July 2018.

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the application of the EU instruments on this matter but through a bilateral agreement within the new model of relationship with the EU.[5] The British proposal was not only limited to Family Law, a subject-matter for which the EU also expressed its willingness to maintain a close cooperation after Brexit, but also in relation to consumer protection and employment contracts, and in general civil and commercial matters, including the current EU rules for matters of cross-border insolvency. On the contrary, the initial negotiation position of the European Commission for matters of civil judicial cooperation was less ambitious and was focused mainly around the transitory rules applicable in relation to the different instruments of EU law.[6]

The Political Declaration that accompanies the Withdrawal Agreement, in which the European Union and the United Kingdom give an overview of their intentions as to their future relationship,[7] is quite clear in the sense that the priority for the European Union is ~~the~~ judicial cooperation for criminal matters (recitals 80 to 89, in particular recital 88). On the contrary, judicial cooperation for civil matters is only referred to partially and only as a side topic connected with the free movement of persons. Thus, recital 55 states: "To support mobility, the Parties confirm their commitment to the effective application of the existing international family law instruments to which they are parties. The Union notes the United Kingdom's intention to accede to the 2007 Hague Maintenance Convention to which it is currently bound through its Union membership" and recital 56 adds that the parties "will explore options for judicial cooperation in matrimonial, parental responsibility and other related matters". This means that the Political Declaration foresees the preservation of EU instruments of Private international law although limited to family law matters and to EU instruments which are now applicable in the UK; these instruments are only a few, but are of great importance: Regulation Brussels II *bis* on matrimonial matters and parental responsibility, Regulation Brussels III on maintenance obligations, and the Hague 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.[8]

Of course, the agreement for matters of judicial cooperation for civil matters can be wider in scope as set out in recital 3 of the Introduction to the Political Declaration where it is

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5 Z.S. Tang, "Future Partnership in EU-UK Cross-Border Civil Judicial Cooperation European", 23 *European Foreign Affairs Review* (2018) 565–583; *Id.*, "UK-EU Civil Judicial Cooperation after Brexit: Five Models", 5 *European Law Review* (2018) 648-668.

6 *Position paper on Judicial Cooperation in Civil and Commercial matters*, 17 July 2017.

7 OJ C 34, 31.1.2020.

8 S. Alvarez Gonzalez, "Persona y familia en el Espacio de Libertad, Seguridad y Justicia tras el Brexit", 63 *La Ley Unión Europea*, 31 October 2018, 1-6; G. Smith, D, Hodson, V. Le Grice, "Brexit and international family law: a pragmatic approach to divorce and maintenance", *Family Law* (2018) 1554-1563; N. Lowe, "Some reflections on the options for dealing with international family law following Brexit", *Family Law* (2017) 399-406; ID, "What are the implications of the Brexit vote for the law on international child abduction", 29 *CFLQ* (2017) 253-266; A. Dutta, "Brexit and international family law from a continental perspective", 29 *CFLQ* (2017) 199-212; P. Beaumont, "Private international law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations", 29 *CFLQ* (2017) 213-232; R. Lamont, "Not a European Family: Implications of Brexit for International Family Law", 29 *CFLQ* (2017) 267-280.

explicitly expressed that if during the negotiations the Parties consider it to be in their mutual interest, the future relationship may encompass areas of cooperation beyond those described in the political declaration. But nothing seems to suggest the possibility that a wider scope of judicial cooperation for civil matters is being sought. Actually, the risk is that even the limited scope of family law matters may bring no results and that in the end no single instrument of EU civil judicial cooperation may survive Brexit.

At the beginning of the negotiations in March 2020 for a new model of relationship ("a new partnership"), there were no reasons to be very optimistic. In fact, international judicial cooperation for civil matters did not appear in the Guidelines for the negotiations which were made public by the European Commission on 3 February 2020 for the approval of the Council in the form of a Recommendation.[9] Judicial cooperation for criminal matters was included among the goals to be accomplished in the negotiations, but civil judicial cooperation was not even mentioned, not even as accessory to negotiations for matters of mobility of physical persons. Maybe this was the result of a negotiation technic on the part of the EU, bearing in mind that in the past it has been the UK who has been actively seeking the introduction in the negotiations of a wider scope of agreements on matters of civil judicial cooperation, but nothing allows the confirmation of such speculation. Later, the negotiations mandate from the British government, made public in February, proposed an agreement in matters of judicial cooperation, but without making reference to any new bilateral agreement, and on the contrary it proposed the ratification of Hague Conference Conventions on the part of UK, and also the ratification in its own name of the Lugano Convention 2007.[10] It seems therefore that the UK negotiation team abandoned all attempts to reach a bilateral agreement directed towards the continuity of application of EU instruments and that solutions will have to come from non-EU multilateral instruments such as Hague Conventions and the Lugano Convention.

(2) Non-EU Multileral Instruments of civil judicial cooperation

As already explained above, if the view in the past was optimistic about bilateral solutions that could safeguard the continuity of application of EU instruments within the framework of a new model of relations or partnership between the UK and the EU, these hopes seem now to have been abandoned under a much gloomier negotiations outlook. Currently, it seems that the only venue by which the UK may keep a certain degree of civil judicial cooperation with the EU Member States is through the ratification in its own right of Non-EU multilateral instruments: a) The Lugano II Convention 2007; b) Hague Conference Conventions 2005 and 2009; in both cases the multilateral instruments are already applicable in the UK as a consequence of EU's ratification for the Member States, meaning that after Brexit day on 1

9 COM (2020) 35 final.

10 The guidelines for the British negotiators can be found in the document entitled "*The Future Relationship with the EU: the UK's approach to negotiations*", 27 February 2020.

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January 2021 these instruments would no longer be in force in the UK.

The ratification by the UK of the Lugano II Convention is only possible after the UK has left the UE (and the transition period has ended) and by unanimous acceptance from all the other parties (the EU, Denmark and three EFTA Member States: Switzerland, Norway and Iceland). This process may take considerable time, especially the acceptance of the EU which has exclusive competence in this area over the EU Member States. Whenever this ratification produces full effect the results would be highly relevant: the Lugano Convention 2007 would be the new instrument applicable to relations between the UK and the EU Member States, and it will also continue to be applied to relations between the UK and Switzerland, Norway and Iceland as it happened in the past. On 8 April 2020 the UK deposited an application for accession before the Swiss Federal Department of Foreign Affairs, as Depositary of the Lugano Convention 2007, and on 14 April 2020 the Swiss Depositary notified the parties (Denmark, EU, Switzerland, Norway and Iceland) that within one year at the latest they must expressly reply in the affirmative or negative as to the UK accession application to the Lugano Convention. The content and timing of the EU reply will be essential, but bearing in mind how this issue can be seen as entangled with other negotiation areas, it is hard to believe the EU will make a formal reply before the bilateral negotiation with the UK as to a new bilateral model of relations or partnership is completely over.

Nevertheless, the accession by the UK to the Lugano Convention 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters is not the same as the continued application of EU Regulation Brussels I *bis* (1215/2012). Not only for obvious formal reasons, but also because, from a material point of view, the Lugano Convention 2007 is moulded after the text of the earlier Regulation Brussels I (44/2001) and this is a backwards step because it implies the acceptance of future technical inefficiencies and the lack of sufficient uniform interpretation mechanisms between Common law and Civil Law when compared with Regulation Brussels I *bis* (1215/2012).[11] Of course, this can be solved in a number of years by the initiation of a negotiation process towards a new Lugano III Convention, but for the time being the UK has only taken a step back to the material content of Brussels I (44/2001) in its relations with EU Member States through its accession to the Lugano II Convention.

The second multilateral approach is the ratification by the UK in its own right of The Hague Conference Conventions which are applicable in the UK as a result of the ratifications made by the UE for the Member States.[12] These are the following two instruments: a) *Hague*

[11] B. Hess, "The unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit" (January 17, 2018), *MPILux Research Paper* (2018), No. 2; Id., "Das Lugano-Übereinkommen und der Brexit", in *Europa als Rechts- und Lebensraum, Liber amicorum für Christian Kohler* (Gieseking, Bielefeld, 2018), at 179; F. Pocar, "The Lugano Convention of 30 October 2007 at the test with Brexit", *ibid.*, at 419-423.

[12] The Hague Conventions have taken a new gap-filling function for UK's private international law as a means to at least partially overcome some of the many shortcomings brought about by Brexit (H. Van Loon, "Le Brexit et les conventions de La Haye", *RCDIP* (2019) 353-366).

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Convention 2005 on Choice of Court Agreements: the UK already deposited an instrument of accession on 28 December 2018 on contemplation of a hard Brexit but suspended its application as a result of the ongoing Brexit negotiations and eventually withdrew the accession instrument on 31 January 2020 after the approval of the Withdrawal Agreement; finally, on 28 September 2020 the UK deposited a new instrument of accession that will take effect on 1 January 2021); b) *Hague Convention 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*: the UK deposited an instrument of ratification on 28 December 2018 whose application was suspended and the instrument of ratification was withdrawn on 31 January 2020; on 28 September the UK deposited the instrument of ratification that will take effect on 1 January 2021, although the UK considers itself a contracting State without interruption from 1 August 2014 when the Convention entered into force in the UK as a consequence of the ratification by the EU).[13]

Accession by the United Kingdom to The Hague Convention 2005 on choice of court agreements is of interest for the continued application of this instrument to the relations between the UK and Mexico, Singapore and Montenegro, although the material scope of application of The Hague Convention 2005 is somewhat limited and it is only temporarily applicable to choice of court agreements made after the entry into force of the Convention for the State of the chosen court.[14] In this regard, UK's implementation of the accession to The Hague Convention 2005 says that the effective date is 1 October 2015 (when the EU ratification took effect), but this is not accepted by the EU Commission that has indicated that the Convention can only be applicable between the EU and the UK with regard to exclusive choice of court agreements made from 1 January 2021.

The accession to The Hague Convention 2005 also poses the problem of its relationship with other international instruments such as the Lugano II Convention 2007 once UK's accession to Lugano II is effective. With regard to relations between the UK and the EU Member States and Denmark, exclusive choice of court agreements and recognition and

[13] On the contrary, the UK has ratified or acceded as a contracting party to: Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions, Convention of 5 October 1961 on Abolishing the Requirement of Legalization for Foreign Public Documents, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations, Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition; Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and Convention of 13 January 2000 on the International Protection of Adults.

[14] B. Campuzano Díaz, *Los acuerdos de elección de foro. Un análisis comparado de su regulación en el Convenio de La Haya de 2005 y en el Reglamento 1215/2012* (Comares, Granada, 2018), at 52-80 and commentary by M. Checa Martínez in 37 *REEI* (2019); M. Ahmed, P. Beaumont, "Exclusive choice of court agreements: some issues on The Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of Brexit", 13 *JPIL* (2017) 386-410 [doi:10.2139/ssrn.2824703].

enforcement of decisions derived from them will be under the scope of application of Lugano II.

The exclusiveness of choice of court agreements designating English courts concluded in the past under the umbrella of Brussels I Regulation (1215/2012) poses a significant problem for the future, although UK's accession to the Lugano II Convention may be a great relief. In any case, Article 23 Lugano Convention 2007 still requires, following Regulation 44/2001, for the validity of an exclusive prorogation of jurisdiction that at least one of the parties is domiciled in a State bound by the Convention. It must also be mentioned, with regard to the relation between *lis pendens* and exclusive jurisdiction agreements under Lugano 2007, the possibility of new torpedo actions (CJEU Judgment of 9 December 2003, *Erich Gasser GmbH (C-116/02)*, instead of the solution now embodied in Article 31.2 Regulation 1215/2012 (stay of proceedings) in cases where there is an exclusive jurisdiction agreement between the parties but the courts first seized are those of a different Member State.

The introduction in the House of Lords on 27 February 2020 of the *Private International Law (Implementation of Agreements) Bill* is an important development as to how the British government intends to build counter measures against undesired effects of Brexit safeguarding the continued application of Hague Conventions after the end of the transition period. The *Bill* contains basically one main clause which implements and gives the force of law in the UK to the following three Hague Conference Conventions: a) the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children; b) the 2005 Hague Convention on Choice of Court Agreements;[15] c) the 2007 Hague Convention on the International Recovery of Child Support and other Forms of Family Maintenance. The implementation into domestic law of The Hague Convention 2005 on choice of court agreements and The Hague 2007 Convention on child support finds its explanation of course in the fact that the UK was only indirectly bound by these instruments as a consequence of its past EU membership status. The explanation is more difficult in the case of The Hague 1996 Convention for protection of children. This Convention was ratified by the UK on 27 July 2012 and entered into force on 1 November 2012 and therefore the UK is directly bound and the Convention is clearly applicable in the UK even after Brexit effective day at the end of the transition period. The explanation for the proposed implementation into domestic law may lie in two factors: a) the fact that the EU authorized its Member States at that time including the UK to sign and ratify the 1996 Hague Convention because the EU had competence in relation to some of its provisions, but was unable itself to become a contracting party; b) there is some overlapping between this Convention and Regulation Brussels II *bis* (2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and parental responsibility; in this sense, the end of the application of

[15] *Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations* 2018.

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Brussels II *bis* for matters of parental responsibility after Brexit effective day is thus mitigated by the implementation into domestic law of The Hague 1996 Convention.

A second clause in the *Private International Law (Implementation of Agreements) Bill* delegated powers to the government (the UK Government and the Devolved Administrations in Scotland and Northern Ireland) to implement secondary legislation (statutory instruments) in relation to other private international law instruments which the government might accede to or ratify in the future, such as the Lugano II Convention, but has been eliminated during the Parliamentary sessions in the House of Lords.

Within the framework of The Hague Conference there is also another international convention of some future interest for the UK: Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (*Judgments Convention* 2019). Nevertheless, this Convention is not yet in force (for the time being there are only two signatory countries –Uruguay and Ukraine– and there is no ratification or accession). The Judgments convention was drafted in a lengthy process (after the approval of The Hague Convention on choice of forum agreements 2005 of which the Judgments convention is considered a further continuation) with transatlantic relations in mind, but Brexit adds a new future dimension to this Convention. A ratification by the UK and eventually by the EU would certainly have great implications, although the Lugano II Convention 2007 once ratified by the UK would take precedence over other multilateral agreements such as the Judgments Convention.

(3) Unilateral solutions with regard to EU retained legislation

The difficulties experienced by the Withdrawal Agreement in the British Parliament and the uncertainty as to the future existence of a hypothetical new model of relations between the UK and the UE soon gave way to unilateral proposals with regard to EU retained legislation for matters of civil judicial cooperation. Consequently, the UK Government using the delegated powers conferred by the *European Union (Withdrawal Act) 2018* has approved as secondary legislation (statutory instruments) a series of Regulations (EU Exit Regulations) which deal with matters of civil judicial cooperation. This comes in part as a result of UK's unilateral arrangements made for the possible scenario of a no-deal Brexit, but now that Brexit has happened with an Agreement the application of these Regulations has been suspended or postponed until Brexit effective day at the end of the transition period, of course only if nothing in a hypothetical new partnership agreement between the UK and the EU requires acting differently.[16]

In these EU exit Regulations, the British government has proceeded to explicitly confirm the transposition into UK law, or has reformed or has derogated, rules contained in EU

[16] M. Gernert, "Harter Brexit und IPR – Vorbereitende Papiere für einen ungeregelten Austritt des Vereinigten Königreich", *IPRax* (2019) 365-369.

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instruments on civil judicial cooperation. These EU instruments are in principle EU retained legislation by the UK and would otherwise remain in force without changes as the result of the inertial effect of the *European Union (Withdrawal) Act* 2018, –also known as the *Great Repeal Bill* because it was initially proposed for obvious political reasons with that technically misleading title–.

Thus, the derogation of Regulation 1215/2012 (Brussels I *bis*) for England and Northern Ireland at the end of the transition period has been set forth at *The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations* 2019[17], although some parts of Regulation 1215/2012 will remain applicable via the *Civil Jurisdiction and Judgments Act 1982* such as the jurisdictional rules in relation to consumer protection and employments contracts, and the legal definition of domicile of legal persons for jurisdictional purposes.[18] These rules will remain applicable for international situations but will also be applicable in cases concerning defendants domiciled in other parts of the United Kingdom –*intra UK cases*–.

The loss of Regulation Brussels I *bis* is a heavy blow to international judicial cooperation for civil and commercial matters in the UK.[19]. Regulation Brussels I *bis* has served in the past decades under its different forms (Brussels Convention 1968, Regulation 44/2001 and Regulation 1215/2012) to consolidate London as judicial capital of Europe for commercial matters. The exclusiveness of choice of court agreements in favour of English courts (in particular the Commercial Court as sub-division of the Queen's Bench in the High Court) and the recognition and enforcement of UK's judicial decisions in other EU Member States is guaranteed by Regulation Brussels I bis. A non-exclusive characterization of London choice of courts agreements by the courts of EU Member States, the ensuing risk of parallel proceedings in different jurisdictions, and greater uncertainty as to the recognition and enforcement of London courts judicial decisions in each EU Member State following domestic private international rules may result to the benefit of other European judicial capitals –Paris, Amsterdam, Brussels, Frankfurt and other European cities have created international commercial courts with the intention to attract some of the litigation that until now has regularly gone to London[20]–. In the absence of choice of court agreements, the return in

[17] Statutory Instruments 2019 No. 479 and No. 1338.

[18] For contracts of employment *vid.* U. Grusic, "L'effet du Brexit sur le droit international privé du travail", 108 *RCDIP* (2019) 367-384.

[19] On the general backward process implied by the derogation of Regulation Brussels I *bis vid.* A. Dickinson, "Back to the Future: The UK's EU Exit and the Conflict of Laws", 12 *JPIL* (2016) 195-210 [doi:10.1080/17441048.2016.1209847]; Id., "Close the Door on Your Way Out. Free Movement of Judgements in Civil Matters. A "Brexit" Case Study", 25 *ZEuP* (2017) 539-568; E. Lein, "Unchartered Territory? A Few Thoughts on Private International Law post Brexit", 17 *Yearbook PIL* (2015/2016) 33-47; B. Hess, "Back to the Past: Brexit und das europäische internationale Privat- und Verfahrensrecht", 36 *IPRax* (2016) 409-418; M. Sonnentag, *Die Konsequenzen des Brexits für das Internationale Privat- und Zivilverfahrensrecht* (Mohr Siebeck, Tübingen, 2017), at 80-84; G. Rühl, "Judicial Cooperation in Civil and Commercial matters after Brexit: Which way forward", 67 *ICLQ* (2018) 99-128 [doi: 10.1017/S0020589317000574].

[20] In France, the creation of the *Chambre international* del *Tribunal de commerce* de París as first instance court and the *Chambre international* de la *Cour d'appel* de Paris as second instance (X. Kramer, "A Common Discourse in European Private International Law. A view from the Court System", in J. von Hein, E.-M. Kieninger, G. Rühl,

England to the particularism of their legal rules on international civil jurisdiction (transient jurisdiction rules, service of process rules on defendants out of the jurisdiction, etc.) and, in general, the return to the common law rules on recognition and enforcement of foreign decisions will also be a significant step back for UK's legal system.[21] On the contrary, the position of London as arbitration capital in Europe is not jeopardized by the loss of Regulation 1215/2012 since arbitration remains largely outside the scope of EU instruments and, on the contrary, arbitration in London may benefit from the uncertainties surrounding the judicial alternatives to arbitration. Also, English courts will now be set free from the *West Tankers* judgment by the ECJ and therefore able to protect the exclusiveness of arbitral proceedings in England through anti-suit injunctions against the courts of EU Member States.[22]

Regulations Brussels II *bis* for matrimonial matters and parental responsibility and Brussels III on maintenance obligations will be derogated for England and Northern Ireland for matters of recognition and enforcement of foreign judgments and cooperation between national authorities, but the international jurisdiction criteria will remain applicable although amended by the *Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations* 2019[23].

With respect of divorce, the jurisdictional criteria contained in the list of Article 3 Regulation Brussels II *bis* will continue to be applied, but a new ground of jurisdiction has been expressly added in the case in which "*either to the parties of the marriage is domiciled in England and Wales*"). This ground until now was only applied in cases of residual competence under Article 7 Regulation Brussels II *bis* (i.e., the sole domicile of either party was only applicable where no EU member state had jurisdiction under the list in Article 3 Regulation Brussels II *bis*). The new legislation does not include rules on *lis pendens*, and those contained in Regulation Brussels II *bis* are derogated. This will result in parallel proceedings situations where the English courts will decide their own jurisdiction over that of the courts of EU Member States according to general notions of closest relationship and *forum non conveniens*.

The recognition in the UK of divorces obtained abroad will be governed by The Hague Convention 1970 on recognition of divorces and legal separations, implemented in the UK by the Family Law Act 1986. The 1970 Hague Convention is also in force in other twelve States

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How European is European Private International Law (Intersentia, Cambridge, 2019), at 230-233.

[21] A return to the Common Law rules which are not always well known and whose flexibility may mean advantages as well as disadvantages (A. Briggs, "Brexit and Private International Law: An English Perspective", 55 *RDIPP* (2019) 261-283; C. Tuo, "The Consequences of Brexit for Recognition and Enforcement of Judgments in Civil and Commercial Matters: Some Remarks", 55 *RDIPP* (2019) 302-318; L. Merrett, "La reconnaissance et l'exécution en Angleterre des jugements venant des États de l'Union européenne, post-Brexit", *RCDIP* (2019) 385-409.

[22] F. Emanuele, M. Molfa, R. Monico, "The Impact of Brexit on International Arbitration", 55 *RDIPP* (2019) 856-874.

[23] The *Civil Partnership and Marriage (Same Sex Couples) (Jurisdiction and Judgments) (Amendment etc.) (EU Exit) Regulations* 2019 sets out the same rules in relation to the divorce of same sex marriages and the dissolution of civil unions.

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of the EU: Cyprus, Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia and Sweden; in the rest of EU Member States recognition and enforcement should be done according to national rules of Private International Law.[24]

For matters of parental responsibility, the applicable international legal instrument will be The Hague Convention 1996 on parental responsibility and child protection, and also The Hague Convention 1980 on international legal kidnapping. These conventions in the future will be applied in the UK isolated from the complementary rules now existing in Brussels II *bis*.

With regard to maintenance obligations the derogation of Brussels III Regulation will be compensated by the ratification of The Hague Convention 2007 on child support recovery, although this is of no avail to guarantee the continued effectiveness of choice of court agreements concluded before the end of application of Regulation Brussels III.

Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings has also been partially derogated and partially modified for England and Northern Ireland in the transposition effected by the *Insolvency (Amendment) (EU Exit) Regulations* 2019 and the *Insolvency (Amendment) (EU Exit) (Nº 2) Regulations* 2019.[25] In particular, the provisions regarding the recognition of the opening of insolvency proceedings in other Member States of the EU are eliminated, but also the jurisdictional criteria in Regulation 2015/848 are modified. The *Insolvency (Amendment) (EU Exit) Regulations* 2019 retains the jurisdictional test based on COMI only as an additional test of jurisdiction and the restrictions for opening insolvency proceedings in the UK where the COMI is in a member State are removed. Thus, UK Courts will have international jurisdiction where: a) the jurisdictional criteria under UK's private international law rules are satisfied; b) the COMI (centre of main interests) of the debtor is in the UK, c) the debtor has an establishment in the UK, even if the centre of the debtor's main interests is in a Member State. With regard to the recognition of foreign insolvency proceedings, the condition and powers of the bankruptcy administrators, trustees or receivers, and other foreign judicial decisions for insolvency matters, the EU Member States will apply in the future their domestic private international law rules in relation with the UK.[26]

The future situation regarding recognition of cross-border insolvency proceedings between UK and the EU is uncertain. Among the EU Member States only Greece (2010), Poland (2003), Romania (2002), and Slovenia (2007) have similar national private international law rules with regard to cross-border insolvency proceedings as a result of their transposition of

[24] In Spain Arts. 41-61 Law 29/2015, 30 July, on international judicial cooperation for civil matters.

[25] Statutory Instruments 2019, No. 146 and No. 1459.

[26] In Spain the private international law rules in the Book III (Arts. 721-752) of the Legislative Decree 1/2020 of 5 May 2020 containing the recast text of the Insolvency Law. With regard to future cross-border situations between Spain and the UK *vid.* A. Espiniella Menéndez, "Brexit e insolvencia transfronteriza", 17 *AEDIPr* (2017) 91-123 [doi: 10.19194/aedipr.17.3].

the UNCITRAL Model Law on Cross-Border Insolvency (1997), as also did the UK (*Cross-Border Insolvency Regulations* 2006), –and also Gibraltar (*Cross Border Insolvencies Regulations* 2014)–. However, the rules on cross-border recognition of foreign insolvency proceedings and cooperation between foreign courts and foreign representatives is not accompanied in the Model Law by rules governing international jurisdiction or applicable law issues.[27]

An obvious lack of future reciprocity means that the EU instruments for civil cooperation between national courts and authorities will cease to be applied from January 2021: Regulation 805/2004 on European Enforcement Order, Regulation 1896/2006 on European Payment Order and Regulation 861/2007 on Small Claims Procedure;[28] and of course also Regulation 1393/2007 on service of judicial and extrajudicial process and Regulation 1206/2001 on obtaining evidence abroad[29]. The gap-filling function of The Hague Conventions comes again to the rescue with the substitution of Regulation 1397/2007 by The Hague Convention 1965 and of Regulation 1206/2001 by The Hague Convention 1970, this time without the need for further accessions or ratifications by the UK but, in both cases, it is another step backwards hardly compatible with the position of London as great European judicial capital.

On the contrary, reciprocity is not necessary for the continued application of conflict of laws rules in EU instruments and the British government has already established the transposition and the resulting continuity of application of Regulation 593/2008 (Rome I) on the law applicable to contractual obligations and Regulation 864/2007 (Rome II) on the law applicable to non-contractual obligations.[30] This is the only part of EU civil judicial cooperation where continuity seemed to be the most natural solution –the loss of these conflict of laws rules would have hardly been defensible and the uncertainty this would have caused immense–. The unilateral solution (transposition) is also simple without the need for further explanations. The loss of Regulation Rome I would have also been hard to explain if we bear in mind that *Common Law* has had a great influence in the drafting and further evolution of Regulation Rome I, although the main influencing factor has not been English law (*proper law of the contract*) but American law (*Restatement Second on the Conflict of Laws*). This is evident both for the law applicable to contractual obligations (US *most significant relationship* test) and the law applicable to extra contractual obligations (US *proper law of the tort* theory). Nevertheless, continuity will be more apparent than real because of the inherent risk of

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[27] E. Adelus, "Global law-making in insolvency law: the role for the United Nations Commission for International Trade Law", 24 *Uniform L. R.* (2019) 175-213 [doi:10.1093/ulr/unz005]; R. Bork, "The European Insolvency Regulation and the Uncitral Model Law on Cross-Border Insolvency", 26 *Int. Insolvency Rev.* (2017) 246-269 [doi: 10.1002/iir.1282]; G. McCormack, H. Anderson, "Brexit and its implication for restructuring and corporate insolvency in the UK", 7 *JBL* (2017) 533-556.

[28] *The European Enforcement Order, European Order for Payment and European Small Claims Procedure (Amendment Etc.) (EU Exit) Regulations* 2018, *Statutory Instrument* No. 1311.

[29] *Service of Documents and Taking of Evidence in Civil and Commercial Matters (Revocation and saving provision) (EU Exit) Regulations* 2018, *Statutory Instrument*. No. 1257.

[30] *The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations* 2019.

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inconsistencies in the interpretation once the rules in Rome I Regulation will be interpreted in the UK by the Supreme Court of the United Kingdom as court of last resort and preliminary questions addressed to the Luxembourg Court become a thing of the past for UK courts (although case law from the CJEU in existence prior to Brexit effective day will cast a long shadow over English courts).

The final approval of the Withdrawal Agreement –*European Union (Withdrawal Agreement) Act* 2020– has established the date of effect of this secondary legislation (statutory instruments) known as *EU Exit Regulations* for the end of the transition period on 31 December 2020, without prejudice to the possibility that a new model of relations between the UK and the EU might foresee differently, although this possibility seems now quite remote. In the end, and for matters of civil judicial cooperation, the much-dreaded *no-deal* scenario will not be very different from the *hard brexit* that will result from the lack of new civil judicial cooperation rules in an eventual new partnership agreement (except for the existence of the agreed transitory rules in the Withdrawal Agreement).

(c) What civil judicial cooperation between Gibraltar and EU Member States?

(1) Civil judicial cooperation between Gibraltar and the EU Member States

Article 355.3 FTEU provides that Treaty provisions "shall apply to the European territories for whose external relations a Member State is responsible", extending the application of EU law to Gibraltar, the only British overseas territory that is part of the European Union, with some particular exceptions (customs union, common commercial policy, fisheries policy, value added tax, etc.) that were included in the 1972 Treaty of Accession. On the contrary, this extension is not applicable to the Isle of Man, or the Channel Islands (Jersey and Guernsey) which are not part of the EU (Article 355.5 FTEU), although for practical reasons became part of the customs union.

The United Kingdom is vis-à-vis the other Member States of the EU the representative State of Gibraltar, particularly with regard to the application and transposition of EU law, as if they were a single State. The CJEU in Judgment 13 June 2017 (C-591/15) *The Gibraltar Betting and Gaming Association Limited C. Commissioners for Her Majesty's Revenue and Customs*, applying Article 355.3 FTEU concluded that provision of services from Gibraltar to persons established in the UK is, according to EU law, a situation in which all the elements are within just one Member State, and therefore the alleged violation of Article 56 FTEU on freedom to provide services cannot be possible.

If the situation is seen from Calais (EU) the UK and Gibraltar are the same State with regard to the provision of services, on the contrary, seen from Dover (England), the UK and Gibraltar are quite different territories (Gibraltar not being part of the United Kingdom and the only British overseas territory in the EU), and this gives sometimes the impression that Gibraltar is another jurisdiction in the EU, distinct from the UK, with a status somehow

closer to that of a micro-State within the EU. This is perceptible, for example, from the fact that Gibraltar is able to provide financial services to the rest of the EU with home country control only under Gibraltarian authorities (passporting rights), or where it corresponds to Gibraltar courts and authorities the application of the reciprocal EU instruments on civil judicial cooperation.[31]

Civil judicial cooperation in Gibraltar is governed by the same EU instruments that bind the UK by virtue of Art. 81 FTEU and this allows the development of a far-reaching legal activity and a thriving legal sector in the Rock of Gibraltar as an offshore jurisdiction where international commercial transactions are highly relevant for a local economy oriented towards the activities of multinational groups and for an estate planning industry aiming at high-net-worth individuals.[32]

Additionally, the United Kingdom with the occasion of each accession or ratification of a Hague Conference Convention is required to express the territorial scope of application of the Convention with regard to territories which are not the United Kingdom, but Crown dependencies (Isle of Man, Jersey, Guernsey) or British Overseas Territories (Gibraltar –as the only European territory under that characterization–, Bermuda, British Virgin Islands, Cayman Islands, etc.).

The UK has made a declaration of territorial extension to Gibraltar in relation to most of The Hague Conference Conventions ratified or acceded by the UK, with the exception of the following: a) Convention of 25 October 1980 on the Civil Aspects of International Child Abduction –in force for the UK from 1 August 1986–; b) Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption –in force for the UK from 1 June 2003; c) Convention of 13 January 2000 on the International Protection of Adults –although only force for Scotland from 1 January 2009, and not for the rest of the UK–.

Not least important, Gibraltar is included in the territorial scope of application in other Hague Conventions as a result of the ratification or accession deposited by the EU with effects for all Member States: a) Convention of 30 June 2005 on Choice of Court Agreements;[33] b) Convention of 23 November 2007 on the International Recovery of Child Support and Other

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[31] Gibraltar as British overseas territory enjoys wide-ranging self-government powers, with the exception of defence, foreign relations and internal order for which the British Governor is responsible (*Gibraltar Constitution Order* 2016), Within the EU, Gibraltar's stance as a self-governing sub-State entity is quite close to that of a micro-State within the EU (K. Azopardi, *Sovereignty and the Stateless Nation: Gibraltar in the modern legal context* (Hart Publishing, Oxford, 2009), at 61-126; and book review by J. Trinidad, 70 *Cambridge L. J.* (2011) 272-274); J. Trinidad, *Self-determination in disputed colonial territories* (Cambridge University, Cambridge, 2018), at 120-133.

[32] I. Kawaley, "Why judicial cooperation in civil and commercial litigation in the British Offshore world matters: An Overview", in I. Kawaley, A. Bolton, R. Mayor, *Cross-Border Judicial Cooperation in Offshore Litigation* (Wildy, Simmonds and Hill, London, 2016), at 3-16.

[33] The implementation into Gibraltar Law was made affective by the *Civil Jurisdiction and Judgments Act 1993 (Amendment No.2) Regulations* 2015.

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Forms of Family Maintenance.[34] Of course, the UK's strategy in relation to the gap-filling function of the Hague Conventions as a means to mitigate the consequences of Brexit for civil judicial cooperation means that the intention of the UK has always been that of acceding or ratifying these conventions with extension of territorial effects to Gibraltar; only the extension of the transition period until 31 December 2020 has suspended temporarily the attempts made for that purpose. On 28 September 2020 the UK has deposited instruments of accession to The Hague Convention on Choice of Courts Agreements 2005 and the Hague Convention on Child Support 2009 that will take effect on 1 January 2021, with extension to Gibraltar from the outset.

In the case of the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, the EC allowed the State Members to accede or ratify the Convention. The UK ratified on 27 July 2012 and the application was extended to Gibraltar on the same date. Gibraltar has implemented the Convention into domestic law through the *Children Act 2009*, *Children (Amendment) Act 2010* and the *Family Proceedings (Children) (1996 Hague Convention) Rules* 2011.

With regard to the territorial scope of application of the 2007 Lugano Convention, this Convention is in force in Gibraltar in relation Switzerland, Norway and Iceland as a result of accession by the EU with effects for all EU Member States. Of course, now that the accession by the UK to the 2007 Lugano Convention seems to be UK's main approach to reduce the uncertainties and loss of EU judicial civil cooperation instruments, the UK government made clear the expression of interest in the accession in its own right to the Convention with declaration of territorial extension to the territory of Gibraltar.

(2) A New Separate Agreement for Gibraltar?

The Withdrawal Agreement contains a Protocol on Gibraltar which is applicable, in particular, during the transition period (Article 185), except for citizens' rights under Article 1, which will also be applied after the end of the transition period.[35] The other provisions in the Protocol regard "air transport law" (Article 2), "fiscal matters and protection of financial interests (Article 3), "environment protection and fishing" (Article 4) and "cooperation in police and customs matters" (Article 5). The Protocol has created a specialised committee for the implementation of the Protocol and different coordinating commissions between the United Kingdom and Spain for the application of the Protocol on citizens' rights, environment protection and fishing, and cooperation in police and customs matters. Essentially, the Protocol confirms from the point of view of EU law the Memoranda of

[34] *Civil Jurisdiction and Judgments Act (2007 Hague Convention) Regulations 2018*, *International Recovery of Maintenance (2007 Hague Convention) Regulations* 2018, *Maintenance Proceedings (2007 Hague Convention) Rules* 2018, *Maintenance Act (2007 Hague Convention) Regulations* 2018, and *Magistrates Court Act (2007 Hague Convention) Regulations* 2018.

[35] *European Union (Withdrawal Agreement) Act 2020* (Gibraltar).

Understanding concluded between the Kingdom of Spain and the United Kingdom on 29 November 2018 in relation to citizens' rights, tobacco and other products, cooperation on environmental matters and cooperation in police and customs matters, as well as the agreement to conclude a treaty on taxation and the protection of financial interests.[36] The Tax Treaty was eventually signed by both parties on March 2019 (International Agreement on Taxation and the Protection of Financial Interests between the United Kingdom and Spain regarding Gibraltar).[37]

The Tax Treaty is still following the procedure for authorisation in the Spanish Parliament but apparently it will be approved before the end of autumn 2020 and will be applied only with prospective effects.[38] The entry into force requires also ratification by the United Kingdom and implementation into Gibraltar Law. A curious institutional aspect of the Tax Treaty –the first Treaty between the UK and Spain with regard to Gibraltar– is that it creates obligations and direct communications for administrative cooperation between Spanish tax authorities and Gibraltarian authorities, not only tax authorities but also the Registrar of Companies Registrar, the Land Registry, etc. The Explanatory memorandum that accompanies the Treaty in the version presented to the British Parliament on March 2019 explicitly recognizes the fact that "*The Government of Gibraltar have led the negotiations for the UK*", therefore it is a bilateral agreement between the UK and Spain but negotiated by Gibraltar for the UK. No wonder that the Treaty has received in Spain some criticisms as to how far has the Spanish government has gone recognizing Gibraltarian governmental or State structures in this Treaty. It is worth mentioning here that in multilateral contexts (Hague Conventions, EU instruments) direct communications between Gibraltarian authorities and other States, including Spain, are formally avoided through an indirect procedure of notifications known as *post-boxing* via the UK Government/Gibraltar Liaison Unit of the Foreign Office in London as channel for all formal communication between Gibraltar's competent authorities and their EU counterparts.[39]

Now that negotiations for a new partnership or model of relations are in progress between the UK and the UE, the application to Gibraltar of any new agreement will depend on the so-called "veto rights" of the Spanish government which actually consists in the acceptance

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[36] C. Martinez Capdevila, "Thoughts on the legal value of the instruments concerning Gibraltar adopted in relation to the EU-UK Withdrawal Agreement", 22 *SYIL* (2018), 1-6 [doi: 10.17103/sybil.22.0].

[37] *BOCG, Sección Cortes Generales, serie A, No. 7*, 14 February 2020.

[38] R. Falcón y Tella, "El nuevo acuerdo fiscal con Gibraltar, pendiente de ratificación", 20 *Quincena fiscal* (2019), 9-14; A. Checa Rodríguez, "The Bilateral Tax Treaty between the United Kingdom and Spain Regarding Gibraltar: another Step in Gibraltar's Quest for De-listing as a Tax Haven", 3 *Cuadernos de Gibraltar-Gibraltar Reports* (2018-2019), 1-14 [doi: 10.25267/Cuad_Gibraltar. 2019.i3.1309].

[39] *Agreed Arrangements relating to Gibraltar Authorities in the Context of EU and EC Instruments and Treaties* of 19 April 2000 (A. Rodríguez Benot, "Acuerdos de cooperación entre España y el Reino Unido de 19 de abril de 2000 a propósito de Gibraltar", 52 *REDI* (2000), 273-275; M. Checa Martínez, "La cooperación civil judicial entre España y Gibraltar" in A. del Valle Gálvez, *Gibraltar 300 años* (Universidad de Cadiz, Cadiz, 2004), 353-360) and *Agreed arrangements relating to Gibraltar authorities in the context of mixed Agreements* (2007) and *Agreed arrangements relating to Gibraltar authorities in the context of certain international Treaties* (2007).

by the EU negotiator that any agreement with the UK in relation to Gibraltar will only be possible if there is a separate agreement that has previously been accepted by the Spanish government. The Guidelines for negotiation of 3 February 2020 ("authorising the opening of negotiations for a new partnership with the United Kingdom") published by the EU Commission have been very clear about the need for a separate agreement in the case of Gibraltar and "prior agreement" from Spain. Of course, this also means that the Agreement in relation to Gibraltar can be very different from the one reached with regard to the UK. Gibraltarian authorities have always expressed their rejection to any separate negotiations as they prefer to be seen in the light of the main negotiation thrust of the UK, but they have also expressed their views as to how disinterested Gibraltar is about a Free Trade Agreement as the one pursued by the UK (Gibraltar lacks any manufacturing industry and is already outside the EU customs area); on the contrary, Gibraltar's main interest is the fluidity at their border with Spain where 40% of their labour force crosses back and forth every day. Keeping fluidity in the border can be guaranteed if Gibraltar becomes part of the Schengen area, notwithstanding the fact that the UK is not part thereof. It is interesting here to note that micro-States such as Monaco or Liechtenstein are not part of the EU but nonetheless are part of the Schengen area. Another area of Gibraltar's concern is keeping access to the EU market for services, even though only 10% of their cross-border services market goes to EU Member States (the UK is the market responsible for Gibraltar's 90% of trade in services, but this market has already been secured with unfettered access rights through direct contact and agreement between Gibraltar and London).

The guidelines for the British negotiators in the Brexit process can be found in the document entitled "The Future Relationship with the EU: the UK's approach to negotiations", 27 February 2020, and, without explicitly mentioning Gibraltar, the document states a guideline to the effect that the UK is negotiating "on behalf of all the territories for whose international relations the UK is responsible". This guideline does not oppose those of the EU Commission, which is not requiring separate negotiations, but only separate agreements with regard to Gibraltar. The British guidelines therefore are not against a separate agreement in relation to Gibraltar with the prior agreement from Spain. Once Gibraltar has left the EU its situation is somewhat similar to microstates like Andorra, Liechtenstein, San Marino or Monaco –micro states which do not belong to the EU but require bilateral agreements with the EU.[40] Although the prior agreement from Spain and British sovereignty over the territory add extra difficulty to the process of adoption of bilateral agreements.

The Political Declaration that accompanies the Withdrawal Agreement leading the way into the negotiations for a new partnership does not mention Gibraltar, but the Protocol on Gibraltar in the Withdrawal Agreement provides that the agreement of citizens' rights in

[40] D. Dozsa, "EU Relations with European Microstates. Happily, ever after?", 14 *European Law Journal (2008)* 93-104 [doi: 10.1111/j.1468-0386.2007.00403.x].

Article 1 of the Protocol will be in force beyond the end of the transition period and it is precisely the citizens' freedom of movement the logical basis for a negotiation leading to the continued application of EU instruments on civil judicial cooperation for family matters. To this effect, the agreed continuity of application of Regulations Brussels II *bis* and Brussels III would allow civil judicial cooperation between Gibraltarian and Spanish authorities in similar terms to what until now has been happening.[41] As we have pointed out earlier, nothing precludes the possibility that the parties may reach an agreement on civil judicial cooperation for Gibraltar different from the agreement reached in relation to the UK because agreements in relation to Gibraltar need to be separate, although with prior approval from Spain.

The risk of absence of new bilateral agreements on civil judicial cooperation in the new partnership agreement between the UK and the UE, and in the Protocol in relation to Gibraltar, will force all parties involved to shift the focus towards the gap-filling function of The Hague Conference Conventions. Of course, accession in its own name by the UK to the 2005 Hague Convention on choice of court agreements and ratification of the 2007 Hague Convention on international recovery of child support with temporal effects from Brexit day and territorial extension to Gibraltar has been the first measure to be contemplated. On 31 July 2019 the United Kingdom extended the application of both Hague Conventions to Gibraltar but in contemplation of a no-deal Brexit, and this the reason why the instruments of accession or ratification were withdrawn on 31 January 2020, without prejudice to a new presentation of instruments before the end of the transition period, which were in fact deposited on 28 September 2020 with extension of effects to Gibraltar. Other possible territorial extensions to Gibraltar could be declared by the UK in relation to the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

Another major gap-filling technique will be the accession of the UK in its own right to the Lugano Convention 2007 as the only way to enjoy a system of civil judicial cooperation comparable to Brussels I bis Regulation. With all its technical deficiencies and shortcomings, the 2007 Lugano Convention already in force in Gibraltar but only in relation to Switzerland, Norway and Iceland, once acceded by the UK with declaration of extension to the territory of Gibraltar would allow the substantial continuity with regard to EU Member States, not of Regulation Brussels I *bis* (1215/2012) for civil and commercial matters, but of the text of Regulation Brussels I (44/2001) on which the 2007 Lugano Convention is modelled after; of course this can be only understood as a step back, but no so huge when compared to the leap in the dark that implies the lack of any similar agreement.

The *European Union (Withdrawal) Act 2019* (Gibraltar) and the *European Union (Withdrawal Agreement) Act 2020* (Gibraltar) do not provide further provisions on civil

[41] A. Borras Rodríguez, "El Brexit y Gibraltar: la perspectiva de las personas físicas y jurídicas", in M. Martín Martínez, J. Martín y Pérez de Nanclares, *El Brexit y Gibraltar: un reto con oportunidades conjuntas* (Ministerio de Asuntos Exteriores y de Cooperación de España, Madrid, 2017), 201-218.

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judicial cooperation, different from those enclosed within the Withdrawal Agreement as transitory provisions with regard to the different EU instruments. It is true then that EU instruments will remain in force in Gibraltar as *retained legislation* by virtue of the *European Union (Withdrawal) Act 2019* (Gibraltar) until modified or derogated by secondary legislation after the end of the transition period –*European Union Laws (Voluntary Implementation) Act 2019*–.[42] As has already been discussed the continuation of the EU instruments is not possible without the element of reciprocity required for their adequate effectiveness in three cases: a) EU instruments governing issues of international civil procedure (implemented in Gibraltar via the *Civil Jurisdiction and Judgments Act* 1993 and further amendments); b) EU instruments for cooperation with foreign courts or authorities (service of process, obtaining of proof, etc.); c) EU instruments governing special civil procedures (European Enforcement Order, European Payment Order and European Small Claims Procedure). On the contrary, the application of the EU instruments on conflict of laws may subsist as retained legislation after Brexit day (Regulation Rome I on the law applicable to contractual obligations and Regulation Rome II on the law applicable to extracontractual obligations). For the time being we have no knowledge of Gibraltar's attitude towards the cherry-picking methodology unilaterally followed by the UK in relation to the transposition of EU instruments after Brexit day. The UK seems to have decided already what parts of each EU instrument will be transposed into English law with modifications, without modifications or will be entirely derogated –in what seems to be an attempt at making a new "tailored suit" Private international law system, but actually resembles a "patchwork quilt" made out of the pieces of EU instruments sewn together with elements of UK domestic Private International Law–.

Brexit also gives the chance to evaluate the status of Gibraltar's domestic rules of Private international law and for the development of new rules. The application of these domestic rules may cause uncertainty for the following reasons: a) Gibraltarian domestic rules are rare and date back prior to the entry into the EC;[43] b) English statutory law is applicable in Gibraltar in some cases (e.g., the international jurisdictional rules in the *Civil Procedure Rules* 1998); c) application of *Common Law* rules brings flexibility but at the price of uncertainty (transient jurisdiction, *forum non conveniens*, anti-suit injunctions, etc.; d) the court of last resort is the *Privy Council* in London in relation to the challenge of judicial decisions from overseas territories (i.e., against judgments from the *Court of Appeal* in Gibraltar)[44]. With

[42] *European Union (Withdrawal) Act 2019*, *Challenges to Validity of EU Instruments (EU Exit) Regulations* 2019, *European Union Withdrawal (Application of International Agreements) Act 2019*, *European Union Laws (Voluntary Implementation) Act 2019*, *European Union (Withdrawal) Act 2019 (Consequential modifications) (EU Exit) Regulations 2020*, *European Union (Withdrawal Agreement) Act 2020*.

[43] *Judgments (Reciprocal Enforcement) Act* 1935, *Maintenance Orders (Reciprocal Enforcement) Act* 1973.

[44] Judgment of the *Privy Council* in the case *Vizcaya Partners Ltd, v. Picard* (2016) on the recognition of a judgment from New York in Gibraltar in relation to the *Madoff* case shows the complexities of Common Law rules versus the legal certainty provided by Regulation Brussels I *bis* (H. Kupelyants, "Implication of Jurisdiction Agreements", 75 *Cambridge L. J.* (2016) 216-219 [doi: 10.1017/S0008197316000477].

regard to the development of new rules, the first hypothesis is the alignment of Gibraltar private international law rules with those in force in the UK (let us not forget that the UK is the main services market for Gibraltar-based companies in the financial, insurance and gaming industries.[45]. On the other hand, and for some matters, Gibraltar has different regulatory needs and interests which are closer to other *offshore* jurisdictions such as Jersey o Guernsey, which have never participated in the EU instruments of civil judicial cooperation. An offshore approach in Gibraltar towards private international law rules can be found in the *Gibraltar Trusts –Private International Law- Act* 2015[46] or in the *Gibraltar Private Foundations Act* 2017[47].

(D) CONCLUSIONS

The UK has left the EU and the transition period in the Withdrawal Agreement will expire on 1 January 2021. The current negotiations between the UK and the EU for a future partnership agreement include criminal judicial cooperation as an ancillary agreement (UK's draft proposal) or an additional chapter (EU's draft proposal) to the main object of negotiation which is a free trade agreement. However, civil judicial cooperation has not been included in the negotiations and seems to have been totally left aside. The only issue on civil judicial cooperation that floats around the negotiations of the new partnership agreement is the application for accession that the UK has already made with regard to the Lugano Convention 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The other State parties to the Lugano Convention 2007 (Denmark, Norway, Switzerland, and the EU) will have to reply to UK's application for accession and it is in this way that the issue of the Lugano Convention 2007 accession is chronologically connected with the negotiations for a new partnership agreement between the UK and the EU. Although the UK's position is that this is a rather technical issue which should be kept separate and should not interfere with the future partnership agreement negotiations, the EU's position is not the same and probably the issue of UK's accession to Lugano somehow will keep being a card on the negotiation table for some time.

UK's accession to the Lugano Convention 2007 cannot be understood as progress in any sense of the term, quite on the contrary, it is only a damage control initiative. The loss of

[45] Gibraltar has implemented the UNCITRAL Model Law on Cross Border Insolvencies in the *Insolvency (Cross Border Insolvencies) Regulations* 2014, *Insolvencies (Cross Border Insolvencies) (Amendment) Regulations 2015*, following the example of the UK that implemented the UNCITRAL Model Law in the *Cross Border Insolvencies Regulations* 2006.

[46] This piece of Gibraltar legislation clearly responds to the needs of an offshore jurisdiction (protection of Gibraltar trusts against foreign laws and judicial decisions which do not recognize the trust or may confer forced heirship rights to any person) and should not be confused with the implementation of The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition which was object of *Trusts (Recognition) Act 1989 (Gibraltar)*.

[47] J. Harris, M. Morrison, "Brexit and the offshore world", 23 *Trusts and Trustees* (2017) 259-262 [doi: 10.1093/tandt/ttx018].

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Regulation 1215/2012 (Brussels I bis), already prospectively revoked with effect on 1 January 2021 by the Civil Jurisdiction (EU Exit) Amendment 2019, is so colossal that something had to be done in the context of multilateral instruments (accepting that a bilateral solution for the continuity of application of Regulation Brussels I bis is not on the negotiation agenda between the UK and the EU). The Lugano Convention 2007 is not a whole substitutive product for Brussels I bis for technical reasons already expressed earlier in this article, but at least it will reduce much of the uncertainty brought about by the UK's unilateral revocation of Brussels I bis, both for matters of international jurisdiction (including the validity of choice of forum clauses) and for recognition and enforcement of foreign judgments.

The other multilateral methodological path followed by the UK with regard to civil judicial cooperation is the improvement of its status in relation to The Hague Conference Conventions. Firstly, by accession or ratification in its own right to The Hague Conventions that are already in force in the UK but only as a result of the ratification by the EU with effects for all EU Member States. For this purpose, the UK has deposited on 28 September 2020 instruments of accession or ratification, so that on 1 January 2021 the following Hague Conventions will be in force: a) 2005 Hague Convention on Choice of Court Agreements, and b) 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007). This future accession or ratifications scenario of Hague Conventions is the object of the Private International Law (Implementation of Agreements) Bill 2009 still pending in the British Parliament and expecting approval in autumn; the Bill foresees the implementation of the 2005 Hague Convention and the 2007 Hague Convention, but more unpredictably it also provides for the implementation of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, which was already ratified by the UK in its own name on 27 July 2012 and entered into force for the UK on 1 November 2012. The underlying explanation for this implementation seems to be the loss of Regulation Brussels II bis Regulation on 1 January 2021 and how, at least for matters of parental responsibility, the void can be partly filled through a new implementation of The Hague 1996 Convention. A rather more speculative projected measure with regard to its practical effects in the short or medium term would be the UK's signature and further ratification of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters; the Convention, although envisaged from its inception for transatlantic relations between the EU and the USA, has not yet been ratified by any country and it remains doubtful whether the EU will try to play ball with this Convention now that the UK is in a post-Brexit context and seems to be the most likely interested country in its entry into force; of course, the projected UK's accession to the 2007 Lugano Convention also diminishes the drive for UK's signature and ratification of the 2019 Hague Convention.

The third movement of this symphony is the most bizarre and based on different heavy tuned scherzos: the collection of civil judicial cooperation UK's EU Exit Regulations adopted

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following the European Union (Withdrawal Act) 2018, with projected entry into force on 1 January 2021. The reason for these measures in the field of civil judicial cooperation is the issue of how to cope with EU's legislation retained in the UK's legal order as the main effect of the European Union (Withdrawal Act) now that mutual application or reciprocity will no longer exist after Brexit effective day. For issues of international jurisdiction, the UK has preferred to revoke most of the retained EU's legislation, although some elements have been retained (international jurisdiction for consumer contracts and employment contracts) and some have been modified (domicile of legal persons, international jurisdiction for divorce, insolvency, etc.) with the creation of new international jurisdictional rules that are a mixture or blend between rules of very different nature (some with origin in the EU's instruments and some with origin in the UK's legal tradition) in the hope that the amalgamation may keep the different materials together. For matters of recognition and enforcement of foreign decisions the movement is logical although more sombre: the UK falls back to its domestic private international law rules and the content of EU instruments is lost in the Brexit process. The same happens to the EU instruments creating special civil procedures (European Enforcement Order, European Payment Order and European Small Claims Procedure) or establishing means of cooperation between courts of different Member States (service of documents and taking of evidence in civil and commercial matters). The only positive, although merely inertial, step is the retaining of the content of EU's instruments on choice of law in the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2019.

To sum up, it does not seem likely that the future partnership agreement or new free trade agreement will get into civil judicial cooperation, and that all the cards are now on the table: a) UK's accession to 2007 Lugano Convention seems quite likely in the short term, although this process is entangled with the current negotiations with the EU; b) the UK will enhance its status in as many Hague Conventions as it may sound practical; c) the UK will pursue its own goals and objectives revoking in most cases, amending in some, and retaining in a few instances the EU legislation retained by the European Union (Withdrawal) Act 2018; d) it remains to be seen whether the UK will also make arrangements in the medium term for the modernization of its own domestic private international law rules which, although highly regarded and nurtured by a long-standing tradition, also show clear signs of obsolescence that should be properly managed, of course not from Brussels anymore.

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Back on the good track: historical institutionalism and the new political model between the EU and Cuba

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Abstract: The beginning of the negotiations of the Political Dialogue and Cooperation Agreement (PDCA) in 2014 opened the way for the birth and implementation of the New Political Model (NPM) between the European Union and Cuba (EU-Cuba). The birth of the NPM meant the beginning of a relationship under equal conditions and non-interference, and it reinforced the political dialogue and the cooperation. The main objectives of the NPM-PDCA are to promote the welfare of the Cuban society and the transformation of its economy, setting away the relationship from the Common Position established in 1996. This article analyzes some of the peculiarities of the process of negotiation and signing and the provisional implementation of the agreement from 2016 towards 2021, until the completion of its ratification process, both by member-states and the European Parliament. From an institutional-historic approach, we will explain the reason why the NPM means a milestone in the relationship between the EU and Cuba, as it enabled the parties to build a new space of mutual respect and understanding. Beyond the specific case, the article also emphasizes the potential for implementation of this Agreement by the EU in its rapport with Latin America and the Caribbean, and the Global South.

Keywords: EU-Cuba – Institutional-historic approach – reciprocity – New Political Model – Political Dialogue and Cooperation Agreement – Foreign Policy.

(A) INTRODUCTION

The aim of this article is to analyze the configuration of the New Political Model (NPM) of the European Union-Cuba (EU-Cuba) relationship and the effects of its provisional implementation on the rapport between both partners. In order to accomplish this, the article analyzes, within the disciplinary frame of International Relations, why and how an NPM between the EU and Cuba has been built. This analysis matters because the relationship between the EU and Cuba has been traditionally approached through the lenses of power-politics, due to the EU's sustained support to the economic and political blockade from the USA against Cuba, before and after the end of the Cold War. Networks, rather than billiard balls, appear to be the appropriate metaphor for an international system increasingly dominated by transnational relations, socioeconomic concerns, and an expanding web of actors, international norms, rules and institutions.[1]

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[1] B. Buzan, and G. Lawson, *The Global Transformation: History, Modernity and the Making of International*

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The article is structured in two sections. The first provides an analysis of the factors that helped restore a political dialogue between the EU and Cuba in 2008 and the beginning of the EU-Cuba NPM in 2014, and we examine the stages that allowed the parties to reach the negotiation and signing of the Political Dialogue and Cooperation Agreement (PDCA) in 2016, whereas in the next section we take a close look at the factors that have helped to reinforce the EU-Cuba relationship NPM starting in 2017, and we continue to state the reach of the NPM and how likely it is to be reproduced in the relationship between the EU and LAC. We finish with some concluding thoughts.

(B) FROM POWER POLITICS TO HISTORICAL INSTITUTIONALISM

As a matter of fact, according to Buzan and Lawson, post-war realism developed in reaction not only to both the practical and the intellectual failures of the inter-war period, and the experiences of the Second World War and the Cold War, but also to the decolonization process and its corresponding revolutionary developments. As Robert Cox points out, it is not by chance that this theoretical current should have coincided with the Cold War, which imposed upon international relations the category of bipolarity and an overwhelming one-sided concern for the defence of the US's power as a stronghold of order, ignoring other important developments such as decolonization[2]. Buzan,[3] however, considers that some elements of the realist canon have a timeless quality. No matter what the structure, or how differentiated the units, power politics, the logic of survival, and the dynamics of (in)security, all them seem to be universally relevant to international relations. This aspect of the realistic approach casts a light on the reason for the EU's Common Position against Cuba, and it also explains why the Common Position was a by-product of the US's foreign policy. The relationship with Cuba is an addendum to this power politics contention, because it was part of the US's domestic politics and it was amplified in the relationship that the EU created with Cuba by way of the Common Position [CP] from 1996 until it was suspended in 2008. In the CP, the EU conditioned a greater political dialogue, official development assistance and commercial cooperation with the Cuban government to respecting Human Rights [HHRR] and to completing a peaceful transition in the island. These conditionings were not accepted by the Cuban government and originated diplomatic tensions. As Buzan pointed out[4], at any period of history it is very hard to escape from the fact that the major powers do play the central role in defining international political and economic order. Thus, while the particular

Relations (Cambridge University Press, Cambridge, 2015), at 306.

[2] R. Cox, *The New Realism: Perspectives on Multilateralism and World Order* (Palgrave Macmillan, New York,1997), at 248. [doi.org/10.1007/978-1-349-25303-6]; also, 'Social Forces, States and World Orders: Beyond International Relations Theory', 10 (2), *Millennium* (1981) 127 at 126-155. [doi:10.1177/ 03058298810100020501].

[3] B. Buzan, 'The timeless wisdom of realism?', in S. Smith, K. Booth, & M. Zalewski (eds.), *International Theory: Positivism and Beyond* (Cambridge University Press, Cambridge, 1996), 60 at 47-65.

[4] *Ibid.*

circumstances and conditions of history change from era to era, there does seem to be a certain continuity to some aspects of political life.

In sum, these elements explain the birth of the Common Position and the reason why the EU made its rapport with Cuba dependent on the US's foreign policy. However, time has shown that the Common Position did not achieve its goals and was not in the EU's interest. For this reason, it had to be derogated so that the political dialogue and the cooperation with the government of Cuba could be restored, on the basis of mutual respect and reciprocity. This is precisely what we are set out to prove in this article.

The shift in the EU-Cuba relationship is in line with the change in international geopolitics, and it is a result of the New World Order that arose after the collapse of the socialist bloc. David Slater[5] argues that socio-political categories such as First World, Second World and Third World – in use since the Second World War until the end of the Cold War – as well as North and South – in use since the end of the Cold War up to these days – are cohesive with the predominating discourses in each era and are oriented toward the political and geographical delimitation of the international space according to the parameters established by the powers-that-be. This criterion, inherent to the post-colonial approach, excludes the development of a political, cooperation-based, unconditional dialogue, one that implies zero interference in the domestic affairs of any Third World or South country. Abrahamsen, states that the post-colonial discussion is fundamentally centered on the analysis of the North-South relations in a global context[6], as well as on the role of groups or movements that have been marginalized in the setting of domestic and global orders. This author points out that agents and countries from the Third World or the South aren't passive agents within the world system or in their relation with First World or North countries, even if their possibilities for action remain low. In fact, Galindo[7] is of the mind that post-colonial perspectives in international relations [IIRR]are focused on the study of contemporary power, hierarchy and domination relations that are articulated around the colonial experience, and that these are reproduced and sustained by discourses and practices that reaffirm such relations on a national and global basis. That is the reason why this paper does not follow the tenets of post-colonial theory, but those of institutional theory.

Against this background, our approach takes thus distance from both realist and neorealist approaches based in power politics,[8] which subordinates expectations of a good negotiation, to the momentary geopolitical situation., because these approaches have a diminishing

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5 D. Slater, *Geopolitics and the Post-colonial: Rethinking North – South Relations* (Wiley-Blackwell Publishing, Oxford, 2004), at 14.

6 R. Abrahamsen, 'Postcolonialism', in M. Griffiths (ed.) *Encyclopedia of International Relations and Global Politics* (Routledge, London, 2008) 111 at 111-122.

7 F. Galindo, 'Enfoques postcoloniales en Relaciones Internacionales: un breve recorrido por sus debates y sus desarrollos teóricos', 22 *Relaciones Internacionales* (2013) 85-107, at 88.

8 Buzan, *supra* n. 3, at 61.

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importance in the analysis of the NPM between the EU and Cuba. Instead, we choose to approach NPM through the lens of Steinmo's historical institutionalism, because it "allows us to better examine the dynamic relationships between ideas, interests, and institutions, helping us thus to better understand the variation in policies and preferences across cultures and over time"[9]. The main contention of the Institutional theory is that political choices are mediated by the more general institutional conditions, widely understood as the combination of formal and informal rules, norms, conventions, and political standards prevailing in a particular policy at any given time[10]. These institutional contexts forge across historical time both the opportunities and the constraints in which the political choices of relevant actors are framed. This framing shapes not only the formulation of interest. It also entails social values, political preferences, and expectations of legitimacy, creating its own political inertia. In other words, institutions have a historical logic of their own, and therefore they create a path of dependence whose unplanned consequences are unforeseen by political actors. These historical paths can be modified only by exceptional political events which are able to shape a new institutional context[11]. This concept allows for identification of the key elements that have colored the institutional shift in the bilateral relationship between the European Union and Cuba and which helped build the NPM between both agents.

For this reason, the building and implementation of the New Political Model in the EU-Cuba relationship has a high impact on the relation of both parties, because it has been implemented through political dialogue and cooperation, with no previous conditions, on an equality basis and after eliminating any and all interference in the parties' domestic affairs. In this vein, this work addresses the EU-Cuba relationship through the institutional-historical approach of international relations. Analytically, historical institutionalism is a research tradition that examines how temporal processes and events influence the origin and transformation of institutions that govern political and economic relations[12]. This approach allows us to analyze how the European Economic Community – nowadays, the EU – normalized political, commercial and cooperation ties with the former socialist countries, "with China since 1985, with Vietnam since 1996, even with Russia [heiress to the USSR] since 1989"[13], but did not follow suit with the Cuban government. We may now ask: Why did the relationship between the EU and Cuba not become normalized? This policy was not of application on the relationship that the EU built with the Cuban government, first of all,

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9 S. Steinmo, 'Historical Institutionalism and Experimental Methods', in O. Fioretos et al (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, Oxford, 2016) 119, at 108-124. [doi:10.1093/oxfordhb/9780199662814.013.6].

10 *Ibid.*

11 A. Lecours, '*New Institutionalism. Theory and Analysis*' (University of Toronto Press, Toronto, 2005), at 363.

12 O. Fioretos, T. Falleti, and A. Sheingate, 'Historical Institutionalism in Political Science', in O. Fioretos et al (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, Oxford, 2016) 10, at 5-24. [doi: 10.1093/oxfordhb/9780199662814.013]

13 European Commission, Joint Communication of 16 of april 2019, JOIN (2019), 6 final.

because the goal was to remove the last bastion of the socialist system from the US's backyard (Latin America and the Caribbean – LAC); secondly, because the EU's foreign policy met the interests of the United States in their foreign policy. For this reason, when it comes to Cuba, the EU sets up a political relationship permeated by the conditionality and interference sanctioned by the 1996 CP against the Cuban government and society and in accordance with the interests of the United States.

(C) THE SETTING OF THE EU-CUBA NEW POLITICAL MODEL BETWEEN 2008 AND 2022.

The EU's foreign policy toward Cuba was, until 2008, a sheer contradiction, because it was based on an institutional position that was different from the one being used with socialist and formerly socialist countries and with all the rest of LAC countries. Such policy had the result that Cuba was, until 2016, "the only LAC country with which the EU had not signed a Cooperation or Association Treaty"[14]. This political anomaly was eradicated only with the onset of a political dialogue on an equal basis, sustained on the absence of interference and on mutual respect from both parties, which are the essential traits of the EU-Cuba NPM. The positive effect of the EU-Cuba NPM may have encouraged the European Parliament and the European institutions to state that "[t]he dialogues should help to identify shared priorities, interests and new cooperation opportunities [...] and the Political Dialogue and Cooperation Agreement with Cuba signed in 2016 established policy dialogues in a wide array of areas, providing an adequate institutional framework to enhance cooperation on bilateral and regional issues" [15]. In order to achieve this goal, it is essential to replicate the space of political and cooperative dialogue created by and in the EU-Cuba NPM, so that it allows for the development of a political dialogue that honors the parties' common interests.

Beyond theoretical debates, through this theory we aim to explain the building of the EU-Cuba NPM and the behavior of the agents that play a part in the process, to continue to assess the reach and impact of the NPM in LAC and how likely its model is to be replicated in other cases.

The second element of note in the setting of the EU-Cuba NPM is a result of the compilation of bibliographic data and of the six interviews made during this Research to EEAS[16] (European External Action Service) officials[17]. It has emerged that the EU-Cuba

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[14] J. Tvevad, 'Latin America and the Caribbean', Fact Sheets on the European Union – 2018, published in October 2018, accessed 15 December 2020.

[15] European Commission *supra* n. 13.

[16] Statement by the EEAS experts in the interviews between 2016 and 2018.

[17] Note by the author: The EU-Cuba relation has always been a very sensitive topic for both parties. This is the reason why the names and positions of the EEAS interviewees are withheld. Nowadays, these officers are members of EU embassies and of bodies created by the PDCA. Therefore, the interviewees are going to be cited such: Statement by the EEAS expert in the interview made in Alicante (2016a); (2018): in the interview via telephone made in Madrid-

relationship "has been and still is a very sensitive subject and a top priority for European institutions and for the Cuban government". This occurs due to several factors, "firstly, because the relationship has always been permeated by the interests of the US about Cuba. For this reason, the EU applied the CP as a pressure tool that was aligned with the US foreign policy against Cuba. And thirdly, because of Cuba's symbolic value in the world scenario, being the only socialist country in LAC, resisting the economic blockade from the US for more than 50 years despite it being reinforced by the Helms-Burton Act in 1996 and in 2019"[18]. The blockade pursued a social outburst and unrest in Cuba and, as a result, a political transition, very much as has happened in Venezuela since January 2018 to June 2019.

The relations between Cuba and the European Economic Community, now the EU, had first been established in 1988 in the context of the Cold War. In this scenario, the European Council approved the proposal by the President of the government of Spain, José María Aznar, to apply the "Common Position" (CP) against Cuba in 1996. By way of the CP, the EU would condition the Official Development Assistance (ODA) and the commercial cooperation with Cuba to respecting human rights and to completing a peaceful political and economic transition in Cuba.

We agree with authors Anna Ayuso and Susanne Gratius on their opinion that, "the relations between the EU and its predecessor, the European Community, and Cuba were conditioned by the position and cooperation with other external partners, above all the United States, Latin America and the Caribbean, and Canada"; and "by the influential role of the development and human rights NGOs that work in or about Cuba. The political conditionality, which is included in the EU Treaty, and the inclusion of the democratic clause [...] [w]as an important obstacle in the development of the cooperation with the island, because Fidel Castro, as a matter of principle, always refused to accept the conditionality" [19].

In this context, the EU and its member states were aware that the CP and the blockade from the US could create a serious general scarcity, including of food and medicines, which would have a negative impact on the Cuban society and which could provoke a social and political crisis in the island.

In the literature cited, perhaps the pioneering, most consistent view in its critique of the reach of the CP is that of Alexander Ugalde. This author believes that the CP "has failed without accomplishing the goals that it was after [...] [i]ts starting points were absolutely inadequate, and its political and diplomatic mechanism is particularly objectionable, because the EU stated its position one-sidedly, and because of its aim to change the political, legal,

Brussels; (2017a): in the interview via telephone made in Madrid-Brussels; (2017b) (2017c): in the interview made in Brussels; (2016a): in the interview made in Alicante; (2016b): in the interview made in Santander.

[18] Statement by EEAS experts, *'Ibid'*.

[19] A. Ayuso and S. Gratius, '¿Nadar a contracorriente?: El futuro del acuerdo de la Unión Europea con Cuba', in A. Ayuso and S. Gratius (eds) *Nueva etapa entre Cuba y la UE: escenarios de futuro* (Barcelona, CIDOB, 2017) 103 at 89-104.

economic and social structure of a sovereign state"[20]

As a matter of fact, this step was a first breach in the institutional bridge between the EU and Cuba, the second breach was EU's interference in Cuba's domestic affairs in defence of human rights. These events were the critical points in the relation, and they pushed the Cuban government to unilaterally break the political dialogue and the cooperation with the EU in 2003.In order to face this twofold challenge, the Cuban leaders needed to start a process of economic and political adjustments to ensure the economic survival of the country and the continuity of the political power [...]. Therefore, through a slow, difficult and hesitant process, Cuba managed to recover part of its economic abilities [...] and still to keep the revolutionary ideals alive to a great extent[21].

In order to guarantee the survival of the Cuban socialist system and the well-being of the Cuban people, in the 7th Congress of the Cuban Communist Party (CCP), the Cuban government continued to prompt changes in its internal and external policy. These changes allowed the CCP to respond to the loss of Cuba's main social and political ally and its main international market, as had been stated in the Council for Mutual Economic Assistance. This stage is known as the "special period" and began right after the disintegration of the Union of Soviet Socialist Republics along with its socialist camp, in 1990.

In all the process of change, the alignments of the Cuban Economic and Social Model stand out, as well as the statement made by President Raúl Castro about the monitoring of the minimum age to become part of the government, and his will to cease to be the President of Cuba beyond 2018. In fact, the 3rd Plenum of the Central Committee of the Communist Party of Cuba, on 18 May 2017, approved restructuring the working lines that the Cuban government ought to follow in order to achieve an economic transformation without moving away from the socialist system. The election of Miguel Díaz-Canel as the new President of Cuba, in April 2018, and the referendum launched on the project to reform the Cuban Constitution in February 2019 mark the change of both domestic and foreign politics that the government of Cuba has been leading since the dismantling of the Socialist bloc until 2020, including its increasing ability to adapt itself to new times.

This strategy justifies the fact that process of change championed by the Government of Cuba in its domestic and foreign policy has, as top priority, to guarantee the continuation of the Cuban socialist system and of the welfare of the Cuban people; then, to change its international image, and to show the will to comply with all the commitments that are in

[20] A. Ugalde, 'Análisis de 2012 de la Posición Común de la Unión Europea hacia Cuba: Una Política Incoherente, Contradictoria y Fracasada', *La Revista Vasca de Sociología y Ciencias políticas INGURUAK (*2013) 1591-*1604, at 1601.*

[21] M. Da Silva, G, Johnson, and A. Medeiros Arce, 'Cuba and International Reintegration in the 21st Century: Looking for New Partners', in K. Dembicz (ed), *CUBA: ¿quo vadis?* (CESLA UW, Warszawski, 2013) 248 at 247-268.

accordance with the international laws.

In this scenario, a constitutional change was called for in order to guarantee the rights and welfare of the people and comply with the national and international agreements, especially after signing the Political Dialogue and Cooperation Agreement between the European Union and Cuba, in 2016. Even though the agreement does not include or demand the reform of the Cuban constitution, it was necessary to guarantee a greater constitutional protection to be able to "pay the Cuban debt in the new timeframes agreed upon with the Paris Club in 2015, along with the payments that the Government must make to purchase products in the foreign market and the need to improve the payment cycles to the foreign investors settled in the country"[22].

The aforementioned elements are framed in time. Even if eleven years is not a long period of time, it is necessary to group up and analyze all the facts in their temporary and historic category. For this reason, it is indispensable to analyze the different stages that the negotiation, signing and provisional implementation of the First PDCA have gone through, in what has been called the EU-Cuba relation NPM.

The development and evolution of NPM is set within five stages, which are split in two moments: preceding moments (2008-2013) and crystallization (2014-2021). Within the preceding moments are the first stage, Reestablishment of the EU-Cuba Political relation (2008-2009), and the second stage, Setting of the negotiations of the EU-Cuba Agreement (2010-2013). The first steps that confirm the institutional change in the relation of both partners happen here.

The crystallization includes the decisive steps that have consolidated the institutional change within the EU-Cuba NPM. Such institutional change has materialized in the third stage, with the Negotiation and Signing of the EU-Cuba Agreement (2014-2016), and in the fourth stage with the Ratification and Provisional Application of the EU-Cuba Agreement (2017-2022). The Agreement being finally launched on 15 May 2018 signified the institutional change in the relation between both parties. Finally, the fifth stage will begin with the Entry into Force and the Implementation of the PDCA between the member states and Cuba (2020-2025).

(1) Reestablishment of the EU-Cuba Political Relation (2008-2009)

The first stage takes place in years 2008 and 2009, when both parties officially acknowledge the beginning of top-level ministerial meetings. This stage is characterized by a wave of moderate optimism between the parties and all over the world, as a result of changes that had been made globally and in the EU. Eg: the changes operated on the functioning of the EU

[22] A. Berg-Rodríguez, 'La reforma constitucional en Cuba en el marco de la aplicación provisional del Acuerdo UE-Cuba del 2016', 9(6) *Oñati Socio-Legal Series* (2019) 924-950, at 930. [Doi: http://opo.iisj.net/index.php/osls/article/view/1171].

High Representative due to the enforcement of the Lisbon Treaty in 2009 and the economic opening brought about by Raúl Castro as the new President of Cuba. Actually, the Reestablishment of the Political relation and the Setting of negotiations of the EU-Cuba Agreement are the preamble to the NPM, because essential changes had taken place to facilitate an approach between both parties on an equal basis, with the aim to eliminate the CP and build a political dialogue with their interests in mind.

The results of this analysis reveal that the EU has evolved through a combination of periods of gradual change and specific events that created critical junctures where actors were able to push through more rapid changes. […] while others encourage slow change (interlinkages) and can facilitate profound changes (diverse legacies and supranational law) in specific contexts[23]. This made the rapport between the EU and Latin America & the Caribbean more diverse and less defined.

Ayuso and Gratius argue that an added difficulty for the Commission and its development programmes was posed by the separation that has happened in the EU's economic and social cooperation policy with the Caribbean, on the one hand, and with Latin America, on the other […]. [T]he relations were even in different directions, of development (DEVCO) for ACP and of Foreign Affairs (RELEX) for Latin America. Cuba, lacking a specific agreement, gravitated between the one and the other, without fully integrating into either, due to political differences as well as to the lack of a legal framework[24].

These factors, together with the EU's will to change its relationship with Cuba, fostered the estrangement of the EU from the US's foreign policy and the resumption of the political dialogue on a ministerial level; further, it suspends the CP and resumes cooperation with the Cuban government and society. As a result, the CP was politically overcome, even if it stayed legally enforced[25]. On the other hand, under Raúl Castro's presidency, starting in 2008, the negotiation frame with the EU became more flexible and started to be characterized by a more pragmatic position; eg negotiations started even under the CP, which was still in force[26].

These steps start with the shift in the EU's institutional position in its relation with Cuba, as the EU put aside all impositions and conditionings that the CP had entailed. This time, the European institutions decided to develop a political dialogue on the basis of mutual respect, the absence of interference in the parties' domestic affairs, and the suspension of the CP against Cuba. This criterion was apparent in the interviews made by the author to the six

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[23] M. Thatcher and C. Woll, 'Evolutionary Dynamics in Internal Market Regulation in the European Union', in O. Fioretos et al (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, Oxford, 2016) 508, at 505-517. [doi: oxfordhb-9780199662814-e-30]

[24] A. Ayuso and S. Gratius, *supra* 19.

[25] F. Černý, 'The EU's Cuban Challenge (1988-2013)', in K. Dembicz (ed), *CUBA: ¿quo vadis?* (CESLA UW, Warszawski, 2013) 286 at 269-310.

[26] A. Ayuso. S. Gratius, & R. Pellón, 'Reencuentro Cuba-UE, a la Tercera va la Vencida. Escenarios tras el acuerdo de cooperación', 177 *Notes Internacionals*, *CIDOB* (2017) 1 – 5, at 3.

EEAS officials. In fact, the EU experts consider the CP "a mistake, as it responded to the interests of the states of the Atlantic Axis, which were aligned with the interests of the US. That's why the member states did not apply the CP and it became an inefficient tool, even though it destroyed the bridge between the European institutions and the Cuban government and people"[27]. Because of this, for the EU, applying the CP against Cuba was an ambivalence in its foreign policy.

The steps that had been taken in the stages one and two were aimed at re-establishing political dialogue and cooperation between the EU and Cuba, as well as at restoring a relation of mutual trust and respect that would allow to build an institutional and legal NPM between both. This process was marked in 2008 by the start-off of the negotiation rounds at a ministerial level to re-establish a political and cooperation dialogue between the parties, with the goal in mind to commence negotiations for a PDCA between the EU and Cuba. As a result, the first stage frames the start of negotiations of the political model that both parties wanted to reach, and which paved the way to the following stages.

This context facilitated that each stage would have, as a central element, "the will of the parties to build an NPM in order to strengthen the EU-Cuba relations", through the implementation of a "political and cooperation dialogue" to "accompany the Cuban society in the process of modernization of the Cuban economic and social model". These traits were of the essence so that the NPM would be implemented on the basis of an equal status, twelve years after the EU Council had approved the CP against Cuba.

At this point, we must first answer this question to continue our analysis: how was the EU-Cuba NPM built? Firstly, the EU and Cuba succeeded at building an NPM because the political dialogue and the cooperation between both parties were re-established after the CP was indefinitely suspended. Secondly, the institutional trade-off between the EU and the Cuban government allowed the parties to create the NPM as a political and institutional space that was free of all conditions and of all mutual interference, where the political dialogue is the integrating axis and the communication bridge to negotiate both parties' common interests, in a context of mutual respect.

Finally, it was possible to build the NPM through the initiation and ulterior signing of the Agreement between the EU and the Cuban government, only once the CP had been derogated. Interestingly, both parties have acknowledged that political dialogue on the basis of an equal status has proved to be the most useful tool for both parties to start converging and to work together toward common goals –a more useful tool, at any rate, than the coercion utilized by the EU against Cuba by way of the CP. Actually, the CP against Cuba was a response emanated from a political moment that was framed in the context of the Cold War, and within the US's foreign policy and interests.

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[27] Statement by the EEAS officials in the interviews between 2016 and 2018.

For this reason, the EU High Representative for Foreign Affairs in 2016, Federica Mogherini, stated that "[t]he end of negotiations and upcoming signature of the Agreement mark the end of the EU's 1996 Common Position as the Union's instrument defining its external relations with Cuba. […] [I] will propose a Council decision to repeal it formally, in parallel to the processes leading to the signature of the agreement".

This argumentative framework lays the foundation to understand, from the institutional theory, the shift in the EU's position in its relation with Cuba, and the way in which the Cuban government shifted its relation to the EU institutions. Because, instead of seeing actors as rational decision-makers constrained and incentivized by institutional structures, we should explore the iterative relationship between human preferences and the institutions in which they are raised[28]. This argumentation explains why, during the validity of the CP, the two-side cooperation, as well as the trade between the member states and the Cuban government flourished. In principle, this scenario arose because observance and implementation of the CP was not mandatory for the member states and because it did not respond to the interests of the EU and of many of its members.

Because of this, stage number one was a turning point in the EU-Cuba relation, as it was the first occurrence of both parties coming to a negotiation table away from the Cold War, in an atmosphere of mutual respect, no interference and no previous conditions. This turn in the EU-Cuba relation helped to put a premium on a constructive political dialogue that would respond to the mutual interests of the parties.

It was in this space that ministerial meetings between the EU and Cuba took place, with the final result of a request to initiate negotiations toward a PDCA between both. This result was preceded by the restoration of relations between Spain and Cuba, with the coming to power of the Socialist Party (PSOE) in Spain in 2008. This political connection was deployed by the EU, Cuba, and Spain to valorize the economic and social changes that the Cuban government was working on from 2006 to 2008 under Raúl Castro's leadership, all the while the EU was exhibiting how its political position toward Cuba had changed.

In this context, the governments of Cuba and of Spain reestablished political dialogue on Human Rights, and this resulted in the progressive release of the dissidents that had been arrested in Cuba, including the 75 detainees from 2003. Likewise, the Cuban government gave the go-ahead for an official visit of the EU Development Commissioner to Cuba, an event that marked the beginning of the rebuilding of the political dialogue and of the cooperation between the EU and Cuba. Then, in 2008, the government of Cuba signed the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

In all stages, the signed Agreements were not ratified by the Cuban government, but we

[28] Steinmo, *supra* n. 9, at 120.

cannot rule out the possibility that the ratification of both Covenants could have been a part of the political dialogue on Human Rights that the EU and Cuba started in the framework of the PDCA. The same applies to the signing of the moratorium by the government of Cuba not to impose death penalty. Basically, death penalty[29] is regulated to preserve the revolutionary progress in the face of terrorist attacks. For this reason, the moratorium would be signed in the long run and could be conditioned to the extinction of the blockade and of the US's interference in Cuba's domestic affairs.

In the first and the second stage, restoration of cooperation between both partners contributed to reinforcing the political dialogue between the EU and the Cuban people, the main target of the DOA from the EU. Likewise, the building of the NPM was reinforced as well, with an increased cooperation in the critical areas for the Cuban people and government, which in fact allowed the EU to accompany the Cuban people in the process of transformation of the Cuban economy.

We agree with Garay and Toirac on their statement that, since 1988, the European Union has subsidized over two hundred cooperation projects in Cuba with about 300 million euros[30]. Two moments in the financing of the EU to Cuba stand out. In the first moment, from 1988 to 2007, the EU supported the US's policy against Cuba, because a cooperation had been established on condition that human rights should be respected and that an economic and political transition should happen in Cuba. Whereas in the second moment, beginning in 2008, there are ministerial negotiations and the start of a bilateral EU-Cuba cooperation, following the EU's interest with the Cuban people and government.

In this case, cooperation has been one of the central axes that has characterized and will continue to characterize the shift in the institutional positioning within the process of restoration of the EU-Cuba relation. On the other hand, the restoration of the political bridge and the setting of the new EU-Cuba political model, and of the EU-LAC model, were reinforced with the implementation of the Lisbon Treaty in 2009, and with the new functions of the High Representative that were stated in Art. 18 of the Treaty of the European Union. The entry into force of the Treaty helped the European Common Diplomacy (ECD) to evolve toward the interests of the EU and its citizens, insofar as the new roles that the HR began to play in the framework of the EU's common policy have allowed the building of a cohesive policy in its relation to LAC and, very especially, to Cuba.

Due to this, the roles of the HR included in the 2009 Lisbon Treaty are qualitatively of higher value than the previous ones, as the HR has new positions that are articulated as a three-peak umbrella, of which the central axis and executing arm is the European External

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[29] See Arts. 190, 263, 298, 327 in Law nº 87/1999, to modify the Criminal Code, entered into force 16 February 1999.

[30] European Union, Cuba Delegation, *Cooperación Unión Europea – Cuba. Contribuyendo a la Agenda 2030 para el Desarrollo Sostenible, (*2019), at 16.

Action Service (EEAS). Art. 18.2, Art. 18.3, Art. 18.4, Art. 27.1, Art. 27.2 and Art. 27.3. of the Treaty of the European Union establish these as the HR's new roles: being accountable for the EU's Common Foreign and Security Policy (CFSP) and of the EU's Common Security and Defence Policy (CSDP). In both cases, the HR represents the EU before third parties, and is in charge of the development, planning and execution of the CFSP and the CSDP. Furthermore, the HR became the president of the Foreign Affairs Council and the Vice-president of the Council, in charge of ensuring the cohesiveness of the EU's foreign action. To help with the development of these roles, the HR relies on the EEAS as the tool that has allowed to invest the Union's common policy with more cohesiveness.

Aldecoa defends that "the main novelty about the figure of the High Representative-Vice-president of the European Commission is that he/she plays three completely different roles, which until then had been played by three different people. Such roles they gave a momentum and an enhanced clarity in the negotiations carried out by the EU and Cuba in this stage, which was the framework for setting the EU-Cuba NPM"[31]. This context allowed for communitarization of the EU's foreign policy and for establishing a policy that was cohesive and coordinated with the LAC and with the Cuban government.

(2) Setting of the Negotiations of the EU-Cuba Agreement (2010-2013)

The launch of the EEAS as the HR's executive arm was the element that marked the setting of the EU-Cuba Agreement negotiations. On the other hand, the entry into force of the EEAS and of the HR's new roles brought along the intensification of the ministerial meetings between the EU and Cuba. As a matter of fact, the proposal made by the Commission to the EU Council requesting the mandate to initiate the political dialogue for PDCA negotiations is one more step that goes to show how the parties, using political dialogue on equal terms, managed to bring their positions closer to each other, and to begin working toward their common interests, without compromising their political systems, values, principles, and political or economic sovereignty.

In this scenario, granting the mandate implied a heavy symbolic burden for the EU, because it meant that the three-year work of the HR Catherine Ashton, and of the EEAS, was at stake, as well as the image and the leadership of the EU in the LAC and in the international scenario. Because of this, the building of the political bridge and the setting of the negotiation previous to the PDCA are a part of the precedents that made it possible to build a bridge between the parties. In this process, the EEAS was in charge of giving the government of Cuba the technical training to start the negotiation of the PDCA with the EU and allow for rapid advancements in the negotiation of the Agreement, because the different themes had been identified and pre-negotiated.

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[31] F. Aldecoa, 'La diplomacia europea como Diplomacia Común', in F. Aldecoa (ed), *La diplomacia común europea: el servicio europeo de acción exterior* (Marcial Pons, Madrid, 2011) 32, at 19 – 41.

In opinion of one of the EU experts (2017b) interviewed during the course of this research, "negotiations started in 2014, but the internal debate within the EU had begun in 2010 and, when we were having a debate with the member states that we wanted to start off a new path with Cuba [...], once we got the confirmation, we began to have informal talks with the Cubans about the clause of Non-Violation of Human Rights, and the suspension clause, which mentions the non-proliferation of nuclear weaponry, so the Cubans were prepared"[32].

This process shows the cohesiveness and the communitarization of the EU's foreign policy in its relation to Cuba, as well as the relevance of the Agreement for both parties. It is also indicative of the professionality of both teams, as they both understood that they had to be clear on the concepts, the reach, and the technical complexity of the language in which the Agreement had been written, so that further steps could be taken on the EU and Cuba's common interests.

(3) Breaking the Glass Ceiling: Negotiation and Signing of the EU-Cuba Agreement (2014-2016)

The proposals and recommendations put forward in 2013 by the HR Catherine Ashton and by the European Commission to begin the negotiation of a Cooperation Agreement with the government of Cuba finished off the setting of the negotiations toward the Agreement. Because of this, the mandate conferred on 10 February 2014 by the EU Council means the start of the third stage and of the EU-Cuba NPM. In the mandate, the Council authorizes the Commission and the HR to begin negotiations with Cuba toward the PDCA, under supervision and with consultation of the Council's Working Group on Latin America, and of the Trade Policy Committee; this, along with suspending the Common Position against Cuba for the entire duration of the negotiations for the Agreement with the Cuban government.

As a matter of fact, the beginning of the negotiation rounds of the EU-Cuba PDCA marked the beginning of the third stage. This process was supervised from Brussels by the HR Catherine Ashton, and "as Head of the Delegation, Christian Leffler, EEAS Director of the Americas, whereas the Cuban delegation was headed by the Cuban Vice minister of Foreign Relations, Mr. Abelardo Moreno"[33]. The first round of negotiations toward the UE-Cuba RDPC was held in April 2014 in Havana and was loaded with great symbolism and political charge both at a regional and international level. On the one hand, the Cuban government was consolidating the Cuban socialist system 90 miles away from the US, without losing its sovereignty or giving up its principles and its political and social values. On the other, the UE, the United States' major commercial and military ally, consolidated its political, commercial and cooperative relation in the US's most sought-after territory. In fact, with this

[32] Statement by the EEAS official in the interview made in Brussels (2017b).

[33] Cubaminrex, '[Celebrada cuarta ronda de negociación del Acuerdo de Diálogo Político y Cooperación]', *Periódico Granma*, 15 December 2020.

step, the EU acknowledges the CP's sheer inefficacy in its relation with Cuba and begins to withdraw from the confrontational and isolation policy that the US was maintaining against Cuba. For this very reason authors such as Schouten are of the opinion that probably, the biggest challenge is the challenge to America. The rest of the world is showing some ability to understand and to be party to an adjustment to a new world order —but will America understand? That's the big problem[34].

The beginning of the negotiation rounds between the EU and Cuba was the first step towards dialogue and the end of the conflicts between both actors up to that point and the conflicts that the new world order might bring about. Because of this, the onset of the EU-Cuba New Political Model was a breach of the Cold War, as it established a relation on an equal basis, with no conditionings, and from both parties' mutual respect. At the same time, the EU acknowledges the right of the Cuban government and the Cuban people to make their own internal decisions on the future of the country in an independent manner. The NPM happens because the application of the CP was ineffective, and it did not make the Cuban government endeavour a political and economic transition. It was not implemented by all the member states, either, because it responded to the interests of the US. This context demanded a radical change in the UE's relation with the Cuban government that would allow for a new style in the political field and in the cooperation field, and one that would respond to the parties' common interests.

Secondly, it was imperative to build a space of political dialogue, of cooperation, on Human Rights, and of commerce on a basis of equality and of mutual respect from both parties. It was also necessary to unify all the policies about cooperation and commerce that the member states had with Cuba, and to rebuild the institutional bridges and the political dialogue that the EU had been holding with the government of Cuba in 1994. Thirdly, the EU had to back up the economic interests that the government of Cuba had, as well as those of the States that had participated in the European blockade and which now wished to abolish the CP in order to sign a PDCA with Cuba. Fourthly, the EU had to take this step to become more autonomous from the foreign policy that the US maintains against Cuba and towards LAC.

These factors have transferred a high political value to the beginning of the Agreement negotiations in Havana in the international scenario, and they have made both parties more visible both in their region and in the Atlantic axis. This fact has an effect, too, on the responsibility that both parties took up with the start of the negotiations, however the Cuban dissidence based on the United States reckoned the negotiations were a whitewashing in favor of Castro's government, or that they were simply leading nowhere.

Susanne Gratius argues that "rather than counterparts or representatives of a future Cuban government, the dissidents and human rights activists are seen, by Brussels, from the prism

[34] P. Schouten, 'Theory Talk #37: Robert Cox on World Orders, Historical Change, and the Purpose of Theory in International Relations' (*Theory Talks*, 2009), at 2.

of cooperation to development. Unlike the US, the EU does not identify the dissidents and the Cuba-based opposition members (whom the EU deems weak in terms of power) as the main agents of change, but rather the Government"[35].

For this reason, in the first negotiation round, the parties agreed on delimitating the bilateral topics and those of mutual interest, such as "migration, the environment, the extraterritorial effect of the American blockade and human rights. To fulfill this goal, they agreed on negotiating the Agreement in several fields of mutual interest"[36]. This strategy has allowed for both parties to reach their interests, while at the same time admitting that the Agreement could generate new opportunities for technical and financial bilateral cooperation, as well as dialogue about policies on several sectors. Likewise, the parties agreed on pushing forward, through the PDCA, an economic cooperation and an exchange by means of international law and the parameters from the World Trade Organization.

To reach this goal, in the second negotiation round, celebrated in Brussels, a negotiation structure was approved which was formed by the points where there was a strongest affinity between the parties, as well as those where there was less of an affinity, because this would allow them to quickly move forward through the former in order to go on to the latter[37]. The structure laid on three essential points: political dialogue, cooperation and dialogue about sectoral policies; and commerce and commercial cooperation, next to the decision of celebrating meetings in rotation, so that Havana and Brussels would be the capital cities in which the NPM negotiation rounds, the signing of the EU-Cuba PDCA and the decision for its provisional implementation would take place.

In this process, the EU ratified its intention of accompanying the Cuban government and people "in the current change and modernization process, by providing a reinforced framework for political and cooperation dialogue. The defence and promotion of human rights and fundamental freedoms are still central to the relation[38].

Besides this, in the 2nd EU-CELAC Summit, the regional State leaders encouraged the EU to exit the context of confrontation that the US were maintaining against Cuba, and for the negotiation, signing and implementation of the Political Dialogue and Cooperation with Cuba to begin[39]. According to Martínez and Pérez the results of the 1st EU-CELAC summit bolstered the change in the Latin American context. In order to negotiate with the region, the Europeans could no longer ignore Cuba, because its neighbors were in support of Cuba and

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[35] S. Gratius, 'Europa y Estados Unidos ante los Derechos Humanos en Cuba', 10 (20) *Araucaria. Revista Iberoamericana de Filosofía, Política, Humanidades y Relaciones Internacionales* (2008) 175-193, at 179.

[36] Statement by the EEAS expert in the interview made in Madrid-Brussels (2018).

[37] Ibid.

[38] Statement by the EEAS expert in the interview made in Brussels (2017).

[39] UE-CELAC Brussels Declaration, '*Building Bridges and Strengthening our Partnership to Face Global Challenges*' (2015), at 16.

were pressuring so that the island would not be excluded or, at the very least, so that their decisions were respected[40].

In this scenario, in June 2015, the eyes of Latin America and of the whole world were on Brussels – first, because it was the place of the 2nd EU-CELAC Summit, in which the member states backed, in the Brussels Declaration, "the opening and progress of negotiations on a landmark Political Dialogue and Cooperation Agreement with Cuba"[41]

The second most important event for LAC was the fourth round of the negotiation of the Agreement, on 15 and 16 June, in which the parties confirmed their interest in continuing to move forward quickly with the Agreement negotiations. This finished with the celebration of the first EU-Cuba Human Rights Dialogue Encounter, on 24 and 25 June, in Brussels, which marked a turning point in the relation of both parties, because human rights were a matter of Cuba's domestic policy.

In this context, and with the announcement of the visit of the President of the United States, Barack Obama, to Cuba, on 21 March 2016, it was possible to ramp up negotiations toward the Agreement. After seven encounters, the First Political Dialogue and Cooperation Agreement between the EU and Cuba was begun on 11 March 2016, ten days before Obama's visit. With this step, the EU confirmed its will to turn its relation with Cuba, and go one step beyond initiating bilateral negotiations, in order to build a space of mutual respect and understanding, through signing a PDCA with the Island, regardless of how the relation between the two neighbours would come along.

The European Union and the Cuban government have built a new political model in their relation with the aim to configure a political and institutional space of understanding and cooperation, where dialogue is the main instrument to be used in the area of cooperation, human rights, and trade, in an atmosphere of equal status, no interference in the parties' domestic matters, and mutual respect, so that mutual trust can be built.

The reality is that the NPM allows the EU to accompany the Cuban government and people in the process of transforming their economic and social model so as to promote the welfare of the Cuban people, with zero interference in the Cuban government and people's internal affairs. According to Pérez Villanueva (2013, p. 37), Cuba continues to transform its economy, implementing deep changes at legal and institutional levels, facilitating the development of other, non-state production forms, and, above all, acting from a pragmatism unknown to a large proportion of the current generations[42]. Moreover, the new model can bring the Cuban government the perfect tools and scenario to continue to make changes in its

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[40] C. Martínez Hernández, and S. Pérez Benítez, 'Relaciones Cuba-Unión Europea (1959-2014) desde un enfoque histórico', 122-123 *Revista de Relaciones Internacionales de la UNAM* (2015) 65-90, at 83.

[41] UE-CELAC, *supra* n.39.

[42] O. Pérez Villanueva, 'The Update of Cuba's Economic Model: The Need that Cannot be Put Off', in K. Dembicz (ed), *CUBA: ¿quo vadis?* (CESLA UW, Warszawski, 2013) 16 at 15-38.

economic system, to ensure coverage of the domestic market's needs; this, without overlooking the potential demand for their products in the European common market, as long as the Cuban products comply with the European common market's phytosanitary requirements.

In this context, Font and Jancsics[43] defends that "Cuba should follow a gradual state-controlled transformation from planning to market, but an Asian-type agriculture-led economic growth model does not seem to be a feasible option for the country. Therefore, Cuba should allow foreign actors to invest in large-scale infrastructure projects on the island".

The above-mentioned aims are part of the goals, the principles and the aspirations that both partners have signed in the PDCA, out of a mutual agreement and a previous negotiation. Through the NPM, the parties proved their political and institutional will to continue cementing their bilateral and multilateral relations in order to create a space of mutual trust, with the welfare of the Cuban people in the center and using political dialogue as a vehicle to reinforce their relation.

Because of this, the derogation, on 6 December 2016, of the Common Position that the EU had suspended in the process of negotiation with Cuba signifies the crystallization of the EU-Cuba NPM and it marks the difference between the EU's foreign policy toward Cuba as opposed to that of the US's. As a result, the signature of the EU-Cuba PDCA, on 12 December 2016, is the main manifestation of the New Political Institutional-Legal EU-Cuba Model, which was itself a product of the joint work by the HR Mogherini, the EEAS and the Cuban diplomacy.

This result proves that: "[H]istorical institutionalism's basic insights—that in order to understand how institutions work and change, we need to better understand what people who constitute these institutions believe and how they behave"[44]. The NPM allows to develop the new EU-Cuba relations, because it unifies, through the Agreement, the dispersed agreements that already existed between the member States and the Cuban government on cooperation and commerce. Simultaneously, it has allowed them to display a unified message in foreign policy and commerce, with the EEAS and the HR being the agents that initiate the political dialogue with the Cuban government.

Following Ayuso, Gratius and Pellón, from now on, both parties share a relation of dialogue that aims to build bridges, increase the mutual presence and facilitate the exchange with no previous requisites[45]. Because of this, the EU-Cuba Agreement is an essential tool for both partners to foster their foreign policy goals, with the central aim of working for the

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[43] M. Font and D. Jancsics. 'From Planning to Market: A Framework for Cuba', 35 *Bulletin of Latin American Research* (2016) 148 at 147–164.

[44] Steinmo, *supra* n. 9, at 120.

[45] Ayuso et al, *supra* n. 26, at 4.

welfare of the Cuban and the European people. However, if a change happens in the EU foreign policy toward Cuba, the NPM-PDCA can turn into an instrument of political pressure for the Cuban government to tackle deeper transformations around Human Rights and in its economic model, namely, freedom of speech, and a further opening and liberalization of its economy.

(4) Implementation of the EU-Cuba Agreement (2017-2022)

The beginning of the fourth stage prompts us to analyse, from a place of marked uncertainty, the challenges that lie ahead of the ratification and provisional implementation of the EU-Cuba PDCA, because it is a Mixed Agreement. In this kind of Agreement, the EU and the member states have common competences in their relation with Cuba. For this reason, 83 of the 89 articles that form the EU-Cuba PDCA are provisionally being applied. Up until, on December 15, 2020, only one-member state (Lithuania)[46] is left to ratify the PDCA; the latest ones to ratify were Netherlands and Sweden, so it seems that ratification will not face any obstacles.

This fourth stage is framed in the post-hegemonic era, and co-occurs with the rise of nationalisms in Europe, as well as with the migratory crisis that broke out in Europe, as a consequence of the Syria war, which has expanded on to Libya and to the European territory –these events, along with the attacks perpetrated from 2015 to 2018 in France, the United Kingdom, Belgium and Spain, have marked the EU's common security policy. One more factor to add to these is the impact of COVID-19 in the European Union, and "Russia's aspiration to regain and keep the Cuban market, especially with Russian high technology products"[47]. These elements can all hinder the ratification of the Agreement, but they can also act as a catalyst to push its application forward. An added factor to this scenario is the US President Donald Trump's intention to make his country the first hegemonic power in economy, politics, and the military, just like it was in the 20th Century.

The coming into power of Donald Trump in the US has not brought along better times for the diplomatic relation between both neighbors, since 2017 saw a decrease in the staff of the "American embassy and the closure of the embassy in Havana in December 2018"[48]. Moreover, the blockade was reinforced in 2019, with the implementation of Chapter III of the 1996 Helms-Burton Act, according to which American citizens are enabled to sue any company that occupies properties that had been confiscated by the Cuban government in 1959. The change in the relationship of the neighbors led to a strengthening of the blockade

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[46] Political Dialogue and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Cuba, of the other part, OJ 2017 L 259.

[47] N. Kalashnikov and L. Nikolaeva, 'Russia and Cuba: New Stage of Cooperation', in K. Dembicz (ed), *CUBA: ¿quo vadis?* (CESLA UW, Warszawski, 2013) 315 at 311-338.

[48] M. Pentón, *'USCIS cierra permanentemente su oficina en la embajada de EE. UU. en La Habana'*, El Nuevo Herald, 15 December 2020.

against Cuba and to an increased pressure from the US in their foreign policy to destabilize the Cuban economy and its socialist system. "While the United States rate these measures as 'embargo', Cuba insists that it is a 'blockade'. One way or the other, the sanctions are one-sided, extra-territorial, and designed to punish the Cuban people"[49].

For this reason, the EU and Cuba are going to have to implement policies to minimize the effect of the blockade on Cuba's external trade, to protect the European businesspeople, and to allow using the EU-Cuba PDCA as a tool to ensure the well-being of the Cuban people and the update of the economic and social model. In doing the latter, the Cuban government is being aided by the European institutions. In this scenario, it is worth insisting that the European activities in Cuba will continue to be restricted for as long as the US's embargo endures. These restrictions will affect the EU's institutional network and the practical schedules of the member states[50].

In order to achieve each of the goals, in 2019 the EU and Cuba held two Political Dialogues about Unilateral Coercive Measures, the last of which was in November 2019 in Havana, with the aim to tackle "the toughening of the economic, commercial and financial blockade imposed by the United States on Cuba"[51]. In this context, some EU member states can hinder the ratification of the EU-Cuba Agreement in the European Parliament, with the aim to protect their political and commercial interests with the US, just like it happened with the CP back in 1996.

(c) THE "OK" OF THE EUROPEAN PARLIAMENT TO THE EU-CUBA AGREEMENT

The main challenge in the fourth stage was to reach the provisional implementation of the Agreement, which had been put on hold for six months by the European Parliament. Because of this, the EU-Cuba PDCA had to wait until June 2017 for the European Parliament to approve the signing and provisional implementation of the Agreement. The favorable result achieved in the Parliament makes it 70% likely that the PDCA be ratified by the European Parliament after each member state has ratified the Agreement in its own parliament.

It is of note that the non-legislative Resolution passed by the European Parliament gives the go-ahead only to the provisional implementation of the Agreement and it authorizes the EU Council to sign the Agreement. We must underscore that the four Political Dialogues on Human Rights between the EU and Cuba from 2015 to June 2020 contributed to unite resolves within the European Parliament to approve the start of the provisional

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[49] C. Alzugaray, 'La política exterior de Cuba en la era Trump', in A. Serbin (ed), *Cuba y el proceso de actualización en la era de Trump* (Pensamiento Propio, Buenos Aires, 2017) 216, at 205-220.

[50] J. Roy, 'Las relaciones entre la UE y Cuba en el marco de la apertura de Barack Obama y Raúl Castro', 10 *Análisis Real Instituto Elcano* (2015) 1-8, at 8.

[51] EEAS, 'La Unión Europea y Cuba mantienen un Diálogo sobre Medidas Coercitivas Unilaterales', published on 30 November 2019, accessed 15 December 2020.

implementation. This process is a moral compromise for the European Parliament to approve the PDCA, as long as there isn't a violation of the clauses that can provoke the suspension and end of the Agreement, such as violation of Human Rights, the respect and promotion of democratic principles and the disarmament and nuclear non-proliferation, included in Art. 1, section 5, and Art. 7, respectively.

We agree with Cástor Díaz Barrado that "the parties to this Agreement take different and even confrontational positions in regards to the "democratic principle" which has long kept them at a low level of cooperation, and which, at times, has created strong clashes and discrepancies on this subject"[52].

The delay of the European Parliament in giving a thumbs-up to the implementation of the Agreement laid the foundations for the announcement of the provisional implementation of the PDCA to reinforce the political dialogue and the international cooperation between the EU and Cuba, because both partners chose 1 November 2017 to make the announcement, thus impregnating it with a high impact and a twofold symbolic charge on a regional and international level, for being the day that the EU voted in the United Nations against the US's economic blockade to Cuba. Its implementation was programmed for May 2018, one month after the Cuban elections, and after HR Mogherini had received the support from the Cuban government to implement the Agreement with the EU, in her third visit to Cuba in early 2018.

In this scenario, there is still the possibility that not every member state ratifies the Agreement. If this were the case, the provisional implementation for an indefinite period of time of the Agreement would still be valid in the sections that are the EU's exclusive competence and make for 90% of the Agreement. Whereas, if all member states do ratify, the Agreement with Cuba would then begin to be developed, in the stage called "The Entry into Force and Implementation of the PDCA between the member States and Cuba".

Following Ortiz (2016, p. 371), the EU's goal is clear: they don't want to lose their status as primary trade partner if the embargo is lifted, despite the fact that the trade between the two neighbouring countries -Cuba and the US- will be quicker and less expensive than that between Brussels and Havana[53]. "But in the longer term Havana will need to send clearer and more coherent economic policy messages if it is to realize the potential for development offered by trade and investment. Europe has a great political and entrepreneurial interest in constructively accompanying Cuba along that road"[54].

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[52] C. M. Díaz Barrado, 'El 'Principio Democrático' al hilo del Acuerdo sobre Diálogo Político y Cooperación entre La Unión Europea y Cuba', 36 *REEI (*2018) 1-40, at 26. [doi: 10.17103/reei.36.03]

[53] E. Ortiz, 'European Union - Cuba: Complex Relationship, Uncertain Future', 32 *Anuario Español de Derecho Internacional (*2016) 337-356, at 339. [doi: 10.15581/010.32.337-371]

[54] E. Schmieg, '*Cuba 'updates' its economic model: perspectives for cooperation with the European Union*', 6/ 2017 SWP Research Paper (2017) 1-28, at 26.

This new stage would be a new step to finish up the institutional change between both actors, but it would happen in the framework of the relations between the member states and the Cuban government, and it is more likely after the election of Miguel Díaz-Canel as the new President of Cuba, and as the main leader in charge of continuing to make changes in the Cuban economic and social model, in favor of ensuring the survival of the Cuban socialist system into the 21st Century and the well-being of the Cuban people. Authors such as García Castro and Brenner state that no one expects Miguel Díaz-Canel Bermúdez, whom the National Assembly elected as Cuba's president in April 2018, to chart a course dramatically different from the one President Raúl Castro had established[55].

For this reason, the implementation of the EU-Cuba Agreement has become an instrument that allows both parties to enhance their political weight, their visibility and their credibility in the international arena, because it is one more proof that the EU is effectively distancing itself from the US's foreign policy, and it is also a token of support to the Cuban people and government in the international arena. Whereas Navarro is of the opinion that "negotiating an Association Agreement between Cuba and the European Union [...] would help to considerably increase the trade and investment exchanges between the two parties"[56]. This can be the higher stage of the New Political Model in the EU-Cuba relationship.

(1) The Institutional Mechanism of the New EU-Cuba Model

The EU-Cuba PDCA has a novel and complex structure, very characteristic of International Agreements. It has 89 Articles distributed into five Parts and nine Titles. The Agreement includes, in the 24 points of its Preamble, the aspirations, the limitations of the parties, the principles and the aims that embody the Agreement. The EU-Cuba NPM has a new structure because both parties acknowledge political dialogue as the axis and the only effective tool to promote and materialize the aspirations, the limitations of the parties, as well as the principles and the structural aims to consolidate the NPM in their relation.

According to Díaz Barrado and Morán "both Cuba and the European Union settle and reaffirm their own values, and their purpose is to open, in a limitless way, an ample space for cooperation, with neither of the parties having to relinquish the positions that they have traditionally maintained"[57]. This does not imply that the EU may begin to export its values to the Cuban government and people, and ensure a higher welfare to the society, through a better distribution of resources in society and through the effective implementation of the

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55 T. García Castro and P. Brenner, 'Cuba 2017: The end of an era', 38 (2) *Revista de Ciencia Política* (Santiago) (2018), 259-279, at 275. [http://dx.doi.org/10.4067/s0718-090x2018000200259]

56 A. Navarro, 'La Nueva Relación entre la Unión Europea y Cuba', in J. Álvarez et al *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz* (Aranzadi, Pamplona, 2019) 232, at 227-245.

57 C. Díaz Barrado, and S. Morán, 'Las relaciones Cuba y Unión Europea: el comienzo de una gran amistad', 34 *Anuario Español de Derecho Internacional*, (2018) 969-1001, at 970. [Doi:10.15581/010.34.969-1001]

economic changes approved in the 7th Congress of Cuba's Communist Party.

The EU-Cuba PDCA is an Agreement for Scientific and Technical Cooperation which includes Research, Development and Innovation, scientific exchange and technologic transference to guarantee the transformation of the Cuban economic and social model. Moreover, the PDCA does not have a financial budget for its implementation and development, nor is it a trade agreement, or a preferential one, because Cuba ceased to be a recipient of the scheme of generalised tariff preferences in 2014. For this reason, the Agreement is, to the Cuban government, an essential tool to foster the transformation of the island's economic model, with the pace and the control that the government itself imposes.

In the EU-Cuba NPM, the partners have put working with the Cuban government in the centre of the relation, and in doing so, working for the welfare of the Cuban society by using political dialogue, and, even if other actors are acknowledged, these will only be included "when appropriate", because their participation is not mandatory. Due to this, all proposals and initiatives that may be presented will be subject to debate and approval through the political dialogue that the parties develop. To fulfil this aim, the Agreement has a complex structure that spins around the axis of political dialogue, with this being the mechanism that can guarantee that the Agreement responds to the interest of Cuban, European and Latin American societies.

In order to achieve an effective functioning, the Agreement has created four bodies and entitled them with enforcing the agreement and implementing every one of its decisions: the Coordination Committee, the Joint Council, the Joint Committee, and the Cooperation Subcommittee. In this new context, the enforcement of the Joint Council (JC) on 15 May 2018 is an extremely relevant fact in the institutional change of both parties, because it is the body in charge of enforcing and supervising that the Agreement is correctly functioning, with adherence to the parties' common principles, aims, and interests. The configuration of the Joint Council gives its decisions great political weight and a binding character for the parties. Moreover, the first meeting was led by the HR Federica Mogherini, and the Foreign Affair Minister of Cuba, Bruno Rodríguez, was in attendance.

As part of the consolidation of the institutional change and the NPM, the JC must assess the Agreement every year and no less often than every two years, and must be formed by "ministry level officers". This trait enhances the political weight of the five political dialogues that were approved in the 2018 Joint Council. In order to ensure this trait, it is foreseen that most meetings be held in Brussels.

In parallel, in the four bodies created *ex officio* by the Agreement lies the strength and the complexity of the structure of the EU-Cuba Agreement, to ensure that the European institutions and the Cuban government can work for the welfare of the Cuban people during the process of transformation of Cuba's economic and social model, in a context where the only condition is that both parties work for a common interest and in benefit of the Cuban and the European people.

(2) The EU-Cuba Joint Council Within the Framework of the NPM (2018 – 2022)

The entry into force of the EU-Cuba NPM in 2018 is a landmark for both parties and is highly symbolic in the area of international relations; firstly, because it is the first case of success of implementation of a political, institutional and legal model of relation between the EU and Cuba – ie, the US's major socio-political and commercial partner and the country that has been resisting an economic blockade from the US for more than 50 years without ceding its sovereignty and without making a political transition – and which places the welfare of the Cuban and European societies in its center. Second, the Agreement or New Political Model is based on and articulated around a political dialogue on an equality basis, by mutual agreement, and from mutual respect.

Alongside this, the provisional implementation of the Agreement is the finest manifestation of the restoration of the political dialogue and the political relations between both parties, since it mends the diverging views between the EU and its member states in their relation with Cuba. Simultaneously, the PDCA is all the more relevant because it encouraged the parties to hold four more political dialoguing sessions on Human Rights, all of which was the result of the cohesion and coordination work carried out by the HR, the government of Cuba and the EEAS around the new foreign policy that both actors have been building in their relation.

The implementation of the Agreement has allowed the enforcement of the five dialogues that were approved in the first EU-Cuba Joint Council (2018):

- The Fight Against Mass Destruction Weapons;
- The control of Conventional Guns;
- Human Rights;
- The Implementation of the 2030 Sustainable Development Agenda; and
- The Solution to Unilateral Coercive Measures.

The five political dialogues approved in the Joint Council directly contribute to facilitating a greater bilateral cooperation in the areas that the EU and the government of Cuba were keen to tackle in order to strengthen their relation in the framework of the PDCA. The announcement by the Joint Council can be considered as a moral binding for the parties in the international arena, and a whole declaration of intent from the EU and Cuba in favor of acting, through the Agreement, in global governance.

The dialogue on human rights is at the core of EU-Cuba relations. The annual human rights dialogue allows both sides to exchange views on basic principles and address mutual concerns. One of the objectives of the dialogue is to identify areas for cooperation and share best practices. For example: "Support to human rights defenders; Monitoring and follow-up on cases of violation of freedom of association, peaceful assembly and freedom of expression,

including artistic expression; Support to the promotion of economic rights, and in particular to the emergence of the private sector; Support to the promotion of women's rights and gender equality; Support to abolition of the death penalty"[58].

Despite this situation, it is worth noting that "the European Union is the only foreign partner with which Cuba has agreed on a regular political dialogue about human rights. Therefore, the EU has opened an important space for deliberation and exchange (…). [T]he common agenda of human rights is an important tool to secure the presence and influence of the EU at the beginning of a new political and economic era for Cuba" [59].

The next formal dialogue on human rights will be held in Havana in October in 2020. In this dialogue the Civil society has a crucial role to play; for this reason, "all five political dialogues are preceded by an event with civil society to ensure that exchanges are as inclusive as possible"[60]. In this space, in 2019, "the EU drafted a Gender Action Plan for Cuba, which is now being implemented"[61]. These results are a qualitative leap forward in the development of the EU-Cuba rapport, and both parties are showing hints of gradual openness.

In order to keep reinforcing the cooperation area, in November 2018 the HR Mogherini encouraged the celebration of the first meeting of the Cooperation Subcommittee, in Havana, with the aim to ensure the assignment of an ODA budget for Cuba in the 2021-2027 timeframe; whereas the commercial area has been strengthened with the participation of the European Commissioner for International Cooperation and Development, Neven Mimica in the Cuba Business Forum celebrated in Havana in 2019.

Dialogue on the Sustainable Development Agenda is closely linked to dialogue on cooperation. This link is due to the fact that the projects that each party is implementing in the framework of the Agreement are aligned with the guidelines from the 2030 Sustainable Development Agenda and with the government's interest to guarantee the welfare of the Cuban people. For this reason, the projects focus on three sectors: "sustainable agriculture and food security, environment and support for a better use of key natural resources for sustainable development, as well as support to sustainable economic and social modernization. The selected sectors respond to the national priorities identified in the "Cuban Guidelines for economic and social policy", which aim to promote reforms in the country".

Quoting Garay and Toirac "the European cooperation in Cuba is clearly on the increase. In fact, at the end of 2019, the ongoing projects had a value of 139 million, four times the average of the previous ten years". This behavior helps to reinforce the relation between both

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58 EEAS, *Chapter on Cuba: EU Annual Report on Human Rights and Democracy in the World 2019 (2019)*, accessed 15 December 2020.

59 A. Ayuso and S. Gratius, *supra* n. 19, at 102.

60 EEAS, '*EU-Cuba Relations*'. (2020), accessed 15 December 2020.

61 EEAS, *supra* n. 58.

partners, and allows the EU for an increased visibility in the Cuban social context, thanks to the exchange of experts and the academic exchanges in the framework of the Erasmus+ programme. To deepen the relationship, the EU-Cuba Joint Council met for the second time on 9 September 2019 in Havana, Cuba. The council analysed the level of implementation of the decisions taken in Brussels. The purpose of this meeting was to reinforce the NMP and ensure compliance with the agreements. For this reason, the joint committee was launched.

Bruno Eduardo Rodríguez Parrilla, Minister of Foreign Affairs of Cuba considers that: "The celebration of this second Joint Council is an example of the progress in our relations with the EU. It allows us to take stock of this progress and to outline future actions of mutual benefit". In the same line, Federica Mogherini, High Representative for Foreign Affairs and Security Policy, signed that: "The Political Dialogue and Cooperation Agreement between the EU and Cuba is a sign of the importance we attach to our relations. We hope that the new chapter we have opened can further strengthen the friendship between the people of Europe and of Cuba. This is why we are here: to celebrate and to further strengthen our dialogue and cooperation"[62].

With this step, the risk that the Joint Council meetings could become merely formal summits to read through the agenda items has been minimized, as it establishes a work planning that will have to be supervised by the Joint Council and launched by the Joint Committee.

In Sanahuja's opinion, what is most relevant is that the Agreement places the EU in a favourable position, as a partner and as an interlocutor, in the face of the changes that can happen in the future. Once again, the Agreement itself and the intensifying of the rapport with Cuba stand as a symbol of the EU's involvement with Latin America and the Caribbean[63]. On a regional level, the parties want to reinforce and encourage a stronger triangular cooperation between the EU, Cuba, and LAC. In this case, Cuba would be the link to the cooperation, due to Cuba's influence in international politics and its high symbolic value all over the Caribbean and Latin America. See OPS and SEGIB "A unique case is that of Cuba, since it plays a role as a high relevance offeror in the South-South cooperation for health development [...] [C]uba is the only country that, in the database for 2015, has at least one record for one project or action offered for each and every country."

Josep Borrell, in the context of COVID19, said that: "In Cuba, the EU is strategically adjusting the cooperation projects to the new context [...] [W]e are grateful to Cuba for having responded immediately to the call for doctors and nurses by Italy and other

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62 EU-Cuba Joint Council (adopted 9 September 2019), accessed 15 December 2020.

63 J. Sanahuja. 'Crisis de globalización y hegemonía en cuestión: un escenario de cambio estructural para Cuba y Latinoamérica y el Caribe', in A. Serbin (ed), *Cuba y el proceso de actualización en la era de Trump* (Pensamiento Propio, Buenos Aires, 2017), 197, at 165-204.

countries"[64].

In this framework, "a dialogue was initiated to explore proposals by organizations from the civil society that would give an answer to the pandemic in Cuba, from the viewpoint of health and of lessening the impact on vulnerable communities, especially on ageing people"[65]. The outcome of this dialogue is the signing of two projects, "with a total financing of 2 million euros, in the framework of the Thematic Programme of Support to Organizations of the Civil Society and Local Authorities"[66].

At this point, two projects stand out: the one named "Taking care of the elderly in times of COVID-19", joining the Italian organization WeWorld-GVC and the Cuban Society of Gerontology and Geriatrics, as well as the Havana provincial government"[67], and the project to "Increase the measures of prevention and response to COVID-19 in Cuba, led by the Cuban Society of Hygiene and Epidemiology and the Cuban Society of Bioengineering, together with the Spanish NGO Movement for Peace (MPDL), and to decrease the expansion of the SARS-CoV-2 in the population"[68]. The signing of both projects within the context of COVID-19 has helped to reactivate the EU-Cuba Agreement and to reinforce the work done by the Government and by the Cuban people to stop the COVID-19 and to begin the reactivation of the economy.

The work done by Cuba in the South-South cooperation is all the more relevant because it has managed to overcome the economic barriers that the six-decade long economic blockade by the US has imposed. For this reason, Cuba can be a valuable partner to promote multilateral initiatives, as has been the case in Colombia's peace process and in the several South-South cooperation projects that have been implemented in the countries of this region.

Gutierrez, consider that "the Agreement is, undoubtedly, the first expression of the EU's 2016 Strategy in its aim to establish a closer link with Latin America, but, this Agreement is also testing the EU in its ability to make profit of the opportunities that Latin America brings, overcoming the challenges and avoiding the risks"[69]. While Díaz Barrado considers that the "Agreement closes the "cooperation framework" that the EU and LAC have designed, which theoretically should be based on common values and principles; nevertheless, in this case, a more pragmatic approach to international relations was preferred" [70].

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[64] J. Borrell. *'La Unión Europea y América Latina y el Caribe: aunar esfuerzos frente al coronavirus'* (Statement by HR Josep Borrell, 2020), accessed 15 December 2020.

[65] EEAS, 'Unión Europea apoya a Cuba en su respuesta frente a la COVID-19', accessed 15 December 2020.

[66] Ibid.

[67] Ibid.

[68] Ibid.

[69] C. Gutiérrez Espada, 'La Unión Europea después del Brexit', in N. Cornago et al, *Repensar la Unión Europea: Gobernanza, seguridad, mercado interior y ciudadanía* (Tirant lo Blanch, Valencia, 2019) 37, at 33-48.

[70] Díaz Barrado, *supra* n. 52, at 28.

In the framework of the Covid-19, the EU can establish a closer cooperation with LAC and especially with Cuba in the field of research through the Horizon2020 program and the Directorate General for Civil Protection and Humanitarian Aid of the European Union (ECHO).

To achieve this goal, the EU can use the Bolivarian Alliance for the Peoples of Our America (ALBA) so that EU can acquire greater visibility and weight in the region, relying on Cuba (co-founder of ALBA together with Venezuela), to stimulate greater political dialogue with the Venezuelan government and continue to strengthen health cooperation with LAC in the framework of Covid-19. On this last point, the EU could support the ALBA Humanitarian Fund, created on July 3, 2020, by the ALBA Bank, with the aim of "consolidating and executing resources aimed at actions to mitigate the effects of the Covid-19 pandemic, among them the necessary financial support for the economic boost"[71].

This scenario has been achieved due to the effects that Covid-19 is having in LAC and because of the policy implemented by the President of the United States Donald Trump towards LAC, especially against Cuba and Venezuela, from 2017 to October 2020. This has caused ALBA to leave behind the "existential crisis after the death of Hugo Chávez in 2013 and the death of Fidel Castro three years later" [72]. On the 15th anniversary of its founding, on December 14, 2019, the commitment was resumed to deepen "regional independence and genuinely Latin American and Caribbean integration"; and "regional unity and integration as the only way to confront the domination exercised by the hegemonic structures of world power"[73].

In this scenario, on August 6, 2020, the first phase of the project "Single Window of Foreign Trade" (SWFT) was launched, with the aim of facilitating the management of Cuban and foreign businesspeople who carry out international purchase and sale operations in Cuba"[74]. This mechanism is part of the gradual process that the Cuban government is carrying out with various specific objectives. The first is to streamline internal procedures to respond to European investors who wish to invest within the framework of the EU-Cuba PDCA; second, to modernize the central administration of the State and especially the area of Foreign Trade to adjust to the procedures of the international market, and at the same time, to minimize the effects of the North American blockade on the island's foreign trade.

We are of one mind with Arturo López-Levy's that, starting with the 2016 agreement, it

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[71] Banco del ALBA, '*Nace el Fondo Humanitario del ALBA para hacer frente a los desafíos económicos de la pandemia del COVID-19*', accessed 15 December 2020.

[72] S. Gratius, and J. M. Puente, '¿Fin del proyecto alternativo ALBA? Una perspectiva política y económica', 180 *Revista de Estudios Políticos* (2018), 229-252, at 243. [doi: https://doi.org/10.18042/cepc/rep.180.08]

[73] Portal ALBA, '*Declaración de la XVII Cumbre de Jefes de Estado y de Gobierno del ALBA-TCP*' (2019), accessed 15 December 2020.

[74] EEAS, 'Cuba pone en marcha primera fase de Ventanilla Única de Comercio Exterior, fruto de la cooperación de la UE en el país' (2020), accessed 15 December 2020.

would be possible to "articulate mechanisms of resistance, of protection of commercial and financial transactions, and of legal counter-reprisals and punishments against those actors who, within the US system - individual claimants, companies and lawyers - intend to use the US courts to initiate litigation contrary to European and Cuban laws, and International Law. This is the worst scenario for the Trump administration"[75].

For this reason, the start-up of the Cuban one-way window constitutes an essential step in the consolidation of the EU-Cuba NPM, increasing the responsibilities and tasks that the Joint Council will have to supervise. At the same time, it is a sign of the EU's distancing from the foreign policy that the United States maintains against Cuba and LAC. In addition to this, it reinforces the EU-Cuba cooperation in international bodies, since the One-Way is the result of cooperation from the European Union in Cuba, MINCEX and technical support from UNCTAD (United Nations Conference on Trade and Development).

Along with the implementation of the SWFT, and with the aforementioned projects, the EU reinforces its commitment with the Cuban people and the international society in order to work for the welfare of the European, Cuban and Latin American people by means of the political dialogue. Finally, the provisional implementation of the EU-Cuba PDCA bestows a formal status to all the previous dialogues that the parties had been carrying out before the Agreement, with a low impact on the Cuban and European society.

(D) CONCLUDING REMARKS

The new political model forged in the EU-Cuba bilateral relation starting in 2014 was a result of the institutional change between both parties, and it put an end to the conditions and the interference that the EU had previously been imposing in its relation with Cuba, by way of the Common Position. The institutional change of the EU and the government of Cuba gave way to a relation based on the institutional political dialogue on a basis of equality and mutual respect from both parties in the political, commercial, cooperation and human rights arenas. Interestingly, the NPM has reinforced the institutional political dialogue between the partners, in a 180-degree turn of the EU's relation with the Cuban government and people in each of the areas that gives substance to the PDCA and configures the NPM. Through the NPM, the parties have proved to be politically and institutionally willing to continue strengthening their bilateral and multilateral relations in order to build a space of mutual trust.

From a pragmatic point of view, the relation between the EU and Cuba has changed against all odds, with a full institutional change in each area of the EU-Cuba NPM, and offers

[75] A. López-Levy, 'Cuba y el Gobierno de Trump: Retorno al conflicto e implicaciones para la relación triangular con Europa', *8 Análisis Carolina* (2019) 1-19, at 4.

every key aspect for it to be replicated in the EU's relation with the government of Venezuela and, furthermore, to be used by the contact group tailored by the EU –Norway and Cuba – with the aim to gather the government and the opposition of Venezuela around the negotiation table and help the country reach a social and political stability.

On the other hand, the political and institutional dialogue reinforced the EU-Cuba relation, allowing the negotiation and signing, out of a mutual agreement, a PDCA with a complex structure that includes and respects both parties' norms and international law. In 2018, they created and enforced the first EU-Cuba Joint Council, for it to be the political, institutional and legal body in charge of ensuring and monitoring that the implementation of the PDCA responds to both parties' common interest. Because of this, its decisions are bonding and mandatory for each party. Herein lies the main strength of the EU-Cuba NPM, because every decision and recommendation is negotiated and based on a mutual agreement.

For this reason, "we can state that the PDCA determines the legal regime of the bilateral relations between the EU [...] and Cuba, which not only consolidates and reinforces the previous progress, but it also modernizes, expands and gives a future projection to a general legal framework that boosts Cuba as one of the privileged partners of the EU in Latin America and the Caribbean"[76].

As far as cooperation goes, for the first time it was possible to establish a Dialogue on Human Rights between both actors, and, as a result, five meetings were held between June 2015 and June 2020.

The strategic value and the undeniable political symbolism of Cuba for the whole Caribbean and Latin American region does not escape our analysis, and this twofold value was made obvious in the EU-CELAC 2013 and 2015 summits, where the pressure exercised by the Latin American States was a key element for the EU to start negotiating, signing and implementing the Political and Cooperation Dialogue with Cuba. Following the initial results, this scheme can be replicated in the LAC region.

In fact, with the self-inflicted absence of the United States in the political changes announced by Raúl Castro as of 2018, "the EU has the opportunity to assume the leading role and strengthen the alliance with the Caribbean and Latin American countries that follow the same policy of international insertion for Cuba"[77] .

Certainly, the EU can become a strategic partner to continue stimulating the reactivation of ALBA and to contribute to regional integration in Latin America and to strengthen the EU-LAC health cooperation through triangular cooperation. With this step, the EU would achieve great visibility in LAC and would reinforce the role of Cuba as an essential pivot in

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[76] J. Martín Arribas, 'The Legal Regime of the Current Bilateral Relations Between the European Union, its Member States and the Republic of Cuba', 13 *Revista Electrónica Iberoamericana* (2019) 508-604, at 601.

[77] A. Ayuso, and S. Gratius, *supra* n. 19, at 101.

South-South Cooperation, and Triangular EU-Cuba-LAC.

Secondly, the implementation of the PDCA on 15 May 2018 turned the NPM into a "present-future" tool, because it invested the relation with more trust, and because it ensured a bigger political and moral weight to the government of Cuba before the US and the EU in its relation with LAC. Because of this, the PDCA has at its core the aim to align with the welfare of the societies (Cuban, European, and Latin American) and to offer the government of Cuba the tools to contribute to the change of the Cuban economy. Besides this, it offers the EU the possibility to accompany the government and the people of Cuba in the process of economic change. The challenge of this external part of the process of change which the Cuban 8government has to face consists of the urgent need of adapting the original roadmap of the internal transformation process until 2018 to the entirely different and rapidly changing external conditions[78]. Finally, Cuba is very slowly but progressively opening itself to the world, and, most importantly, it is doing so for the well-being of the Cubans. The challenge here is to observe how the EU wants this opening to be and how the EU will continue to open itself to Cuba in the framework of the EU-Cuba NPM while the U.S. continues to be the hegemonic power and with the world being negatively affected by the COVID-19 and the related crisis. This scenario can be an opportunity to enforce new mechanisms of bilateral cooperation in the fields of health and foreign trade, as well as it is in the best interest of the European and the Cuban people and, by extension, of the international community.

[78] W. Grabendorff. 'Cuba: The Challenges of Change', in A. Serbin (ed), *Cuba y el proceso de actualización en la era de Trump* (Pensamiento Propio, Buenos Aires, 2017) 35, at 33-56.

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From bullets to fake news: Disinformation as a weapon of mass distraction. What solutions does International Law provide?

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Abstract: Disinformation is one of the features of the hybrid wars, arguably the most frequent types of current conflicts according to relevant international organizations such as the United Nations, the European Union or NATO, which place the so-called "fake news" among the main threats to tackle. Although disinformation is not new, the current digital means have aided tremendously in the extent and depth of their impact. These tools allow the shaping of public opinion as never before, at times determining the outcome of elections, even in nations with consolidated democracies. Could a campaign of disinformation against a state be considered an interference in its internal affairs or a violation of its national sovereignty? Could such an action represent a threat to peace and security? How to face it? Conventional warfare has given way to 'information warfare', an expression openly used by most exemplary international organizations. New approaches and new rules deem necessary.

Keywords: Armed conflicts – cyberwar – hybrid conflicts – disinformation – fake news – journalism – International Law

(A) PRELIMINARY REMARKS

It is more appropriate to refer to *false messages* than *false news*, since the latter expression is contradictory itself. News, by definition, refers to a new and true event, and false news turns out to be an oxymoron hastily coined to designate the problem we are going to face in this paper. National institutions, international organizations as well as the vast majority of researchers who approach this phenomenon from different perspectives refer it under generic name of *disinformation*, despite the fact that among citizens and even in the jargon of the media[1], the term fake news has become popular. Obviously, the aim of this work is not the nominal clarification of a concept but the concept itself: the malicious rigging operations to influence citizens by spreading false messages with the intention of taking advantage or causing harm. But according to the rigour required by scientific language we need a name, so we will call it disinformation since, as has been said, it is the preferred expression among scholars, with some nuances. A report issued by the Council of Europe[2] distinguishes three types of information disorder: dis-information (information that is false and deliberately created to cause harm), mis-information (information that is false, but not created with the

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1 *Fundéu*, 28 September 2017.

2 Council of Europe, *Information Disorder : Toward an interdisciplinary framework for research and policy making* October 2017, at 20.

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intention of causing harm), and mal-information (information that is based on reality, used to inflict harm on a person, organization or country). It is convenient to make this initial clarification to avoid confusion, in a timely but brief manner lest we distract from the object of this work. We must be aware that the rapid evolution of reality generally makes sterile the effort to define it at a precise moment.

We cannot either defend the originality of this paper strictly speaking, because disinformation as a practice to achieve political or military objectives is not new at all. It has existed since a very long time ago and it has tremendously improved its methods particularly from World War II, as reveals the valuable study by D.H. Levin.[3] Its basic procedure is quite simple: disinformation consist of operations (open or secret) designed to favor any of the parties by using informative manipulation that ends up modifying the position of the citizens who remain oblivious while believing they act according to their free will, because the civil population is the main object of the attacks. Nevertheless, what is truly original now is the use of these methods at large-scale with an unattainable significance only a few years ago. Only the number of disinformation cases against European Union countries attributed to Russian sources from January to October 2019 (998 cases) is more than double that for the same period in 2018 (434 cases).[4] NATO[5] admits that deception has always been part of conventional conflicts but their influence has increased exponentially to become an essential part of modern hybrid wars, with the help of the speed and intensity offered by the internet.

Another novel aspect is the consideration of this problem as a serious threat to the security of states. Contemporary governments such as Spanish[6] place disinformation and interference in political participation among the main challenges for their own security, so we could say that these manoeuvres, barely considered until recently, have gained positions among the dangers we face nowadays, and have put us on alert only since a very recent time. The reactions made by states are still taking place in a somewhat disorderly and ineffective way, both separately and jointly (within the international organizations), and frequently in a double direction. Firstly, with the implementation of rules to prevent from disinformation dissemination and at the same time by dangerously exceeding the limits that protect freedom of expression[7], and secondly by simply warning us to be vigilant[8], which is a public

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3 D. H. Levin, "When the Great Power Gets a Vote: The Effects of Great Power Electoral Interventions on Election Results" *International Studies Quarterly*, Volume 60, Issue 2, June 2016, at 189–202.

4 European Parliament, Resolution of 10 October 2019 on foreign electoral interference and disinformation in national and European democratic processes.

5 Topic: NATO's response to hybrid threats, 8 August 2019.

6 Law Decree 14/2019, 31 October 2019, por el que se adoptan medidas urgentes por razones de seguridad pública en materia de administración digital, contratación del sector público y telecomunicaciones. Documento BOE-A-2019-15790

7 GA/RES/74/157 23 January 2020.

8 J. Althius and S. Strand, *"Fake News. A Roadmap"*, NATO Strategic Communications Centre of Excellence,

recognition that we are mired in what the European Union calls a state of *information warfare*[9]. Here we have come by malicious use of citizens' confidence and modern digital tools, used to legitimize actions that threaten sovereignty, political independence, territorial integrity of states and population security[10], charges serious enough to justify the thorough study of this problem without turning a blind eye on. In other words, disinformation violates one of the elementary principles of International Law, such as the abstention from interfering in the affairs of another state, intimately linked to the one that defends the sovereign equality of all of them. Half a century ago, the UN General Assembly declared any action against its members' political independence contrary to the principles and purposes of the Organization, which are none other than global peace:

> "Armed intervention and any other form of interference or attempted threat against the personality of the state or against the political, economic or cultural elements are in violation of international law [...] Every state has the inalienable right to choose its political, economic, social or cultural system without interference in any way by any other state."[11]

Disinformation appears as a form of interference in sovereignty, weakens peaceful coexistence and the law, and raises doubts about the validity of the tools to tackle it. We should not be surprised, because crime always moves faster than law, but the magnitude achieved raises other questions: Does the spread of large-scale disinformation truly amount a threat to global peace and security? Could a disinformation campaign against a state be considered an aggression? What is the applicable law? Would it lead to the application of International Humanitarian Law? Does it mount an interference in internal affairs or an internationally wrongful act? There are no clear answers and the community of nations is understandably concerned about the ambiguous normative.[12] The effect of disinformation and its consequences for international peace and security is also included in the UN agenda, which asks states for responsibility when using these operations and calls upon the observance of International Humanitarian Law within the course of armed conflict. The UN General Assembly[13] has called on a group of experts to present conclusions within the seventy-fifth session (2020-21) and prepares concrete actions to improve the application of International Law to the use of information and communications technologies by states.[14] They are still incipient actions, future solutions for a present problem. The Internet era represents an advance on a global basis for the exercise of public liberties, however, the question often arises

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Riga, January 2018, at 69.

9 European Parliament, *"EU strategic communication to counteract anti EU propaganda by third parties"* 23 November 2016.

10 *Ibid* par. I.

11 GA Res. 2625 (XXV), 23 October 1970.

12 M. Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, at 17 (Cambridge University Press, 2013).

13 GA Res. 73/27, 11 December 2018.

14 GA Res. 73/26, 19 January 2019.

whether it also poses a threat to democracy. Some legal, political and citizen initiatives suggest we should be critical about this subject.[15] Governments, on the one hand, make plans to defend national sovereignty against disinformation, but on the other invoke fake news to delegitimize messages contrary to their interests or to diminish critical journalists. Fear grows in the vicinity of an electoral process when taking advantage of the special sensitivity of the electorate. The OSCE asks several countries, such as Spain, for a more effective regulation to prevent people from malicious hoaxes and messages during election campaigns.[16]

Do we vote freely or manipulate? A growing number of citizens around the world show their concern for the authenticity of the information they consume mainly during election time[17], one of the battlegrounds for information warfare. Seven out of ten internet users distrust of the news during the electoral period[18] and we already know that in 2022 the citizens living in the most developed countries will consume more false news than true[19]. Nevertheless, the need to keep citizens informed appears in the 2030 Agenda promoted by the United Nations to meet the 17 objectives of sustainable development, among which we find the public access to information[20]. In this point, the Spanish government has declared its particular commitment:

> "An informed society managed by transparent and open public administrations and institutions is in a position to demand from its rulers the fulfillment of the commitments acquired by them based on proven and certain facts."[21]

The balance between information and democracy is weakening while civilians` will is targeted. As a matter of fact, citizens become enemies of their own states and simultaneously victims of the information manipulation mainly disseminated on the internet, the global space that makes us feel more capable but also the diffuse place where lies spread faster than truth. Right away we will see why.

(B) FROM TARGETING THE MILITARY TO TARGETING CIVILIANS

Deception is a clear example of a tool firstly used in armed conflicts and later developed in peacetime. It has been used largely in the realm of warfare to gain military advantage by confusing the enemy, although today it appears to be more prevalent in peacetime aiming to citizens (each one of us) for political purposes, mainly to undermine our confidence in

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15 See, as examples of these projects, Co-inform and World forum for Democracy, Strasbourg, November 2019.

16 OSCE Report Spanish General Election.10 July 2019, at 11.

17 World Forum for Democracy 2019

18 European Commission: "*Democracy and Elections*", November 2018.

19 Gartner Top Strategic Predictions for 2018 and Beyond 3 October 2017.

20 Peace, justice and strong institutions – United Nations Sustainable Development 2015.

21 Spanish Government, Action Plan to Agenda 2030, 29 June 2018, at 63-64.

democratic institutions or influencing the election outcomes. As a matter of fact, The European Union has recently expressed deep concern about the fact that evidence of interference is continuously coming to light, often with indications of foreign influence, more in the run-up to all major national and European elections, with much of this interference benefiting anti-EU, right-wing extremist and populist candidates and targeting specific minorities and vulnerable groups including migrants, LGBTI people, religious groups, people with a Roma background and Muslims, to serve the wider purpose of undermining the appeal of democratic and equal societies. [22]

Legally speaking, peacetime and warfare are two different scenarios that require different approaches, although disinformation pursues the same purposes and techniques in both of them: obtaining particular advantages (either military or political) by using false messages (targeting military or civilians). Notwithstanding deception is an unlawful practice in peacetime, while a legal mean of war. This contradictory separation may be purely theoretical these days, since contemporary hybrid wars unfold in a blurred territory making it difficult to accurately answer the question of whether we are or not at war. While definitions of hybrid threats vary and need to remain flexible to respond to their evolving nature, the concept aims to capture the mixture of coercive and subversive activity, conventional and unconventional methods (diplomatic, military, economic, technological), while remaining below the threshold of formally declared war.[23] With these conditions, hybrid conflicts are often difficult to be labelled, as well as the situations of war and peace. But let us start from the beginning.

According to the law of armed conflicts the lie is a legal mean of war. It has been used by the combatants since ancient times to the present days (the Tallinn Manual also defends ruses legality in the virtual sphere)[24]. In the Middle Ages Sun Tzu already warned military strategists about the importance of deception as a valuable strategy to fulfill military objectives:

> "A military operation implies deception. Even if you are competent, appear to be incompetent. Even if you are effective, prove ineffective."[25]

And so, it has been done until today, according to technical possibilities each moment. Karl Von Clausewitz already knew at the beginning of the 19th century that in military campaigns it is more important to take care of the forms than the background, namely how it is done is more relevant than what is done. During the Civil War of the United States of America (1861-1865) the army observed the rules on the conduct of hostilities elaborated by the jurist Francis

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[22] European Parliament, *supra* n. 5 (par.5).

[23] European Commission Joint Framework on countering hybrid threats a European Union response, April 2016.

[24] M. Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. Second Edition (Cambridge University Press, 2017) Rule 13, at 495.

[25] SUN TZU, *El arte de la guerra*. Ed. by T. Cleary, (ed. EDAF, Madrid 2008) at 21.

Lieber, who contemplated deception as a method of war[26]. The Lieber Code included the general practice of armies and influenced the incipient codification of International Humanitarian Law. From them, we find provisions related about ruses of war in the Brussels Declaration of 1874[27], as well as in the first Hague Conventions of 1899[28] and 1907[29] that declares as lawful the war tricks and the use of the necessary means to mislead the enemy. A similar provision is contained in the norms on customary law, which authorize deception and stratagems because they do not violate any rule of IHL[30], and the same in Additional Protocol 1 to the Geneva Conventions (1977) that explicitly includes the validity of false information, making the lie a recurring legal tool[31]. Cheating, simulating, misleading, manipulating information are practices that neither violate any norm of international law, nor are perfidious since they do not target the good faith of the adversary. Until the beginning of the 20th century, deception was part of a very localized campaigns aimed at confusing the enemy on the battlefield and at specific times, but from then on they have been also oriented towards citizens, when strategists appreciated the importance of public support for the success of military operations. The First World War was a milestone as the first informative event of world relevance that aroused great interest among the population and spurred the exercise of journalism. Until that moment, International Relations were a reserved scope to governments since the time necessary or the technical difficulty for the dissemination of the chronicles, together with citizens mostly illiterate, hindered the issuance of information[32] and the exercise of journalism itself; but the First World War confrontation turned the media and public opinion into international actors –and even more so since World War II– capable of influencing the outcome of armed conflicts. Since then, success in military operations depends on the management of public opinion rather than the armies work in the field. Manipulated information emerges as an effective means to achieve it[33], what definitely involves civilians into the sphere or conflicts. In fact, the European Parliament[34] refers to this process

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26 F. Lieber, *Instructions for the Government of Armies of the United States in the Field* (Lieber Code), 24 April 1863, Arts. 15,16 and 101.

27 Project of an International Declaration concerning the Laws and Customs of War, Brussels, 27 August 1874: Art. 14. "Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country (excepting the provisions of Article 36) are considered permissible."

28 Regulations concerning the Laws and Customs of War on Land,The Hague, 29 July 1899.

29 Article 24 of The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

30 International Committee of the Red Cross (2005) Customary IHL.Art. 57 Ruses of war.

31 Additional Protocol 1 to The Geneva Conventions Art.37.2 (Adopted 8 June 1977, entered into force 7 December 1978).

32 A. Pizarroso, *Periodismo de guerra*, (Ed. Síntesis, Madrid, 2007) at. 46.

33 Ch. Suarez Serrano. *Periodismo y Derecho Internacional Humanitario, un análisis para el siglo 21.* (Dykinson, Madrid, 2017) at 236.

34 European Parliament. *supra n. 10* (par. 2).

"informative war" and points out that it is a historical phenomenon as old as the war itself, although it was not generalized until the 20th century during the Cold War to henceforth become an intrinsic part of the modern hybrid wars. If the lie has served the interest of war since immemorial time using conventional media (mainly press, radio and television) internet enlarges the wave of deception and spreads it to levels never imagined, involves the citizens without their consent but with their necessary collaboration. The objective of such attacks is altering the political, economic and social balance of the attacked country without looking like a war and of course without a formal war declaration. All will deny making use of these manoeuvres, but all include deception operations and disinformation in their military instructions[35]. Warfare overflows its limits, adopts new forms and embraces us all regardless we are civilians or living peacetime, as the European Commission warns in one of its approaches to contemporary disinformation…

> "Verifiably false or misleading information" which, cumulatively, (a) "Is created, presented and disseminated for economic gain or to intentionally deceive the public"; and (b) "May cause public harm", intended as "threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security."[36]

Which could fit the definition of conventional warfare. The secular legalization of lies as a tool for making war has brought us here. Civilization advances but the 21st century has not eliminated barbarism; it has only polished it, as *Voltaire* would say.

Although the states have been refining their disinformation campaigns and defensive strategies for decades, the incorporation of the term "fake news" into the public debate has been very recent as a result of the frequent appearance in the political discourse around 2016, simultaneously during the presidential election in the United States and Europe. Firstly, in the course of the referendum campaign that ended up with the United Kingdom withdrawal from the European Union and the following electoral processes currently happening in the European countries, conditioned by the spread of disinformation and the use of bots. The constitutional referendum in Italy (2016), the presidential elections in France (2017) or the elections to the European Parliament (2019)[37] are other examples in our immediate surroundings. In Spain, this phenomenon was consolidated in the publications of the media and among public opinion after the unlawful[38] independence referendum of October 1, 2017 in Catalonia, and the subsequent Catalan regional elections of December 21[39]. Anyhow, we have incorporated the expression "fake news" into our everyday slang. It was not in vain that

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35 International Committee of the Red Cross (2005) Customary IHL, Practice Relating to Rule 57.

36 European Commission, Code of Practice on Disinformation, May 2019.

37 D. Barrancos, "Las elecciones más hackeables de Europa" 11 *Ciber Digest. Informe mensual de ciberseguridad*, Julio 2019, at 14.

38 Constitutional Court Judgement [STC]. 114/2017 17 October 2017 Documento BOE-A-2017-12206

39 Sociedad digital en España 2018. *Informe de la Fundación Telefónica*, at. 109-110

it was a candidate for word of the year 2017 of the famous *Fundéu*[40], a position that the English version "fake news" obtained in the United Kingdom according to the *Collins Dictionary*[41], and a year earlier, 2016, it was the word "post-truth" (post-truth) according to the *Oxford Dictionaries*[42], a term adopted by the Spanish Academy (*RAE*) in 2017[43]. In all cases, these prestigious publications had observed a notable growth in the use of these words both within the population and the media, infected by the political debate and the impulse of the social networks, which act as the first facilitators of disinformation.[44]

At the same time, the main messages exchange websites began to limit the activity of groups that disseminate false information. In the leading up days to the 2019 European Parliament elections, *Facebook* came to identify and eliminate more than 500 pages or these groups. Its content would have exceeded 500 million views across Europe, with more than 6 million followers[45]. *Facebook, Google* and *Twitter* had signed a code of conduct a few months early to prevent from the dissemination of these types of messages on the Internet, also compiled by the European Union, which alerts of threats to freedom of expression:

> "As the Commission repeatedly acknowledges in the Communication, the Signatories are mindful of the fundamental right to freedom of expression and to an open Internet, and the delicate balance which any efforts to limit the spread and impact of otherwise lawful content must strike."[46]

The European Commission set out in march 2019 the Action Plan against Disinformation, which openly recognizes the existence of the *information war (*even in peacetime*)* and the risks it poses to the values supported by democracy. Spain also reacts in 2019[47], firstly in the days before the campaigns for general elections, and secondly European and municipal processes, through the Permanent Commission against Disinformation[48], with direct participation of the Presidency of the Government and the Ministries of Defence, Home office, Foreign Affairs, and Economy and Business, which reveals the importance attached to these threats against national security, followed with concern by the media[49]. There was a prominent antecedent during the presidential elections in the United States that the Republican candidate Donald Trump won in 2016, just the year which begins the *post-truth*

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40 *Fundéu*, 19 Diciembre 2017.

41 Collins 2017 Word of the Year Shortlist

42 Oxford Word of the Year 2016.

43 Real Academia Española, Noticias RAE. 27 Noviembre 2017.

44 J. Althius and S. Strand, *supra* n. 9, at 71.

45 D. Barrancos, *supra* n.38, at 14.

46 European Commission, *supra* n. 37.

47 European Commission, Action Plan Against Disinformation. 5 December 2018.

48 Spanish Government, Informe del Plan de lucha contra la desinformación.. 15 Marzo 2019.

49 *El País*, 11 Marzo 2019.

era[50] in which we are immersed. It is a fact that the lie spreads more quickly than the truth on the internet. According to a study[51] based on the messages in *Twitter* between 2006 and 2017, false information is spread up to one hundred times more and faster than true. Nevertheless, contrary to what was thought, the paper reveals that people disseminate disinformation as fast as robots. Our push is essential so that false messages spread up to 70 per cent more likely than a true one.

The use of disinformation as a mean of war represents a fundamental feature of hybrid warfare[52], characterized by the military and civilian components which makes it difficult to accurately determine which the applicable law is, what the legal consequences are, and how to effectively face it. The principle of distinction currently refers to clearly distinguishing between peace and wartime rather than separate military or civilian objectives in the battleground. Properly identifying whether we are in war or peace has become a challenging duty. We must bear in mind that disinformation within hybrid conflicts could provoke in peacetime similar effects than war ("public harm, intended threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment…" following the European Commission[53]) what according to the Tallinn Manual could derive in the same legal consequences. Years ago, it was necessary to defeat an army in the battlefield, but today it can be enough just by shaping the opponent's public opinion with floods of false messages, neither mobilizing any soldier nor using the slightest form of violence.

(C) THREATS, AGGRESSIONS. TWO OPEN QUESTIONS ABOUT DISINFORMATION.

(1) A real threat?

Eight out of ten European citizens believe that so-called fake news poses a threat to democracy[54], while seven out of ten internet users distrust the truthfulness of the information published by the media during election time[55]. These data reveal the concern about "fake news" has fully reached the population, and also that we are becoming aware of the danger they mean. NATO[56] has already included false information within the hybrid threats whose deactivation places among its priorities because of its destabilizing potential. In the same

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50 L. Hayden, "Tell me lies, tell me sweet lies" in J. Althius and S. Strand *supra* n. 9, at 7.

51 V. Soroush, R. Deb, A. Sinan, "The spread of true and false news online" (2018) in 359 *Science*, Issue 6380, at 1146-1151 [doi: 10.1126/science.aap9559].

52 European Commission, *supra* n. 37.

53 *Ibid.*

54 European Commission. Flash Eurobarometer 464 Fake News and Disinformation Online, April 2018.

55 European Commission, *supra* n. 19.

56 NATO's response to hybrid threats, 8 August 2019

way, the European Parliament[57] has warned about the threat posed by disinformation due to its negative influence on democratic processes and citizen debate, and simultaneously the United States, China or Russia[58] face it as one of the main external risks that threaten their security. In the particular case of Spain, disinformation appears as one of the main challenges we face within the Cybersecurity Strategy (2019)[59], which shows an increase in the so-called hybrid threats, designed to attack the vulnerabilities of democratic states through traditional military actions, cyber-attacks and disinformation operations. A novel aspect, previously anticipated in the National Security Strategy (2017):

> "To the traditional armed conflicts are added additional forms of aggression [...] sophisticated systems of high precision weapons combined with the functional lethality of cyber attacks and actions of influence and misinformation."[60]

The text clarifies that the disinformation campaigns are within the so-called hybrid wars, which combine military means with cyberattacks, elements of economic pressure or campaigns of influence by social networks and information manipulation. As the National Security Strategy does, the National Security Law (2015)[61] also indicates false messages as one of the threats that compromise or undermine security, which occupies a prominent place among the main challenges posed by new technologies in the processes of political participation of citizens.[62]

To what extent could we refer to disinformation as a threat legally speaking? Answering this question is a matter of utmost importance, because the statement of "threat" is essential to decide how to deal with. International Law grants the UN Security Council the faculty to determine the existence of any threat to the peace, breach of the peace or act of aggression, as stated in article 39 of the San Francisco Charter (1945). In other words, the world's peace depends on the effective location and neutralization of the threats that endanger it, being the highest executive body of the UN in charge of such an arduous duty. In fact, this is one of the most relevant provisions of the United Nations Charter, from its very beginning:

> "The purposes of the United Nations are: Maintain international peace and security, and to that end: to take effective collective measures to prevent and removal threats to peace." [63]

However, we start from a diffuse basis because there is no more precise definition of this

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57 European Parliament, *supra* n. 5 (par. 3).

58 The Military Doctrine of the Russian Federation, 29 june 2015

59 Spanish Government, Estrategia Nacional de Ciberseguridad (2019)

60 Royal Decree 1008/2017, de 1 de diciembre 2017, Spanish National Security Strategy 2017. BOE no. 309 21 december 2017

61 Law 36/2015, 28 September 2015, of National Security (BOE no. 233, 29 September 2015).

62 "Entre los principales desafíos que las nuevas tecnologías plantean desde el punto de vista de la seguridad pública se encuentran las actividades de desinformación, las interferencias en los procesos de participación política de la ciudadanía y el espionaje." BOE 266 5 November 2019 at 121755.

63 Charter of the United Nations art. 1 (Adopted 26 June 1945, entered into force 24 October 1945)

concept in International Law, so a "threat" will be what the Security Council shall decide in each moment, and its position varies depending on a number of factors as well as the entailed actors. Threats officially proclaimed over the years have been very diverse, almost unattainable, as Gutierrez and Cervell[64] reminds us. From the persistence of an internal armed conflict, as happened during the Balkan War (1991),[65] Angola or Rwanda, the repression of the population itself causing the risk of mass exodus (Iraq 1991),[66] the involvement in acts of international terrorism (1992),[67] massive violations of International Humanitarian Law and Human Rights during an armed conflict (1993),[68] a coup government (Haiti 1994)[69] or a military deployment at the border of a neighboring state (Iraq 1994).[70] In the 21st century the Council has seen a threat to peace when a state ignores its responsibility for protecting civil population (Libya 2011),[71] illegal trafficking of small arms (2015),[72] cultivation, production, traffic and the illicit consumption of narcotic drugs (2019),[73] the terrorist activities of the so-called Islamic state (2019),[74] or the Covid 19 pandemic (2020).[75] All these situations are officially threats, and can trigger the due responses contained in the treaties. The concept of threat as a risk to peace is also the first of the Principles of International Law declared by the UN Assembly in Resolution 2625, half a century ago (italics added):

> "Every state has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any state, *or in any other manner* inconsistent with the purposes of the United Nations."[76]

Given the impact of disinformation on the political independence of states, could it amount to *any other manner* of threat contrary to the Charter's principles? European Union seems to consider so, when arguing that electoral interference in one Member state affects the EU[77] as a whole insofar as it can have an impact on the composition of the EU institutions putting global security at risk.

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64 C. Gutíerrez and M.J. Cervell, *El Derecho Internacional en la Encrucijada* (Ed. Trotta, Madrid, 2012) at 401.

65 SC Res 713(1991) 25 September 1991

66 SC Res 688(1991), 5 April 1991

67 SC Res 731(1992), 21 January 1992, SC Res 748(1992), 31 March 1992

68 SC Res 808(1993), 22 February 1993

69 SC Res 940(1994), 31 July 1994

70 SC Res 99 (1994), 15 October 1994

71 SC Res 1973 (2011), 17 March 2011

72 SC Res 2220 (2015/, 22 May 2015

73 SC Res 2482 (2019), 19 July 2019

74 SC Res 2490 (2019), 20 September 2019

75 S/RES/2532(2020) 1 July 2020

76 GA Res 2625 (XXV), 24 October 1970

77 European Parliament, *supra* n.5.

Malicious information has always been a factual threat capable to derive in disastrous consequences, though we seldom had neither the required sensitive nor the minimum cleverness to anticipate the calamity: In the decade of 1990, The International Criminal Tribunal for the former Yugoslavia, within the so-called *Tadic case*[78], warned us how the methodical use of today's called fake news can fuel armed conflicts. The Court sentenced that President of Serbia, Slobodan Milosevic, launched systematic disinformation campaigns through the conventional media stirring up Serbs nationalist feelings with the aim of converting an apparently friendly atmosphere between Muslims, Croats and Serbs in Bosnia and Herzegovina into one of fear, distrust and mutual hostility. The ICTY links this operation (unfolded in peacetime) with the subsequent civil war and the horrible crimes tried, which shows that disinformation poses an unheeded threat to peace:

> "After the disintegration of the former Yugoslavia began, the theme of the Serb-dominated media was that if for any one reason Serbs would become a minority population . . . their whole existence could be very perilous and endangered . . . [and therefore] they had no choice but a full-scale war against everyone else…"[79]

Other examples show how false messages still touch off lurid violence, conflicts and suffering these days, such as the persecution of Rohingyas in Myanmar.[80] The fear arises in the 21st century world, when malicious messages are widespread like never before with the internet pushing. If a disinformation campaign reaches the capacity to put peace and security at risk, it should be formally designated as a threat, and the responsible state might be sanctioned in the way considered by the UN Security Council. Nevertheless, none of the contemporary disinformation operations has been formally classified as a threat so far.

(a) *Interference in internal affairs.*

The principle of prohibition of threats is related to non-interference in internal affairs (United Nations Charter, article 2.7). Both of them could amount serious dangers to global stability:

> "Violation of the principle of non intervention poses a threat to the independence, freedom, and normal political, economical and social development of countries […] and can pose a serious threat to the maintenance of peace." [81]

Non intervention principle was endorsed by the International Permanent Court of Justice nearly one century ago (1927) in the "Lotus" case judgment:

> "Now the first and foremost restriction imposed by international law upon a state is that-failing the existence of a permissive rule to the contrary-it may not exercise its power in any form in the territory of

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78 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1992. Case No. IT-94-1-T; 7 May 1997 (par. 83)

79 *Ibid* (par. 88).

80 *The Washington Post*, 8 December 2017

81 GA Res 2131(XX), 21 December 1965.

another state."[82]

It was generally established in a treaty since Montevideo Convention (1933):

"Art. 5: The fundamental rights of states are not susceptible of being affected in any manner whatsoever."

"Art. 7: No state has the right to interfere in the internal or external affairs of another."[83]

The International Court of Justice (1986) recalls that the existence of violence it is not necessary for intervention in internal affairs to occur, but methods of coercion. This means forcing a state to behave against its sovereign will in those decisions which is able to take freely,[84] such as the choice of a political, economic, social and cultural system. All of them depend on the citizens' will expressed in free elections. UN General Assembly[85] argues that states must abstain from any defamatory campaign or hostile propaganda for the purpose of intervening or interfering in the internal affairs of others, but lately there have been growing attempts to manipulate public opinion from abroad using distorted news, even when the states are under international obligation to behave just the opposite. Such practices are harmful to the promotion of peace, cooperation and friendly relations among nations, nevertheless they are frequently used for political or war purposes.[86] The European Union also argues that fake news is a form of hostile interference in elections, as a part of a broader strategy of hybrid warfare. Such interference can take a myriad of forms, including disinformation campaigns on social media to shape public opinion.[87] Furthermore, states have also a positive obligation to fight against external (or internal) interferences that could alter the rights of citizens to freedom of expression, one of the main purposes of disinformation:

"Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[88]

This provision is enshrined in the most relevant treaties for the protection of fundamental rights, such as the European Convention of Human Rights (1950), the International Covenant on Civil and Political Rights (1966), the American Convention of Human Rights (1969) or the European Charter of Fundamental Rights (2012) to quote some. To this end, states must provide the free participation of citizens in electoral processes, without

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[82] The case of SS. "Lotus" PCIJ September 7th 1927, *at* 18.

[83] Convention on Rights and Duties of States Montevideo 1933, Art.4.

[84] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, ICJ, judgement. 27 June 1986 (par. 205).

[85] GA Res 73/27, 11 December 2018.

[86] Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security. A/65/201, 30 July 2010 (par.7).

[87] European Parliament, *supra* n.5.

[88] International Covenant on Civil and Political Rights. December 1966, entry into force 23 march 1976, Art. 19.1 and 2.

interference of any kind, and this means not exerting any pressure on them, and ensuring that others will not do so from abroad either. Attempts to influence the will of citizens to freely elect their political representatives represent an interference in internal affairs when carried out from outside, but also a violation of the fundamental rights of the people when deployed from within. In both cases, a violation of international (and national) law is arguable.

(b) *State Responsibility*

When a disinformation wave reaches neither the necessary threshold to endanger global peace and security to be formally declared a threat nor an unlawful interference, but causes any verifiable harm to other(s), the international responsibility of the state could be invoked. This occurs when the "responsible" state breaches an international obligation, namely when an act of that state is not in conformity with what is required of it by that obligation.[89] State responsibility is a relevant norm of the law of armed conflicts[90] (where a party which violates any obligation shall be liable to pay compensation). We also find this provision in peacetime within the draft articles on Responsibility of States for Internationally Wrongful Acts, which undeniably can be extended to hybrid conflicts in the virtual sphere, according to the Tallinn Manual guidelines.[91] The European Parliament has shown similar concern upon deeming disinformation as interference in democratic processes:

> "Such interference by other states constitutes a violation of international law, even when there is no use of military force."[92]

Disinformation could engage state responsibility under international law assuming that entails a violation of the non intervention principle, what is a breach of an international obligation. But this is a theoretical approach hardly to be proved, so the choices to claim responsibility to the state are conditioned to the arduous task of previously confirm that action:

> "The indication that an activity was launched or otherwise originates from the territory or objects of the infrastructure of a state may be insufficient in itself to attribute the activity to that state. Accusations of organizing and implementing wrongful acts brought against states should be substantiated."[93]

Another difficult question is how could an election meddling be repaired, as well as the measurement of public opinion's manipulation or even an interference in electoral outcome when revealed months or years after it took place. At this point we have to remind that satisfaction may simply consist in an acknowledgement of the breach, an expression of regret,

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89 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts,(2001) Art. 2.

90 Additional Protocol 1 to the Geneva Conventions, *supra* n. 32, Art. 91.

91 M. Schmitt, *supra* n. 25, at 80.

92 European Parliament, *supra* n.5.

93 GA Res. 73/27, 11 December 2018.

a formal apology or another appropriate modality,[94] nothing that could really make a return to the past.

(2) Aggression?

As occurs with the designation of a threat, the UN Security Council is the competent body to determine what an act of aggression is, as provided in article 39 of the Charter that we have already appointed, and it shall decide what actions must be adopted to counteract it. But contrary to the concept of threat, which lacks a precise definition, the act of aggression is quite clarified, reducing the Council's interpretation. It appears in General Assembly Resolution 3314 (XXIX) 1974[95], what basically defines aggression as the state's uses of armed force in contravention to the UN Charter. This does not mean that every use of force constitutes an act of aggression (for example the legal exercise of self-defence), but the Resolution offers some examples such as military occupation, bombing or port blocking but warns us that the list is not exhaustive, asking the Security Council to determine what other situations may become aggressions in the future. Half a century later, it is still not easy to define an act of aggression in the 21st hybrid conflicts, dominated by multidisciplinary components where the use of force generally does not exist. In the criminal jurisdiction, the signatories of the Statute of the International Criminal Court needed more than ten years to reach an agreement on the legal definition to the act of aggression, which does not appear among their powers until 2010 just to copy the position that proposed three decades before by The United Nations Assembly:

> "Act of aggression means the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations."[96]

Could interference in the internal affairs of a state through informative manipulation be considered as "any other manner" inconsistent with the Charter

The use of force and physical violence remain general premises for the identification of the act of aggression, what significantly reduces the chances. But we do not rule out this possibility because today it is commonly accepted that the violence of a hostile action depends rather on its consequences than on the means. Let us consider the use of biological, chemical or radiological agents. It goes without saying that these methods involve violent actions even if they are not accompanied by force.[97] Schmitt[98] concludes that the threshold is marked by

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94 International Law Commission, *supra* n. 90, Art.31.

95 GA Res. 3314(XXIX), 14 December 1974.

96 Amendments to the Rome Statute of the International Criminal Court on the crime of aggression, 11 june 2010.

97 C. Droege, "Get off my cloud: cyber warfare, international law, and the protection of civilians" 94 *International Review of the Red Cross (2012)* 533-578, at 557.

98 M. Schmitt, "Wired warfare: Computer network attack and jus in bello" 84 *International Review of the Red*

the degree of suffering caused to the population, so that if the effects are only temporary discomforts or a slight decrease in the quality of life, it would not be accurate speaking of an aggression, but if it causes other more serious effects such as a collapse of the economy of democratic system, the rise of unemployment, widespread anxiety among the population, fear, panic or other situations of similar gravity, they could be taken by a full-blown. Some recent episodes show us that a scenario of this nature is not unlikely, as it happened when the dissemination of false messages about the death in a traffic accident of *Ethereum* founder, one of the most valued cryptocurrencies[99] that caused millionaire losses; or the fake news about Boris Johnson's death because of Covid-19 infection, spread from a *Twitter* account and broadcasted in Pakistan media as true.[100] Could malicious information intentionally designed against the credibility of the state's institutions, the quality of democracy, or the trust of the population provoke the same consequences? This condition remains not only for its present effects but also future, because if an action involves a latent or potential danger that will foreseeably cause serious damage to protected people or places, it might be formally declared as aggression, even though conventional violence does not exist. This is the case that in 1983 a letter from an alleged American scientist appeared in a small newspaper in Delhi, India, called *Patriot*. It was titled "AIDS May Invade India, The Mysterious Disease Caused by Experiments in the US." The text recounted how an experiment to create biological weapons in a military laboratory in Maryland had gone wrong. That piece was picked up by a Soviet scientific magazine, jumped into African newspapers and spread until four years later it reached the main evening news in the United States.[101]

From time ago some scholars[102] exclude from the definition of aggression methods such as the dissemination of propaganda or psychological and even economic warfare, and it really seems difficult to refute them with the legal arguments we still have today. But the world evolves faster than the treaties and places us in front of new challenges. Hence, the European Union[103] has already warned about the indiscriminate damages that disinformation operations cause even without the use of force, but seriously affecting the democratic processes or sensitive goods to peace and stability as the protection of health, the environment or the safety of citizens, putting us back on an unclear ground between war and peacetime. The Vice-President of the European Commission and high representative for the Union's foreign policy, Josep Borrell, warned that disinformation can kill[104] alluding to false messages

Cross (2002) 365-398, at 377-378.

99 Vitalik Buterin dead?: A hoax on 4Chan crashed ethereum's price 26 June 2017.

100 UK PM Boris Johnson's death, 9 April 2020; Fake tweet Boris Johnson's death, 7 April 2020.

101 *El País*, 25 Junio 2020.

102 M. Bothe, *New Rules for Victims of Armed Conflicts. Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Ed. Martinus Nijhoff Publishers, Dordrecht. 1982), at 289.

103 European Commission, *supra* n. 37.

104 Josep Borrell, High Representative of the EU for Foreign Affairs and Security Policy, on Twitter 23 March

spreading over the internet about Covid-19 and its influence on the population's behaviour in the face of massive contagions. In the same context the UN Secretary General has also warned about the danger posed to the population by these fraudulent and uncontrolled publications.[105] There are other doubts difficult to solve, such as the cataloguing of a disinformation campaign as an attack, a weapon or use of force. These concepts belong to the field of armed conflicts, so they are theoretically out of this scope until the connection between disinformation and a military campaign is demonstrated. New conflicts sometimes exceed the ius in bello framework, making it difficult to face with current regulations. Hybrid war does not mean that hybrid law is needed. On the contrary, the law must be clearer than ever to best tackle the new types of conflicts in this slippery domain.

The notions of attack and use of force are sometimes very close, separated for narrow details. Disinformation could be difficulty labelled as use of force according to article 2.4 of the UN Charter or as an armed attack according to article 51, thus it would not be appropriate to invoke the right to self-defence. To determine whether an object can be a weapon or in which cases its use constitutes an attack, we must resort to the rules governing the conduct of hostilities. According to Additional Protocol 1 to the Geneva Conventions,[106] an attack is an act of violence against the adversary, whether offensive or defensive, within an armed conflict. Both the existence of armed conflict and the use of violence are two implicit elements in the very concept of attack, from which it turns out that if an action does not exercise violence, for instance a disinformation campaign or even a cyber-attack, will not be considered as such unless it is framed within a war operation that involves the use of force. This is the position sustained by the International Committee of the Red Cross[107] as well as the Tallinn Manual; the operations in cyberspace (including manipulated information) could become attacks providing its effects reach the same damage level as conventional warfare. When the connection between disinformation and an armed conflict is difficult to ascertain, we could rarely consider it an attack or use of force. To that end it is compulsory to thoroughly check the consequences and damages caused,[108] which seems to be quite debatable. European Union claims for a precise and legal framework to tackle hybrid threats, both at EU and international level, in order to enable a robust response,[109] because in the meanwhile the opposite powers are taking advantage by exploiting the absence of clear rules. This is the case of Russia, whose aggressive activities in the cyber domain against European countries have

2020.

105 Antonio Gutierres, UN General Secretary, on Twitter. 28 March 2020.

106 Additional Protocol 1 to the Geneva Conventions, *supra* n. 32, Art. 49.

107 ICRC Report, International humanitarian law and the challenges of contemporary armed conflicts Geneva, 31 October 2015, *at* 39–44

108 M. Schmitt, *Tallinn Manual 2.0…supra* n.25, *at* 49.

109 European Parliament, *supra* n.5.

increased amidst legal gaps and the ambiguity of the existing ones, according to the EU.[110] Are these actions issued within an armed conflict, or using conventional violence? They definitely do not, but while discussing the precise scope or the applicable law, the problem grows. The position adopted by NATO[111] seems to take precedence over the challenge posed by hybrid threats rather than the legal framework to tackle them. This is a new domain, where the North Atlantic Organization is determined to defend itself as it does on land, sea and air:

> "We announce the establishment of Counter Hybrid Support Teams, which provide tailored, targeted assistance to Allies, upon their request, in preparing for and responding to hybrid activities. We will continue to support our partners as they strengthen their resilience in the face of hybrid challenges."[112]

Nevertheless, international law opens a chance to link disinformation with a weapon. The law of armed conflicts defines weapons as the objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[113] Following the position issued by Droege[114], it is the intrinsic nature of an object that gives the status of weapon. But objects that are not weapons in nature may also make an effective contribution to military action by virtue of their particular location, purpose or use, which means they can acquire this condition circumstantially. This reminds us that labels are not absolute, being able to go from civil to military and vice versa in a matter of minutes. The information (true or false) disseminated by the media could become a weapon, and consequently a legal object of attacks if they either help the military effort or its destruction or neutralization results in a definite advantage; but in general, we could hardly label disinformation itself as use of any kind of force.

(D) DISINFORMATION AND NON-ARMED CONFLICTS

(1) Towards a new category of non-armed conflicts

International Law distinguishes between international or non-international armed conflicts. There are the only two legal types of armed conflicts although latest episodes would suggest a first preliminary distinction between armed and *non-armed conflicts*. Disinformation campaigns obviously belong to the last group in which conventional force does not exist, although there could be significant unarmed violence. NATO has lately showed a similar interpretation, with this warning:

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110 European Parliament, *supra* n.10.

111 NATO, Warsaw Summit Communiqué, 8-9 July 2016.

112 NATO Brussels Summit Declaration, 11-12 July 2018.

113 Additional Protocol 1 to the Geneva Conventions, *supra* n.32, Art.52.2.

114 C. Droege, *supra* no. 98, at 562.

> "The coronavirus crisis provides insight into challenges that do not typically fall under militarised (use of force) security but could nevertheless destabilise, if not cripple, whole societies [...] The distinction between peace and war are far less clear now as disinformation and cyberattacks are continuous, rolling campaigns designed to disrupt and destabilize, possibly without end. The grey zone encompasses measures that create destabilization and conflict below the threshold of overt violence, including disruptive tactics such as disinformation, psychological operations and destabilising legal processes."[115]

Non armed conflicts, although less visible, are increasingly frequent and develop on a larger scale than those using military force. They camouflage among the mass media to feign a harmless appearance which is the basis of their success, unlike the military wars that rely on noise and opulence to generate fear. Of course, unarmed conflicts have less destructive effect than those using force, but probably a similar destabilizing potential. Can the same rules be applicable to such different forms of war? The International Court of Justice, in its Advisory Opinion on the legality of the threat or use of nuclear weapons (1996) prophesied the validity of the treaties also for the threats to come, regarding the application of the Rules of International humanitarian Law to the new weaponry:

> "It cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future."[116]

This advisory opinion sheds light on the current situation, unimaginable in the 1990s. But in today's world, the only reference to their international or local area seems not to be enough for the factual classification of conflicts.

As we have seen, International Humanitarian Law is applicable to disinformation operations or cyber-attacks only if they take place in the context of an armed conflict.[117] As a matter of fact, in those cases both hostile action and its response must respect the basic principles of distinction, caution, proportionality, military necessity and humanity.[118] However, there are dissonant voices proposing new rules (even new treaties) for a situation that demands clearer rules over again. We have already said that information warfare could be hardly deemed armed operations *stricto sensu*, since it goes beyond the theoretical definition stated in the Geneva Conventions. Today these new forms of warfare are purely non armed conflicts which have come to inaugurate a new category not recognized within the International Law body that still requires the essential condition of military force.

Is it appropriate to refer to cyberwar even when the very concept of war is not clearly established? There is no legal definition, although the Criminal Tribunal for the former

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115 NATO Review, Coronavirus, invisible threats and preparing for resilience, 20 May 2020.

116 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1 I. C.J. Reports (1996), at 226, (par.86).

117 ICRC Report, IHL and the Challenges of Contemporary Armed Conflicts. Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions, Geneva, 22 November 2019.

118 ICRC Report, International Humanitarian Law and Cyber Operations during Armed Conflicts. (Position paper) 28 November 2019.

Yugoslavia offers a valuable approach to armed conflict referring to the use of force between states, or the situation that produces continued armed violence between government forces and one or more organized groups, or between these groups within the state.[119] Recognizing the legal weight of this contribution, it does not provide much more content to the conventional subdivision established decades ago in the Geneva Conventions between International or Non-International Armed Conflicts. They still are the two only legally accepted types of conflicts, both of which have the use of armed force in common. The application of the conduct of hostilities rules in the cyberwar or in any of the operations that take place on the virtual sphere is uncertain. Today, the question as to what action short of an armed attack constitutes a use of force remains not fully resolved.[120]

(2) Non armed conflicts and freedom of expression

In times of war, lying is considered a valid method while freedom of expression is not specifically protected. In peacetime, instead, it is considered one of the fundamental rights that upholds the right of citizens to freely express or receive opinions, ideas or information by any means and without restrictions. However, most international human rights instruments do not specify whether the information must be real or false. It could be said that the veracity of information is an implicit concept, it would be better if this important detail had been laid down in the treaties to better protect the right to useful information. For example, article 19 of the International Covenant on Civil and Political Rights (1966) protects "the freedom to seek, receive and impart information and ideas of all kinds" without going into further consideration about the veracity of the messages, apart from calling upon the states to provide any lawful restriction. The same occurs with the European Convention on Human Rights (1950) whose article 10 defends the "freedom to receive or communicate information or ideas without interference from public authorities" or the European Charter of Fundamental Rights (2000) which, in its article 11 says:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> "2. The freedom and pluralism of the media shall be respected."

A malicious reading of these treaties could conclude that they protect the dissemination of messages without any further requirements, whether true or false, avoiding the public power's interference unless the life of the nation is in danger, in which cases guarantees could be suspended for all messages, both true and false. Why do the treaties not clearly defend only true information? The approach to this fundamental right in international law opens a certain degree of ambiguity. Nevertheless, some national constitutional texts did adopt this

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119 *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, International Criminal Tribunal for the Former Yugoslavia (ICTY) The Prosecutor v. Dusko Tadic, IT-94-1-A, 2 October 1995, par. 70.

120 M. Schmitt, *Tallinn Manual 2.0…supra* n. 25, at 333.

precaution, such as the Spanish Constitution (1978) whose article 20 provides the protection of citizens against false news (emphasis added): "the right to freely communicate or receive *truthful* information by any means of dissemination." One word, *truthful*, would have been enough to undo the ambiguity within international law and make it easy to fight against false news.

States' countermeasures against disinformation must be limited by the guarantees offered by international law lest collide with the privileges enjoyed by the citizens, such as the right to freedom of expression (except in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed[121]). Institutions such as the UNESCO, UN General Assembly or the European Commission recently warn about the practice of many governments fighting disinformation disrupting people's rights.

Both the internet and information have fully implicated the civilian population in the conflicts of the 21st century. 69 per cent of European citizens prefer to get information from the Internet, and three out of four encounter false messages at least once a week. The citizens' habits to stay up to date on current affairs have changed radically in a few years, setting the stage for the spread of disinformation.[122] People like you and me are at the same time active and passive subjects, actors and victims of these non-armed conflicts. International courts have often equated the rights and obligations of so-called citizen journalists with professionals, when it comes to recognize their contribution to denounce violations of law.[123] Disinformation equates now civilians in peacetime to soldiers in the battlefield, both targeted with the clear purpose to fulfil spurious interests. Cyberwar, hybrid conflicts, disinformation operations raise doubts about their legal approach to which instruments such as the Budapest Convention (2001)[124] or the already mentioned Tallinn Manual (2017) try to respond. The so-called Budapest Convention, or Cybercrime Convention drawn up by the Council of Europe (2001) is the first international treaty to fight crime on the internet, with specific references to support freedom of expression in the digital world:

> "The right of everyone to hold opinions without interference, as well as freedom of expression, which includes the freedom to search, obtain and communicate information and ideas of all kinds, regardless of

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121 See International Covenant on Civil and Political Rights Art. 4, (Opened for signature at New York on 19 December 1966, Entered into force 23 March 1976). *Treaty Series*, vol. 999, p. 171, and European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15 (Opened for signature at Rome, 4 November 1950, entered into force 3 September 1953).

122 European Commission, Tackling online disinformation. 18 September 2019.

123 Ch. Suárez Serrano. "El Fenómeno de los Periodistas Ciudadanos en los Conflictos Armados Actuales." 36 *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades (2016)* 111-130 at 121. doi: 10.12795/araucaria.2016.i36.06

124 Council of Europe, Convention on Cybercrime (Open to signature Budapest, 23 November 2001, entered into force 1 July 2004).

borders."[125]

Any state party to the International Covenant on Civil and Political Rights (1966) availing itself of the right of derogation any of the articles, shall immediately inform the other states Parties of the provisions from which it has derogated and of the reasons by which it was actuated. The restriction must be reflected in an existing law, necessary to the objective, and for legitimate purpose as defined in the Covenant. Nevertheless, UNESCO has recently denounced the lack of enthusiasm of governments when it comes to abiding by the international rules on the protection of freedom of expression (in this particular case when addressing the Covid-19 pandemic):

> 'In the urgency to address the public health crisis, more than 80 governments around the world have declared states of emergency. Most of these countries have not notified the UN, as required by the International Covenant on Civil and Political Rights, and many of the emergency measures lack "sunset" clauses'[126]

The number of countries with specific regulations in this field has increased exponentially in the very last years.[127] states theoretically respond to the urgency of the threat in the exercise of its sovereign powers, although particular selfishness is hidden with the aim to monitor the Internet users' activity, which eventually result in the erosion of freedom of expression. When the protection of legal guarantees is forgotten, civilians become victims twice. Firstly because of the manipulative effect of malicious messages; and secondly due to the rights interruptions authorized by their own governments such as freedom of expression, officially under the need to repel the attack. Surveillance or limitation of internet use, control measures over private publications and many other measures fraudulently empower governments. The UN General Assembly insists on the actions to tackle disinformation should not collide with the protection of fundamental rights because they are not opposed objectives, but rather complement and reinforce each other:

> "Condemns unequivocally measures taken by states in violation of international human rights law aiming to or that intentionally prevent or disrupt access to or the dissemination of information online and offline, aiming to undermine the work of journalists in informing the public, including measures to unduly restrict, block or take down media websites, such as denial of service attacks, and calls upon all states to cease and refrain from these measures, which cause irreparable harm to efforts at building inclusive and peaceful knowledge societies and democracies"[128]

The European Commission[129] warns of the reprehensible action of governments that combat disinformation with actions sometimes aiming to the interruption of fundamental rights than

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125 *Ibid*, preamble.

126 UNESCO Journalism, press freedom and COVID-19 May 2020, at 11.

127 S. Bradshaw, P.N. Howard, P. N. and L. Neudert, *Government Responses to Malicious Use of Social Media* StratCom Coe, Riga, November 2018.

128 GA Res 74/157 23 January 2020.

129 European Commission, Tackling... *supra* n. 123.

to their protection, and recalls the limits that they must observe. The European Union[130] also calls on the Member states to combat these disinformation campaigns without damaging freedom of expression, because it would be as much as collaborating with their objectives to interfere with the electoral processes or weaken the democracy or the European Union institutions. Among the alerts issued continuously by International Organizations it can also be named the privacy, a fundamental condition for the enjoyment and exercise of most of the rights and freedoms contained in the European Convention on Human Rights:

> "The rule of law is a prerequisite for the protection and promotion of the exercise of human rights and pluralistic and participatory democracy. Member states must refrain from violating the right to freedom of expression and other human rights in the digital environment."[131]

Fighting disinformation requires a global approach to efficiently neutralize its effects, since the falsehood techniques evolve faster than the defence tools designed to date. The United Nations Assembly has been working on this premise for more than a decade, with the conviction that this battle has just begun:

> "As disruptive activities using information and communications technologies grow more complex and dangerous, it is obvious that no state is able to address these threats alone. Confronting the challenges of the twenty-first century depends on successful cooperation among like-minded partners. Collaboration among states, and between states, the private sector and civil society, is important and measures to improve information security require broad international cooperation to be effective. Therefore, the international community should examine the need for cooperative actions and mechanisms."[132]

The European Union responds to waves of fake news with different programs that mainly seek unity of states members to counteract disinformation against their interest by common guidelines. As a result, several initiatives have emerged, such as the High Level Group on fake news and disinformation, the Code of Good Practice Against Disinformation, or the Action Plan to combat disinformation appear, which is based on four pillars:

> "1. Improvement of the capacity of the Union institutions to detect, analyze and expose disinformation. 2. Reinforcement of coordinated and joint responses to disinformation. 3. Mobilization of the private sector to combat disinformation. 4. Increased awareness and response capacity of society"[133].

If the ultimate goal is to avoid the effect of false messages on public opinion, it seems obvious that action must also be taken on consumers. International organizations and governments point out the low quality of journalism and the low critical awareness of citizens, as part of the problem:

> "The financial crisis and the advancement of new forms of digital media have posed significant challenges for quality journalism, which have led to a decrease in critical thinking among the public, making it more

130 European Commission, *supra* n. 37.

131 Council of Europe, Recommendation of the Committee of Ministers to member states on the roles and responsibilities of internet intermediaries, 7 March 2018.

132 A/65/201, 30 July 2010 (par.15).

133 European Commission, *supra* n. 37.

susceptible to disinformation and manipulation."[134]

Another important aspect must be taken into account. Despite record growth in late audience ratings, the survival of the media is more than ever at risk. Advertising revenue has suddenly fallen to as much as 70 percent. This shocking reduction in their income jeopardizes the ability of the media to provide independent news coverage.[135] Simultaneously to the disinformation increasement, civil society has organized itself using precisely the facility offered by the internet, principally to denounce network cuts around the world that undermine the free flow of ideas.[136] Journalists also have recently organized in different non-profit associations to check news and eliminate hoaxes, such as the International Fact-Checking Network.[137] There are hundreds of similar initiatives tracking the virtual space every minute to locate malicious messages with the aim to return the truth to the place it should never have lost. Or rather, who never occupied either in war or in peace.

(E) FINAL CONSIDERATIONS

Are we living at war or peacetime? Few convictions resist the doubts arising from this confusing world. We are living a kind of *war without rules* according to World Economic Forum[138]or information war (following the mentioned EU position), immersed in confrontations without specific norms that disbelieve the usefulness of the treaties signed very long time ago… in the analogical era. Today's world has changed faster than law but slower than challenges. When it comes to new threats arising from hybrid conflicts, it very often remains unclear what the applicable law is. The accuracy of norms in any of the operations taking place on the internet is uncertain, specifically when there is no resource to the armed force.[139] But hybrid war cannot be faced with hybrid laws at all. On the contrary, the law must be clearer than ever to successfully tackle new threats in this slippery domain.

To better confront the new challenges disinformation poses, we have already explored the usefulness of a preliminary distinction between armed and non-armed conflicts within *jus in bello* norms, as a complement to the factual classification as international or non-international conflicts since it sometimes turns out deficient as the International Criminal Court stated.[140]

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134 European Parliament, *supra* n. 10 (par.2).

135 Council of Europe, Declaration by the Committee of Ministers of quality of journalism on the digital age, 13 February 2019.

136 Access Now is an organization to defend and extend the digital rights of users at risk around the world.

137 IFCN Code of Principles

138 World Economic Forum, The Global Risks Report 2018

139 M. Schmitt, Tallinn Manual 2.0, *supra* n.25, at 333.

140 *Prosecutor v. Thomas Lubanga, Judgment pursuant to Article 74 of the Statute*, International Criminal Court

Furthermore, the new dangers coming from hybrid conflicts outreach the legal concept of frontiers or state's authorship, which supports the need of a more accurate approach in order to give a more efficient response. This is the European Union[141] claiming in order to counteract disinformation campaigns before it is too late. Instruments such as The Tallinn Manual 2.0 (2017) lead the fighting against disinformation and cyberspace conflicts, assuming that it needs to be constantly updating. Furthermore, other significant sources, such as European Plan of Action Against Disinformation, a number of Un Assembly General Resolutions, or the Draft Articles on States Responsibility represent valuable, inspiring instruments despite it constitutes soft law not legally binding, with limited effectiveness.

Disinformation is not only a legal and authorized method since the first codification of armed conflicts norms, paradoxically it also has contributed to humanize war, the basic premise of International Humanitarian Law. Contemporary Information warfare might become a preferable method rather than conventional armed conflicts simply because it reduces damages over the civilian population and cultural or natural heritage,[142] an argument issued decades ago in the Comments to the Protocol 1 to the Geneva Conventions:

> "A ruse is not only in no way unlawful, but is not immoral either. In many cases it will allow a successful operation with less loss of life than through the simple use of force."[143]

It would not be unrealistic to think that the laws of armed conflicts will prioritize in the near future cyberwar tools over the kinetic use of force because of the apparent lower collateral effect on objects and civilians.[144] Nevertheless, some doubts appear because disinformation as a mean of war seems to be less harmful in the short term, but we should not forget its potential effects can amount to more serious consequences, comparable to conventional war. As a matter of fact, European Union[145] has actually warned about these potentially indiscriminate damages, when seriously affecting the democratic processes or sensitive goods to peace and stability as the protection of health, the environment or the safety of citizens. As long as it does not reach that significant threshold, disinformation puts us in a midterm between the obligation of the peaceful settlement of disputes and the prohibition of the use of force, and a new way to solve international conflicts neither violating these two core principles nor causing bloody harms. This is arguably the reason for its growing presence in modern hybrid conflicts. Does it pose a threat? As said before, this is the duty of the UN Security Council, but considering its practice and having known the potential consequences, a fake news operation

(ICC), 14 March 2012, (par. 539-540).

141 European Parliament, *supra* n. 5.

142 International Committee of the Red Cross, IHL and cyber operations during armed conflicts – ICRC, November 2019, at 3.

143 International Committee of the Red Cross, Commentaries 1516 and 1521 to Additional Protocol I (1987).

144 International Committee of the Red Cross, The Potential Human Cost of Cyber Operations, May 2019, at.15.

145 European Commission, *supra* n. 37.

could be formally regarded as a threat in the near future. If such recognition has not come yet it might be because behind today's disinformation operations are mainly the most powerful and technologically developed states, many of them permanently seated in the Security Council. In other words, they have the power to veto such a similar resolution. Otherwise, the factual statement of disinformation as a threat could be a matter of very short time.

How to efficiently fight disinformation? Avoiding the impact of malicious information over the population demands on the one hand clear actions of democracy enforcement. Strong democracies would less likely fall into fake news campaigns against each other. The autocracies adopting Internet censorship and spreading disinformation online to the domestic population are more probable to also attack their neighbouring democracies than neighbouring autocracies for their geopolitical interest. In addition, the lower educational level of the population, and the greater Internet coverage increase the possibility of disinformation campaigns from abroad.[146] In the meanwhile states' countermeasures basically consist of applying the same means. The ability to respond to disinformation threats by employing a sound communication strategy deems essential,[147] but we must bear that actions designed under the label of "strategic communication" are very frequently operations of propaganda, since both pursue specific and predetermined ends. The aim of modern propaganda is not only to modify ideas, but to provoke action, to make the individual cling irrationally to a process of action,[148] just the same objective disinformation pursues. On the other hand, disinformation proliferates in a general context of low journalistic quality, which demands media professionals with the appropriate knowledge and support to build contrasted truthful messages, as well as citizens with solid critical awareness. To this achievement, independent media are necessary, endorsed by the public authorities. The United Nations, the European Union or the Council of Europe[149] insist on the importance of promoting public media so that it guarantees citizens' access to quality information, and remind governments the obligation to refrain from using them for particular purposes.

146 Ming-Chiao Chang, Chun-Chih Chang, Thung-Hong Lin. "The Art of iWar: Disinformation Campaign as a Strategy of Informational Autocracy Promotion". Paper is submitted to the 116th American Political Science Association's Annual Meeting & Exhibition, September 10-13, 2020.

147 European Parliament, *supra* n. 5.

148 J. Ellul, *Propaganda: The Formation of Men's Attitudes* (Vintage Books, New York, 1973), at 25.

149 Council of Europe, Committee of Ministers, *supra* n. 136.

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Trade in minerals and human rights: towards responsible sourcing of minerals from conflict areas in Europe (Regulation (EU) 2017/821)

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Abstract: Regulation 2017/821 laying down supply chain due diligence obligations for importers in the European Union establishes a common System of obligations that entail minimum standards of responsible sourcing hitherto unknown in Europe. It represents a positive trend in the strengthening of due diligence practices and respect for human rights by European companies when exercising cross-border activities. This paper provides an analysis of its application in order to highlight its possible strengths and weaknesses before it is finally implemented.

Keywords: European regulation – minerals – responsible sourcing – cross-border companies – obligations – due diligence

(A) INTRODUCTION: DUE DILIGENCE AS A STARTING POINT

Since the adoption of the UN Human Rights Council's Guiding Principles on Business and Human Rights (UNGPs),[1] some mechanisms have been gradually implemented with the aim of protecting and respecting human rights, and remedying the adverse impacts and/or possible human rights abuses that business operations may cause in third countries.

Extrajudicial procedures are directed to protect and respect Human Rights (HR) and to remedy, prevent or mitigate any adverse effects on them. They are used as an alternative to judicial mechanisms for the reparation of damages,[2] which are often fraught with procedural difficulties in the initial stages. As a result, due diligence has come to play such a leading role that it has become the main method used for this purpose.[3] In this way, some progress has been

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[1] 'Guiding Principles for Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Human Rights Council (A/HRC/RES/17/31), Human Rights Council Resolution 17/4 of 16 June 2011, *vid.* J.E. Esteve, 'Los Principios rectores sobre las empresas transnacionales y los derechos humanos en el marco de las Naciones Unidas para proteger, respetar y remediar: ¿hacia una responsabilidad de las corporaciones o la complacencia institucional?' 27 *Anuario español de Derecho Internacional*, (2011).

[2] *Vid.* M. Requejo Isidro, *Violaciones graves de Derechos humanos y responsabilidad civil* (The Global Law Collection. Thomson-Aranzadi, Cizur, 2009); J.J, Álvarez Rubio and K. Yiannibas, (eds.), *Human Rights in Business: removal of barriers to Access to Justice in the European Unión* (Routledge, NY, 2017).

[3] Due diligence can be defined as '(...)an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights', as stated by the United Nations High

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made in terms of the duty of States to protect human rights and the responsibility of companies to respect them. This is been attained through a series of national and international sectoral measures,[4] including Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017,[5] with forms the core of this paper.

Regulation 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected areas (hereinafter referred to as the Conflict Minerals Regulation) is aimed at addressing the challenge of ensuring that due diligence is implemented regarding conflict minerals, as set out in the second pillar of the Guiding Principles.[6] Under the Conflict Minerals Regulation, prevention is encouraged in a particularly topical area by establishing a set of obligations directed at preventing EU trade of natural resources the extraction of which is likely to cause sustained violations of human rights.

This is not the first time that the European Union (EU) has adopted a Regulation in order to alleviate the negative consequences that the growing demand for a given product and its trade, together with the institutional and governance shortfalls of the producing countries, may have for the environment, for societies and for people whose way of life revolves around that product.[7] A political initiative was also taken at that point, of which the EU was the main driving force, which was later strengthened by the 2015 Paris Agreement.[8] In this scenario, the fight against climate change has not only been seen as a necessity to achieve a cleaner world and sustainable development,[9] but also as an opportunity for investment and innovation in the field of renewable energies, since it will bring growth to the markets for goods and services related to energy efficiency produced in the EU.

The EU has set itself the target of reducing greenhouse gas emissions by 40% by 2030.[10] In

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Commissioner for Human Rights in 'The corporate responsibility to respect human rights. An Interpretive Guide', United Nations, 2012.

4 Of relevance are the French law on the duty of vigilance of parent companies, the Dutch Child Labour Due Diligence Act and the Draft UN Treaty on Business and Human Rights.

5 OJ 19 May 2017, L130/1.

6 The Guiding Principles on Business and Human Rights contain 31 principles organised around three pillars: the State duty to protect against human rights abuses by third parties, including business enterprises; the duty of business enterprises to respect human rights; and the need for more effective access to remedies for victims of human rights abuses.

7 Regulation (EU) No 995/2010 of the European Parliament and of The Council of 20 October 2010, laying down the obligations of operators who place timber and timber products on the market, OJ, 11 November 2010, L 295/23.

8 Paris Agreement adopted under the United Nations Framework Convention on Climate Change, see J. Juste Ruiz, 'El acuerdo de París sobre el cambio climático y los acuerdos no normativos o no jurídicos', in C. Martínez Capdevila (eds.) *Principios y Justicia en el Derecho Internacional: libro homenaje al profesor A. Remiro Brotons,* (Dykinson, 2018),173-181.

9 Agenda 2030 on sustainable development.

10 COM (2015) 81 final, 25 February 2015, '*The Paris Protocol-A Blueprint for tackling global climate change beyond 2020*'.

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the energy transition the priority of the 'Energy Union' is: 'to move away from an economy driven by fossil fuels'.[11] In this context, promoting 'clean mobility' is one of the main objectives, bearing in mind that transport accounts for at least a quarter of greenhouse gas emissions and is a major cause of pollution in cities.[12] In line with these guidelines, there has recently been a significant increase in measures and incentives to encourage both the production and use of 'clean vehicles', namely electric and hybrid cars.[13] In fact, increasing the production of so-called clean vehicles and boosting innovation in this field is seen as one of the great benefits for the Member States, for their industries and for their citizens; and it can position Europe as a leader in renewable energies.

Yet there is hardly any discussion on how clean vehicles move. The demand for the lithium batteries needed for their operation (similar to those used for computers and electronic devices) has increased proportionally to the demand for electric cars, in parallel to the growth in funding for technical innovations aimed at lowering their production costs to achieve greater competitiveness. Although it has barely been noticed, the ultimate driver of the momentum behind the progressively higher use of electric cars (and therefore, of the greenhouse gas reduction targets) has been their improved batteries. They provide increasingly greater autonomy at a lower cost, while also lowering pollution and reducing their negative effects on human rights.

Battery suppliers therefore have become key actors, and battery components are their main props. As batteries are made up of cobalt and lithium, among other elements, there has also been a significant increase in the demand for these minerals in recent years. However, cobalt is one of the most expensive minerals, due to its scarcity and to the difficulty in its extraction. Some 55% of the world's production is extracted from artisanal mines located in the Democratic Republic of the Congo (DRC).[14] And the DRC, despite being one of the wealthiest countries in natural resources (gold, diamonds, copper, coltan, uranium and cobalt), is one of the poorest countries in the world.[15] The profits from growing demand for the production of these raw materials do not seem to help the country break out of the cycle of poverty and political instability that has characterised it since its colonisation by king Leopold II of Belgium. On the contrary, it has been argued that there may be a 'resource 'curse', since the trade in these minerals (as with coltan, gold or diamonds) has plunged the country into a

[11] COM (2015) 80 final, 25 February 2015, '*A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*'.

[12] COM (2016) 501 final 20 July 2016, 'A European Strategy for Low-Emission Mobility'.

[13] Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles, OJ 12 July 2019, L188 COM (2017) 675 final, 8 November 2017 'Delivering on low-emission mobility A European Union that protects the planet, empowers its consumers and defends its industry and workers'.

[14] Date extracted from *Cobalt Institute*, last accessed on 12 October 2020.

[15] According to World Bank and UNHCR data.

continuous struggle for control of mines, and has resulted in illegal exploitation[16] and smuggling. This has caused not only to two civil wars, but also continuous armed conflicts in which sexual violence, forced displacements, looting, child labour, mutilations and all kinds of human rights violations are so common that they have become a part of the everyday lives of the country's population.

The Conflict Minerals Regulation set out a series of measures aimed at ensuring the responsible sourcing of minerals from so-called 'conflict-affected areas' (including the Democratic Republic of the Congo) in order to mitigate the negative effects of their trade. It includes a set of due diligence practices that companies sourcing minerals from these areas must comply with and enforce throughout the supply chain. This paper analyses: some similar measures that provide the legal background for the Conflict Minerals Regulation; the implementation of the Conflict Minerals Regulation and its functioning, with a view to explaining its strengths and weaknesses.

(B) LEGAL BACKGROUND: OECD FOR RESPONSIBLE MINERAL SUPPLY CHAINS AND THE DODD-FRANK ACT

(1) Due diligence in the Guiding Principles on Business and Human Rights

The Guiding Principles on Business and Human Rights (UNGPs) which were adopted by consensus by the UN Human Rights Council in 2011, put into practice the UN 'Protect, Respect and Remedy' Framework. This is a comprehensive framework to integrate conflict mineral due diligence initiatives. Considering that risks to human rights result from the potential negative impact of companies' business operations, the Risk-Based Guiding Principles call for the prevention or mitigation of such negative impacts before damage occurs, and for the remediation of damage that has already occurred.

Principle 17 sets out the basic due diligence parameters for preventing the negative impacts that business activity can have on human rights, while Principles 18 to 22 expand on these essential components. Human rights due diligence includes the identification and management of risks with the aim of preventing or mitigating their possible adverse effects and the establishment of a due diligence system that includes monitoring, evaluation and communication measures to ensure their successful progressive implementation.

The idea of anticipating the undesirable consequences of business activity in order to mitigate any potential risks to human rights risks underlies this principle. It promotes early action when an activity or relationship is in progress in order to prevent its negative effects from being carried along the entire supply chain. The earlier the due diligence process is

[16] Related to the mines in the Democratic Republic of the Congo see F. Triest, 'El sector minero en artesanal en el Congo oriental: condiciones de los emplazamientos y perspectivas', Alboan (ed.) *Comisión de Justicia y Paz* (Bilbao 2012).

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initiated in a business activity, the better the chances of mitigating its potential adverse effects. Taking the necessary measures to prevent the negative effects of the business activity and thus reduce the risks to human rights therefore becomes a basic pillar of due diligence. It has also been a key factor in the development of European Regulations on conflict minerals.

Compliance with the Guiding Principles requires that State Business and Human Rights Action Plans (NAPs) incorporate initiatives of positive law and public policies relating to, among other aspects: the articulation of due diligence processes; the inclusion of rights clauses in investment treaties; and the making available of effective redress mechanisms for the victims, both in and out of court. The adoption of many of these measures will require corresponding legislative reforms, which should be announced at the beginning of each NAP and have the necessary institutional support. However, due diligence has a heterogeneous presence and development in NAPs. In general, the differences lie in the way due diligence, or Principle 17, is approached in a more abstract manner: by promoting, guiding, inviting (Denmark, Finland, Chile, Colombia, Czech Republic, Ireland, Italy, Poland, Spain, Switzerland, Sweden and United Kingdom); or by proposing concrete measures to achieve the desired objectives and even deadlines (Belgium, France, Germany, Netherlands). The French NAP (like the Italian one) includes important initial diagnostic work and proposes the adoption of specific measures in the future. Whereas due diligence is not imposed by law in the Italian NAP, it undertakes to promote its adoption by reviewing existing legislation on public procurement. In the case of Norway, the NAP contains proposals linked to specific sectors.

The State must assist in the implementation of effective due diligence processes by providing the necessary tools for companies to comply with their due diligence duty. Nevertheless, most States have outlined a plan of intentions in their National Plans in which hardly any concrete tools are developed.

(2) The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

The 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas' (hereinafter referred to as the OECD Conflict Minerals Guidance) was devised following the 'OECD Guidelines for Multinational Enterprises', included in the 'OECD Declaration on International Investment and Multilateral Enterprises'.[17] The OECD Conflict Minerals Guidance is the first of a set of OECD Due Diligence Guidance documents developed for various sectors[18] as non-binding recommendations. They

[17] For more on the OECD Guidelines, *vid.* P. T. Muchlinski, *Multinational Enterprises & Law*, 2nd ed. (Oxford University Press, Oxford 2007), 658-700.

[18] The OECD has published sector-specific due diligence guidance documents for responsible supply chains in the agricultural, garment and footwear sectors, as well as good practice documents for the extractive and financial sectors: OCDE (2016 a.), OCDE (2017a), OCDE (2017b), OCDE (2018), OCDE/FAO (2017). On 31 May 2018,

were issued by OECD member state[19] governments and are addressed to multinational enterprises with the aim of encouraging responsible conduct in their business operations, regardless of the country in which they operate. The OECD Conflict Minerals Guidance was clearly used as a reference framework for the development of the EU Conflict Minerals Regulation. In fact, the Conflict Minerals Regulation was a response to the recommendation to promote compliance with the OECD Conflict Minerals Guidance and reflects the active involvement of the EU in the adoption of the Guidance document and its commitment to responsible sourcing from conflict areas.

The OECD Minerals Guidance was developed in 2011,[20] and was a collaborative effort between governments, international organisations, industries and civil society. It provides a due diligence framework that should be used as a basis for companies to achieve responsible supply chain management of minerals from so-called conflict- or high-risk areas. Its objective is to help companies respect human rights and to engage in responsible supply practices that do not contribute to maintaining conflicts in these areas, by creating conditions conducive to agreements to be made with their suppliers that guarantee human rights. To this purpose, it provides an overarching risk-based due diligence framework for responsible supply chains of minerals from conflict and high-risk areas (Annex I); a model mineral supply chain policy that provides a set of principles (Annex II); and a series of suggested measures for risk mitigation and indicators for measuring improvement that upstream companies may consider with the possible support of downstream companies (Annex III). In addition, taking into account that specific due diligence requirements and processes differ depending on the mineral and the company's position in the supply chain, specific recommendations are established through Supplements for tin, tantalum, tungsten and gold that are adapted to the challenges associated with the supply chain structures of these particular minerals.

The effectiveness of the measures included in the Annexes of the OECD Conflict Minerals Guidance depend on a number of issues. Both the concept of 'risks' and the concept of 'supply chain' are particularly important, as they are used to establish the number of companies affected. 'The OECD Conflict Minerals Guidance defines 'risks' in relation to the potentially adverse impacts that the operations and activities of a company or its relationships with third parties may have. Adverse impacts may include harm to people (referred to as 'external impacts'), and reputational damage or legal liability for the company (referred to as 'internal

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the OECD published the OECD Due Diligence Guidance for Responsible Business Conduct (OECD 2018b).

[19] Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.

[20] Approved by the OECD Investment Committee and the OECD Development Assistance Committee and endorsed by eleven member states of the International Conference of the Great Lakes Region (Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia). An additional Gold Supplement was adopted on 17 May 2012.

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impacts'). In view of the existing difficulty in proving liability for external damages in court, both types should be taken into account. In order to ensure that effective mechanisms are in place for human rights claims, it is crucial to argue that harm has been caused and, in the reverse, the degree of impact on competitiveness linked to internal impacts. The confluence between both types of damages can be found in the legal liability of companies for causing harm to people; and in terms of the difficulty in obtaining some form of reparation for the victims as a result of company liability, the key issue is the impact that this damage can have on their business reputation. Efforts to provide information and transparency are fundamental to ensure that consumers can play a role in establishing effective systems, since their behaviour indirectly affects companies' competitiveness.

The definition of 'supply chain' in the OECD Conflict Minerals Guidance refers to the process of bringing a raw mineral to the market. This process involves multiple actors who generally take part in the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacture and sale of the end product. The term 'supply chain' refers to 'the system of all the activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers'.[21] In this process, the companies involved are differentiated according to whether their participation in the supply chain is 'upstream' or 'downstream'. 'Upstream' companies include miners, local traders or exporters from the country of origin, international concentrate traders, mineral re-processors and smelters/refiners; and 'Downstream' companies include metal traders and exchanges, component manufacturers, product manufacturers, original equipment manufacturers (OEMs) and retailers. The OECD Conflict Minerals Guidance applies to all companies operating in a conflict-affected and high-risk area, or supplying or using tin, tantalum or tungsten, or their smelted derivates, from a conflict-affected and high-risk area.

Annex I is divided into five steps aimed at: (1) establishing strong business management systems, which include due diligence standards that are to be publicised, communicated, and guaranteed through a system of control and transparency applicable to all actors in the supply chain; (2) Identify and assess risks; (3) Design and implement a strategy to respond to identified risks (with the assistance of Annex II and Annex III); (4) Carry out independent third-party audit of due diligence practices in supply chains; and (5) report on supply chain due diligence. Obviously, some flexibility is required in the application and implementation of due diligence, and the steps must be adapted to each company's own activities and its position in the supply chain. Taking the OECD Guidance and Gold Supplement as an example, it can be seen that a more specific distribution of obligations has been established for upstream companies than for downstream companies.

[21] Definition taken from p. 20 of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

Finally, it should be noted that the OECD Conflict Minerals Guidance is voluntary and non-binding. Therefore, there are no sanctions linked to non-compliance with its recommendations. The task of promoting and encouraging their correct application lies in the States, and it is the National Contact Points in each State that are responsible for promoting the effectiveness of the OECD Guidance and Guidelines. National Contact Points act as deliberative bodies and their role is promoting and facilitating out-of-court resolution of potential disputes related to non-compliance (with the recommendations set out in the OECD Conflict Minerals Guidance).[22] Disputes are resolved through a procedure in which the National Contact Point mediates and attempts to reach consensus between the parties involved on the basis of compliance with the OECD Guidelines.

(3) Section 1502 of the Dodd-Frank Act.

A major financial reform was launched in the United States with the enactment of the Dodd-Frank Financial Reform and Consumer Protection Act (the Dodd-Frank Act),[23] signed into law by President Barack Obama on 11 July 2010. It was aimed at restoring investor confidence in the integrity of the system and fostering its stability in the aftermath of the worst crisis since the Great Depression. As stated in the Preamble of the Dodd-Frank its main objectives were: to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end the problems arising from financial institutions that are 'too big to fail', to protect the American taxpayer by ending bailouts and to protect consumers from abusive financial services practices.

Special attention should be paid to Section 1502 of the Dodd-Frank Act, which expressly refers to the exploitation and trade of minerals originating in the Republic of the Congo or an adjoining country. The objective of Section 1502 is to curb the serious human rights abuses related to the trade of certain minerals and reduce the capacity of armed groups that use the illegal trade in minerals to finance their activities, maintain control of mines and power, and foster conflict and political instability, and establish certain due diligence guidelines to be followed by potentially affected U.S. companies.

Section 1502 of the Dodd-Frank Act set a pioneering national standard in integrating due diligence obligations for U.S. publicly traded companies that directly or indirectly (through their suppliers) use so-called conflict minerals in their manufactured products .[24] And it is

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[22] In Spain the Contact Point was created by Ministerial Order PRE/2167/2014 of 11 November 2014, which established and regulated the composition and operation of the National Contact Point; *vid.* M. C. Márquez Carrasco and I. Vivas Teson, (coord.). *La implementación de los principios rectores de las Naciones Unidas sobre empresas y Derechos humanos por la Unión Europea y sus Estados miembros* (Thomson Reuters- Aranzadi and Spanish Ministry of Economy, Industry and Competitiveness, 2017).

[23] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173,111 Congress (2009-2010) of the United States of America.

[24] M. C. Rodríguez de Ramírez, 'La polémica regulación de la Comisión de valores de Estados Unidos sobre minerales provenientes de zonas de conflicto en la cadena de suministros', *Profesional y Empresarios (D&G)*, XV,

certainly a point of reference when analysing the European Conflict Minerals Regulation. US law has had a major influence on the process of drawing up the EU Regulation, especially throughout the discussions and negotiations that emphasised its unintended consequences on the countries of origin. The Dodd-Frank Act requires companies whose suppliers obtain minerals from a covered country[25] to conduct a due diligence process to ascertain whether the purchase of such material could have a direct or indirect link to the financing of armed groups. In order to report on the presence of conflict minerals in their products, companies within the scope of the Dodd-Frank Act must submit an annual report to the *Security and Exchange Commission* (SEC) by 31 May.

The first report from May 2014 was submitted to the SEC by more than 1,000 companies that may use conflict minerals. *Global Witness* and Amnesty International analysed 100 of these reports and produced a document entitled 'Digging for transparency', which revealed the initial strengths of the Dodd-Frank Act and some of its shortfalls.[26] Without going into an exhaustive analysis of the Act some conclusions of interest can be drawn that may be used as a starting point. Additional data from the Dodd-Frank Act will be used later when analysing the Conflict Minerals Regulation).

The first documents submitted to the SEC showed that most companies did not know if their products were linked to the activities of armed groups; and 41% did not have a specific policy to identify risks in their supply chain. In fact, only 15% of the companies analysed appear to have contacted, or at least attempted to contact, the facilities that process the minerals into their products (foundries and refineries) and their research was limited to their direct supplier. Some 79% of the reports analysed did not comply with the general requirements established by the Dodd-Frank Act; however, the fact that the remaining 21% did in the first year of its application demonstrates that it is feasible to do so.

The absence of sanctions and independent external controls or audits is probably the weak point of the Act. During the first years after the implementation of the Dodd-Frank Act, the SEC established an obligation for the reports to be evaluated by external audits through the Small Entity Compliance Guide.[27] But the obligation was repealed by a 2014 Court of Appeals decision, which urged the SEC to issue a new guide in which a company should only have its due diligence activities audited on a voluntary basis if it freely chooses to describe its products as DRC conflict free. At the same time, the wording of the Act did not establish a system of sanctions for companies that submit incomplete or inaccurate reports, which reflected a common weakness that is usually inherent in due diligence mechanisms.

September 2014.

[25] Democratic Republic of the Congo and its adjoining countries: Sudan, Uganda, Rwanda, Burundi, Tanzania, Zambia, Angola, Congo and Central African Republic.

[26] Global Witness and Amnesty International: *'Digging for transparency, How companies are only scratching the Surface of conflict minerals reporting'*.

[27] For more information see Small Entity Compliance Guide.

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Despite the initial hurdles, this is a type of report that had not previously been required of U.S. companies or their business operations in high-risk countries. This has placed the United States at the forefront of the efforts to ensure that companies obtain or market natural resources responsibly, guaranteeing respect for human rights. It is worth noting its innovative character and its encouragement for American companies to move towards responsible minerals sourcing beyond their borders. It has also served both as an incentive for the drawing up of the EU Conflict Minerals Regulation and as a model during the process.

(C) THE EU CONFLICT MINERALS REGULATION

(1) EU Conflict Minerals Regulation: a first step towards responsible minerals sourcing.

At the supranational level, the EU Conflict Minerals Regulation was adopted on 17 May 2017 in the wake of the Guiding Principles in Business and Human Rights and the OECD Conflict Minerals Guidance. Its objective was to establish proper due diligence in the supply chain through a 'proactive' and 'reactive' process. This required European economic operators to monitor and manage the sale and purchase of certain minerals in order to ensure that their activities would not contribute to perpetuating conflicts or negative effects resulting from their trade.[28]

The Conflict Minerals Regulation was adopted on the initiative of the European Parliament. It had the support of civil society, which on four separate occasions[29] called on the EU to follow in the footsteps of Section 1502 of the Dodd-Frank Act. The Conflict Minerals Regulation was passed as a non-binding instrument, which after an intense debate took the form of recommendations. Therefore, the duty to verify and sanction the extent to which it is complied with was left to States, as established in Article 16.

The negotiations before the adoption of the Regulation reflected the existence of two approaches that marked the long debate and were reflected in the text that was finally adopted. On the one hand, the Commission's initial proposal, influenced by the anti-legislation coalition, established a voluntary certification system for only a small part of the supply chain. This position was built on the desire to avoid the unintended consequences that the implementation of the Dodd-Frank Act had had on the Democratic Republic of the Congo and on minerals trade. It sought to end the de facto embargo on conflict minerals and the

[28] P. Diago Diago, 'El control del comercio internacional de los minerales en conflicto: el Reglamento (UE) 2017/821 por el que se establecen obligaciones en materia de diligencia debida en la cadena de suministro de estaño, tantalio, y wolframio y sus minerales y oro', 9099 *Diario La ley,* (2017); O. Martin-Ortega, 'Europa se enfrenta (por fin) al resto de los minerales conflictivos: el Reglamento 2017/821', 45 *Revista General de Derecho europeo*, (2018), 276-298 and 'Human rights due diligence for corporations: from voluntary standards to hard law at least?', 32 *Netherlands Quarterly of Human rights* (2014) 1-31.

[29] Resolutions of 7 October 2010, 8 March 2011, 5 July 2011 and 26 February 2014.

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unintended consequences linked to the stigmatisation of the territories listed in the US law.[30]

On the contrary, the pro-regulation coalition advocated a mandatory rule for both the importers of raw materials and for products containing the minerals considered to be conflict minerals. This position describes the de facto embargo as a necessary and temporary evil that has helped to reduce the income of armed groups and to provide greater security for mining territories. The unintended consequences of the rule were only effective in the short term and yet guaranteed long-term results. In the political process, the Parliament ended up representing this position and, although it is true that in the Parliament's Committees both positions were represented, on 20 May 2015, it voted in favour of far-reaching amendments to the Commission's Proposal. During the process, there had been intense mobilisation in Europe calling for strong regulations, which undoubtedly influenced Parliamentarians. According to this position, as had been reflected in the first years of implementation of the Dodd Frank Act, the voluntary system could be ineffective. Most companies do not check suppliers and do not publish the necessary information on their due diligence practices, even if they are obliged to do so.

After the Parliament's vote, the Council of Ministers reached an ambiguous compromise that enabled the start of the trialogue of the European institutions in December 2016. All positions aimed to reduce the unintended consequences of the US law and the key was whether to choose a voluntary or an obligatory system. The efforts of the Dutch government to reach consensus during its presidency culminated in a text that sought to strike a balance and included the idea that the volume of imports would determine whether the rule would be mandatory or not. It also included a system of thresholds that would exempt small and medium-sized enterprises from the excessive administrative burden of due diligence systems. As we will see, the text finally adopted represented a minimum agreement, which, after six years of negotiation, did not require compliance for the whole supply chain, but it was compulsory for direct importers of metals and minerals, which was a small, but important, step forward.

As in the case of its American counterpart, the Conflict Minerals Regulation established a supply chain due diligence system, the main purpose of which is to reduce opportunities for armed groups and security forces to benefit from trade in certain minerals, and thus to stop contributing to the negative consequences and continuing human rights violations associated with their trade (Article 1). Although they agreed on the main objective, their approaches differed. Thus, the Minerals Regulations changed the focus from compliance with American law to a risk policy aimed at implementing a number of measures to increase transparency and certainty in the supply activities of the Union's importers, and of the smelters and refiners

[30] D-J., Koch and O. Burlyuk, 'Bounding policy learning? EU efforts to anticipate unintended consequences in conflict minerals legislation', 17 *Journal of European Public Policy* (2019), pp. 1-23.

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sourcing their minerals from conflict-affected or high-risk areas.

(2) Material scope of the Regulation: what are conflict minerals?

Today, high-technology components have been incorporated into our everyday lives at a rapidly increasing rate, as mobile phones, tablets and computers have become ubiquitous within daily tasks. The number of mobile phones in a family sometimes even exceeds the number of its members; they each have a tablet and a computer at an ever-younger age, and in many cases, households have a TV for each family member. The components that make up these technological devices include coltan, gold, tantalum and tin, each of them having a specific function within their structure. European countries cannot meet the growing demand for these raw materials and resort to those countries where the reserves of these minerals are located for their supply. For example,70% and 80% of the world's reserves of tantalum (from which coltan is extracted) are found in the Democratic Republic of the Congo, especially in artisanal mines in the north of the country in Katanga, Maniema and Kivu. The geographical nature of this mountainous area and the lack of roads and electrical infrastructures pose logistical difficulties that render industrialisation[31] virtually impossible.

Similarly, gold is used not only in jewellery but also in electronic instruments of all kinds; as well as cobalt, tungsten, copper and diamonds,[32] minerals that are characterised by their scarcity and difficult extraction. In fact, the land of the Democratic Republic of Congo is also particularly rich in cobalt, from which the lithium batteries that move electric vehicles are made. As noted in the Introduction to this paper, these have become a solution to the harmful effects of greenhouse gas.

The Conflict Minerals Regulation, as Section 1502 of the Dodd-Frank Act, is intended to prevent the trade in minerals in areas considered politically unstable from being used to finance armed groups and forced labour, and to curtail opportunities for the violation of human rights corruption and money laundering. In order to establish the material scope of the Conflict Minerals Regulation, two aspects should be taken as a starting point: what type of minerals it covers, and which areas are considered to be conflict or high-risk areas. The combination of both will result in the definition of 'conflict minerals'.

Minerals falling within the material scope of the Conflict Minerals Regulation are the so-called '3Ts and G'.[33] These are minerals or metals which either contain or consist of tin,

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[31] See, F. Triest, 'El Sector minero artesanal en el Congo Oriental: condiciones de los emplazamientos y perspectivas', Alboan (ed.), *Comisión de Justicia y Paz*, (Bilbao, 2012).

[32] In order to prevent the illegal trade in diamonds and its negative effects on human rights, a Certification Scheme for diamonds, called the Kimberley System, was established in 2002, P. Diago Diago, 'Los diamantes de conflicto y el comercio internacional: necesaria evolución del sistema PK', 8364, *Diario la Ley*, (2014) and 'El comercio internacional de diamantes: Sistema de certificación del Proceso Kimberley', in vol. 1., no. 1, *Cuadernos de Derecho Transnacional* (March 2009), 72-91.

[33] *Tantalum, tungsen and tin + gold.*

tungsten, tantalum or gold and are within the minimum thresholds laid down in Annex I (Article 18). These must be reviewed and updated every three years from the application of the Regulation. This is a restrictive delimitation that leaves out minerals with similar characteristics such as cobalt and copper, among others, the demand for which has been increasing in recent years.

As in the case of the Dodd-Frank Act, the Conflict Minerals Regulation only includes certain types of minerals which, moreover, must be found in a predetermined minimum percentage. Therefore, the material scope of the Regulation is limited and restricted; however, it would have been more appropriate to have been defined more extensively by using common criteria based on the sudden increase in the demand of certain minerals, by their scarcity or by the difficulty in their extraction. This would have made it possible to include minerals such as cobalt, which has similar characteristics to those established in the Regulation, and to update the application of the Conflict Minerals Regulation according to the minerals affected, by linking their trade with potential human rights violations.

The OECD's Conflict Minerals Guidance provided a more consistent response, by permitting the potential extension of the mechanisms put in place to new minerals, in order to promote responsible sourcing. Its structure establishes some basic models that help companies to achieve their objective, but then complements them with specific Supplements for each mineral. This allows companies to adapt to the characteristics of the trade of that type of mineral and to better meet their needs, and Supplements can also be added as needed. As can be seen, the first version of the OECD's Conflict Mineral Guidance included Supplements on Tin, Tantalum and Tungsten, followed later by the Gold Supplement.[34]

Article 2 of the Conflict Minerals Regulation, broadly defines 'conflict and high-risk areas'.[35] The definition includes all areas where there is an armed conflict or which, having had an armed conflict, have not recovered and are fragile. It also refers to areas of political instability, such as locations with governance deficiencies where the political structure and security is precarious or even non-existent. An example provided is that of failed states, in which continuous violations of international law and human rights violations are committed. In this context, reference is also made to the definition of 'armed groups and security forces' mentioned in Annex II of the OECD Conflict Minerals Guidance.

This broad definition creates a certain degree of legal uncertainty, although greater clarity and consistency is provided in Article 14. Article 14 calls on the Commission, in consultation with the European External Action Service and the OECD, to establish non-binding guidelines

[34] The 'OECD Due Diligence Guidance for Responsible Supply Chains for Minerals from Conflict-Affected or High-Risk Areas' was endorsed by the OECD Investment Committee and the OECD Development Assistance Committee in the Lusaka Declaration of 15 December 2010 and was subsequently amended on 17 July 2012 to include a reference to the Gold Supplement.

[35] This definition has been regarded favourably by legal doctrine: see O. Martin-Ortega, 'Europe...', *supra* n. 28 at 228.

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in the form of a handbook for economic operators explaining how to apply the criteria for determining whether an area is a conflict or high-risk area. According to the guidelines provided by this handbook, a non-exhaustive list of conflict or high-risk areas will be provided, to be updated periodically. The industry demanded an exhaustive list of countries affected by the conflict that companies could use to select their suppliers, but the Commission refused to provide a fixed list. As was evident in the process of negotiations on the Conflict Mineral's Regulation, the intention was to avoid the stigmatising effects that a closed list can have on the countries and areas included, and the de facto boycott of certain areas. In fact, the list is not intended to be decisive in delimiting the scope of the Conflict Minerals Regulation, since it does not exempt Union importers sourcing from areas not included in the list[36] from compliance with their obligations. Hence the importance of the handbook with appropriate guidelines for companies to correctly identify risk areas and comply with their obligations.

Thus, the Conflict Minerals Regulation is flexible in terms of what is considered to be a conflict zone, which needs to be revised and updated, and does not limit its application to a restricted geographical scope; unlike the Dodd-Frank Act, which has a narrower scope and provides a fixed number of pre-established areas, and consequently may fail to meet actual needs. In fact, the type of negative effects that are to be avoided are not only characteristic of the countries identified in the Dodd-Frank Law (Democratic Republic of the Congo and adjoining countries). There are other mineral-producing countries[37] where extraction difficulties (especially when done by hand), together with political instability in the mining areas and poverty all contribute to an increasing risk of potential human rights violations, given the absence of guarantees to ensure respect of human rights. The dynamic list reduces the possibility of a country being embargoed and is therefore considered a good measure to avoid any unintended consequences that the rule might have.

(3) Timeframe: is the long transitional period too long?

The Conflict Minerals Regulation was adopted on 17 May 2017. It was published in the Official Journal of the European Union on 19 May 2017 and, pursuant to Article 20, it entered into force twenty days after its publication. It was generally applicable from 9 July 2017, but in reality, most of the provisions that impose effective obligations on importers will be applicable from 1 January 2021, which will be the definitive implementation date.

This 4-year transitional period seems excessively long. It is intended to make it easier for the economic operators involved to adapt to the new system of due diligence obligations and, above all, it is directed to setting the process in motion. Companies have been encouraged to

[36] Measure that 'may be excessively burdensome for importers, who will have to deal with a large volume of bureaucracy and costs that may have a negative impact on their finances when they do not source conflict minerals', as stated by P. Diago Diago, 'El control del...', *supra* n. 28, at 2

[37] Venezuela, Colombia, Brazil, India, China, Myanmar and Thailand, among others, also have coltan, cobalt and gold mines.

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prepare for the effective fulfilment of their obligations by the implementation date as required. Measures include some preparatory tasks to be performed by the Member States, the Commission and the IIigh Representative of the Union for Foreign Affairs and Security Policy (hereinafter the Commission). This implementation period gives all those affected by the standard (exporting countries, importing countries and companies) some time to prepare for implementation of the standard and to strengthen their due diligence systems. This encourages companies and suppliers to work together to bring their systems into compliance with the standard. The aim is to try to avoid the unintended consequences that the abrupt disruption of trade in conflict areas may have for the countries of origin.

According to Article 10 of the Conflict Minerals Regulation, Member States were required to designate the competent authorities responsible for the application of the Regulation and inform the Commission of their names and addresses by 9 September 2017. The Commission is responsible for publishing this list in the manner set out in Annex III and for keeping it up to date in the light of changes reported by Member States. The list of competent authorities was published - with some delay - on 6 June 2019 (data updated to March 2019[38]).

The designated competent authorities are responsible for ensuring the effective and uniform application of the Conflict Minerals Regulation throughout the European Union (Article 10). They are also responsible for carrying out the necessary controls to ensure that the Union's importers comply with the obligations laid down in the Conflict Minerals Regulation and, where appropriate, to establish appropriate sanctions.

The Commission is also to consult with the European External Action Service and the OECD during the transitional period, and to prepare a handbook with guidelines that will help economic operators to identify conflict or high-risk areas. As discussed in the previous section, the purpose of this handbook is to provide an indicative list of major conflict or high-risk areas to allow companies to correctly implement the Conflict Minerals Regulation. Nevertheless, this is not an exclusive list, because Union importers sourcing from areas not mentioned in it will continue to be responsible for the fulfilment of the obligations laid down in the provisions. The handbook has not yet been published.[39] While it is possible to have an idea of what 'conflict area' means according to the definitions established in the Conflict Minerals Regulation and, therefore, of the companies that will be potentially affected, this delay will reduce companies' operability and their progressive adaptation to the Regulation during the transitional period. Consequently, the Conflict Minerals Regulation to a certain extent, is failing to meet its expectations.

[38] This information was taken from the European Commission website, available here, last accessed on 13 October 2020.

[39] However, a small Guide was published in March 2017, see 'A quick Guide if you're involved in the trade in tin, tungsten, tantalum, or gold'. In August 2020 was published a DG Trade Statistical Guide; last accessed on 13 October 2020.

(4) Personal scope: one of the major weaknesses of the Conflict Minerals Regulation

The Conflict Minerals Regulation requires EU companies in the supply chain to ensure that their imports of the minerals and metals do not come from conflict areas. However, as can be seen from the definition of the mineral supply chain in Article 2, obligations will be imposed on those organisations and actors involved in moving and processing the minerals from the extraction site to their incorporation in the final product. By setting the limit on this incorporation of the mineral into the final product, the definition of supply chain only applies to direct importers of minerals based in the EU. However, it leaves out companies that import already manufactured electronic components and have a key role in the supply of the products and their arrival on the market. Compared to the definition of the supply chain provided in the OECD Conflict Guidance, the Regulation is less ambitious and ignores those companies that are involved in the manufacture and sale of the final product. According to the OECD Conflict Minerals Guidance, the supply chain ends with the sale of the final product and includes those who participate from 'extraction site downstream to its incorporation in the final product for end consumers'. This notably increases the number of operators involved in due diligence tasks and gives greater prominence to the companies that have more visibility for the consumer in the market.

The wording of Article 1 of the Conflict Minerals Regulation is even stricter in this respect, and exempts part of the companies included in its own definition of supply chain by introducing supply chain due diligence obligations only for those Union importers of minerals or metals whose volume of imports of each of the minerals or metals exceeds the minimum laid down in Annex I.

This is in line with the definition of importers in Article 2 of the Conflict Minerals Resolution. Firstly, it points to any natural or legal person declaring minerals or metals for release for free circulation within the meaning of Article 201 of Regulation (EU) No. 952/2013 laying down the Union Customs Code.[40] In so doing, it identifies those who fall within the definition of direct importers based in the EU. And secondly, to direct importers in the EU who import the established minimum volume. Thus, it further restricts its material scope by means of a second predetermined threshold which leaves out those importers who do not exceed it through a process based on companies' own information on their imports. This is intended to exclude small and medium-sized enterprises, which would not be able to cope with the excessive bureaucratic burden that the introduction of the Regulation's due diligence system may entail. However, it would have been more appropriate to include them,

[40] Based on Article 201 of Regulation (EC) 952/2013 of 9 October 2013, OJ 10 October 2013: 'Release for free circulation shall entail the following: the collection of any import duty due; the collection, as appropriate, of other charges, as provided for under relevant provisions in force relating to the collection of those charges; the application of commercial policy measures and prohibitions and restrictions insofar as they do not have to be applied at an earlier stage; and completion of the other formalities laid down in respect of the import of the goods.'

but to also give them appropriate means to implement the system during the process.

Article 18 lays down the methodology for setting these minimum volumes, which are to be published in Annex I on the basis of customs information that shall be provided by the Member States at the request of the Commission on the annual import volumes into their respective territories by Union importer. The Commission will use this information to select the highest annual import volume per Union importer corresponding to no less than 95 % of the total annual volume of imports into the Union. On the date of publication of the Conflict Minerals Regulation, the first thresholds were established by volume and by type of mineral. These were excessively high quantities (especially for some of the minerals) that not only left out a large number of companies that were exempted from the obligations established in the Regulation, but also corresponded to market values that can be a strong incentive to buy arms or promote bribes in the producing countries.[41]

Finally, it should be noted that under the Conflict Minerals Regulation, companies that recycle minerals or stocks that include the above-mentioned minerals sourced before 1 February 2013 are also excluded from the obligations provided. However, the Regulation will indirectly affect smelters and refiners insofar as the importers concerned are obliged to ensure that their sources of supply come from responsible smelters and refiners. The Commission's tasks include preparing an overall list of responsible smelters and refiners that comply with the requirements set out in the Conflict Minerals Regulation, as set out in Articles 8 and 9. The Commission will also be required to update the list as the Regulation is gradually implemented and companies strengthen their due diligence process.

Different types of obligations are established for upstream companies, which extract and refine the minerals (mining companies, raw material traders, smelters and refiners) and for downstream companies, which process minerals into finished products and sell them to other businesses, governments or private individuals. While all upstream companies must comply with the due diligence obligations set out in the Regulation, a distinction is made between different types of downstream companies: those that import metal-stage products, which must also comply with due diligence obligations, and those that operate beyond the metal-sage, which do not have the same obligations. However, the latter companies are required to use reporting and other tools to help make their due diligence more transparent and promote the due diligence system.[42] Through this differentiation, the Regulation emphasises the link in the chain where there is a greater risk, but it may also run the risk of causing manufacturing tasks to be transferred to non-EU countries in order to avoid compliance with the obligations

[41] The amount of gold that companies must trade in to fall within the scope of the Regulation was at least 100 kg. per year. As each gram of gold is priced at around 43 euros, 100 kg. of gold will buy a substantial number of weapons.

[42] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards the disclosure of non-financial information and information on diversity by certain large companies and certain groups, OJ 15 November 2014, L330/1.

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laid down.

It can be concluded that the personal scope of application of the Conflict Minerals Regulation is more restrictive than that of the OECD Conflict Minerals Guidance and then that of the Dodd-Frank Act. The latter includes companies that use conflict minerals directly or indirectly through their suppliers in manufactured products, provided that the mineral was 'necessary to its functionality' or 'necessary for the production' of the product.[43] The Conflict Minerals Regulation exempts from compliance those companies that import the manufactured electronic component, as they are not required to ascertain whether or not the product contains these minerals, or whether their suppliers have applied any due diligence scheme. And, at the same time, it differentiates between those that operate with small quantities and do not reach the minimum thresholds, which would also be exempt from complying with the Regulation's provisions.

Taking all this into account, the European Commission provided an estimate of the number of European companies to which the Conflict Minerals Regulation will apply. Between 600 and 1000 companies will be directly affected about 500 smelters and refiners (regardless of whether or not they have their headquarters in the European Union) will be indirectly affected by the Regulation.[44]

(D) THE EU DUE DILIGENCE SYSTEM

The Conflict Minerals Regulation establishes a system of due diligence in the supply chain of conflict minerals that is called the Union System. The Union System implements a set of obligations in order to provide greater transparency and legal certainty to the supply practices of the Union's importers, smelters and refiners of conflict minerals that are supplied in the established areas and throughout the chain. The aim is curtailing the opportunities for armed groups and security forces to use the trade in these minerals to finance their illegal activities.

This is a due diligence system based on the OECD Conflict Minerals Guidance to. It consists of four types of obligations that constrain affected importers to identify actual or potential risks and prevent or reduce their negative effects. This differs from the compliance-based approach of American law. The value of trade in minerals in the countries of origin has been emphasised, and in order to minimise the consequences that the rule could have in these territories, the approach to the obligations was modified. Companies were no longer required to label their products as 'conflict free' and were able to work together with suppliers to implement the due diligence system. These obligations include: management system obligations (Article 4); risk management obligations (Article 5); third-party audit obligations (Article 6); and disclosure obligations (Article 7).

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[43] As established by the Commission on the website that explains how the Regulation works.

[44] See more information here.

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It should be noted that the obligations of importers will be accompanied by monitoring and checks by the competent authorities appointed by the States (Article 11) that urge companies to comply with recommendations that were merely optional both under the OECD Guide and the Dodd-Frank Act. This involves taking one-step further towards stronger due diligence systems in Europe.

(1) Management system obligations

Article 4 of the Conflict Minerals Regulation refers first of all to the main obligations on importers, and generally defines some basic standards against which supply chain due diligence is to be conducted. To this end, the five steps of the OECD Conflict Minerals Guidance are taken as a starting point and developed further t in certain aspects.

To begin with, EU importers will be obliged to initiate a due diligence policy to identify and assess the potential risks of adverse impacts in their mineral supply chain. This is a risk-based system that in turn depends on whether activities are carried out in the conflict-affected areas stipulated in Annex II. This assessment is an initial obligation for all companies with a potential risk, in order to demonstrate that their activities are consistent with the Control Minerals Regulation. This first obligation may initially have an impact on a larger number of companies. No specific method is established to identify risks and carry out the risk assessment, so it is left to companies to state whether their activities involve a risk or a potential risk with the sole indication that they must comply with the OECD Conflict Minerals Guidance and Annex II, and that they must report the information detailed in Article 4 of the Conflict Minerals Regulation.

However, there is a provision that sets out that these risks shall be assessed on the basis of reports drawn up under Article 6 of the Conflict Minerals Regulation within a third-party audit of smelters and refiners. Based on the recognised reports and due diligence schemes, the Commission shall provide a list of responsible smelters and refiners worldwide that are at least partially sourcing minerals from conflict zones. If those reports are not available and where there are no recognised schemes, companies should manage this information themselves through independent third-party audits. Importers that provide substantive evidence that all smelters and refiners involved in their supply chain comply with the requirements of the Conflict Minerals Regulation shall be exempted from the obligation to carry out third-party audits. In this way, some minimum standards are established whereby companies already operating with due diligence systems are not required to engage in additional paperwork.

To oversee the proper implementation of the responsible supply chain policy, companies should structure their own internal management systems and keep records of this information for at least five years. In cases when the importer is not a natural person, the responsibility for overseeing the process will fall on 'senior managers', (Article 4.c). One more

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step is still needed to hold these managers fully responsible, which would involve introducing possible sanctions when the competent authorities find problems in the implementation of the due diligence policy. As already mentioned, the decision to introduce a system of *ad hoc* sanctions will be taken by each Member State (Art. 16).

In addition, in order to introduce due diligence standards throughout the supply chain, the Conflict Minerals Regulation provides that responsible policy goes beyond mere informing suppliers and therefore due diligence standards should be incorporated into contracts and agreements with them. This world effectively extends obligations to other actors that do not fall within the material scope of the Conflict Minerals Regulation but will be indirectly affected by its due diligence mechanisms.

An important new development of the Conflict Minerals Regulation is that, unlike the Dodd-Frank Act, it incorporates the obligation to include or encourage a grievance mechanism, which includes an early-warning risk-assessment system, which it will promote through collaboration agreements with suppliers or other economic operators or organisations (Article 4.c).

In establishing the characteristics of the supply chain policy, the Regulation provides some indication as to the obligations to be met by importers depending on whether they are importers of minerals, metals or by-products. These obligations are intended to 'operate a chain of custody or supply chain traceability system that provides (...) information' on minerals and metals. This information includes the basic characteristics of the mineral or metal and of the importer, including its trade name, type, name and address of the EU importer. In addition, the country of origin and quantities must be given in the case of minerals and data from refiners or smelters in the supply chain of the EU importer must be provided in the case of metals. For minerals or metals originating from conflict or high-risk areas for which potential risks have been identified, data should be provided on the mines of origin or locations where the affected resources are consolidated, traded and processed, as well as the taxes, fees and royalties paid. In this way, very useful information is available that will allow complementary traceability and certification measures to be established in parallel with the implementation of the basic obligations for importers. It is necessary to have this information, which is to be found in the initial stages of the chain, because once the product has been processed it is almost impossible to identify its origin.[45]

In the case of metals, the records of third-party reports or audits (or evidence of compliance, as mentioned above) shall be provided. If these reports are not available, the data on the countries of origin of the minerals in the supply chain of smelters and refiners or additional information shall be provided in accordance with the specific recommendations for

[45] As highlighted by P. Diago Diago, 'El control del comercio...', *supra* n. 28, at 3., and P. Diago Diago, 'Minerales y diamantes en conflicto: mecanismos de control y diligencia debida en tiempos ODS", 63 *Deusto Journal of European Studies* (2020) 153-182.

downstream companies provided by the OECD Conflict Minerals Guidance.

As far as importers of by-products are concerned, documentation supporting the information on the origin of these by-products must be provided, that is, the point where the by-product has been separated for the first time from its primary mineral or metal.

(2) Risk management obligations

Once the due diligence policy structure has been described, Article 5 of the Conflict Minerals Regulations sets out the obligations for importers to identify and manage any potential risks. The aim is to establish a risk management strategy consistent with Annex II of the Conflict Minerals Regulation, which will lead them to adopt measures aimed at reducing or mitigating them, or even at preventing the negative effects that these risks could have.

The risk management strategy of the Conflict Minerals Regulation again makes a distinction between the obligations for importers of minerals and for importers of metals. Importers of minerals, having identified and assessed risks through the information gathered in the previous article, must implement a strategy to deal with those risks. This process begins by reporting findings to those responsible for the risk management structure (senior management), so that they can exert pressure on the suppliers who can most effectively prevent or mitigate the identified risk. These measures are linked to the business relationship between the importer and the supplier and can range from continuing trade with those suppliers while simultaneously implementing measurable risk mitigation efforts to temporarily suspending trade while pursuing those efforts; to disengaging from the supplier after several failed attempts to reduce risks. The risk reduction model is based on Annex III of the OECD Conflict Minerals Guidance: 'Suggested Measures for Risk Mitigation and Indicators for Measuring Improvement'. It suggests a series of steps to mitigate risks and provides indicators for assessment (Article 5.3 of the Conflict Minerals Regulation).

This step involves shifting the point in time when action is taken. The obligations of importers are intended to verify or evaluate the efforts that their suppliers are making or have made. In order to assess risk reduction efforts, under the Conflict Minerals Regulation importers are invited to consult local authorities or central governments, international organisations and/or civil society organisations and affected third parties on the state of play. In this way, EU importers' pressure will sometimes have an impact on operators that do not fall within the scope of the Regulation, extending the Regulation's scope of influence but making it easier to work together with suppliers. And strong emphasis is made in the Conflict Minerals Regulation on involving those who can report on the effects that non-responsible practices can have on the place of origin. Their fieldwork can play a major role, as they can apply complementary measures of traceability, certification and information.[46]

[46] There are several regional and international traceability initiatives: Certified trading chains (German Geological survey in collaboration with the DRC, Rwanda, Burundi); Conflict-free gold standard (world gold

The risk assessment to be carried out by metal importers under the Mineral Regulation will be different. Based on Article 5.4 of the Conflict Minerals Regulation, they will be required to assess supply chain risks on the basis of available third-party audit reports on smelters and refiners. Their evaluation of the due diligence processes shall be in accordance with Annex II of the OECD Conflict Minerals Guidance: 'Model Supply Chain Policy.' Once risks have been identified and information has been reported to senior management, the strategy to reduce or avoid adverse effects must be consistent with the provisions in Annex II, which is also aimed at incorporating a responsible sourcing policy into contracts and agreements with suppliers. Given the place of metals in the supply chain, measures on metals make even greater emphasis on collaborating with authorities and organisations in the producing country, which results in the focus being placed on the early stages of the supply chain.

(3) Third-party audit obligations

Article 6 of the Conflict Minerals Resolution concerns the obligations of EU importers of minerals and metals to carry out audits through independent third parties. This is one of the major differences between the Regulation and the Dodd-Frank Act. While the Dodd-Frank Act originally included a similar obligation, it was immediately repealed.[47] Third-party audits play a key role in the Conflict Minerals Regulation, as they evaluate all the activities and processes used by importers. The audits shall determine the conformity between the practices adopted by importers and the Regulation's due diligence system, and provide appropriate recommendations for improvement. In addition, audit reports will serve as a basis for evaluating the risk management of metal importers when taking measures for mitigation, reduction or elimination. In general, the conditions for audits follow the guidelines of the OECD Conflict Minerals Guidance, and should be consistent with the principles of independence, competence and accountability.

The obligations of the audits are aimed at verifying that importers meet their obligations. Therefore, those importers who have demonstrated through reliable evidence (including third party audit reports) that all smelters and refiners in their supply chain comply with the standards of the Regulation will be exempted. In fact, those importers of metals who source only from smelters and refiners included in the list of responsible smelters and refiners to be drawn up by the Commission pursuant to Article 9 of the Conflict Minerals Regulation (published as Annex II) will not be required to provide evidence. A model based on the traceability and certification of smelters and refiners is indirectly promoted, although some

council); conflict-free smelter programme (EICC, GeSI); Conflict-free Tin initiative (Dutch government), ICGLR regional certification mechanism; responsible gold guidance (London bullion market association), see J. Masika,*'Mujeres y minería artesanal: el impacto de los sistemas de trazabilidad en las comunidades de Rubaya/Masisi en la República Democrática del Congo'*, in G. Otano and P. Aleman (eds), *Synergie des femmes* (Bilbao September 2017).

[47] M. C. Márquez Carrasco, and I. Vivas Teson, (coord.). 'La implementación...', *supra* n. 24, at 3.

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additional work remains to be done on the certification of mines *in situ.*[48]

(4) Disclosure obligations

Article 7 of the Conflict Minerals Resolution deals with the disclosure obligations of metal and mineral importers. Firstly, the reports drawn up by third party audits or, where appropriate, substantial evidence of compliance with the diligence schemes recognised by the Commission under Article 8 must be disclosed and made available to the competent authorities chosen by the Member States (Article 10).

Article 7 also establishes an obligation to make information on the supply chain available to their immediate downstream purchasers. This is the only obligation in which the Conflict Minerals Regulation expressly refers to downstream operators who make the final product available to the customer and who, as seen in the personal scope of the Regulation, are exempted under the established definition of what a supply chain is. However, Article 7. 2 stipulates that disclosure will be made 'with due regard for business confidentiality and other competitive concerns.' This addresses a concern that companies have but makes it significantly more unlikely for the information to reach the end consumer. It also reduces the transparency of the scheme, which is one of the key objectives of the Conflict Minerals Regulation.

Article 7.3 serves to reinforce this point and reiterates the obligation for importers of either metals or minerals to publicly report on their due diligence policies and responsible sourcing practices 'as widely as possible'. This information is also to be published on the Internet and includes the measures they have taken to comply with the obligations relating to their management system (in accordance with Article 4) and their risk management (in accordance with Article 5) of the Conflict Minerals Regulation.[49]

(5) Alternative due diligence schemes

The Conflict Minerals Regulation also provides for the possibility of recognising due diligence schemes which are already in operation and are similar to those laid down in its Articles. As provided for in Article 8, governments, industry associations and groupings of interested organisations having due diligence schemes in place may apply to the Commission to have the

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[48] The Conflict Minerals Regulation must have some accompanying measures at the place of production to ensure improved conditions for workers in mines. In order for the change in supply and supply policies to be truly effective, accompanying measures must be insisted upon, as highlighted in a report by *The European Network for Central Africa* (EurAc) 'Accompanying Measures in the EU Regulation on the responsible sourcing of minerals', March 2017. The European Parliament attempted to introduce a provision (Article 15 a) in the Proposal for a Regulation) by means of amendment 55, in which it called for the Commission to establish a Programme of accompanying measures in order to ensure the effectiveness of the Union System, but it ultimately did not succeed, P8_TA (2015) 0204.

[49] T. Bradshaw, 'Apple to name-and-shame suppliers of conflict of minerals', *Financial Times,* 13 February 2014.

supply chain due diligence schemes that are developed by them recognised by the Commission. This would avoid an unnecessary increase of bureaucracy to ensure the functioning of the Union System. The Commission, following an evaluation process (designed through the delegated regulation established in the Delegated Regulation (EU) 2019/429 of 11 January 2019[50]) will issue a recognition of equivalence with the requirements of the System laid down in the Conflict Minerals Regulation on the basis of the information and evidence provided by the companies. In doing so, it shall specifically take into account the risk-based approach and method for the purpose of identifying conflict areas. If a scheme applies for recognition and fails to meet the requirements, remedial action will need to be taken to overcome the deficiencies. In this way, the Conflict Minerals Regulation becomes the promoter of a uniform due diligence standard in the minerals field at European level.

Finally, in order to make the public aware of these programmes, the Commission will establish a register of those schemes that have been recognised as being equivalent to the Union System, which will be made publicly available on the Internet. This register will be regularly updated with the information provided by the companies.

(E) FINAL REMARKS

The Conflict Minerals Regulation establishes the first common due diligence system applicable for all European States. It involves standards in responsible sourcing policy not previously seen in any other field: the European System. It is a true milestone and marks the beginning of a positive trend in respect for human rights and in the social responsibility of companies in the extraction of minerals from conflict areas, which undoubtedly deserves to be applauded. The Conflict Minerals Regulation should be taken as a starting point on a path of no return towards respect for human rights by European companies. Although it could have been more ambitious, it is an example of the slow but gradual progress that is now being made towards the definitive implementation of due diligence across Europe.

However, this could have been an opportunity to move forward further in this direction, particularly bearing in mind that some stricter measures were proposed in the initial negotiation rounds and through the European Parliament's amendments which failed to be incorporated into the final text. Their removal or lack of approval ultimately weakened the Resolution's effectiveness.

One of the major weaknesses of the Conflict Minerals Regulation is the limited scope of its material application; for example, even though demand for cobalt is increasing and will further grow in the coming years with the introduction of electric vehicles, this mineral is not included in the scope of the Resolution. Even though it followed in the footsteps of the Dodd-Frank Act and the OECD Conflict Minerals Guidance in this regard, its material scope could

[50] OJ 2019, L75/19

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have been determined in a more generic manner that would enable its expansion according to the needs of the minerals and/or metals trade.

Similarly, the personal scope is considered excessively restrictive, in that it only includes direct importers of minerals and leaves out companies that import electronic devices or manufactured components. In addition, when determining the importers concerned, the Resolution establishes a scale based on volume thresholds to delimit its personal scope, which leaves out those undertakings which do not exceed those volumes. The problem is that the volumes thresholds were too high, which significantly reduces the number of companies affected; the operations conducted by some companies may therefore continue to encourage armed groups and contribute to perpetuate the conflict. In determining the quantity, no account has been taken of the cost of these minerals on the market and their hypothetical value for buying arms or financing the conflict.

One of the most successful aspects of the Conflict Minerals Regulation is the absence of limitations as regards the determination of the conflict area, which marks the scope of the Regulation's application, as well as its potential geographical scope of influence. The absence of a closed list will help to determine its scope in line with the changing needs of society worldwide and to avoid any unintended consequences on the countries of origin.

It can be concluded that the Regulation is a crucial step in the right direction for ensuring the implementation of a strong due diligence scheme. This is a system that requires EU companies to guarantee compliance with certain minimum standards as regards the protection of human rights when they carry out international activities in different States; and to require those involved in their supply chain to do so as well. However, it is still a system based on voluntary compliance with these obligations, the duty of which lies with legal operators. Thus, an opportunity has been missed to establish specific sanctions for non-compliance with the obligations established by the Union System. It will be necessary to wait for its definitive implementation and for the development by States of *ad hoc* legislation, as provided for in many of the NAPs, along the lines of the French *Loi 2017/399* related to due vigilance[51]. While this Law could also have taken further steps forward, for the first time it requires companies to comply with due diligence obligations, and it provides that they may be held responsible in the event of non-compliance.

[51] Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n. 0074 du 28 mars 2017.

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New screening of foreign direct investment (FDI) in Europe: a first step towards a new paradigm?

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Abstract: In March 2019, Regulation 2019/452, establishing a European framework for the screening of FDI in the Union, was finally adopted after a fast-track legislative procedure of only one year and a half. However, the cooperation mechanism therein designed will only apply from 11 October 2020. Although the Regulation clearly establishes the principle of non-discrimination between third countries, it is evident that one of the main triggers of the new mechanism has been the exponential increase in direct investments in Europe from emerging economies and especially from China. Does this new regulation represent a new era for FDI in Europe? What is the scope and impact of the Regulation on future investment relationships? Does the Regulation try to limit FDI in Europe? Has there been a political shift in the EU towards less liberalization of these investments? Is effective protection established against risks to public security, lack of reciprocity and / or eventual unfair competition? Is it a first step of a trend that announces new future steps in the same direction? This contribution tries to answer all these questions.

Keywords: Trade – Investments – FDI – Common Commercial Policy – Trade defence – Public security & public order – Unfair competition

(A) INTRODUCTION

On 13 September 2017, the European Commission published its proposal for a European regulation for the screening of foreign direct investment (FDI) in the European Union.[1] In record time for such a new topic —just a year and a half—, in March 2019, Regulation 2019/452 was finally adopted, establishing a framework for the supervision of FDI in the Union.[2] The Regulation entered into force twenty days after its publication in the Official Journal of the European Union but it will not be fully applicable until 11 October 2020, which in practice

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[1] European Commission Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, COM/2017/0487 final - 2017/0224 (COD).

[2] OJ L79 1/1.

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means that the new mechanisms will not be operational until that date.[3]

The new regulation promotes greater European controls on direct investments from outside the European Union. Although the Regulation clearly establishes the principle of non-discrimination between third countries[4] and, therefore, is not aimed at investments from any specific country, it is evident that one of the main triggers of the new mechanism has been the exponential increase in direct investments in Europe from emerging economies and especially from China.[5] A concern has arisen not only because of the amount of such investments but because of their objectives (strategic assets that could put public security at risk) and the fact that they are carried out in the absence of reciprocity and with possible unfair competition from the Chinese investors (public companies or other companies financed or / and supported - sometimes even remotely controlled - by the Chinese Government). Therefore, China is not the sole objective of the new regulation, nor will its investments be unjustifiably treated differently than those of other third countries, but, contextually, it is at the origin of the Regulation and, undoubtedly, its investments may be the main affected.

Does this new regulation represent a new era for FDI in Europe? What is the scope and impact of the Regulation on future investment relationships? Does the Regulation try to limit FDI in Europe? IIas there been a political shift in the EU towards less liberalization of these investments? Is effective protection established against risks to public security, lack of reciprocity and / or eventual unfair competition? Is it a first step of a trend that announces new future steps in the same direction? We will try in this work to answer all these questions.

To achieve these objectives, we will begin by understanding the background and the context in which the new regulation is approved: where we come from, what was the political position and the regulatory framework on the control of FDI both at the European Union level and at the national level of the Member states, as well as which is the position and trends in other global actors and what are the determining factors derived from previous international commitments of the European Union. Understanding this context is essential to comprehend the possibilities that the European Union had and the step that the new regulation implies.

We will continue with an in-depth analysis of the new screening: the chosen legal basis —with its reasons and its limitations—, the objectives of the new regulation and its scope regarding issues such as: invokable grounds for control; what, to whom and how control will

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3 Article 17 of the Regulation.

4 Article 3.2 of the Regulation: "Rules and procedures related to screening mechanisms [...] shall be transparent and not discriminate between third countries".

5 See, among others, M. Schaake, 'Comment of a Member of the European Parliament', in J. Bourgeois, (ed), *EU Framework for Foreign Direct Investment Control*, (Wolters Kluwer, 2020), at 99-101, or J. Bourgeois & E. Malathouni, 'The EU regulation on Screening Foreign Direct Investment: Another Piece of the Puzzle', in the same book, 169-191, at 170: "The regulation comes largely as a response to the lack of reciprocity faced by EU investors abroad and mainly in China". See also European Commission Staff Working Document on Foreign Direct Investment in the EU, Following up on the Commission Communication "Welcoming Foreign Direct Investment while Protecting Essential Interests" of 13 September 2017, SWD (2019) 108 final, 13 march 2019, at 67.

be exercised; who controls and to what extent. We will finish with a critical assessment and some conclusions.

(B) BACKGROUND AND CONTEXT

(1) The Starting Point: the EU in favor of Investment Liberalization, but not at Any Cost

FDI is beneficial for the economy of the European Union because it contributes to growth, innovation and employment (6% of jobs in the EU are in companies controlled by foreign investors). They often involve new capital, technological development and knowledge, leading to increased competition, productivity and better inclusion in the global value chain of companies, while creating entry opportunities for them in other markets.[6] For this reason, there has been an exponential increase in FDI globally: from 1990 to 2017, they have multiplied by 15, going from 2 to 30 trillion US dollars.[7]

For this reason, too, the EU has been one of the most open markets for FDI[8], as recognized by the OECD, while other global actors (e.g. China) are much more restrictive.[9] European Member States have even been making efforts to attract foreign capital and sometimes even competing with each other to attract it. And this open character of the EU regarding FDI is true both for the period before and after the Lisbon Treaty (2010).

In this sense, there have been clear efforts since the beginning and especially since the Maastricht Treaty (1992) with the adoption of the renewed chapter on the free movement of capital in the Treaty (current articles 63 *et seq* TFEU). It is highly significant that the general principle of liberalization of capital movements was raised to constitutional rank, both for intra-EU and extra-EU movements.[10] It is also revealing that, when the first significant complaints against FDI from sovereign wealth funds arose, the European Union, instead of choosing to promote a legally binding supervisory mechanism, advocated and negotiated greater transparency of such funds and a code of conduct.[11]

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[6] Copenhagen Economics, The World in Europe. Global FDI Flows Towards Europe: Extra-European FDI Flows Towards Europe (March 2018) at 9.

[7] UNCTAD, World Investment Report 2018: Investment and New Industrial Policies (United Nations, 2018), at 188, table 2.

[8] In 2015, the EU received 5.7 trillion euros in FDI, compared to 5.1 trillion in the US and only 1.1 trillion in China (1.5 if Hong Kong is included). See Eurostat -News release 200/2018 and Booklet of the European Commission, Screening of Foreign Direct Investment - An EU Framework. This gap has narrowed somewhat in the following years, although it is still very relevant.

[9] OECD, OECD International Direct Investment Statistics 2019 (OECD 2020).

[10] See Article 63.1 TFEU and below, in this same contribution, the analysis of EU Constitutional Limits to FDI.

[11] European Commission, Communication from the Commission: *A Common European Approach to Sovereign Wealth Funds*, COM (2008) 115 provisional (Feb. 27, 2008). See also J. Lundqvist, 'Screening Foreign Direct Investment in the European Union: Prospects for a "Multispeed" Framework?, *European Union Law Working Papers, Stanford – Vienna Transatlantic Technology Law Forum*, at 10.

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After the Lisbon Treaty, this spirit was maintained with the new Common Commercial Policy powers that already included FDI for almost a decade, without reinforced controls on FDI until very recently.[12]

Therefore, it seems clear that the EU has always advocated a progressive liberalization of investments, albeit with values and reciprocity. An EU that, after the new FDI powers conferred by the Lisbon Treaty, also seems strengthened and better positioned to promote this objective than its Member States.[13]

Isn't pushing for stronger controls on FDI inconsistent with this traditional position? Is there a political turn towards a greater restriction on FDI? And if so, how is this twist explained and what is its scope? To understand it, one must ask what has changed in recent years in the global FDI landscape and especially in the FDI that the EU receives.

Compared to previous periods in which FDI came mainly from other OECD members (USA, Canada, Switzerland, Japan), in recent years, more FDI has come from emerging economies such as Brazil, Russia and especially China.[14] In some of these emerging markets, the role of the State is much stronger and more 'dirigiste', raising questions about the purposes of the investments and about the respect of a level playing field. On the one hand, this origin and characterization raises suspicions that the goals and priorities are not merely economic or just to gain a return on investment, but more of a strategic-political nature and, therefore, may affect more security or public order (control of information and sensitive data, infrastructures, technologies or critical supplies).[15] These suspicions grow especially when the investor is a State Owned Enterprise (SOE), or at least the State influences, directly or indirectly, its decisions.

On the other hand, there is concern that the equality or level playing field is not respected. The direct financing of the State in public companies or the granting of public aid and privileged financing by the State to private companies, together with a lack of transparency in such aid, and the lack of reciprocity in the opening of internal markets in these countries, generates imbalances and unfair competition that does not seem acceptable, especially when some of these emerging markets have grown exponentially in recent years. Furthermore, neither the regulation of international trade nor the European internal regulatory framework were prepared to deal effectively with this unfair competition.

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[12] European Commission, *Towards a comprehensive European international investment policy*, COM (2010) 343 final, July 2010, at 2; and European Commission, *Trade for all: Towards a more responsible trade and investment policy*, COM (2015)497 final, 14 October 2015, at 5-6.

[13] M. Martín-Prat, 'The European Commission Proposal on FDI Screening', in Bourgeois *supra* n. 5, 95-98, at 97.

[14] European Commission, *supra* n. 5, at 67.

[15] European Parliament, *Proposal for a Union Act on the Screening of FDI in Strategic Sectors*, B8-0302/2017, 26 April 2017.

These concerns are assimilated to those of other global actors[16], but perhaps in Europe, being a particularly open market and with fewer mechanisms of supervision and control, they may be more pressing.[17]

With this breeding ground, it is not surprising that demands have grown progressively to equip the European Union with instruments that could effectively protect European interests against risks to public safety and face unfair competition.

As early as 2010, the European Commission argued that liberalization had to be reciprocal and that it was essential to maintain a level playing field.[18] However, these pronouncements were not yet accompanied by concrete proposals for new instruments to solve it. In 2011, in a letter to the President of the European Commission, two of its members (the then Commissioners Barnier -Single Market- and Tajani -Industry-) asked to open a debate to create a centralized European mechanism for controlling strategic investments. The initiative met with the opposition of the Commissioner of Commerce (De Gucht) and several Member States, so it did not succeed.[19]

After a peak of FDI in Europe in 2015 and a wave of acquisitions of European companies by Chinese investors[20], the years 2016 and especially 2017 opened a new phase of claims to act and this time led to successful concrete initiatives.[21]

In 2016, Sigmar Gabriel, then Minister of Economy in Germany, warned that his country was sacrificing its companies on the altar of the free market without receiving adequate compensations from the Chinese government. [22] In February 2017, the governments of Germany, France and Italy sent a joint letter to the European Commission demanding to act.[23] In May 2017, in its reflection document "Harnessing Globalization", the European Commission echoed these concerns and insisted on the need to ensure a level playing field.[24] In June 2017, the European Council welcomed the Commission's initiative to explore an FDI control mechanism.[25] In July 2017, the German, French and Italian governments insisted on

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[16] UNCTAD, *supra* n. 7.

[17] Lundqvist, *supra* n. 11, at 3.

[18] European Commission, '*Towards ...*', *supra* n. 12, at 4.

[19] See Miller, 'EU Mulls Board to Review Foreign Investments', *Wall St.J.* (Mar. 14, 2011), and Von Reppert-Bismarck, 'Analysis: Rising Foreign Investment Fuels Vetting Debate', (Reuters, 8 march 2011).

[20] 37 billion Chinese FDI in Europe in 2016. See T. Hanemann & M. Huotari, EU-China FDI: Working towards reciprocity in investment relations. A report by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS, 2018).

[21] For a detailed analysis of FDI, see European Commission, *supra* n. 5.

[22] J. Delcker, 'Sigmar Gabriel's Mission to Halt China's Investment Spree', *POLITICO* (Nov. 1, 2016),

[23] Germany, France & Italy, Proposals for Ensuring an Improved Level Playing Field in Trade and Investment (Feb. 2017).

[24] COM (2017) 240 of 10 May 2017.

[25] European Council, Conclusions, EUCO 8/17, June 22-23, 2017.

their proposals with a more developed document.[26] The Commission elaborated on its reflection document on how to take advantage of globalization in September[27] and the same month adopted its proposal for a Regulation on FDI.[28] In just a year and a half the proposal would end up being approved.[29]

The then President of the European Commission, Juncker, declared: "Europe must always defend its strategic interests and that is precisely what this new framework will help us to do. This is what I mean when I say that we are not naïve free traders. We need scrutiny over purchases by foreign companies that target Europe's strategic assets".[30] The declarations were now followed by concrete actions. The European FDI Control Regulation is one of them, one more piece of a puzzle under construction.[31]

Not being naive, even if you continue to believe and promote the liberalization of FDI, maintaining a policy of openness to investments but not at any cost, seem to be the keys to understanding the turn of the new European policy of which the Regulation under study is a key piece. And it does not seem that it will be a one-day flower because other initiatives confirm the same line of concern and action.[32]

(2) Constitutional Limits in the EU to Controls on FDI

It is important to understand what the framework prior to this regulation is and where the new instrument will be inserted. In particular, the capitals chapter in the TFEU was the main reference in European Law to understand the possibilities of action regarding FDI.

Article 63 TFEU establishes a general principle of freedom of movement of capital not only intra-EU but also extra-EU. A principle that was constitutionalized since Maastricht (more especially since the entry into force of this new chapter of capital in January 1994) and which also has direct effect by which it confers rights and imposes obligations not only on the States but also on individuals.[33] Significantly, it is the only freedom that also extends to third States

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[26] Policy Paper submitted by the French, Italian, and German governments to the European Commission, European Investment Policy: A Common Approach to Investment Control (July 28, 2017).

[27] European Commission, *A balanced and progressive trade policy to harness globalisation*, Communication from the Commission, COM (2017) 492 final.

[28] COM/2017/0487 final - 2017/0224 (COD).

[29] On the whole legislative procedure and especially the positions of the European Parliament along it, see A. Neergard, 'The Adoption of the Regulation Establishing a Framework for Screening of Foreign Direct Investments into the European Union', in Bourgeois, *supra* n. 5, 151-167.

[30] European Commission, IP_18_6467.

[31] Bourgeois & Malathhouni, *supra* n. 5, at 187-190. For an analysis of this trend towards a more cautious view to FDI, see C. Esplugues Mota, *El Control de las Inversiones Extranjeras Directas* (Tirant lo Blanch, 2018) at 42-52.

[32] See A French-German Manifesto for European Industrial Policy fit for the 21st Century (19 Feb 2019), altogether with Macron, Renewing Europe (March 2019) and A. Kramp-Karrenbauer, Making Europe Right (March 2019). On China, it is very revealing to see European Commission, *EU-China-A strategic Outlook*, JOIN (2019) 5 final.

[33] There is direct effect of the liberalization principle also with regard to extra-EU movements (see

and, in principle, on equal terms. However, there are exceptions to the free movement, and they are not the same for intra-EU as for extra-EU, thereby opening a possible differentiation of treatment: for extra-EU we may apply additional exceptions.

The principle of free movement applies to all types of capital movements, not only to portfolio investments but also to direct investments. This is evident when looking at the annex to Directive of 1988 that includes a section on such direct investments.[34] In principle, these direct investments include real estate investments, greenfield investments (establishment of new companies, subsidiaries or branches) and brownfield (purchases of existing companies through mergers or acquisitions).[35]

It is also important to understand the exceptions applicable to this principle of free movement of capital:

First. Legitimate restrictions on free establishment for which, it should be noted, there is no liberalization with respect to third parties.[36]

We must distinguish 3 possible scenarios:

Scenario 1: If the transaction is a mere corollary to a capital movement, art. 63 is applicable and, therefore, the transaction should not be examined under the freedom of establishment.[37]

Scenario 2: However, the former would not be the case if there is: a) an incorporation of a new company in accordance with national law (Greenfield investment) by investors from third countries; b) a merger with (or acquisition of) a company already established in the country (brownfield investment) by investors from third countries. In both, we would be before the right of establishment that is not liberalized for third States.

Scenario 3: What about other capital acquisitions in existing companies in that MS?

a) If there is only a passive investment (without interest or intention to influence the control and management of the company), it is a capital movement.

b) If, on the contrary, investments allow the investor to exert a 'real influence' on the company's decisions ("definite influence on a company's decisions"), it falls under freedom of establishment.[38]

Judgment of the Court (of 18 December 2007, C-101/05, *Skatteverket*, ECLI:EU:C:2007:804, para. 38), but it cannot be ruled out that, due to the different context, an exception can be accepted for extra-EU movements that would not have been accepted for intra-EU movements (see Judgment of the Court of 12 December 2006, C-446/04, *Test Claimants in the FII Group Litigation*, ECLI:EU:C:2006:774, para. 121).

[34] Annex I of Council Directive of 24 June1988 (88/361/CEE), OJ L 178/5. The CJEU, in case *Trummer* (Judgment of the Court of 16 March 1999, C-222/97), ECLI:EU:C:1999:143, confirmed that the nomenclature of said annex continues to have the same indicative value in order to check whether a transaction is a capital movement after the introduction of the new capital chapter.

[35] CJEU, Judgment of the Court of 11 September 2014, C-47/12, *Kronos*, ECLI:EU:C:2014:2200, paras. 40-42.

[36] See Article 65.2 TFEU.

[37] This is, for instance, the case of real state investments: see CJEU, Judgment of the Court of 6 March 2018, C-52/16 & C-113/16, Segro, ECLI:EU:C:2018:157, paras. 54-55.

[38] CJEU, Judgment of the Court of 13 November 2012, C-35/11, Test Claimants (II), ECLI:EU:C:2012:707, paras. 90-92.

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And when is there 'real influence'? It has to be decided in each specific case, since there is no clear test in the case-law.[39] We know that a majority of capital is not necessary, but participation cannot be marginal or merely passive. Personally, I think that if there is control participation (veto in strategic decisions), it should be considered establishment. Therefore, any investment that implies 'decisive influence' in accordance with the European merger control regulation should be considered real influence. Below that threshold, it is more doubtful. It cannot be ruled out that, as rules for competition and freedom of establishment / foreign investment have different objectives, cases in which there would be no decisive influence according to the first may be cases of real influence according to the second; that is, even if you do not participate in the control of the company, you can exert a certain influence (although not decisive) on some management decisions, always beyond a mere passive investment.

Consequently, if we are in scenario 2 or 3 b), when falling under free establishment, there is no general principle of liberalization regarding extra-EU investments. Therefore, each Member State can establish its own rules regarding the access and exercise of this free establishment by non-community third parties in its territory. However, it is necessary to be aware that, once a company has been incorporated or created a subsidiary in accordance with the legislation of that Member State and as long as it meets the minimum requirements of that Member State to continue to be considered a company of that State, it will be equated to a national of that Member State and, therefore, may exercise the right of free establishment in the rest of the European Union without further limitations than those required to the rest of EU companies, that is, those justified by a general interest and proportionate. Given the divergences between Member States and the limited requirements demanded by some, an indirect route can be opened to channel this type of FDI without obstacles or, with much less.

On the other hand, if we are in a case of scenarios 1 or 3 a), the initial presumption is going to be investment liberalization, so there will be significant FDI possibilities for actors from third States in the EU. However, it is true that this principle of investment liberalization can be broken by applying certain exceptions provided for in the Treaty; exceptions, moreover, that are broader than those provided for intra-EU movements and that we will see below.

Second. Legitimate restrictions on non-EU capital movements, in particular on FDI from outside the EU.

a) Pre-existing restrictions. All restrictions on FDI, both national and European, that existed as of 31 December 1993, can be maintained, according to article 64.1 TFEU.[40] In this case, there is no need to invoke any justification based on general interest or to prove that the restriction is proportionate. Article 64.1 allows to maintain the status quo, the already existing

[39] S. Hindelang, *The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law*, OUP 2009, [doi: 10.1093/acprof:oso/9780199572656.001.0001] at 85.

[40] In Bulgaria, Estonia and Hungary, the date is 31 December 1999. For Croatia, it is 31 December 2002.

restrictions. On the contrary, it must be understood that any new restriction (or extension of an existing one) would have to be duly justifiable under one of the exceptions provided.

Regarding pre-existing ones, the EU could adopt new liberalizations that affect both national and community restrictions, through the ordinary legislative procedure (art- 64.2 TFEU). This implies that qualified majority would suffice to liberalize. However, to establish new restrictions, unanimity would be necessary, in accordance with article 64.3 TFEU. This difference is very revealing of the spirit that presided over the adoption of the new capital chapter in the 90s and in particular of the regime that was desired for FDI: the adoption of new liberalizations by the EU was clearly facilitated (majority voting) while raising new obstacles to back down in liberalization was very difficult (unanimity). A single State veto in the Council would block any backtracking or further restriction. In a Union of 28, with some States very interested in keeping their markets open to FDI, it made almost impossible to introduce new restrictions without justification: at the national level because art. 64.1 prohibited them and at European level because the unanimity of all the Member States was almost impossible. The only imaginable case in which such unanimity would be relatively easy to achieve could be when a third country was denying the EU (all EU states) reasonable conditions of reciprocity in accessing its markets.

Furthermore, it must be borne in mind that: first, the reform of article 64 TFEU, being primary law, is very complicated and would also require unanimity after a rigid review process; second, despite the fact that 64.2 TFEU was applicable "without prejudice to the provisions of the other chapters of the Treaties", FDI did not enter the scope of the Common Commercial Policy until the reform of the Lisbon Treaty in 2009.

For all these reasons, it can be understood that this regime produced a weakening of the EU's negotiating position in order to achieve more openness and better conditions of access to third-country markets, especially in bilateral agreements, today prevailing given the global scenario of serious difficulties to advance at the multilateral level. Indeed, for a good connoisseur of the EU system, and in particular of this article 64 TFEU, the threat of introduction of new restrictions on FDI by either the EU or its Member States was not credible (unless they could be justified based on a general interest). The Lisbon Treaty may have changed this scenario by including FDI within the scope of the Common Commercial Policy and thus by opening up the possibility for the EU to introduce or promote new restrictions. The recent exercise of these new powers (through the new European FDI control regulation) could be interpreted as one more step to close this deficit.[41]

b) New restrictions justified by the general interest. The capital chapter provides for other exceptions to the general principle of FDI freedom that would allow new restrictions to be introduced by Member States or the European Union, but only if they are justified on the basis

[41] S. Schill, 'Foreign Direct Investment in the European Union: Rising Protectionism or Instrument for Further Investment Liberalization?', in Bourgeois, *supra* n. 5, 57-75.

of a general interest and are proportionate. Thus, Article 65 TFEU allows, both for intra-EU and extra-EU movements, that States establish new restrictions to, among others, "prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security". Note that the list of justifications is merely exemplary as evidenced by the breadth of its first paragraph ("prevent infringements of national law and regulations"), by the fact that the list is preceded by "in particular" (that is, as an example), and that at the end of the list the conjunction "or" is used. Furthermore, in case of any doubt, the CJEU has said that, similar to what happens in other freedoms and regardless of the explicit exceptions, other public interests can be invoked.[42] Thus, the possibility is opened for invoking any justification based on a general interest worthy of protection at European level and, in accordance with the provisions of article 65.3 and the case law of the CJEU, provided they are proportionate. In addition, it is necessary to be aware that such exceptions should be interpreted restrictively.[43]

Article 66 TFEU also allows the Council, by a qualified majority, to adopt safeguard measures when extra-EU capital movements cause, or threaten to cause, serious difficulties for the functioning of the Economic and Monetary Union. In any case, these restrictions could be maintained for a maximum period of 6 months. To extend them further, it would be necessary to resort to the procedure of article 64.3, which requires unanimity. Article 346 TFEU also creates an exception applicable to FDI in the defence and security sector.

Therefore, it is interesting to conclude that, regardless of the possibilities opened up by the new European regulation of FDI control, the Treaty does allow introducing new restrictions by the States (and in the case of Article 66 by the Union) if there is a justification based on a general interest and the restriction is proportionate.

However, these possibilities were far from solving the aforementioned deficit and the weakening of the European negotiating power to open foreign markets to European investment. There was still an imbalance as Europeans could only restrict on public interest grounds and with proportionate measures, or by unanimity of all Member States, while the possibilities of third States were greater, as they were not subject (and even less constitutionally) to the same conditions.

(3) Divergences between Member States on FDI Control

Within the EU, there are many divergences regarding controls on FDI. At the time of the

[42] See, among others, CJEU, Judgment of the Court of 4 June 2002, C-367/98, Commission v. Portugal, ECLI:EU:C:2002:326.

[43] CJEU, Judgment of the Court of 14 March 2000, C-54/99, Scientology Church, ECLI:EU:C:2000:124, paras. 17-18. It is not possible to invoke economic ends.

proposed regulation, 12 MS had some type of supervisory mechanism (at the end of December 2019 there were already 15).[44] These mechanisms were very varied in terms of the object of control and the design of the supervision system. Regarding the object, they varied in terms of activities (some only military or defense, others broader including also security or infrastructures, technologies or critical inputs) and the minimum shareholding thresholds to activate control. Regarding the design, some were prior authorization systems (prior notification and approval by the authority), others were ex post, or with a mix of both formulas. The divergences were not only economic but also geo-political, since the interests and dependence of these FDI were also very different.[45] Furthermore, as LUNDQVIST rightly points out, it is also necessary to take into account the margin of autonomy that sub-state entities had in some Member States to negotiate directly with foreign investors.[46]

For all these reasons, it is not surprising that opinions on the possibility of establishing a European FDI control mechanism were also very different. Before the European Commission proposal, France, Germany and Italy had already expressed their concern about the acquisition of strategic companies by non-European investors and the lack of reciprocity and fair competition (level playing field).[47] Their proposals went far beyond what the European Commission ended up proposing and was finally adopted and which, as we will see later, does not directly contemplate neither the lack of reciprocity nor the unfair competition and level playing field concerns. On the contrary, for other Member States such as the Nordic countries, Ireland, the United Kingdom, Spain, Portugal and Greece, the proposals were perceived as protectionist. As if that were not enough, some other MS were concerned that the European Commission would begin to interfere on public security issues, which they considered to be a clearly national power.[48]

Both the lack of supervision and the divergent controls lead to a clearly unsatisfactory scenario for multiple reasons. There are more and more interconnections and externalities, especially within Europe given our Single Market and our deeper integration. In this context, an FDI can be a threat to the State that receives it, to a different MS than the one that receives

[44] Germany, Austria, Denmark, Spain, Finland, France, Hungary, Italy, Latvia, Lithuania, the Netherlands, Poland, Portugal, the United Kingdom and Romania had notified control mechanisms to the European Commission as of December 2019.

[45] See, in this sense, the editorial of European Law Review, (2019) 44 ELRev, at. 138.

[46] Lundqvist, *supra* n. 11, at 8: "All EU Member States are parties to the European Charter of Local Self-Government. This Charter recognizes a broad scope of rights for local governments to manage public affairs without federal oversight. Local governments have relied on this right to negotiate directly with foreign investors over investments in infrastructure".

[47] See above section B.I

[48] F. Di Benedetto, 'A European Committee on Foreign Investment?', *Columbia FDI Perspectives*, (2017), no. 214. For more details on national positions, see G. Grieger (2018), European Parliamentary Research Serv., Briefing: EU Framework for FDI Screening, (2018), at 6.

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it, to several MS or even to the entire Union.[49] All this is even more evident in cases of projects of common interest with strong EU funding (eg Galileo navigation system, trans-European networks, or large EU research and innovation programs). Sufficient information exchange between MS and with the EU is lacking, leading to a lack of coordination of national systems, poor protection of national interests and even more so of Europeans.

In addition, it should also be noted that the supranationalization of FDI powers that occurred with the Lisbon Treaty was done without much debate, going largely unnoticed. It is not surprising, therefore, that the underlying divergences and controversies have been carried over to the implementation phase.[50]

(4) Strengthened Controls on FDI from Other Global Actors

The main global actors have FDI supervision mechanisms, some of which have also been expanded and strengthened in recent years to face growing concern about the change in context.

Thus, in the US, research and control over FDI is carried out by CFIUS (Committee on Foreign Investment in the US) and has recently been reformed by FIRRMA (Foreign Investment Risk Review Modernization Act), which sought to modernize and strengthen the review mechanism for national security reasons. Again, the main reason was concerns about Chinese investments in the US.[51]

In China, the system has also been reformed: it has gone from 3 lists (prohibited, restricted and promoted) to a principle of liberalization except for a negative list. In recent times, some restrictions have been removed from the negative list, but still many restrictions remain.[52]

According to studies by international organizations, professionals and scholars, this trend of establishing, strengthening or maintaining important controls on FDI is global.[53]

(5) Due Respect for the EU's International Commitments: WTO and Others

All the old and new instruments (such as those called to establish the new European Regulation) allow the Union and the Member States to adopt restrictive measures regarding

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[49] M. Martín-Prat, 'The European Commission Proposal on FDI Screening', in Bourgeois, *supra* n. 5, 95-98, at 97.

[50] S. Meunier, 'Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment, 55 J. *COMMON MKT. STUD.* (2017) 593, [doi: 10.1111/jcms.12528], especially at 606.

[51] See P. Rose, 'FIRRMA and National Security', *Ohio State Public Law Working Paper*, (2018), no. 452, and J. Mendenhall & R. Terney,), 'CFIUS Review', in Bourgeois, *supra* n. 5, 135-147.

[52] Bourgeois & Malathoumi, *supra* n. 5, at 173; Hanemann & Huotari , *supra* n. 20, at 14. See also the annual European Business in China Position Papers of the European Chamber of Commerce in China.

[53] Baker Mckenzie, Rising Scrutiny: Assessing The Global Foreign Investment Review Landscape, (2017), at 32-66; S. Thomsen & F. Mistura (2017), Is Investment Protectionism On The Rise?: Evidence From The OECD FDI Regulatory Restrictiveness Index, 2017.

foreign direct investment, for reasons of security or public order, provided that the international commitments that the EU and the States have assumed are also respected. Indeed, as the Preamble of the European Regulation itself will finally state:

> "The implementation of this Regulation by the Union and the Member States should comply with the relevant requirements for the imposition of restrictive measures on grounds of security and public order in the WTO agreements, including, in particular, Article XIV(a) and Article XIV bis of the General Agreement on Trade in Services (12) (GATS). It should also comply with Union law and be consistent with commitments made under other trade and investment agreements to which the Union or Member States are parties and trade and investment arrangements to which the Union or Member States are adherents".[54]

Article XIV (a) of the GATS establishes possibilities of exceptions for reasons of public morality and public order, provided they do not constitute arbitrary or unjustified discrimination. Public order requires that there be a serious threat to a fundamental interest of society.

Article XIVbis of the GATS establishes exceptions for military purposes or other emergencies in international relations. The exception seems quite restrictive (similar to Article 346 TFEU at intra-EU level).

In any case, before seeing if the exception is applicable, a preliminary step is to analyze whether there is a breach of any commitment made by the GATS given that there may be investments linked to free establishment. Among those commitments are those of the Most Favored Nation clause (II), Market Access (XVI) or National Treatment (XVII). If there is a risk of violating any of these commitments, it is when exceptions could come into play. If these commitments are not breached, the restrictions are valid without the need to apply the exceptions. The necessary respect for these limits must always be taken into account when designing and drafting any new FDI control mechanism and, therefore, they could also have had an influence on how the European Regulation was designed.[55]

(C) THE NEW EU SCREENING FRAMEWORK

(1) Powers of the European Union and Legal Basis

The new European Regulation has chosen Article 207.1 TFEU as a legal basis, which, after the reform of the Lisbon Treaty, includes FDI in the Common Commercial Policy, an exclusive competence of the European Union. Opinion 2/15 of the CJEU clearly established that this new EU competence includes both the liberalization of pre-establishment investments (access,

[54] Preamble, paras. 3 and 35.

[55] Bourgeois & Malathoumi, *supra* n. 5, at 165-166: They point out that the general terms of the Regulation prevent the incompatibility with the mentioned provisions of the WTO. The responses and restrictions imposed are ultimately national measures. What if these measures restricted investments? The authors consider that the governmental control factor and ownership structure could be controversial. The rest of the factors enshrined in article 4.2 do not seem to pose problems.

openness) and the protection of post-establishment investments (non-discrimination, fair and equitable), since it aims to "promote, facilitate or regulate trade" with third States and may have direct and immediate effects on this international trade.[56] This may include respecting international commitments made by the EU such as environmental, social, non-discrimination or other limits to state discretion to ensure that restrictions are not disguised, unjustified or disproportionate.[57]

However, it does not extend to portfolio investments and alternative dispute resolution mechanisms.[58] For this reason, the signing of trade agreements that include these elements would require either a mixed agreement, or two separate agreements for the different blocks,[59] or only an EU agreement but authorized by the Council on a proposal by the Commission.[60]

Article 207 TFEU was not, however, the only possible basis that could be considered. Also, article 64 TFEU, within the framework of the free movement of capital, would have allowed the adoption of a regulation on FDI control. The option for Article 207 TFEU is controversial.

Some authors consider that, as the Regulation is drafted, the legal basis is correct,[61] although they do not fail to point out its limitations, especially for the future.[62] NEERGARD, for example, recognizes that article 64 TFEU could also have been a good legal basis, but states that, given the "without prejudice to the provisions of the other chapters of the Treaties ..." in the drafting of article 64 TFEU, Article 207 TFEU is more correct.

However, other authors say that the use of 207 TFEU as a legal basis is, at least debatable, fragile and questionable, perhaps prompted by the European Commission's attempt to seize the opportunity to consolidate this power after Lisbon and that Article 64 TFEU would have been more appropriate.[63] Furthermore, they warn that, although with the current wording, the legal basis may be acceptable by continuing to leave in the Member States the final decision on whether security and public order are affected and how to intervene, it would not allow the

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[56] CJEU, Opinion 2/15 16 may 2017, Singapore Free tarde agreement, ECLI:EU:C:2017:376, paras. 78-110.

[57] M. Cremona, 'Regulating FDI in the EU Legal Framework', in Bourgeois, *supra* n. 5, 31-55, at 53.

[58] CJEU, Opinion of the Court of 16 May 2017, 2/15, ECLI:EU:C:2017:376, paras. 238, 243 and 293.

[59] This is what happened with the Free Trade Agreement with Singapore.

[60] CJEU, Judgment of the Court of 5 December 2017, C-600/14, Germany v. Council, ECLI:EU:C:2017:935, para. 68.

[61] Cremona, *supra* n. 57, at 53-54 or Neergard, *supra* n. 29, at 165 and 166.

[62] For instance, Cremona, *supra* n. 57, at 53-54 considers that the 207 TFEU is correct because the Regulation does not establish a new European regulatory mechanism and national competence is preserved (it is the MS who decide whether to control it or not, and what type of control to exercise, always with certain guarantees at European level; the list of factors to keep in mind is not exhaustive). But, if they wanted to adopt future rules replacing national control by a European one, she seems to consider that the most correct legal basis should be Article 64 TFEU.

[63] R. Bismuth, 'Reading Between the Lines of the EU Regulation Establishing a Framework for Screening FDI into the Union, in Bourgeois, *supra* n. 5, 103-114, especially 106-108 and 111-112.

adoption of a European control instrument that replace the nationals.[64] If further steps had to be taken to create that European mechanism, if the Regulation was seen as just a first step, it is highly doubtful whether article 207 TFEU is an adequate basis or that another legal basis can even be found to transfer decisions on security and public order at a centralized European level.[65] In fact, national security is, according to Articles 4.2 TEU and 346 TFEU, an exclusive national competence and the European Commission itself recognizes that a single European instrument would be a very difficult option to articulate due to exclusive national competences on national security.[66]

We must not forget the different decision-making procedures that these legal bases imply. Article 207.2 TFEU indicates that the ordinary legislative procedure (therefore with a qualified majority in the Council) will be used. Article 64.2 TFEU establishes the same procedure, but only for measures that imply progress in liberalization, while for measures that imply a backward step in liberalization, Article 64.3 TFEU establishes a special legislative procedure, with a decision of the Council by unanimity, after consulting the European Parliament. Given that greater controls on FDI can be understood as a step backwards in liberalization, if Article 64 were used, resort to the procedure of paragraph 3 (unanimity) would be required. Thus, the choice of legal basis is, in this case, very relevant. By using 207 TFEU, the European Parliament was given a greater role (co-decision) and the negotiations occur under the shadow of the vote and not of the veto (qualified majority instead of unanimity). This difference could have influenced the choice of legal basis of the European Commission.

In conclusion, in its current wording, Article 207 TFEU seems to be acceptable and its legality is not debatable. It has advantages and limitations. The greatest advantage is that its negotiation and approval was carried out by the ordinary legislative procedure with qualified majority in the Council. The main disadvantages may be: first, that it can only be used for FDI and not for portfolio investments, therefore control is fragmented according to the type of investment and a gap can be generated in the system; second, it would not allow subsequent reforms to centralize control of FDI into a single European instrument. The fact that national security is an exclusive competence of the Member States would prevent this and,

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[64] Bismuth, *supra* n. 62, at 112.

[65] Although public security is a national competence, the EU can put certain limits to its use as evidenced by the European control of public security exceptions in the framework of the freedoms of the Internal Market. It should also be explored whether, in addition to the concept of national security, there is a European security concept that could justify EU interventions.

[66] See the Preamble of the Regulation, para. 7 and European Commission, *supra* n. 5. According to Bismuth, *supra* n. 62, at 112: Article 207 TFEU (taking into account Opinion 2/15, *supra* n. 55, especially at para. 101), does not affect the right of MS to adopt justified measures for the protection of national security or public order under 65.1.b). The only thing that allows is to introduce this exception, to be exercised by the MS, in EU investment agreements. Against, R. Vidal Puig, 'The Scope of the New Exclusive Competence of the European Union with regard to Foreign Direct Investment', 40 *Legal Issues of Economic Integration* (2013), 133, especially at 157-160.

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furthermore, it seems to have greatly conditioned the very design and scope of the proposed and finally approved European framework.

(2) Objectives and Scope

(a) *A new balance between liberalization and control*

To understand the new Regulation, we must start by reaffirming that the European Union will try to maintain an open and attractive system for FDI. As the then Vice-President of the European Commission declared at the time of the launch of the proposed Regulation "the EU is and will remain one of the most open investments regimes in the world. FDI is an important source of growth, jobs and innovation)".[67] This opening and promotion of FDI liberalization is, and will continue to be, in the European DNA[68] and the Regulation should not be interpreted as protectionism nor should protectionist use be made of it.[69]

However, the Regulation encourages the establishment and application of limits to this liberalization when they are justified by putting public security and order at risk. It is, therefore, one of the actions that the European Union promotes after acknowledging that it has been somewhat naive, with respect to these FDI and that it has lacked sufficient controls.

At the same time, these new and reinforced controls seek to increase the EU's international negotiating power with third countries in investment matters by not assuming that the European doors will always be open without conditions. From this point of view, the Regulation could be seen as an instrument to promote the liberalization of investments at the international level rather than as a protectionist measure to favor European industry.[70] The fact that the Regulation is limited to promoting controls when there are risks to security and public order and has not directly and prevalently dealt with issues related to lack of reciprocity and unfair competition, may point in the same direction, reaffirming the pro opening and pro liberalization background position of the EU in the new context.

The Regulation must therefore be understood as a new balance between several general interests: on the one hand, the positive effects of investment liberalization and the attraction of FDI in Europe, which are still very present; and, on the other hand, the need for greater controls, to set justified limits and to provide more effective instruments to protect against possible abuses and damages to national and European interests. The Regulation is the result of a new balance between liberalization and control, as required by a new context.

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[67] European Commission, Press release, 14 september 2017. See as well European Commission, Reflection Paper on Harnessing Globalisation, COM(2017) 240 of 10 May 2017, at 15.

[68] Bismuth, *supra* n. 63, at 105.

[69] Schaake, *supra* n. 5, at 101.

[70] Schill, *supra* n. 41.

(b) *Improved coordination and information at EU level when there is a risk to security or public order*

A mechanism for information exchange and cooperation is established among the Member States, and the Member States with the European Commission, regarding FDI that may affect security and public order. All Member States must participate —it is binding— whether or not they have a national control mechanism, although the degree of participation can be very diverse.

The mechanism can be initiated both in the event that the State receiving the investment has a national control for FDI and this control is activated (Article 6), and even when this is not the case if another Member State or the Commission considers that said FDI may affect security or public order, or has relevant information in relation to said FDI (Article 7). Note that it does not depend on whether the Member State has a control mechanism, but whether it is activated in the specific case.

In the first case, the recipient Member State shall automatically communicate to the Commission and to the other Member States at least all the information on the FDI mentioned in Article 9.2 of the Regulation. In the second case, the other affected Member State or the Commission may justifiably request the information from the recipient State (Article 7.5).

The recipient Member State may request the information provided in article 9.2 from the foreign investor and the investor will be obliged to provide it without undue delay (article 9.4). Thus, it may be creating a direct obligation on investors, at least in cases where it does not exist in the relevant national law. The Regulations do not foresee sanctions in case of breach of this duty. It would be advisable to provide them in national law to make this obligation more effective. In fact, we might think that such an obligation is imposed on the Member State by the duty of loyal cooperation and the principle of effectiveness of EU law, as set out in Article 4.3 TEU.

In addition, the European Commission is empowered to issue non-binding opinions in two cases: (a) when it affects a program or project of interest to the EU (European funding, or programs covered by European Law, on infrastructures, technologies or critical supplies) (article 8.1); (b) when the Commission considers that public order and security may be affected in more than one State of the Union or has relevant information in relation to said FDI (articles 6.3 and article 7.2). The Commission will be obliged to issue such an opinion when at least a third of the Member States consider that an FDI may affect their security or public order (Article 6.3 and 7.2); and the recipient Member State "shall give due consideration to the comments of the other Member States referred to in paragraph 2 and to the opinion of the Commission" (Articles 6.9 and 7.7).

Furthermore, if it is a Commission's opinion on a project or program of European interest as referred to in the Annex,[71] the recipient Member State "shall take utmost account of the

[71] See Article 8.3 and the list of the Annex of the Regulation: European GNSS programs (Galileo and EGNOS),

Commission's opinion and provide an explanation to the Commission if its opinion is not followed". It seems clear that the Commission's opinion is not formally binding,[72] but also that it will be difficult for the State to go against it and that, in many cases, it will be followed.

The list in the annex is exhaustive. Article 8.3 initially seems to use an open formulation when it states that these programs include "those projects and programmes which involve a substantial amount or a significant share of Union funding, or which are covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order". But then it concludes stating that "The list of projects or programmes of Union interest is set out in the Annex." The European Parliament tried that the list of the Annex had no exhaustive character but it was not accepted.[73] The objectives of these mechanisms seem to be:

- first, to increase the awareness of the Member States about the risks of some FDI not only for them but for other Member States and the European Union as a whole. Therefore, it is requested to assess the interconnection and externalities in other Member States, as well as the European dimension of public security;
- second, to generate a collective management of these risks and a response that, even if it is national, is taken after having listened to the other affected parties and having taken into account their concerns, observations or opinions;
- third, the European Commission is not conferred a formal veto power, but it is granted a significant influence on the final decision of the recipient State (soft power), especially when the FDI affects a program or project of European interest;
- fourth, increase the flow of information on FDI in Europe and create a forum for its discussion and, therefore, to assess possible future developments in the management of these FDI and its control mechanisms;
- fifth, generate a dynamic of greater national controls, impose a minimum framework for them and promote more soft harmonization of these national controls through collective management and best practices, without prejudice to respect for national powers; and
- sixth, take advantage of synergies. It would allow sharing intelligence among the different Member States, which could be especially interesting for countries that do not have it or where it is scarce.[74]

Copernicus, Horizon 2020, trans-European transport, energy and telecommunications networks, European Program for Industrial Development in the field of Defense and Permanent Structured Cooperation (CEP), as well as the subsequent modifications adopted by the Commission in accordance with article 8.4 and 16 of the Regulation.

[72] Preamble of the Regulation, paras. 16 y 17.

[73] Neergard, *supra* n. 29, at 158.

[74] ELRev (2019), editorial, *supra* n. 45, at 138.

(c) *A common framework for national control mechanisms*

(i) Just a common framework? Power and soft harmonization

A single European mechanism is not created and therefore veto powers are not directly conferred on the European Commission. Although the European Commission does not have a de jure veto to FDI, nevertheless it receives notifications, it can request information and issue opinions that shall be duly taken into account, in general, and, in some cases, into "utmost account", in addition to request from Member States an explanation to the Commission if its opinion is not followed.[75] The European Commission thus gains a considerable soft power, although the responsibility ultimately lies with the Member States, which are the ones who formally take the decision.[76] The opinions of the European Commission are not challengeable under an annulment action of article 263 TFEU as they do not produce legal effects on third parties, and, where appropriate, they would not generate liability either, since the final decision will always be imputable to the Member State.

The Regulation also does not oblige, at least formally, Member States to adopt a mechanism at the national level.[77] On the contrary, it allows MS to maintain or / and reform existing ones or adopt new mechanisms where they do not exist. Although it is not expressly mentioned that existing ones can be eliminated, it must be understood that this possibility is not excluded, given the great margin of action given to the States. In any case, it is evident that the Regulation points in another direction: far from promoting the elimination of existing ones, it implicitly encourages the adaptation (and reinforcement) of existing ones, as well as the creation of new ones where they do not exist.[78]

In this regard, it should be remembered that: Article 5.1 establishes that, even when a Member State does not have such a control mechanism, it will have the obligation to send an annual report to the European Commission on FDI in its territory based on the available information; Article 6, that Member States can issue observations and the European Commission an opinion and communicate them to the Member State where the FDI takes place if they consider that it involves a risk to security and public order, and this Member State should duly take them into account; and Article 8 enables the Commission to adopt an opinion, if programs of European interest are affected, which the Member State must take into utmost account, providing the latter with an explanation if it does not follow it.

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[75] Articles 6 and 8 of the Regulation.

[76] Bismuth, *supra* n. 63, at 109-11, or N. Lavranos, 'Summary of the Discussion of the Final panel on the EU's FDI Screening Proposal', in Bourgeois, *supra* n. 5, 115-118, at 116, reproducing the opinion of a member of FTI Consulting.

[77] During the negotiation, there was much insistence by the Council on this point and on the fact that security and public order is an exclusive national competence: see Neergard, *supra* n. 29, at 154 and the quotation of the reforms and adjustments required to article 1 and to paragraphs 3,4,8 and 17 of the Preamble in order to insist on this point.

[78] In this same line, Bismuth, *supra* n. 63, at 108-109.

For all these actions, it would be better to have a legal basis in national law that enables and facilitates national action. This implicitly will lead many Member States to establish a national control mechanism (or a more comprehensive one).[79]

Furthermore, the Regulation requires to adjust existing and new national controls to a minimum common framework with conditions of transparency, non-discrimination between third countries, grounds for action, procedure, deadlines and appeals.[80]

In any case, it is only a minimal common framework. The Regulation leaves the final decision on FDI in the specific case to the State or States that are exercising supervision: it is them who decide whether or not to control the specific FDI, whether to raise objections or not, whether to restrict it or not. It is also them who will decide if they design an ex-ante, ex-post control or if there is no national control mechanism. Member States choose. The Regulation also does not establish what measures to adopt, if any, to solve the threat to public order and security. Thus, the mechanisms provided for in the Regulation are called to fulfil a complementary function to that of national mechanisms. It seeks to help Member States and the European Commission to collectively assess potential cross-border or European threats to security and public order.

(ii) The grounds for control

Just public order and security? The Regulation refers only to intervention on grounds of public order and security, indicating a non-exhaustive list of factors that can be taken into account by the Member States.

Does this mean that Member States cannot limit FDI for reasons other than public order and security? Some authors seem to suggest that the answer would be yes and that the Member States could not invoke other reasons and, even less, economic reasons to control and /or block an investment.[81] This conclusion could find support on the fact that FDI is now part of the Common Commercial Policy and as such the exclusive competence of the European Union. If the Regulation has not authorized limitations for reasons other than public order and security, this door has been closed for now. The issue may be controversial: first, because the chapters on capital movement and establishment (and the CJEU's interpretation of them) clearly admit other general interests as justifications, although never purely economic ends; second, because the Regulation at no time expressly excludes other reasons, although it must be recognized that during the negotiation other possible grounds such as lack of reciprocity and unfair competition were discussed and were not included (at least not as main grounds) in the final text; third, because it could be understood that the Regulation self-restrains to

[79] Article 2.4 of the regulation defines 'screening mechanism' as "an instrument of general application, such as a law or regulation, and accompanying administrative requirements, implementing rules or guidelines, setting out the terms, conditions and procedures to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments on grounds of security or public order;"

[80] See below section (c) (v).

[81] Bourgeois & Malathouni, *supra* n. 5 at 178.

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establishing that the procedures set forth therein must be applied to cases in which there may be a threat to public order and security, and does not regulate other matters that must be governed by the other applicable European and national rules; Fourth, because it must be borne in mind that public order and security is a broad concept that is not defined in the Regulations and that can be detailed and must be applied by each State, who must establish the reasons for control (article 3.2); furthermore, the list of possible factors to take into account is a non-exhaustive list (article 4); fifth, because article 4.2 a) does refer to a factor linked to possible unfair competition,[82] without excluding others; Sixth, because although it is not possible to resort to purely economic ends, public security can have an economic aspect - economic public security - that has been recognized by the CJEU as a possible justification for restrictive measures.[83]

What is the meaning of public order and security in comparative law? The terms used in FDI Comparative Law present some variations, but not very substantial: in the USA and the recent FIRRMA the term is 'national security', as in the Canada Investment Act; in Australia, a broader concept is chosen: 'national interest'; in other jurisdictions the expression 'essential security interests' is preferred.[84]

Regarding the content and the approach to these concepts, in some jurisdictions general guidance are offered, while others relied on a case-by-case analysis.

In some European Member States, reference is made only to the defence sector, while in others, different public interests are alluded to.[85] The European Union has chosen in the Regulation to refer to public security and public order, including guidelines on its content and scope in the Regulation itself, and alluding to possible factors to be taken into account without being an exhaustive list. In the MEMO that accompanied the launch of the Regulation, it is stated that purely economic goals are not included.

What about the factors and sectors affected? The Regulation provides a non-exhaustive list of factors that can be taken into account by States to assess these threats. It is a mere orientated guide, neither mandatory nor exhaustive. It therefore offers very limited legal certainty: for investors -and to attract investment- more precision would have been desirable.[86]

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[82] Article 4.2 a) indicates a possible factor to consider: "whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;".

[83] Indeed, the CJEU has accepted it in multiple cases in the field of internal market freedoms, such as in Judgment of the Court of 10 July 1984, C-72/83, Campus Oil, ECLI:EU:C:1984:256, or Judgment of the Court of 13 May 2003, C-463/00, Commission v. Spain (golden shares), ECLI:EU:C:2003:272 .

[84] For a more detailed analysis, see F. Wehrlé &. Pohl, 'Investment Policies Related to National Security: A Survey of Country Practices', *OECD Working Papers on International Investment*, 2016/02, OECD Publishing, Paris.

[85] European Commission, Staff Working Document accompanying the Regulation proposal, SWD (2017) 297 final, at 8.

[86] See, for instance, the comments by a representative of Goodyear in Lavranos, *supra* n. 76, at 115.

It is interesting to note that there was a consensus among the three EU Institutions on the non-exhaustive nature of the list,[87] but there was a great discussion on what to include: the European Parliament was in favour of a longer and more detailed list, and even to make some of the factors mandatory, while the Council advocated a shorter and less detailed list.[88]

It is necessary to take into account, on the one hand, the articles of the Regulation, in particular Article 4, and, on the other hand, also the Preamble, in its sections 11 to 14. They differ slightly, although both have a similar status as they are non-binding and both are revealing of the main sectors that may be affected. Article 4.1 of the Regulation says that the potential effects of FDI may be taken into account, among others in:

> "a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure;
>
> b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009 (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;
>
> c) supply of critical inputs, including energy or raw materials, as well as food security;
>
> d) access to sensitive information, including personal data, or the ability to control such information; or
>
> e) the freedom and pluralism of the media".

Additionally, Article 4.2 of the Regulation also mentions, among the factors that could be taken into account:

> "a) whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding;
>
> b) whether the foreign investor has already been involved in activities affecting security or public order in a Member State; or
>
> c) whether there is a serious risk that the foreign investor engages in illegal or criminal activities."

The Preamble completes what is established in article 4. For example, when saying that the Member States and the Commission must also be able to take into account "the context and circumstances of the foreign direct investment", and in relation to the point 4.2 a) of the Regulation, not only "in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country" but also if it "is pursuing State-led outward projects or programmes".

It is interesting to note that a comparison between the material scope and the factors to be assessed in US regulations (CFIUS, after FIRRMA) and the European Regulation reveals their similarities. Beyond slight differences, both refer to practically the same sectors and factors.[89]

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[87] Preamble of the Regulation, para. 11.

[88] Neergard, *supra* n. 29, at 155-156. The European Parliament wanted to include other factors such as reciprocity, human rights, labor standards and intellectual property, but they were not accepted.

[89] For a detailed comparison, see Bourgeois & Malathouni, *supra* n.5, at 181-182.

There is an almost total coincidence in the underlying concerns of both regulations, something that can be very useful due to the more extensive experience in the application of the US regulations.

The listing also confirms that the concept of security and public order that is being targeted goes far beyond strictly the defence sector. Undoubtedly, it extends to other aspects of strategic security in today's societies such as data, information, technologies, key services for citizens, as well as critical infrastructures and supplies. From this perspective, it can be clearly concluded that it covers areas that have entered into previous CJEU case-law as 'economic' public security (guarantees of access, use and / or supply of services and critical supplies) and other public interests (guarantees for electoral processes, for the protection of personal data or media pluralism).[90]

In any case, the list is neither obligatory for the Member States (although not taking it into due account may require explanations from the affected Member State, especially if it diverges from the opinion of the European Commission) nor does it closes the list of sectors that could be affected and the factors that can be assessed. Let us remember that the list is not exhaustive and that, furthermore, it is ultimately a national competence, so Member States have the last word also on this matter. In addition, the examination will be done on a case-by-case basis, taking into account all the specific circumstances. Some of them can be very important such as: the intensity of the investment and the degree of influence in the recipient company; if the risk exists by the mere access to the information or if control over the company is acquired; or the degree of 'critical' intensity of the investment target.

(iii) The controlled subject: Foreign investor

In accordance with article 2 in its paragraphs 2 and 6, a foreign investor is meant to be any natural person from a third country or company from a third country (that is, the one incorporated under the laws of a third country), who makes an FDI.

And what happens if a third-country company establishes itself in a Member State where a national mechanism for controlling foreign investment has not been created (for example, creating a subsidiary) and then, from this subsidiary, makes a direct investment in another Member State that does have FDI control? Should we consider that investment as an investment of an EU company and therefore not an FDI? On the contrary, should we consider it as an FDI and apply the new European Regulation to it?

In principle, as a general rule, it will be considered an intra-community investment. However, the Regulation has echoed the risk that this type of scenario poses to avoid the control of FDI: in article 3.6 of the Regulation, it is stated that "the Member States that have control mechanisms will maintain, modify or adopt the measures necessary to determine and avoid circumvention of the control mechanisms and control decisions". It should be borne in

[90] Following the same line, ELRev (2019) editorial, *supra* n. 45, at 138.

mind that, in such situations, the subsidiary State, even if it does not have national control of FDI, may receive observations from other Member States and opinions from the Commission if there is a security risk in any Member State. Furthermore, we might think that Article 3.6 of the Regulation enables the Member State in which the subsidiary invests to consider the new investment as FDI with a view to avoiding circumvention of FDI control.[91]

The Preamble to the Regulation, in its section 10, clarifies that such measures should cover investments made within the Union "by means of artificial arrangements that do not reflect economic reality and circumvent the screening mechanisms and screening decisions, where the investor is ultimately owned or controlled by a natural person or an undertaking of a third country". It seems therefore that the goal is to block the practice of creating "Special-Purpose Entities" (SPEs), or letterbox companies, and that it could not be used in other cases in which European companies owned by investors from third States carry out genuine activities in the Member State where the investment comes from.[92]

Does all this mean that the foreign investor's position has been harmed by the adoption of the Regulation? Although it is true that the most important impact is that these FDI can be subjected to more and more reinforced controls, it is also possible that there will be some positive aspects for the foreign investor. Some FDI that were previously outside the scope of EU law and therefore did not benefit from its guarantees (for example, those associated with free establishment that does not extend to extra-EU relations), are now clearly applicable as all FDI are within the scope of the new Regulation and therefore of EU law. This implies that the guarantees of the Charter of Fundamental Rights of the European Union (CFREU) must be respected in addition to the rest of the limits and the common framework established in the Regulation.[93]

(iv) The object of control

Foreign direct investment. The Regulation is limited to FDI only, but to all types of FDI, both to mergers and acquisitions (brownfield) and ex novo (greenfield).[94] Article 2.1 of the Regulation defines FDI as:

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[91] This interpretation, however, can be controversial, given the general principle of mutual recognition and its solid case-law support (for example, Judgment of the Court of 9 March 1999, C-212/97, *Centros*, ECLI:EU:C:1999:126, or Judgment of the Court of 13 December 2005, C-411/03, *Sevic*, ECLI:EU:C:2005:762, as well as other provisions of the Regulation such as Article 1.3 which emphasizes that each Member State decides whether or not to control each FDI.

[92] Lundqvist, *supra* n. 11, at 20 and 52.

[93] See also ELRev (2019) editorial, *supra* n. 45, at 138.

[94] See, among others, Bourgeois & Malathouni, *supra* n.5, at 176. See also MEMO accompanying the Regulation: "Foreign direct investment can take two different forms: greenfield, and mergers and acquisitions (M&As). International greenfield investment typically involves the creation of a new company or establishment or facilities abroad, whereas an international merger or acquisition amounts to transferring the ownership of existing assets to an owner abroad".

> "an investment of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity". Furthermore, this definition and the criteria used in it must be seen as a consolidation of previous case-law.[95]

It does not cover non-direct investments, passive or portfolio financial investments, nor could it do so with the current legal basis of 207 TFEU.[96] This is very important for two reasons: first, because the EU is also an important actor in this area[97] and second, because it creates a vacuum that, in a way, puts the new control of FDI at risk by allowing foreign investment to be channelled as not direct to avoid controls, achieving similar strategic-political ends as an FDI.

Temporal scope. The Regulation applies only to FDI subsequent to the entry into force of the Regulation itself, therefore, never to those made before 10 April 2019.[98] In addition, the European Commission, in the MEMO FAQ that accompanies the Regulation, says that the cooperation mechanism will apply from 11 October 2020, since this transitional period is necessary for the adjustment of national controls, the establishment of contact points and to secure channels for information exchange.[99] But then, can this mechanism be applied retroactively to an already completed FDI? The Regulation does not provide further explanations, but the Commission gives guidance again in its MEMO FAQ. It clarifies that: first, when FDI is subject to national control, the cooperation mechanism will be applied if national control allows it (this will not be the most frequent case given that these national controls normally establish ex ante control regimes and not ex post); second, if the FDI is not subject to national control, the maximum period to start the cooperation mechanism will be 15 months after the FDI has been carried out.[100]

(v) Common minimum requirements

The Regulation also establishes some common requirements for all national controls: transparency, judicial review and non-discrimination between different third countries, in addition to guaranteeing respect for the protection of confidential information. Therefore, national control systems must clearly establish the circumstances that give rise to supervision, the reasons, procedures, deadlines and (judicial) remedies. It is not a great novelty since these

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95 CJEU, Judgment of the Court of 12 December 2006 C-446/04, *Test claimant*, ECLI:EU:C:2006:774, para. 181, or Judgment of the Court of 22 October 2013, joined cases C-105/12 to C-107/12, *Staat der Nederlanden v. Essent NV & others*, ECLI:EU:C:2013:677, para. 40. See also above section (B) (II).

96 Non-direct investments are explicitly excluded from the Common Commercial Policy as confirmed by Opinion 2/15, ECLI:EU:C:2017:376, paras. 225-245, especially 227, and the Preamble of the Regulation, para. 9). They are subject to the chapter on the free movement of capital.

97 Eurostat, Statistics Explained: international Investment Position Statistics.

98 Article 7.10 and Preamble, para. 21, of the Regulation.

99 See also, although less clear, Article 17 of the Regulation.

100 See especially para. 13 of the MEMO FAQ.

requirements were already required by the CJEU case-law on capital movement.

(d) *Greater legal certainty?*

One might think that the Regulation offers greater legal certainty to existing national mechanisms and to the new ones that are created. Indeed, given that the Lisbon Treaty included FDI in the EU's Common Commercial Policy and that this is an exclusive competence, doubts could be raised about whether States could, after Lisbon, act in this area without authorization from the EU. Although the issue is controversial, given that the powers to maintain order and public security in the States are national powers as recognized by the TEU itself in its article 4.2, this European Regulation eliminates any doubt in this regard, as it can be understood as an empowerment to the Member States.[101]

Regarding investors, it is difficult to foresee what the effect of the new mechanisms may be on their legal certainty. On the one hand, the common framework could bring clarity and facilitate coordination and a unified conception, but, on the other hand, by leaving a lot of margin to the Member States and being a very open framework, it may imply greater complexity, additional controls, more actors involved and, therefore, greater uncertainty about whether the investment can be made. Only time will end up telling us which of the two opposite effects will prevail.

(D) CRITICAL ANALYSIS AND CONCLUSIONS

(1) A Political Turn: The Announcement of a New Era

The Regulation should be interpreted as a political and conceptual shift towards more defensive and cautious positions regarding FDI. If previously the Commission had been very favourable to FDI, little inclined to promote controls on them and even belligerent against some of those who wanted to establish them at national level,[102] the Regulation symbolizes, first, an alert call, and second, a certain turn of position.

The European Union, and the Commission in particular, seem determined to make more differences in the analysis of EU and non-EU investments: remain strict in supervising and stopping restrictions on the former, and, instead, promote greater controls and caution regarding the second, in which it acknowledges that it has been somewhat naive. Although the Regulation focuses on security and public order, it does so in a broad sense, and it cannot be ignored that its adoption owes much to a context of lack of reciprocity and fair competition from new important investors, especially—although not only—the Chinese.

The intensity of the turn is yet to be determined. That it has occurred is undoubted. The European Union remains in favour of investment liberalization, and continues to see FDI as

[101] In this sense, Martin-Prat, *supra* n. 13, at 97.

[102] See, for instance, Bismuth *supra* n.63, at 103-107. See also above section (B) (I).

positive, but not at any cost or in all sectors and conditions. Although the Regulation has not clearly stated it, there is behind a serious concern not only for defending strategic and security interests but also for unfair competition or the need to guarantee the same level playing field. It is possible to foresee, therefore, the development of new controls at national level, the tightening of some of the existing ones and a greater weight of shared opinions on common risks at European level.

It should also be understood that the Regulation could increase the bargaining power of the European Union in investment agreements with third parties, since it cannot be taken for granted that FDI will remain wide open in Europe with almost no limits as until recently.

(2) A Missed Opportunity for Greater Ambition

However, the Regulation can be seen at the same time as a missed opportunity to respond to the challenge of lack of reciprocity, unfair competition and the possibility of equipping itself with effective mechanisms to require third States to play with the same rules (level playing field).[103] Or, in other words, the Regulation can be seen as a partial, only half-hearted response to this challenge.

It appears that based on Article 207 TFEU, the Regulation could have referred not only to public order and security but also explicitly to lack of reciprocity or unfair competition. In fact, 207 TFEU already explicitly refers to trade defence measures, including cases of dumping or subsidies. By analogy it should also be feasible to include the possibility of controlling FDI carried out by foreign public companies, subsidized or with the support of government agencies, public companies or sovereign wealth funds and cases of lack of reciprocity.[104]

It is true that the Regulation, in its art. 4.2 a) already includes a mention to this when saying that "In determining whether a foreign direct investment is likely to affect security or public order, Member States and the Commission may also take into account, in particular: (a) whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding; " However, it is only one of the guiding factors that can be used by Member States or the Commission in their analysis of security and public order. It does not seem to enable control simply because this factor is present if it is not linked to a risk to public order and security. Therefore, it is a partial and unsatisfactory response to this risk and allows very limited action. It does not empower to discipline the third State merely for the existence of unfair competition or lack of reciprocity, as some Member States had requested or was sought by the European Parliament. This absence is especially important since: first, the European

[103] Bismuth, *supra* n. 63, at 112-114. See also the opinion of Prof. Bronckers, as collected in Lavranos, *supra* n. 75, at 117, referring to the regulation that is "solely limited to national security considerations: the EC should address reciprocity, the real issue and not national security".

[104] Bismuth, *supra* n. 63, at 113-114.

Union cannot always resort to the WTO in these cases either, since the agreement on subsidies is only applicable to goods, and the current European trade protection instruments are also limited in scope; secondly, the European control of State aid does not work either because it only applies to aid granted by EU Member States; and third, it does not seem clear that the Member States can include the lack of reciprocity or unfair competition within the exception of public interest, although the CJEU does not seem to have ruled it out with respect to investors from third States.[105] Therefore, it is logical to think that the European Union should equip itself with an instrument of trade defence for these scenarios and could have (should) have taken advantage of this occasion to fill the existing gap. From this perspective, the Regulation is a missed opportunity.

(3) A Possibilistic Commitment: Towards Greater Awareness, Effective Protection, Bargaining Power, Unity and Legitimacy

As is often the case in political negotiation and even more so in the field of European integration, the Regulation must be seen as a compromise between very diverse and distant positions: that of those who wished more ambitious measures and those who did not consider it necessary and were even reluctant to establish new controls, to tighten existing ones, and, of course, rejected the creation of a powerful single European instrument.[106]

It is therefore a possibilistic solution that seeks to advance controls, facilitate the exchange of positions between the Member States and EU Institutions, promote greater awareness of the externalities of FDI beyond national borders and start to think "European" as well in this ambit. It seeks to move towards more effective protection and an increase in European bargaining power, but by adopting regulations that allow unity in progress, even at the cost of less ambition and leave more room for action to each Member State that remains, formally at least, the one who decides. Harmonization exists, but it is minimal (very minimal) and the power of the European Commission, although probably not negligible in practice, is based on soft mechanisms, without binding vetoes. Not surprisingly, for some like SHAAKE, the result is "still quite loose ... be seen more strategically as taking a position in a debate more than coming down with hard regulations".[107]

The risk of possible solutions is that it will lead to suboptimal results, so it is not surprising that other avenues such as the use of other legal bases[108] or enhanced cooperation[109] have been

[105] Lundqvist, *supra* n. 11, at. 42-43.

[106] The then Trade European Commissioner, Cecilia Malmström, acknowledged that the proposal of the European Commission was the outcome of a balance between Member States who don't want anything at all and those that want something much more ambitious.

[107] Shaake, *supra* n. 5, at 100.

[108] Cremona, *supra* n. 57 and Bismuth, *supra* n. 63.

[109] Lundqvist, *supra* n. 11, develops this possibility, stating that it would be better on the basis of Article 73 TFEU than Article 329 TFEU.

explored by scholars. The advantage of the possibilistic solution is that it allows us to advance in unity, even with soft means, and to give an opportunity to coordinated action and the growth of common understandings. Unity is important in reducing forum shopping, while avoiding unsupervised, unclogged areas through which undesirable investments can sneak in.

Given the great margin that States have and the soft nature of the power acquired by the Commission, it remains to be seen how the progress will materialize, if it occurs with sufficient unity and if it is effective enough. It is also too early to see if the warning that the Regulation announces increases the bargaining power of the European Union to a significant extent and, therefore, allows it to promote the liberalization of investments with third States. It seems that, on this front, the Regulation has important limitations since the lack of reciprocity and unfair competition have not been included as main reasons, but the change made and the possibility of increasing its scope will undoubtedly have an impact. Only time will tell us the final answer to these unknowns.

(4) Just a First Step? Looking into the Future

In view of all the above, it is questionable whether the Regulation is not only a first step, a symbolic step representing a turn, but only a first step: if, therefore, a more ambitious reform cannot be expected in the future and if it will be accompanied of other commercial defence measures that contribute to filling the existing loopholes.

Regarding the second question, there is indeed no doubt that the Regulation must be seen as just another piece of a puzzle, of a global response to the new challenges detected by unfair competition at a global level.[110] The debate on a better defense of the strategic interests of the Union, the demand for greater reciprocity and the promotion of a new European industrial policy, is still open and a hot-topic. It is certain that sooner than later we will see proposals for reforms relating to our public procurement markets, competition law (merger control, State aid) and trade defence, other sectoral regulations, greater claims of openness to investments and general access to markets in third countries, both multilaterally and, above all, bilaterally (for example, in the ongoing negotiations for an investment agreement between the European Union and China). The substantive debate is more far-reaching and it will be necessary to pay close attention to the interaction of the different pieces of the puzzle and to the overall effect they will produce.[111]

Regarding the first question, everything indicates that it would have been very difficult to reach a more ambitious FDI control solution in the short term. As Neergard says, the European Parliament wanted to be more ambitious, but the divergence of positions and sensitivities of

[110] Bourgeois & Malathouni, *supra* n. 5, at 187-191.

[111] See, in this regard, European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM (2020) 253 final, now subject to public consultation.

the Member States made it impossible.[112] Furthermore, the times for its approval before the end of the legislature were very limited (remember that it was passed in record time) and it seemed urgent to take at least a first step and to send a clear signal.

Will it be possible to be more ambitious in the future? In the near future, and with regard to this specific tool, I don't think so. Let be patient: progress has been achieved that cannot be underestimated and we must wait for the results, the implementation by the Member States and the functioning of the planned cooperation mechanisms that, remember, will not start operating until October 11, 2020. It is foreseeable that the mechanism will increase the awareness of the States about the externalities of FDI in other Member States and at the European level, as well as that there will be a soft harmonization of the concept of strategic interests and public security at European level with significant contributions by the European Commission. This is the path that has been chosen (perhaps because it was possible) and now we have to see how it works. In any case, there are still unresolved issues. In a more medium-long term, and depending on the results obtained, not only in the scope of the Regulation but on other fronts (liberalization of investments with third States, reciprocity, level playing field ...), it is not ruled out that a reform could be explored. For such future reforms, the possibilities and limitations of the chosen legal basis (which we have already widely discussed throughout this contribution) must be kept in mind, as well as the possibilities of alternative bases. The context, both intra-EU and on the global stage, will greatly determine the direction of these reforms. Its evolution is too open to be able to venture more than speculation.

In sum, even if aware of its weaknesses, the progress must not be underestimated. It is time to be constructive in exploiting its maximum potential and, furthermore, do it with a European spirit.

[112] Neergard, *supra* n. 29, at 167.

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Brexit and European Citizenship: Welcome Back to International Law

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Abstract: The emergence of European citizenship in 1992 was considered an important step forward in the "constitutionalization" of the Community legal order. As it was formulated, European citizenship was little more than a compilation of the rights contained in the founding Treaties and secondary law. But the CJEU, supported by a pro-integrationist academic doctrine, turned it into the "fundamental status of the nationals of the Member States". It is not surprising then that many scholars considered Brexit, which involved the loss of European citizenship for millions of UK nationals, a disappointment. Some of them looked at international law trying to find some limits to the most serious effects of Brexit on the rights of European citizens. The aim of this article is precisely to analyse in detail those doctrinal discourses that resort to international law as a possible constraint on state sovereignty. At the end we will see that these proposals are based not only on a methodological misperception of what international law is and what it is for, but also on a serious distortion of the real meaning of European citizenship.

Keywords: Brexit – European citizenship – Court of Justice of the European Union – International law.

(A) BREXIT AND...

The terms used by the academic doctrine interested in the process of European integration to describe the British decision to leave the European Union (EU), after 47 years of membership,[1] give an idea of its

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[1] The process of the UK's exit from the European Union, universally known as Brexit, started to take shape on 23 June 2016 when British citizens, by a majority of 51.89% of the votes cast, expressed their decision to withdraw from the EU in a referendum convened by Prime Minister David Cameron. The other key dates of the disengagement process have been 29 March 2017, when the UK formally activated the withdrawal process provided for in Article 50 of the Treaty on European Union (TEU); 17 October 2019 when the EU adopted the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Agreement); and midnight on 31 January 2020, the date on which the UK formally leaves the Union, although according to Article 126 of the Agreement, it has to continue to apply Union law on a transitional basis until 31 December 2020. For details of the referendum and its result, see *The Electoral Commission, Results and turnout at the EU referendum*; y S. Bonnecke, "Brexit-¿Quo Vadis?", 51 *Estudios Internacionales* (2019) 9-36 [doi:10.5354/0719-3769.2019.54136]. Obviously, the profound reasons that have led to the withdrawal of the UK go back much further in time and their study, in view of all the political and legislative vicissitudes experienced by the British side in the process of withdrawal, is almost better approached from the political, social and cultural psychology. See K. McEvoy, A. Bryson, & A. Kramer, "The Empire Strikes Back: Brexit, the Irish Peace Process, and the Limitations of Law", 43 *Fordham International Law Journal* (2020) 615-668, and its bibliography. Also J. Frosini & M.F. Gilbert, "The Brexit car crash: using E.H. Carr to explain Britain's choice to leave the European Union in 2016", 27 *Journal of European Public Policy* (2020) 761-778 [doi:10.1080/13501763.2019.1676820]; G. A. Veltri *et al.*, "The identity of Brexit: A cultural psychology analysis", 29 *Journal of Community & Applied Social Psychology* (2019) 18-31 [doi: 10.1002/casp.2378]; A. Golec de Zavala, R. Guerra & C. Simão, "The Relationship between the Brexit Vote and Individual Predictors of Prejudice: Collective Narcissism, Right Wing Authoritarianism, Social Dominance Orientation", 8 *Frontiers in Psychology* (2017) 1-14

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apparent historical, geopolitical, sociological and legal significance; the drama and concern with which it was received. "Earthquake", "tremor", "crisis", "abyss", "regression", "confusion", "discouragement", "uncertainty", "farce", "risky experiment", "danger".[2] Those most prone to tragedy spoke of a dying EU, if not already being dead and buried. For others the integration project was damaged "beyond repair or redemption".[3] Some commentators spoke, in one of the most curious revivals of the theory of the "domino effect", which had so much predicament during the Cold War between the US military and politicians, of a spiral of exits from the Union, following in the British wake, which would inevitably lead to the dissolution of the EU.[4] Or to its decline, if a new European patriotism did not emerge (*sic*).[5]

As expected, this emotional impact was translated into an avalanche, in the most literal sense of the word, of academic literature whose objective was to analyse the repercussions of Brexit in the most diverse fields of knowledge. What I call "Brexit and ..." left on the other side of the binomial an infinite variety of terms that ranged from the balance of power in Europe to anti-politics, including international law, the environment or pig farming, among hundreds of possibilities.[6] From an international legal-political point of view, the "Brexit and European citizenship" binomial is definitively worth studying.[7]

[doi:10.3389/fpsyg.2017.02023]; and 39 *Political Psychology*, special number devoted to *The Political Psychology of European Integration: Brexit and Beyond*.

[2] See S. Ahlhaus & P. Niesen, "Regression in membership law: For a cosmopolitanism from within", 26 *Constellations* (2019) 492-503 [doi: 10.1111/1467-8675.12433]; A. Mangas, "PostBrexit: una Europa confusa, entre el desánimo y la incertidumbre", 54 *Revista de Derecho Comunitario Europeo* (2016) 427-437; J.L. Marco, "El *Brexit* y el futuro de la Unión Europea", 51 *Actualidad Jurídica Uría Menéndez* (2019) 7-18; J.L. Malo, "El futuro del proyecto europeo después del *Brexit*", 896 *Información Comercial Española, ICE, Revista de economía* (2017) 141-152; C. Di Maio & A. Tomás, "La ciudadanía europea ante el reto de la unidad política: ¿mero estatuto de libertades o motor para una sólida integración de la Unión Europea?", 40 *Revista Derecho del Estado* (2018) 181-208 [Doi: 10.18601/01229893.n40.08]; V. Power, "Brexit: Legal and Policy Lessons learned for the European Union, the Withdrawal Process and European Union Law", 21 *Irish Journal of European Law* (2018) 36-54; O. Garner, "After Brexit: Protecting European citizens and citizenship from fragmentation", *EUI Working Papers*, LAW 2016/22 1-21 [doi: 10.2139/ssrn.2871404]; J. Klabbers, "Continent in Crisis", 27 *European Journal of International Law* (2016) 553-556 [doi.org/10.1093/ejil/chw029].

[3] For a sample of the most pessimistic analyses, see R. Maher, "International Relations Theory and the Future of European Integration", 0 *International Studies Review*. Analytical Essays (2020) 1-26, at 1-2 [doi: 10.1093/isr/viaa010/5775616].

[4] II. Yergiin, "Does Brexit Would Cause Domino Effect on Other European Union Countries? Is It the End of Regional Integrations?", 6 *International Journal of Humanities and Social Science Invention* (2017) 31-43.

[5] G. Schwan *et al.*, "Guest Editorial: Without a new European patriotism, the decline of the EU is inevitable", *EJIL:Talk*, April 2020.

[6] An example of the infinite possibilities of this "Brexit and...", can be seen in P. Diamond, P. Nedergaard & B. Rosamond (eds), *The Routledge Handbook of the Politics of Brexit* (Routledge, London, 2018), at v-vii.

[7] The consultation of the term "Brexit and international law" in the Oxford Public International Law (OPIL) returns a reading list of four sections: history/background, treaties, trade agreements, borders/secession/sovereignty, and citizenship. The doctrine most concerned with formal legal aspects has mainly dealt with the effects of Brexit on the treaties concluded by the EU. See J. Odermatt, "Brexit and International Law: Disentangling Legal Orders", 31 *Emory International Law Review* (2017) 1052-1073; G. Van der Loo & S. Blockmans, "The Impact of Brexit on the EU's International Agreements", *Centre for European Policy Studies,Policy Paper* (2016); Ch. Hillion, "Consequences of Brexit for international agreements concluded by the EU and its Member States", 55 *Common Market Law Review* (2018) 101-131. The Spanish doctrine has focused on

In fact, as early as *Van Gend & Loos*, the Court of Justice of the European Union (CJEU) had made it clear that the Community legal order was somewhat different from the traditional international legal order,[8] which led many to believe that we were facing a reality radically different from the imperfect world of international law in which individuals have a very limited role. With the passage of time, and the invaluable help of the CJEU, which already in its Opinion 1/91 declared that the Treaty establishing the EEC was the "the constitutional charter of a Community based on the rule of law",[9] the most pro-European academic doctrine allowed itself to affirm that the Court had de facto constitutionalized the Community legal order, making it more supranational and less intergovernmental.[10]

The emergence of European citizenship in 1992 put the finishing touches to this supposed "constitutionalization" of the Community legal order. After all, what better proof of supranationality than the possibility, implicit in the new European citizenship, of political membership and individual and collective self-determination beyond the borders of the nation state? And taken to the extreme, did not European citizenship imply a questioning of nationality as a matter reserved for strict state competence - a de facto relativization, if not abolition, of Member States' nationality since the rights it granted were totally dissociated from the nationality that had given access to the status?

It is not surprising that Brexit fell like cold water on such a markedly Europeanist academic community, provoking the sudden awakening of all those who were beginning to describe reality in post-national terms. European citizenship has a derivative character - only those who have the nationality of a Member State are European citizens - and consequently, it is apparently lost with the departure of a state from the EU. What kind of constitutional order are we talking about, then, when a Member State can, from one day to the next, deprive more than sixty million people of a significant part of their, to use the very words of the CJEU in *Van Gend & Loos*, "legal heritage". Was not the role of individuals, their legal subjectivity, the great difference between international and Community law? How can the rights of millions of European citizens be left at the mercy of the mere will of the state, however democratically formed it may be? Does this not resemble too much the normal functioning of international law?

Suddenly, international law seemed to reappear through the back door in the Community legal order. *Welcome back to International law*. Something that James Crawford put in even more ironic

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the consequences of Brexit on the Gibraltarian dispute. See M. Martín & J. Martín (coord.), *El Brexit y Gibraltar. Un reto con oportunidades conjuntas* (Ministerio de Asuntos Exteriores y Cooperación, Madrid, 2017); A. Del Valle, "Gibraltar, the Brexit, the Symbolic Sovereignty, and the Dispute. A Principality in the Straits*?", Cuadernos de Gibraltar – Gibraltar Reports*, No. 2 (2017) 67-96 [doi: 10.25267/Cuad_Gibraltar.2017.i2.05]; A. Mangas, "¿Brexit? Escenarios internacionales y Gibraltar", *Real Instituto Elcano Documento de Trabajo 9/2016*. You can also find articles on the rights of European citizens: J.J. Piernas, "Derechos de los ciudadanos de la Unión Europea y del Reino Unido después del Brexit", 35 *Anuario Español de Derecho Internacional* (2019) 261-295 [doi: 10.15581/010.35]; technical analysis on CJEU rulings: P. Andrés, "Un tribunal a la altura de sus responsabilidades: el *Brexit* ante el Tribunal de Justicia de la Unión Europea", 62 *Revista de Derecho Comunitario Europeo* (2019) 17-37 [doi.org/10.18042/cepc/rdce.62.01]; or contributions of a general nature: S. Torrecuadrada & P. García, "¿Qué es el Brexit? Origen y posibles consecuencias", XVII *Anuario Mexicano de Derecho Internacional* (2017) 3-40 [DOI: doi: 10.22201/iij.24487872e.2017.17.11030].

[8] Judgment of the Court of 5 February 1963, -NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, Case 26-62, at 12, ECLI:EU:C:1963:1.

[9] Opinion of the Court of 14 December 1991, Opinion 1/91, ECLI:EU:C:1991:490.

[10] See *infra* paragraph (D).

words when he said, at the 12th Annual Conference of the European Society of International Law, that international law was "all that remains when 'Brexit' happens or when Donald Trump wins the US Presidential elections ".[11] Thus, the European Commission, guardian of the Treaties, in response to questions about the impact on European citizenship of the opening up of a hypothetical secession of part of a Member State's territory,[12] answered without hesitation that " in the hypothetical event of a secession of a part of an EU Member State, the solution would have to be found and negotiated within the international legal order ".[13] Similarly, the CJEU used it as support in one of its decisions on Brexit which, curiously enough, for some reaffirmed the constitutional nature of EU law.[14] Along the same lines, and also paradoxically, many of those who considered that international law as the guiding principle of European regional relations was *dépassé* began to turn to it in search of limits that would alleviate the consequences of Brexit on citizens' rights.

The aim of this article is precisely to analyse in detail the doctrinal discourses that resort to international law to find some limits to the most serious effects of Brexit on the rights of European citizens. To this end, after a review of the origins of European citizenship, and the CJEU's interpretation of it, we will look in detail at some of the doctrinal proposals to avoid the loss of citizenship rights as a result of the United Kingdom's exit from the EU. At the end of the journey we will see that these proposals are based not only on a serious distortion of the real meaning of European citizenship, but also on a methodological misperception of what international law is and what it is for.

(B) THE BIRTH OF A POST-NATIONAL CITIZENSHIP

Like other administrations, both national and international, the EU is in the habit of giving its citizens, from time to time, slogans or ideas whose objective is to facilitate our understanding of its problems and activities, while serving to orient and focus its energies at a given time and in a given direction. In 1985, when I was graduating in European law from the Institute of European Studies (IEE) of the Free University of Brussels, the *mot d'ordre* was the "democratic deficit" and the "Europe of the citizens.[15]

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[11] Quoted in I. De la Rasilla, "International Law in the Early Days of Brexit's Past", *EJIL: Talk* (2020).

[12] Parliamentary question by Mara Bizzotto (EFD), E-007453/2012, 25 July 2012; and Parliamentary question by Izaskun Bilbao Barandica (ALDE), Ramon Tremosa i Balcells (ALDE), Salvador Sedó i Alabart (PPE) and Raül Romeva i Rueda (Verts/ALE), E-008133/2012, 17 September 2012.

[13] Answer given by Mr Barroso on behalf of the Commission, P-009756/12 and P-009862/12, 3 December 2012.

[14] Judgment of the Court (Full Court) of 10 December 2018, Andy Wightman and Others v Secretary of State for Exiting the European Union, Case C-621/18, ECLI:EU:C:2018:999. After recalling the autonomy of Union law, "both to the law of the Member States and to international law", the Court, apparently unsure of its own reasoning, ends up confirming it with "the provisions of the Vienna Convention on the Law of Treaties, which was taken into account in the preparatory work for the Treaty establishing a Constitution for Europe". On the constitutional significance that some attribute to this decision, see Andrés, *supra* n. 7, at 32; and P. Eeckhou & E. Frantziou, "Brexit and Article 50 TEU: A constitutionalist reading", 54 *Common Market Law Review* (2017) 695-734 [doi.org/10.2139/ssrn.2889254].

[15] The expression "democratic deficit" was first used by the English academic and parliamentarian David Marquand, in his 1979 book *A Parliament for Europe (Cape, London)*. See P. Mindus, *European Citizenship after Brexit. Freedom of Movement and Rights of Residence* (Palgrave Macmillan, London, 2017), at 9. See the definition of "democratic deficit" in the glossary contained in the Eur-lex database of European legislation. The first initiatives for a "Citizens' Europe" date from the late 1960s, although the first time the expression appears in a legal source is in the 1987 Council Decision on the Erasmus programme. See S. Kadelbach, "Union Citizenship",

Without forgetting, of course, the *hype* caused by the Commission's White Paper on the measures needed to achieve the much-desired internal market once and for all.[16]

Busy, and fascinated, as were my Spanish fellow students and I, learning to navigate, before Spain's accession to the European Communities (EC), by the subtle complexities of its legal order —and also by the immense bureaucracy of acronyms and abbreviations physically embodied in the urban landscape of Brussels—, we could not yet realize that in relation to slogans, *mots d'ordre* and other resources of the Community communication strategy, the EU is one of the best empirical proofs of the factual existence of the eternal return.

Indeed, the EU's long-standing "democratic deficit" —the lack of direct participation by the citizens of the Member States in its institutions and decision-making procedures, and the complexity of these— was not new in the history of the Community. Already in the late 1960s, the EC had considered various initiatives to make the whole Community building more accessible to its inhabitants, to raise their interest in its fate, and to strengthen its democratic character.[17]

But it is in the 1970s that the EC seems to take its democratic health seriously. Under the impetus of Valéry Giscard d'Estaing and Helmut Schmidt, interested in relaunching the idea of a genuine political process in Europe based on citizen participation, the European Council proposes two concrete measures: a reflection on the civil and political rights that could be granted to European citizens in order to bring them closer to EC institutions and policies, and the election by universal suffrage of Members of the European Parliament.[18] Of the two, only the second would take shape, but the slow community machinery had finally started up and all we could do was sit and wait.

And the truth is that this time it was not necessary to wait long. It will be precisely in the 1980's when the "citizens moment" arrived. The pro-European sectors, in favor of a greater political union between the Member States, with Altiero Spinelli at their head, concluded that the only way to promote greater union was through the involvement of the citizenry. His draft "Treaty to establish a European Union", which included the creation of a true European citizenship, would never see the light of day.[19] But, in the short term, it would help the European Council held in Fontainebleau in 1984 to revive the idea of a citizens' Europe and to create a committee that would propose measures so that the EC could move in that direction. The two reports that were drafted in that committee, which informally received the

Jean Monnet Working Paper 9/03 (2003) 1-56, at. 6-8.

[16] Nor the imminent holding of the intergovernmental conference that would lead to the adoption of the Single European Act and, with it, the extension of the Community's powers in the ever-welcome direction of greater integration of its Member States.

[17] See Commission of the EC (1970), *Third General Report on the Activities of the Communities 1969*.

[18] Paris Summit of 10 December 1974. At the European Council in The Hague on 30 November 1976, the Heads of State and Government recognized, in the same vein, the need for "the attachment of the peoples" to the construction of the Community. See M. Catala, "From the Europe of citizens to European citizenship, 1974-1992", *Encyclopédie pour une histoire nouvelle de l'Europe* [online], published 14 November 2018; and E. Deschamps, "L'Europe des citoyens", *Centre Virtuel de la Connaissance sur l'Europe,* published 8 July 2016. Already in the preamble to the final communiqué of the 1972 Paris Summit it was stated "the will of the members to base the development of the Community on political democracy, freedom of opinion, the free movement of persons and ideas and the full participation of the people through their duly elected representatives". See an analysis of this Summit in C. Westendorp, "La Cumbre de París", 1 *Revista de Instituciones Europeas* (1974) 165-172, at 171.

[19] In the medium term, the draft Treaty would also serve as a basis for the Single European Act and the Maastricht Treaty.

name of its former president, the Italian politician Pietro Adonnino, contained a whole series of proposals whose ultimate objective was, on the one hand, to make citizens enjoy tangible benefits as a consequence of their membership in the EC and, on the other, to reinforce the image of the EC before their citizens and before the world.[20]

We can now leave aside the proposed measures concerning the image of the EC, especially the flag, the anthem and Europe Day, which gave my friends and I such an hilarious moment in that May 1986 when the flag was first raised before our eyes in the courtyard of the EC Commission's headquarters, the iconic Berlaymont building, while the EC choir sang Beethoven's Ode to Joy, its new anthem.[21] But if one reads carefully the measures that the Adonnino Committee suggested so that ordinary citizens would finally realize that the EC was not an abstract and distant entity without any impact on their lives, but the great and useful invention that it really was, one will immediately realize that a large part of them were incorporated as such into the new European citizenship that was introduced in our lives in 1992 with the Maastricht Treaty.[22] With the invaluable help, it must be said, of the fall of the Berlin wall and, allow me some chauvinism, of Spain's accession to the EC, with its irrepressible Europeanism after such a long isolation.

The fall of the Berlin Wall was one of those foundational moments when time seemed to stand still. After the initial fears of the unknown, which the inevitable German reunification seemed to awaken among the European political class, it soon became evident that the guarantee that Germany would never return to its historic ways was to strengthen the union of the EC countries not only economically but also, and much more importantly, politically. And that this deepening of the union between the Member States, which involved hitherto unknown transfers of sovereignty to a supranational entity, could only be done with popular support. The way was cleared for the measures proposed by the Adonnino Committee to become a reality. After all, what popular support could there be for something whose functioning and usefulness were not even known? It was clear, to use the words of the ever-intelligent Jacques Delors, that no one was going to fall in love with a common market. Something else was needed.[23]

This is where Spain enters the picture. After forty years of authoritarian Hispanic political idiosyncrasy, Spaniards had, without a doubt, a desire for Europe. Joining the EC had become an aspiration of the Spanish political class to break with what was considered an anomalous parenthesis on the European side of Spain's history. And, after the rigors of the accession negotiations, which began

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[20] The contents of the two reports and all related official documents can be viewed at P. Adonnino, "A People's Europe. Reports from the ad hoc Committee", *Bulletin of the European Communities*, Supplement 7/85 (1985) 1-35.

[21] A description of the events that took place on the occasion of the first Europe Day and the adoption of the new European flag and anthem can be found at Commission of the EC, "European Identity: Simbols to Sport", *European File*, n. 6/87 (1987) 1-12, at 3.

[22] In particular, freedom of movement and residence in any country of the Union, the right to vote and to stand as a candidate in local and European elections held in the country of residence even if it is not the country of origin, diplomatic and consular protection from the authorities of any Member State in countries where the state of which you are a national is not represented, the right to petition and the establishment of a European ombudsman.

[23] "*You don't fall in love with a Common Market, you need something else*". Quoted in Th. Kuhn, "'Nobody falls in love with a Common Market': Why Cross-border Interactions Don't Always Foster European Identity", *The UACES Blog*, November 2013.

in 1979, on 1 January 1986, under the government of Felipe González, Spain effectively became a member of the EC.

Those of us who had the opportunity to listen to the speech González was invited to give at the opening ceremony of the 1985-1986 academic year in one of the temples of academic Europeanism, the College of Europe in Bruges, were able to confirm his certainty about the decidedly Europeanist character of the Spanish people which led him to believe that Spain could "constitute a positive factor for the indispensable reforms of the European Community".[24]

We were soon able to check it out. Those who have been called the "Golden Years" of Spain's membership of the EC, from its accession until 1992, saw our country become one of the most determined defenders of the Economic and Monetary Union, and of the Political Union.[25] And this attitude led, in the months prior to the formal convening of the Intergovernmental Conference that would approve the Maastricht Treaty,[26] to the drafting of a memorandum entitled "Towards a European citizenship". The memorandum proposed the creation of European citizenship as a "personal and inseparable status of the nationals of the Member States, who by virtue of their membership of the Union are subject to special rights and duties within the Union".[27]

In honesty, we have to admit that the Spanish proposal was nothing new in terms of its content. It was basically limited to taking up the measures advanced by the Adonnino Committee and little else. However, it had the virtue of embodying, on a symbolic level, the spirit of that "Europe of the peoples" which had become so fashionable. To such an extent that, despite British and Danish reticence, European citizenship ended up being part of the Maastricht Treaty which introduced Articles 8 to 8E into the EC Treaty under the heading "Citizenship of the Union". Overnight, we all became European citizens.

The Treaty of Maastricht set the definitive traits of this new addition to Community law.[28] The most important is undoubtedly its derivative character: to be a citizen of the Union you have to be a national

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[24] In French in the original. Translation is mine. The full text of the speech is available at https://www.coleurope.eu/events/opening-ceremony-bruges-campus-21.

[25] See C. Powell, "Fifteen years on: Spanish membership in the European Union revisited", *Center for European Studies Working Paper No. 89* (2001) 1-18, at 2.

[26] A tour of the backroom that led to the Maastricht Treaty can be seen at F.J. Fonseca & J.A. Martín, "La Unión Europea: génesis de Maastricht", 19 *Revista de Instituciones Europeas* (1992) 517-563.

[27] The Memorandum divided the rights of future European citizens into three classes: special basic rights (freedom of movement and residence, and participation in political life); new "dynamic" rights (those that could be derived from the evolving nature of the EC, incorporating over time new social, environmental and cultural rights); and rights to "protection" (diplomatic and consular protection and ombudsman). The measures contained in the document would be incorporated as a formal proposal in a letter from the President of the Spanish Government to the President of the European Council, and the proposal would be further refined on 21 February 1991. See Mindus *supra* n. 15, at 10.

[28] The specific content of the new institution, in the form of rights associated with the status of citizen, was basically the same as those we saw earlier in the Adonnino Committee Reports: the right to move and reside freely within the territory of the Member States; the right to vote and stand as a candidate in municipal elections and in elections to the European Parliament in the Member state in which one resides; the right to enjoy, in the territory of a third country in which the Member state of which one is a national is not represented, the protection of the diplomatic and consular authorities of any Member state; the right to petition the European Parliament; and the right to apply to the Ombudsman newly established by the Maastricht Treaty itself. See A. Rallo, "Los derechos de los ciudadanos europeos", 18 *Revista de la Facultad de Derecho de la universidad Complutense* (1994) 251-276; A. Mangas, "Título V Ciudadanía", in A. Mangas (dir.), *Carta de los Derechos Fundamentales de la Unión Europea:*

of a Member State.[29] As citizenship was directly linked to the concept of nationality,[30] which touches directly on the hard core of the powers of the modern Westphalian State, the Member States took it upon themselves to make it clear, in a Declaration annexed to the Final Act of the Maastricht Treaty, that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned". It was clear that the new EU was not going to go around happily handing out citizenship cards to those whom it saw fit.

Over time, the European citizenship underwent some minor cosmetic touches. The Treaty of Amsterdam, in 1997, renumbered the articles of the Treaty establishing the EC devoted to citizenship from 17 to 22. It also added that citizenship of the Union would be complementary to, and not a substitute for, national citizenship. In 2000, the Charter of Fundamental Rights of the European Union, in Articles 39 to 46, reiterated the rights of European citizens, extending the scope *ratione personae* of the majority, except for the political ones, to cover third-country nationals legally resident in the Union. Finally, the Treaty of Lisbon carried out a final renumbering of the articles of European citizenship, which became Articles 20 to 25, while amending the proviso added to the Treaty of Amsterdam to read "Citizenship of the Union shall be additional to and not replace national citizenship".

In terms of its specific content, the new European citizenship brought almost nothing new to the list of rights already enjoyed by nationals of the Member States. Besides, it entailed no obligations, and its impact had all the hallmarks of being extremely limited in the day-to-day life of the new European citizens. Some did not hesitate then to describe it as a "cynical exercise in public relations",[31] a "pie in

Comentario artículo por artículo (Fundación BBVA, Bilbao, 2008) 645, at 650; J. Martínez, "La ciudadanía de la Unión Europea y sus derechos: un análisis crítico", en 23 *Revista de Derecho UNED* (2018) *423-456*; J.A. González, "Ciudadanía europea", in R. Reyes (dir.), *Diccionario crítico de Ciencias Sociales* (Ed. Plaza y Valdés, Madrid-México, 2009).

[29] See P. Solbes, "La citoyenneté européene", 345 *Revue du Marché Commun et de l'Union Européenne* (1991) 168-170; and J.L. Gil, "La vinculación de la ciudadanía europea a la nacionalidad", 39 *Revista El Notario del Siglo XXI* (2011).

[30] Citizenship and nationality are like two sides of the same coin. Nationality refers to the legal bond that unites a person with a state, through which that person is under the personal jurisdiction of that state. In *Nottebohm*, the International Court of Justice defined it as a "legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties". *Liechtenstein v Guatemala - Nottebohm* - Judgment of 6 April 1955 - Second Phase, *ICJ Reports* (*1955*), 4, at 23. In international law the term citizenship also refers to the same legal bond and is in fact used interchangeably with nationality. Some states differentiate, however, between the two, citizenship being used to describe the political, social, cultural, local and linguistic aspects of domestic law of that same bond, or the set of rights that the national of a State may exercise. See W.T. Worster, "Brexit and the International Law Prohibition on the Loss of Nationality", 15 *International Organization Law Review* (2018) 341-363, at 343 [doi:10.1163/15723747-01502005]. In Community law, it is clear that "nationality" refers to that formal link between a person and a state, while the term citizenship refers to the new status created in Community law. A tour of the meanings of both terms in the different Member States can be seen in G.R. De Groot, "Towards a European Nationality Law", 8 *Electronic Journal of Comparative Law* (2004) 1-37, at 2.

[31] J.H.H. Weiler, "European Citizenship and Human Rights", in A.E. Kellermann *et al* (eds), *Reforming the Treaty on European Union: The Legal Debate* (Kluwer, The Hague, (1996) 68.

the sky",[32] a symbolic device to camouflage the lack of real developments in the field of social rights,[33] a "blank banner" or a "mobilizing metaphor".[34]

To understand, however, the exact content and implications of European citizenship by looking at its constituent articles is, as scholars of Community law know, an incomplete exercise. In the Union's legal order, more than in others, it is always necessary to scrutinize very closely the interpretations of it made by the CJEU. Since the beginning of its existence, the CJUE has been characterized by an interpretation of the founding Treaties that is close to Europeanist judicial activism. To the extent that, in the graphic expression used by some authors, legal institutions whose content, according to the Treaties, could be branded as innocuous or irrelevant end up being, in the hands of the CJEU, a veritable pandora's box whose opening releases the most varied Europeanist furies.[35]

(C) THE COURT OF JUSTICE AND EUROPEAN CITIZENSHIP

At an age, and in circumstances where the staunch defense of the EC's integration project was taken for granted, one could only fantasize, following the study visit that the students of the IEE made to the headquarters of the CJEU (at that time, the CJEC), about this "*phalange judiciaire*"[36] which, from its Palace in Luxembourg had "judicially revolutionized" the EC. Signing, among others, judgments such

[32] H.U. Jessurun D'oliveira, "Union Citizenship: Pie in the Sky?", in A. Rosas & E. Antola, E. (eds), *A Citizen's Europe. In Search for a New Order* (Sage, London, 1995) 84. It seems that Professor Jessurun has since changed his mind radically. See H.U. Jessurun D'oliveira, "Union Citizenship and Beyond", *EUI Working Paper LAW 2018/15* (2018) 1-19, at 2 [doi:10.2139/ssrn.3247681].

[33] See E. Meehan, "Political Pluralism and European Citizenship", in P.G. Lehning & A. Weale. (eds), *Citizenship, Democracy and Justice in the New Europe* (Routledge, London, 1997) 69.

[34] See C. Shore, "Whither European Citizenship? Eros and Civilization Revisited", 7 *European Journal of Social Theory* (2004) 27-44, at 31 [doi:10.1177/1368431004040018].

[35] See S. Besson & A. Utzinger, "Introduction: Future Challenges of European Citizenship. Facing a Wide-Open Pandora's Box", 13 *European Law Journal* (2007) 573-590 [doi:10.1111/j.1468-0386.2007.00384.x].

[36] The expression, which today would no doubt be considered very politically incorrect, comes from one of the presidents of the CJEU, Robert Lecourt. Quoted in A. Vauchez, "À quoi «tient» la Cour de Justice des Communautés Européennes? Stratégies commémoratives et esprit de corps transnational", 60 *Revue française de science politique* (2010) 247-270, at 254 [doi:10.3917/rfsp.602.0247]. About Lecourt and its legal philosophy, see W. Phelan, "The Revolutionary Doctrines of European Law and the Legal Philosophy of Robert Lecourt", 28 *European Journal of International Law* (2017) 935-957 [doi:10.2139/ssrn.2901943]. Alongside Lecourt, there are mythical names such as Monaco, Trabucchi, Donner, Catalano, Capotorti, Pescatore, Mertens de Wilmars, Roemer, Verloren van Themaat, and also other actors such as Michel Gaudet, head of the Commission's legal service, and Walter Hallstein, its president from 1958 to 1967, who, according to some, promoted the idea that because the lack of political impetus for European integration at that time, the CJEU had to take the lead in the European integration process by using the law. See also from the same author A. Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity,* Cambridge University Press, Cambridge, 2015) 129.

as *Van Gend & Loos* or *Costa c. Enel*,[37] which for some had de facto "constitutionalized" the Community legal order, making it more supranational and less intergovernmental.[38]

This use of the law to advance European integration, the famous "integration through law",[39] caused and still causes,[40] enormous academic interest. Ignoring however the debate on whether the pan-European activism of the CJEU is more apparent than real,[41] what seems clear is that, despite the criticism it raises,[42] its role as driving force of European integration did not end in the so-called "*âge*

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[37] These two judgments establish, respectively, the direct effect of Community law and its supremacy over national law. Both have literally made rivers of ink flow. A review of all the literature on *Van Gend in Loos* on the occasion of the 50th anniversary of his adoption can be found at M. Rasmussen, "Revolutionizing European law: A history of the Van Gend en Loos judgment", 12 *International Journal of Constitutional Law* (2014) 136–163 [doi.org/10.1093/icon/mou006]. *The expression "revolution judiciaire" in relation to these sentences is used by* Vauchez, À quoi «tient»..., cited in previous note, at 253.

[38] Weiler's article, "The Transformation of Europe", 100 *Yale Law Journal* (1991) 2403-2483, is considered by some to be the standard account of the constitutionalization of the Community order carried out by those two judgments, and obviously contains a good presentation of them. See A. Stone, "The European Court of Justice and the judicialization of EU governance", 5 *Living Reviews in European Governance* (2010) 1-50, at 16 [doi: 10.12942/lreg-2010-2]. In any case, the first to speak of a constitutionalization was the American professor Eric Stein who published an article in 1981, in 75 *American Journal of International Law* entitled "Lawyers, Judges and the Making of a Transnational Constitution" (1981) 1-27 [doi:10.2307/2201413]. A critical and revisionist vision in relation to the "constitutionalization" of the community legal order can be seen in M. Rasmussen & D. Martinsen, "EU Constitutionalisation Revisited – Redressing a central assumption in European studies", 25 *European Law Journal* (2019) 251-272 [doi:10.1111/eulj.12317]. The German Constitutional Court judge Dieter Grimm, taking into account the impact of the jurisprudence of the European Court of Justice on legislative policy, and the difficulty of reversing that jurisprudence due to the need for unanimity to reform the treaties, even speaks of an "over-constitutionalisation" of the EU legal order. See D. Grimm, *Europa ja - aber welches? Zur Verfassung der europäischen Demokratie* (C.H.Beck, München, 2016), at 1. Grimm does not consider that the community order is still fully constitutional due to the absence of a "constitutional moment" to ensure its popular legitimacy. See D. Grimm, "The Democratic Costs of Constitutionalisation: The European Case", 21 *European Law Journal* (2015) 460-473 [doi:10.1111/eulj.12139].

[39] From the name of the project that, under the same title, was carried out during the 1980's at the European University Institute in Florence by professors Mauro Cappelletti, Monica Seccombe and Joseph Weiler. On the history of the project and its repercussions to this day you can read R. Byberg, "The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe", 18 *German Law Journal* (2017) 1531-1556 [doi:10.1017/S2071832200022410]; and L. Azoulai, "'Integration through law' and us", 14 *International Journal of Constitutional Law* (2016) 449-463 [doi:10.1093/icon/mow024].

[40] According to Stone Sweet, the CJEU is the second most studied jurisdiction by the American doctrine after its Supreme Court. See A. Stone Sweet, "The European Court and Integration", in A. Stone Sweet (ed), *The Judicial Construction of Europe* (Oxford University Press, Oxford, 2004), at 7 [doi:10.1093/019927553x.003.0001]. The interest is not limited only to legal disciplines. Political science and history have also shown interest in the CJEU. A tour of this literature can be found at L. Conant, "Review Article: The Politics of Legal Integration", 45 *Journal of Common Market Studies* (2007) 45-66 [doi:10.1111/j.1468-5965.2007.00734.x]; and M. Blauberger & S. Schmidt, "The European Court of Justice and its political impact", 40 *West European Politics* (2017) 907-918 [doi:10.1080/01402382.2017.1281652].

[41] For some, this activism is more apparent than real and, deep down, the jurisprudence of the CJEU is constantly aligned with the interests of the Union's major powers. See the literature cited in the previous note.

[42] The pioneer in questioning the consensus on the positive role played by the CJEU in the European integration process was undoubtedly the Danish jurist Hjalte Rasmussen with his pioneering work *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, published in 1986 by Martinus Nijhoff. As a lover of controversy as I am, I cannot help but acknowledge that Professor Rasmussen's provocative and entertaining style made me a convert to his theses during my time at the College of Europe where

d'or" of the Luxembourg Court in the 1960s.[43] Its case law on European citizenship, without which it is impossible to understand the contours and limits of the institution, is good proof of this.[44]

The first warning to seafarers of the pro-integrationist potential that European citizenship could acquire at the hands of the CJEU comes even before its entry into force. In *Micheletti*,[45] the CJEU decided that the determination of acquisition and loss of nationality is, in accordance with international law, a matter for each Member State. However, this competence must be exercised in compliance with Community law.[46] The Court thus opened the possibility of introducing limitations on the sacrosanct exclusive competence of the states concerning the determination of their nationals.

Micheletti sparked a lively doctrinal debate about what those limitations might be[47]. But, after all, the events took place before the entry into force of European citizenship, and the legal doctrine it contained was directly linked to the exercise of one of the fundamental freedoms provided for in the founding treaties.[48] There was therefore a typically community cross-border element that justified the Court's decision to limit state power in the interest of a homogeneous interpretation of Union law.

In *Grzelzyk*,[49] on the other hand, the provisions on European citizenship were already in force, were in fact invoked in the preliminary ruling that gave rise to the case, and were expressly used by the CJEU

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he was in charge of the course "Constitutional Law-making by the judiciary as a generator of social change".

[43] See Vauchez, À quoi «tient»..., *supra* n. 36, at 254.

[44] See D. Sarmiento, "A vueltas con la ciudadanía europea y la jurisprudencia expansiva del Tribunal de Justicia, 26 *Revista española de derecho europeo* (2008) 211-227; E. Crespo, "La jurisprudencia del TJCE en materia de ciudadanía de la Unión: una interpretación generosa basada en la remisión al derecho nacional y en el principio de no discriminación por razón de la nacionalidad", 28 *Revista de Derecho Comunitario Europeo* (2007) 883-912.

[45] Judgment of the Court of 7 July 1992, Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria, Case C-369/90, ECLI:EU:C:1992:295. The facts giving rise to the question referred for a preliminary ruling occurred in March 1990: the Spanish government delegation in Cantabria refused to grant a residence card to Mario Vicente Micheletti, an Argentine dentist who also held Italian nationality, on the grounds that, in accordance with the Spanish civil code, which itself respects international law, in cases of dual nationality the one which prevails is that of the state in which one had habitual residence prior to arrival on Spanish territory, in this case Argentina.

[46] In particular, the CJEU said that it was not for the law of a Member State to limit the effects of conferring the nationality of another Member State by requiring additional conditions for recognizing that nationality in order to exercise the fundamental freedoms provided for in the Treaty. An interpretation of Article 52 of the Treaty, according to which, where a national of a Member State is also a national of a third country, the other Member States may make recognition of his or her Community citizenship subject to conditions such as the person's habitual residence, could lead to a divergent interpretation of Community law in the various Member States. See M. Fraile, "La ciudadanía europea", 7 *Fundamentos: Cuadernos monográficos de teoría del estado, derecho público e historia constitucional* (2012) 310-357, at 316-320.

[47] See M. Hailbronner & S. Iglesias, "The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status", 5 *Vienna Journal on International Constitutional Law* (2011) 498-537, at 506 [doi:10.1515/icl-2011-0403].

[48] See S. Alonso, "El inminente tránsito hacia una ciudadanía supranacional de la UE", 47 *Cuadernos Europeos de Deusto* (2012) 101-126, at 116 [doi.org/10.18543/ced-47-2012pp101-126].

[49] Judgment of the Court of 20 September 2001, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, Case C-184/99, ECLI:EU:C:2001:458. The case concerns a student of French nationality, Mr. Grzelczyk, who began his university studies in Belgium. At the beginning of his fourth and final year of studies, he applied to the Belgian government for an assistance benefit which was granted and subsequently withdrawn, as he did not fall within the definition of a worker under secondary law. The Court of Justice held that the provisions relating to non-discrimination and European citizenship preclude the grant of a social benefit under

to settle the case.[50] In any event, there was still a cross-border element in this case, which directly connected it with the exercise of fundamental freedoms. Citizenship was therefore not the only legal basis whose autonomous effects made it possible to resolve the issue. Its importance, however, resides more in the *obiter dictum* that it contains, connected with expressions of the same style that have marked the Court's Europeanist activism: "Union citizenship is destined to become the fundamental status of nationals of the Member States".

From then on, the expression would become commonplace in the Court's main jurisprudence on citizenship.[51] A clear warning that the best was yet to come. ***Baumbast,***[52] for example, concerned a person who had previously exercised one of the fundamental freedoms provided for in the Treaties, although he had ceased to do so. The Court began to decouple the effects of citizenship from the exercise of economic activities, and clearly stated that the Treaty on the European Union did not require European citizens to be employed or self-employed in order to enjoy the rights relating to citizenship, including the right of residence in any country of the Union.

But it is in ***Rottman*** and ***Ruiz Zambrano*** that the CJEU unashamedly displays the potential supranational effects of European citizenship. In the first case,[53] the CJEU, which had left us in doubt in *Micheletti* as to what limits Community law could impose on the state's competences to determine its nationals, gives us the first of these.

Janko Rottman was initially, by birth, an Austrian national. He later moved to Germany to escape criminal proceedings against him in Graz, Austria, and an arrest warrant was issued. In Germany he applied for and obtained German nationality, without mentioning the criminal proceedings in which he was involved. Obtaining German nationality resulted, under Austrian law, in the loss of Austrian nationality. When the Austrian authorities informed the Germans that Rottman was the subject of

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a non-contributory scheme from being made subject to a condition which nationals of the host Member State are not required to meet.

[50] Earlier, although less forcefully, the CJEU had cited European citizenship in the Judgment of the Court of 12 May 1998, María Martínez Sala v Freistaat Bayern, Case C-85/96, ECLI:EU:C:1998:217; and the Judgment of the Court of 24 November 1998, Criminal proceedings against Horst Otto Bickel and Ulrich Franz, Case C-274/96, ECLI:EU:C:1998:563.

[51] A list of all judgments referring to citizenship up to 2007 can be found at F. Wollenschläger, "The Europeanization of citizenship. National and Union citizenships as complementary affiliations in a multi-level polity", *Paper presented at the EUSA Tenth Biennial International Conference,* Montreal, Canada, 17 May 2007, 1-13.

[52] Judgment of the Court of 17 September 2002, Baumbast and R v Secretary of State for the Home Department, Case C-413/99, ECLI:EU:C:2002:493. The facts relate to the Baumbast family who were validly resident in the United Kingdom because of the husband's economic activity. Following their separation, and the loss of worker status by Mr Baumbast, the English Government refused to grant a residence permit to all the members of the family, on the ground that their health insurance did not cover emergency medical care, and that they were a burden on the English exchequer within the meaning of a Community directive. The Court said that a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State may, as a citizen of the Union, enjoy a right of residence in that State by virtue of the direct application of Article 18(1) EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where appropriate, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality, a principle which was not observed in this case.

[53] Judgment of the Court (Grand Chamber) of 2 March 2010, Janko Rottman v Freistaat Bayern, Case C-135/08, ECLI:EU:C:2010:104.

criminal proceedings, his naturalization was revoked retroactively on the grounds that he had obtained German nationality by fraud.

Perhaps because it touches on the hard core of sovereignty, the law on nationality, both the states involved in the case and the Commission agreed that this was a purely internal situation that had no link with Union law. The CJEU saw things differently and made it clear that, even in the absence of cross-border movements, national measures depriving an individual of Union citizenship status, and associated rights (as was the case when the withdrawal of German nationality meant that Rottman became stateless), fell within the scope of the Treaties. In other words: Member States could no longer deprive anyone of their nationality without the supervision of the CJEU, by virtue of the expansive nature of European citizenship.[54]

In *Ruiz Zambrano* the CJEU took another great step forward, introducing one more of those indeterminately mysterious concepts that make the members of the academy so happy: *the substance of the rights conferred by the status as citizen of the Union.*[55] In this case, the Court had to decide whether a Colombian national, who was illegally resident in Belgium, could obtain, on the basis of the provisions of the treaty on citizenship, residence and work permits because he was the father of two children with Belgian nationality who had never left the territory of that Member State.

Against all odds —the governments involved, and the Commission regarded the situation as strictly internal— the CJEU decided that Ruiz Zambrano should receive not only a residence permit but also a work permit. Why? Because, otherwise, his children, who were citizens of the Union, would be deprived, as they would probably have to leave Belgium, of the effective enjoyment of the substance of the rights attached to citizenship status.

The sentence raised great academic dust and, considering that it affected an illegal immigrant, also a political one.[56] The most pro-integrationist considered that the two rulings advanced the legal construction of citizenship of the Union in a quasi-federal direction, independent of any cross-border movement or underlying economic logic. This was for many a welcome constitutional development of European citizenship.[57]

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[54] The Court refers to *Micheletti* - the determination of the ways in which nationality is acquired and lost is, in accordance with international law, a matter for each Member State. But specifies that the situation of a Union citizen who, like the applicant in the main proceedings, is faced with a decision revoking naturalization taken by the authorities of a Member State which places him, after having lost the nationality of origin of another Member State, in a position which may result in the loss of the status conferred by Article 17 EC and the corresponding rights is, by its very nature, within the scope of the law of the Union to be respected. In the present case, although it is legitimate for a state to take measures, such as the revocation of the grant of nationality where it has been obtained under fraudulent conditions, Community law requires that those measures comply with the principle of proportionality, something which did not occur in this case when Rottman became stateless.

[55] Judgment of the Court (Grand Chamber) of 8 March 2011, Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm), Case C-34/09, ECLI:EU:C:2011:124.

[56] Shaw speaks of Member States' dismay at the possible effects of the judgment. See J. Shaw, "Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?", 62 *EUI Working Papers* (2011) 1-51, at 33.

[57] Hailbronner & Iglesias, *supra* n. 47, at 501.

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Others, along the lines of Joseph Weiler, who warned in 2001 that the Court's reasoning tended to be too Cartesian,[58] considered the argument laconic, cryptic, minimalist, even poor.[59] Some revived the traditional accusations of ambivalence, lack of coherence and legal basis, and irrationality.[60] One author openly spoke of judicial error.[61]

Such were some of the criticisms that CJEU President Koen Lenaerts himself had to come out to the forum to explain that they were following an incremental approach to dealing with issues of potential constitutional importance. According to him, if one followed the evolution of the case-law on questions of citizenship, as he did in his article with *Ruiz Zambrano*, its background and its aftermath, it was quite clear that the CJEU was following a "step-by-step" method, respectful of the nature of preliminary ruling questions, common in the Anglo-Saxon courts. Hence, it could not be accused of being laconic or cryptic at all.[62]

One cannot help thinking that academic criticism, and, above all, political concerns, must have made some dent in the direction taken by the case law on citizenship from that moment on. If one analyses the judgments that followed *Ruiz Zambrano*,[63] it becomes clear that the doctrine of effective enjoyment of the substance of the rights linked to the status of citizen only operates in exceptional circumstances: when the national provision in question forces the citizen to leave the territory of the Union, thus depriving him/her of the effective enjoyment of his/her rights.

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[58] J.H.H. Weiler, "Epilogue: The Judicial après Nice", in G. De Búrca & J.H.H. Weiler. (eds), *The European Court of Justice* (Oxford University Press, Oxford, 2001) 215, at 225.

[59] K. Hailbronner & D. Thym, "Case C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), Judgment of the Court of Justice (Grand Chamber) of 8 March 2011", 48 *Common Market Law Review* (2011) 1253–1270; and U. Šadl, "Case – Case-Law – Law: Ruiz Zambrano as an Illustration of How the Court of Justice of the European Union Constructs its Legal Arguments", 9 *European Constitutional Law Review* (2013) 205-229, at 205–209. [doi:10.1017/S1574019612001125].

[60] See A. Somek, "Is Legality a Principle of EU Law?", in S. Vogenauer &.S. Weatherill (eds), *General Principles of Law European and Comparative Perspectives* (Hart Publishing, Oxford, 2017); K. Hailbronner, "Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den EuGH?", 57 *Neue Juristische Wochenschrift* (2004) 2185-2188; D. Martin, "Comments on Mazzoleni (ex parte Guillaume) (Case C-165/98 of 15 March 2001), Leclere (Case C-43/99 of 31 May 2001) and Grzelczyk (Case C-184/99 of 20 September 2001)", 4 *European Journal of Migration and Law* (2004) 127-144, at 136. Some even consider that, under the guise of a certain pro-European goodism, which leads to the Europeanisation of what were exclusively national competences for the sake of citizenship, the CJEU is inadvertently giving a coup de grace to the underlying logic of the welfare state, and with it, to the social rights of all. See A.J. Menéndez, "European Citizenship after Martínez Sala and Bambaust. Has European law become more human but less social?", 11 *ARENA Working Paper* (2009) 1-41, at 38-39.

[61] See H.U. Jessurun D'oliveira, G.R. de Groot & A. Seling, "Court of Justice of the European Union: Decision of 2 March 2010, Case C-315/08, Janko Rottman v. Freistaat Bayern Case Note 1 Decoupling Nationality and Union Citizenship? Case Note 2 The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters", 7 *European Constitutional Law Review* (2011) 138-160 [doi:10.1017/S1574019611100073].

[62] See K. L*enaerts*, "EU citizenship and the European Court of Justice's 'stone-by-stone' approach", 1 *International Comparative Jurisprudence* (2015) 1-10, at 9 [doi.org/10.1016/j.icj.2015.10.005].

[63] Cases *McCarthy, Dereci, O & S, Imeraga y Alokpa.* See the comments on those cases made by Lenaerts himself in the article cited in the previous note.

But it will be, above all, *Dano*[64] and *Alimanovic*[65] where we could see, according to some, the beginning of a "regression" in the case law of the CJEU on citizenship.[66] In both cases, the CJEU underlines that Union citizens can claim non-discriminatory treatment only if they are legally resident in the host Member State, i.e., if they fulfil the conditions for residence as laid down in Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. For some, a return to determining the rights of individuals based on their belonging to one of the categories established in secondary law, rather than a holistic view of the concept of citizenship.

Regression or not, what is clear is that the case law of the CJEU, since the European *status civitatis* depends on the nationality of the Member States, has ended up having repercussions on the hard core of the competences of the modern state, *i.e.,* determining who its nationals are and, therefore, the holders of the rights that it has to respect and the obligations that it can demand. These are powers that the Member States themselves had wanted to safeguard specifically in the above-mentioned Declaration annexed to the Maastricht Treaty.

For this reason, the most Europeanist scholars also thought of the CJEU, together with international law, as one of the bastions that could put limits on the loss of citizenship rights because of Brexit. It is therefore time to make a leap in European citizenship towards a doctrinal vision of it. In fact, some have even argued that it is impossible to understand the evolutionary vicissitudes of the institution, including the case law of the CJEU, without taking into account an academia that, seeing an enormous potential in the evasive phrases of the Treaties, pressed to give it the form that best suited its socio-legal preferences.[67]

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[64] Judgment of the Court (Grand Chamber), 11 November 2014, Elisabeta Dano and Florin Dano v Jobcenter Leipzig, Case C-333/13, ECLI:EU:C:2014:2358. In *Dano* the CJEU had to determine whether a Romanian national resident in Germany who was not engaged in any economic activity and whose period of residence in the host Member State was more than three months but less than five years (i.e. who did not fulfil the conditions of secondary entitlement to social benefits in the host country), could rely on equal treatment with nationals of the latter Member State as regards entitlement to social benefits. The Court established that the possible existence of unequal treatment between Union citizens who have made use of their freedom of movement and residence and the nationals of the host Member State as regards the granting of social benefits is an inevitable consequence of Directive 2004/38, based on the requirement of sufficient resources as a condition of residence, on the one hand, and the concern not to create a burden on the social assistance of the Member States, on the other. Therefore, a Member State should have the possibility, under Article 7, to refuse social benefits to Union citizens who do not exercise an economic activity and who exercise their freedom of movement for the sole purpose of being able to benefit from the social assistance of another Member State when they do not have sufficient resources to qualify for the right of residence.

[65] Judgment of the Court (Grand Chamber) of 15 September 2015, Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others, Case C-67/14, ECLI:EU:C:2015:597. This case concerns a Swedish national and her children, who are resident in Germany, who have had their living allowances for the long-term unemployed withdrawn on the grounds that their right of residence was based solely on the search for employment and were not therefore covered by German legislation. The Court considered that German law, although it did not apply equally to Germans, was not discriminatory as it was based on secondary law.

[66] See O. Garner, "The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status", 20 *Cambridge Yearbook of European Legal Studies* (2018) 116-146, at 127 [doi:10.1017/cel.2018.6]; N. Shuibhne, "Limits rising, duties ascending: The changing legal shape of Union citizenship", 52 *Common Market Law Review* (2015) 889-937; C. O'brien, "Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights", 53 *Common Market Law Review* (2016) 937-977.

[67] The academics most committed to the positions apparently supported by the Court demonstrated their

(D) ACADEMIA, EUROPEAN CITIZENSHIP AND BREXIT

In the spring of 1986, I was travelling from Brussels to Florence. My doctoral thesis project had been pre-selected at the Law Department of the European University Institute (EUI),[68] at that time directed by Mario Cappelletti, with Gunther Teubner as one of the emerging stars. Joseph Weiler had just left it to go to the University of Michigan. If, after the necessary interview with the professors of the Department, my project was finally accepted, which it finally was, the EUI itself would see to it that the Spanish government financed my studies there.

I didn't finish my thesis at the EUI because of the twists and turns of life, but I did spend enough time there to learn a lot from the interesting seminars organized at the Law Department, while witnessing first-hand how an elite research centre operates at the European level. I also enjoyed, of course, the academic social life, looking out from the loggia of the *Badia Fiesolana* at the incredible views of Italian Tuscany.

Anyone who has been sitting in that loggia, listening to the conversations of the different characters who walk around the EUI headquarters,[69] can have no doubt that some of the scholars of European law, especially those who revolve around the EUI, form part of what the Anglo-Saxons call "advocacy networks",[70] and "epistemic communities".[71] These are referred to by Vauchez as "cooperation

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contribution to a supranational reading of European citizenship, having helped to unfold its Europeanist potential. Without wishing to draw a line between those who were right and those who were wrong, they did state openly that they were much more successful in shaping the socio-legal reality than those who, not having seen that citizenship was not only what it was, but also what it should be, were much less convincing, timid, or directly short-sighted, in helping to unfold the true potential of European citizenship. See D. Kostakopoulo, "Ideas, Norms and European Citizenship: Explaining Institutional Change", 68 *The Modern Law Review* (2005) 233-267, at 263; and D. Kochenov, "The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and The Moon?", 62 *International and Comparative Law Quarterly* (2013) 97-136, at 99 [doi:10.1017/S0020589312000589]. Both articles contain important reviews of the academic literature on European citizenship. Also J. Shaw, "Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism", in P. Craig & G. De Búrca (eds), *Evolution of EU Law* (2nd ed, Oxford University Pres, Oxford, 2011) 575; Garner, *supra* n. 66; and, although older, A. Warleigh, "Frozen: Citizenship and European Unification", 1 *Critical Review of International Social and Political Philosophy* (1998) 113-151 [doi:10.1080/13698239808403261].

[68] The idea of a European University was first presented at the European Congress in The Hague in 1948. But it was not until 1972 that Belgium, France, Italy, Luxembourg, the Netherlands, and Germany signed the Convention that created it outside the institutional apparatus of the EC, but in its orbit. According to Article 2 of the Convention, its main objective is "to contribute, by its activities in the fields of higher education and research, to the development of the cultural and scientific heritage of Europe, as a whole and in its constituent parts. Its work shall also be concerned with the great movements and institutions which characterize the history and development of Europe". The history of its origins can be seen in J.M. Palayret (ed), *A University for Europe: Prehistory of the European University Institute of Florence (1948–76)*, (Presidency of the Council of Ministers, Department of Information and Publishing/European University Institute, Rome/Florence, 1996).

[69] For an idea of the constant movement between the academic, judicial and bureaucratic world of the EU, which has as its meeting point the EUI, see Byberg, *supra* n. 39.

[70] "A transnational advocacy network includes those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse and dense exchange of information and services". See M.E. Keck & K. Sikkink, *Activist Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, Ithaca, 1998), at. 2.

[71] "An epistemic community is a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area". See P. Haas, "Introduction: Epistemic Communities and Policy Coordination", 46 *International Organization*

networks" or "support groups" of Community's bureaucratic and judicial world that have built the European Union that we know.[72] In other words, the most pro-integrationist academic world of European law has not just meekly followed judges and legislators, but has actively helped to shape the Union and its citizenship.[73]

A first important point of his disciplinary energy turned to the legal meaning of the new institution, its nature. It could not be otherwise given the derivative character of European citizenship. The most pro-European academic doctrine analysed European citizenship through cosmopolitan lenses and emphasized the possibility it offered of political membership and individual and collective self-determination beyond the borders of the nation state. For them,[74] the derivative character was a mere determinant of access to status. What was important was that the essence of the institution was totally communitarian in the sense that the rights it granted were totally dissociated from the nationality that had given access to the status. Taking logic to the extreme, some authors proposed disconnecting one and the other in the future,[75] or, in any case, to extend it to third-country nationals' resident in the territory of the Union.[76]

The discussion on nature was accompanied by the debate on the logic underlying European citizenship. Traditionally, Community law unfolded its effects in the presence of a cross-border logic linked to the existence of a single market. It was the exercise of one of the four fundamental freedoms contained in the Treaties that triggered the application of Community law. In the absence of such a cross-border link, the situation was considered purely internal to the Member state. It is true that the CJEU had interpreted extensively the situations that triggered the Community link, but ultimately a "cross-border element" was needed.

The advent of European citizenship led some to believe that we were faced with a new "fundamental freedom without a market", an extension of the scope *ratione materiae* and *ratione personae* of the Treaty. From now on, any citizen of the Union could possibly fall within the scope of Community law without having to be in a cross-border situation linked to an economic activity.[77] Some even advocated

(1992) 1-35, at 3 [doi:10.1017/S0020818300001442].

72 See Vauchez, *supra* n. 36, at 249.

73 See D. Kochenov, "The Present and the Future of EU Citizenship: A Bird's Eye View of the Legal Debate", *Jean Monnet Working Paper 02/12* (2012), 1-50, at 4-5 [doi:10.2139/ssrn.2063200]; J. Shaw, "Constitutional Settlements and the Citizen after the Treaty of Amsterdam", in K. Neunreither & A. Wiener (eds), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, Oxford, 2000) [doi:10.1093/0198296401.003.0015].

74 The main exponents can be seen in D. Kochenov, "Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights", 15 *Columbia Journal of European Law* (2009) 181-193.

75 See D. Kostakopoulou, "European Union Citizenship and Member State Nationality: Updating or Upgrading the Link", in J. Shaw, *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?, EUI Working Papers,* RSCAS 2011/62, at. 21ff.; and Kochenov cited in previous note, at 182. Davis talks about abandoning the hierarchy between European citizenship and nationality in favor of "citizenship pluralism". See G. Davis, "The Entirely Conventional Supremacy of Union Citizenship and Rights", in Shaw, *supra* n. 56, at 9.

76 See D. Kostakopoulou, "EU Citizenship: Writing the Future", 13 *European Law Journal* (2007) 623-646 [doi:10.1111/j.1468-0386.2007.00387.x]; E. Balibar, *Nous, citoyens d'Europe: Les frontières, l'État, le people* (La Découverte, París, 2001), at 190; A. Føllesdal, "Third Country Nationals as Euro-Citizens – The Case Defended", in D. Smith & S. Wright (eds), *Whose Europe? The Turn Towards Democracy*, (Blackwell, London, 1993), at 104–122.

77 See E. Spaventa, "Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its

the obligation for host countries to grant social benefits to all migrants who are Union nationals.[78] Others, taking citizenship based on the exercise of the fundamental freedoms of the common market for granted, began to seek, as a normative exercise, possible alternatives based on values such as justice, equality or political representation.[79] Some, on the other hand, pointed out that it was too early for triumphalism and that, on close analysis, European citizenship remained closely linked to the market, something which was not particularly negative per se, bearing in mind that the market we are talking about is a market within a constitutionalized order such as the European one.[80]

Another set of questions, linked to the previous one, that drew doctrinal attention was the effect of the new citizenship on the relations between the national and Community legal orders. For some, citizenship came to reshape the federal *status quo* in Europe by altering the division of powers between the EU and the Member States. They took, as an example, nationality, whose status as a matter reserved for strict state competence was potentially challenged.[81] The most enthusiastic went so far as to assert that European citizenship implied a *de facto* relativization, if not abolition, of the nationality of Member States.[82]

The remodelling did not end there. As citizenship assumed the end of the connection between transboundary movement and the application of Community law, some authors concluded that no national legislation was potentially outside the scope of the Treaty, *ratione materiae*. An eventual extension to infinity of the scope of Community law.[83]

The withdrawal of Great Britain from the European Union has recently enlivened these debates by putting those who defended the quasi-autonomous nature of European citizenship in a paradoxical situation in which, as if by magic, this autonomous link could disappear overnight. In contrast to those who, like me, see the loss of European citizenship, and the very departure from the EU from which it derives, with total legal indifference,[84] or to those who see it as an inevitable consequence of the practical exercise of democracy,[85] those who could be called legalists', or legal romantics', in support of

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Constitutional Effects", 45 *Common Market Law Review* (2008) 13-45; F. Wollenschläger, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration", 17 *European Law Journal* (2011) 1-34 [doi:10.1111/j.1468-0386.2010.00536.x].

78 See the literature cited in N. Shuibhne, "The Resilience of EU Market Citizenship", 47 *Common Market Law Review* (2010) 1597-1628, at 1597-1598.

79 See the literature cited in Kochenov, *supra* n. 67, at 108-109.

80 Shuibhne, *supra* n. 78, at 1608.

81 See De Groot, *supra* n. 30.

82 See G. Davies, "'Any Place I Hang My Hat?' or: Residence is the New Nationality", 11 *European Law Journal* (2005) 43-56, at 43.

83 See Spaventa, *supra* n. 77, at 14.

84 In line with the argument of the German Federal Constitutional Court in its ruling on the Maastricht Treaty in which, resorting to the key concept in international law of state sovereignty, it made clear that "Germany is one of the 'Masters of the Treaties' who expressed their will to be bound by the indefinitely concluded EU treaty and in this way established a long-lasting membership, which however can be dissolved by an act to the contrary." *BVerfGE*, 12 October 1993, 89, 115, at 112. It is published in Spanish in the 20 *Revista de Instituciones* Europeas (1993) 975-1030. The Court's statement was no less obvious but was criticized by some who seem to regard the EU more as a sect than as an international organization. See C. Rieder, "The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)", 37 *Fordham International Law Journal* (2013) 147-174, at 153 [doi:10.2139/ssrn.3217937].

85 See M. Van den Brink & D. Kochenov, "Against Associate EU Citizenship", 57 *Journal of Common Market*

a logic based on legal principles and rules,[86] considered that loss an unacceptable consequence of Brexit from the point of view of law, since it involves a reduction in fundamental rights.[87] Basically, it was seen as a hard blow to the credibility and reliability of a legal order, that of the Union, hailed at the time as the first concrete example of transnational law.[88]

The legal attack of the "legalists" to try to counteract the foreseeable effects of Brexit on the enjoyment of the rights associated with European citizenship has been articulated around the two legal systems potentially involved: the Union legal order and the international one. With regard to Union law, the lines of argument have revolved, on the one hand, around the consideration that European citizenship is not a status but a fundamental right and, therefore, its withdrawal subject to limitations that would prevent a mass loss of the Brexit type; on the other hand, around proposals for legislative reforms that would mitigate the perverse effects of the loss of the status of national of a Member State. Let us look at them in more detail.

Some authors, based on a pro-integrationist reading of the articles corresponding to European citizenship in the Treaty of Lisbon, the Charter of Fundamental Rights of the Union, and the case law of the CJEU, concluded that citizenship of the Union "acquires the normative quality of a fundamental right, as a general principle of EU law within the meaning of Art. 6(3) TEU, and as a constitutive element of various rights recognized in the Charter".[89] Consequently, as a fundamental right inseparable from personality, the loss of European citizenship through a general measure affecting entire groups of people would be null and devoid of any legal effect. States may leave the Union, but the withdrawal cannot affect citizenship built as a fundamental right within the deep structure of an autonomous legal order such as that of the EU.[90]

European citizenship would thus acquire a certain autonomous character in relation to the nationality of the Member States. They would still have the competence, but not the right, to grant it *via* their own nationality, but once acquired they would no longer be free to withdraw it, except by means of an individual measure of a proportionate nature respecting the limits of EU law as set out in the case law of the CJEU.[91] Taking into account this case law, in particular ***Rottman*** and ***Ruiz Zambrano***, and encouraged by the real possibility that the Court might rule on whether the departure of a Member

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Studies (2019) 1366-1382, at 1376-1378 [doi.org/10.2139/ssrn.3338435].

[86] See J. Shklar, ***Legalism. Law, Morals and Political Trials*** (revised ed, Harvard University Press, Cambridge, 1986), at 1.

[87] Examples of the different positions can be seen in Van den Brink & Kochenov, *supra* n. 85; F. Strumia, "From Alternative Triggers to Shifting Links: Social Integration and Protection of Supranational Citizenship in the Context of Brexit and Beyond", 3 *European Papers* (2018) 733-759; and D. Kochenov, "EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?", *LSE 'Europe in Question' Discussion Paper Series*, n. 111/2016, 1-39, at 3ff.

[88] See Strumia, cited in previous note, at 742.

[89] See V. Roeben *et al*, "Protection from Exclusion: A Reassessment of Union Citizenship in the Time of Brexit", *Working* Paper (2018), at 6 [doi.org/10.2139/ssrn.3130823].

[90] Ibid., at 16ff., and M. Dawson & D. Augenstein, "After Brexit: Time for a further Decoupling of European and National Citizenship?", *VerfBlog*, 2016/7/14 [doi:10.17176/20160714-114950].

[91] See Rieder, *supra* n. 87, at 172; Jessurun d'Oliveira, de Groot & Seling, *supra* n. 62, at 138ff; W. Worster, "European Union Citizenship and the Unlawful Denial of Member State Nationality", 43 Fordham International Law Journal (2020) 768-818, at 816 [doi.org/10.2139/ssrn.3459635]; and S. Lashyn, "Brexit Means Brexit: Does It so When It Comes to EU Citizenship?", EJIL:Talk! (2019).

State from the EU necessarily entails the loss of European citizenship,[92] some authors have also begun to speculate on another possible "constitutional moment", of the *Van Gend & Loos* type, in which the Court would adopt a decision declaring that European citizenship does not automatically collapse in the event of withdrawal from the Union.[93]

While disciplinary energy was devoted to legal constructions that would shield European citizenship from the effects of a withdrawal from the EU, others were devoted to proposing interpretations of secondary law or legislative changes that would have more or less the same effect. Thus, it has been argued that an analogical interpretation of secondary legislation would allow English nationals to be considered as "former EU citizens", while maintaining most of the rights contained in Directive 2004/38.[94] Others argued for the creation of a specially protected EU citizen status for European citizens affected by the Brexit.[95] Along the same lines, and from the European Parliament, the creation of a new "associated citizenship" was even promoted, which would make it possible to maintain certain fundamental freedoms provided for in the Treaties and to vote in elections to the European Parliament.[96] Finally, the idea of introducing changes to decouple European citizenship

[92] That possibility came close to being realized when a Dutch District Court decided to refer two questions to the CJEU for a preliminary ruling on whether the United Kingdom's withdrawal automatically led to the loss of European citizenship for its nationals and hence of the associated rights and freedoms. The Court of Appeal decided not to refer the questions to the Court on the grounds that they were unspecific and hypothetical at that point in the UK's withdrawal process, but it cannot be ruled out that it may be reactivated in the near future. See in this regard, O. Garner, "Does Member State Withdrawal from the European Union Extinguish EU Citizenship? C/13/640244/KG ZA 17-1327 of the Rechtbank Amsterdam ('The Amsterdam Case')", *European Law Blog* (2018).

[93] See A. Wesemann, "European Union Citizens in Post EU UK", in K.A. Prinz von Sachsen, J. Garcia & N. Szuka (eds), *Legal Implications of Brexit* (MV-Wissenschaft, Münster, 2018) 121. For obvious reasons, most authors, while raising the possibility, rule out such judicial activism. See J. Shaw, "EU citizenship: still a fundamental status?", *EUI Working Paper,* RSCAS 2018/14, at 8-9; G. Davies, "Union Citizenship-Still Europeans's Destiny after Brexit?", *European Law Blog* (2016); A.P. Van der Mei, "EU Citizenship and Loss of Member State Nationality", 3 *European Papers* (2018) 1319-1331, at 1327; R. McCrea, "Brexit EU Citizenship Rights of UK Nationals and the Court of Justice", *UK Constitutional Law Association* (2018).; Garner, *supra* n. 92, at 26ff.; A. Schrauwen, "(Not) losing out from Brexit", 1 *Europe and the World: a Law Review* (2017) 1-18, at 4ff. [doi:10.14324/111.444.ewlj.2017.04]; and Mindus, *supra* n. 15, at 88.

[94] See E. Spaventa, "The impact of Brexit in relation to the right to petition and on the competences, responsibilities and activities of the Committee on Petitions", *Study for the PETI Committee,* Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament (2017) 1-26 [doi:10.2139/ssrn.3171414].

[95] *"Creating a special EU protected citizen status would ensure that all EU citizens affected by Brexit, that is, EU citizens living in the UK and UK nationals living in the EU, would continue to enjoy their EU citizenship rights and to be subject to the same conditions relating to their residence, employment and family reunification which apply to all other EU citizens".* See D. Kostakopoulou, "Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens", 56 *Journal of Common Market Studies* (2018) 854-869, at 852 [doi.org/10.1111/jcms.12683].

[96] The origins of the proposal can be seen in V. Miller, "Brexit and European Citizenship", *House of Commons Library Briefing Paper*, n. 8365 (2018) 1-39, at 24ff.; Van den Brink & Kochenov, *supra* n. 85, at 1366; and V. Roeben *et al.*, "The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit", A study for Jill Evans MEP (2017) 1-69 [doi.org/10.2139/ssrn.3178055].

from the nationality of the Member States was once again taken up.[97] It was even suggested, in desperation, that the Member States should naturalize the British.[98]

Even more curious have been the lines of argument that have resorted to international law -in particular to the doctrine of acquired rights, the regime of nationality, and human rights-, seeking limits with which to mitigate the loss of rights associated with European citizenship as a consequence of the Brexit.

Perhaps because of its undeniable legal pedigree, linked to the so-called Theodosian Rule contained in the Digest, that is, the non-retroactivity principle, and to what is generally known as intertemporal law,[99] one of the first doctrines to be taken out of the keepsake box was that of acquired rights.[100] Until now, the doctrine had been more widespread in private international law,[101] and in classical international law, when scholars and some arbitration tribunals used Roman law for their legal arguments.[102] But it had also moved towards a more contemporary international law. First, through its materialization in article 70 of the 1969 Vienna Convention on the Law of Treaties (VCLT). But also as a legal tool with which to measure some problems linked to the succession of states, and the treatment of foreign investors in cases of nationalizations. Hence, its rescue as a possible brake on the loss of citizen rights associated with Brexit.[103]

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[97] G. Morgan, 'Union Citizenship for UK Citizens', EUDO Forum Debates Freedom of Movement Under Attack: Is it Worth Defending as the Core of EU Citizenship? (2016); L. Orgad & J. Lepoutre, "Should EU Citizenship Be Disentangled from Member States Nationality?", *EUI Working Papers*, RSCAS 2019/24 (2019) 1-54 [doi.org/10.2139/ssrn.3372837].

[98] M. Steinbeis, "Nach dem Brexit-Referendum: ein Fast Track zur deutschen Staatsbürgerschaft für bedrohte Unionsbürger!", *VerfBlog*, 24 June 2016 [doi:10.17176/20160624-131559]; and D. Kochenov., "EU Citizenship and Withdrawals from the Union: How Inevitable is the Radical Downgrading of Rights?", *LEQS Paper No. 111/2016* (2016) 1-32.

[99] "*Leges et constitutiones futuris certum est dare forman negotiis, non ad facta praeterita revocari, nisi nominatim de praeterito tempore, et adhuc pendentibus negotiis cautum sit*". Law 22, Title 3, Book 1 of the Digest. See B. Verdera, *La irretroactividad. Problemática general* (Dykinson, Madrid, 2006).

[100] The literalness of " to be taken out of the keepsake box " can be verified by taking a cursory look at the bibliography of some of the works that resort to the doctrine of acquired rights. See, for example, M. Waibel, "Brexit and Acquired Rights", 111 *AJIL Unbound Symposium on Treaty Exit at the Interface of Domestic and International Law* (2017) 440-444 [doi:10.1017/aju.2017.98]; or A. Fernández & D. López, "The impact and consequences of Brexit on acquired rights of EU citizens living in the UK and British citizens living in the EU-27", *Study for the AFCO Committee,* Policy Department C: Citizens' Rights and Constitutional Affairs, European Parliament (2017).

[101] See the classic study of A. Miaja, "Los derechos adquiridos en la doctrina española y en el sistema de derecho internacional privado español", I *Anuario de derecho internacional* (1974) 1-28.

[102] See, for example, the use of it by H. Gros Espiel, "El derecho intertemporal y las formas de adquisición del territorio en el derecho internacional contemporáneo (Primera parte)", *Jurídica. Anuario del Departamento de Derecho de la Universidad Iberoamericana,* n. 14 (1982) 147-154; or T.O. Elias, "The Doctrine of Intertemporal Law", 74 *American Journal of International Law* (1980) 285-307 [doi.org/10.2307/2201033]. And the classical works of G. Kaeckenbeeck, "La Protection Internationale des Droits Acquis", 59 *Collected Courses of the Hague Academy of International Law* (1937) 317-420 [doi:10.1163/1875-8096_pplrdc_A9789028609624_04>]; o Lalive, P. (1965), "The Doctrine of Acquired Rights", in *Rights and Duties of Private Investors Abroad.*

[103] See the use of acquired rights as a possible limit to the loss of citizenship rights that is made, among others, in Miller, *supra* n. 96, at 14ff.; Kostakopoulou, *supra* n. 95, at 10; Mindus, *supra* n. 15, at 62; House of lords (European Union Committee), "Brexit: Acquired Rights. 10th Report of Session 2016–17", *HL Paper,* n.º 82 (2016) 1-58, at 25ff.; or F. Strumia & K.Hadzimusic, (eds), "Brexit and Loss of EU Citizenship: Cases, Options, Perceptions", *ECAS Paper* (2017) 1-29, at 12ff.

Obviously, the international law doctrine of acquired rights, only by the absurdity of wanting to be applied to a political decision of a democratic character that affects millions of people, did not have much used as a limit to the loss of citizenship rights associated with Brexit, and was soon discarded by almost all commentators.[104] Eyes then turned to the international law on nationality.[105]

The prospects were not too promising either. State regulation of nationality had traditionally remained outside the scope of international law, in that safety box known as *domaine reservée*, for obvious reasons. States did not have the slightest interest in self-limitation in a matter, the delimitation of persons subject to their jurisdiction, which, even more than territory, was an essential element of state self-determination projects.[106] Thus, the question of nationality, which had been practically abandoned to the sphere of private international law, was languishing among scholars, with a decreasing number of pages devoted to it, [107] between quotations from the o*biter dictum*, incomprehensibly treated as a hard and fast rule of international law, from the old and outdated *Nottebohm* case;[108] references to diplomatic protection;[109] and thoughtful jurisprudential studies on the principle of effectiveness in international law.[110]

The *vis attractiva* of human rights and globalization, however, gave international law on nationality a second chance.[111] After the intense movements of people and changes in borders that followed World War II, states came to the conclusion that a world full of stateless persons was too dangerous an option to be allowed. Accordingly, they introduced article 15 into the Universal Declaration of Human Rights (UDHR), which codified nationality as a fundamental right, including change, while prohibiting

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[104] See, for all, S. Douglas-Scott, "What Happens to 'Acquired Rights' in the Event of a Brexit?", *U.K. Constitutional Law Blog* (2016); or Fernández & López, *supra* n. 100. Waibel, on the other hand, argues that the right of permanent residence would be protected by the doctrine of acquired rights. See Waibel, *supra* n. 100, at 444.

[105] Classical treatment of this international law of nationality can be found in "Nationality in International Law", 28 *Transactions of the Grotius Society* (1942) 151-168; or H. Goldschmidt, "Recent Applications of Domestic Nationality Laws by International Tribunals", 28 *Fordham Law Review* (1959), 689-736. For a treatment of the question from the always original perspective of the *New Haven School*, see M. Mcdougal H. Lasswell & Ch. Lung-Chu, "Nationality and Human Rights: The Protection of the Individual in External Arenas", 83 *Yale Law Journal* (1974) 900-998 [doi:10.2307/795378]. A good summary of the issue of nationality in international law can be found in C. Dumbrava, "Nationality, Citizenship and Ethno-Cultural Membership. Preferential Admission Policies of EU Countries" (Doctoral thesis on file at the EUI, Florence, 2012).

[106] See P.J. Spiro, "*Nottebohm* and 'Genuine Link': Anatomy of a Jurisprudential Illusion", *Investment Migration Working Papers*, IMC-RP 2019/1, 1-32, at 1.

[107] In Spain, for example, classic manuals such as that of Díez de Velasco devoted 13 pages to the personal competence of the State, while in more modern ones, such as that of Andrés Sáenz de Santamaría, they were reduced to 2.

[108] See *supra* n. 30. An exhaustive study of the case and all the criticisms it has received can be seen at Spiro, *supra* n. 106; and K. Hailbronner, "Nationality in Public International Law and European Law", in R. Bauböck *et al.*(eds), *Acquisition and Loss of Nationality. Policies and Trends in 15 European States* (Amsterdam University Press, Amsterdam, 2006) 35-104 [doi:10.5117/9789053569207].

[109] See E. Denza, "Nationality and Diplomatic Protection", 65 *Netherlands International Law Review* (2018) 463-480 [doi.org/10.1007/s40802-018-0119-4].

[110] See the classical work of A. Miaja, "Nuevas realidades y teorías sobre la efectividad en Derecho Internacional", III *Anuario de derecho internacional* (1976) 3-47.

[111] See P.J. Spiro, "A New International Law of Citizenship", 105 *American Journal of International Law* (2013) 694-746, at 694 [doi:10.5305/amerjintelaw.105.4.0694].

arbitrary deprivation of nationality.[112] Globalization, on the other hand, has led to a renewed interest in nationality and dual nationality issues, which were once demonized and are now even encouraged,[113] and to profound changes in the very essence and function of citizenship.[114]

It is precisely this *vis attractiva* that caused many authors to turn to international law on nationality and human rights in their quest to find limits to the loss of citizenship rights because of Brexit. Some argued that since the loss of European citizenship was not necessary for the United Kingdom to leave the EU, it could then be considered arbitrary and therefore prohibited by international law.[115] Others speculated that, since it was not entirely clear whether the loss of citizenship status as such, not that of any of the associated rights, could be challenged before any judicial body, it could eventually be considered arbitrary.[116]

The doctrine of the "genuine link", formulated by the International Court of Justice in the aforementioned *Nottebohm* case, used by the CJEU in some of its judgments in the form of social integration, and read in conjunction with the right to enter and leave one's own country as laid down in Article 12 of the International Covenant on Civil and Political Rights, has also served to argue for a new perspective on the protection of European citizenship in the event of withdrawal from a Member

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[112] The law contained in the UDHR was incorporated into several human rights treaties, including two specific conventions to prevent statelessness, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, which have curiously received a low number of ratifications. The Covenant on Civil and Political Rights, on the other hand, only included the right to nationality of children and the right to leave and enter one's own country but was silent on the question of change of nationality. Within the European framework there is also a Convention on nationality which has been ratified by only twelve EU Member States. An overview of the issue of nationality and human rights can be found in S. Price, "The Right to Renounce Citizenship", 42 *Fordham International Law Journal* (2019) 1547-1582, at 1551ff. Doctrinal attention to the situations that lead to the loss of nationality has also been intense. See J. Lepoutre, "Citizen Loss and Deprivation in the European Union (27+1)", *EUI Working Papers*, RSCAS 2020/29 (2020) 1-36 [doi:/10.2139/ssrn.3657076]; R. De Groot, R., "Survey on Rules on Loss of Nationality in International Law Treaties and Case Law", 57 *CEPS Paper in Liberty and Security in Europe* (2013); R. Bauböck & V. Paskalev, "Cutting Genuine Links: A Normative Analysis of Citizenship Deprivation", 30 *Georgetown Immigration Law Journal* (2016) 47-104.

[113] On recent issues relating to nationality and international law, see the special issue of the *Netherlands International Law Review* of 2018 devoted exclusively to the topic. On the evolution that dual nationality has undergone, see the entertaining story of P.J. Spiro, *At Home in Two Countries. The Past and Future of Dual Citizenship* (NYU University Press, New York, 2016).

[114] On the evolution suffered by the institution, see, for example, Ch. Joppke, "The Inevitable Lightening of Citizenship", 51 *Archives Européennes de Sociologie* (2010) 9-32 [doi:10.1017/S0003975610000019], which uses the case of EU citizenship to illustrate these changes; or K. Henrard , "The shifting Parameters of Nationality", 65 *Netherlands International Law Review* (2019) 269-297 [doi.org/10.1007/s40802-018-0117-6], which also contains, along with the socio-political transformations that citizenship has undergone, a good summary of the changes that have taken place in international nationality law.

[115] See Worster, *supra* n. 30, at 362.

[116] See Mindus, *supra* n. 15, at 80-81. The author concludes, however, that the only certainty in applying the prohibition of arbitrariness would be in cases of retroactive restrictions. Ibid, at 62. There he agrees with Kochenov, *supra* n. 94, at 15. However, Mindus concedes that, applying what has been done in cases of State succession, the only sure principles one can draw from international law are the obligation to negotiate a solution and the obligation to inform the persons concerned.

State based on the social links that a national of another state has established in another host Member state.[117]

Finally, the case law of the European Court of Human Rights, for example the *Kurić* case, has also given rise to the possibility of intervention by the Strasbourg Court because of the possible effect of Brexit on the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR).[118] Or even, bearing in mind that British citizens with dual nationality from another EU country will continue to be European citizens, for violation of the prohibition of discrimination under Article 14 ECHR.[119]

Legal speculation and prospective work are an essential part of academic life, not to mention the potential income that writing reports and studies can bring to the never sufficiently paid researchers. It is therefore not a matter of questioning the interest or the opportunity to venture into the arcanes of international law in search of a foothold to curb the most undesirable effects of Brexit on the lives of people. Nor do I seek to refute or clarify the content of the sources used for these legal constructs or their application to the case in question. But it is important to point out that many of these legal exercises are based on an unrealistic conception of what international law is, of its relations with politics and of the real limits that, beyond academic formalism, the international legal order imposes on the still sacrosanct state sovereignty. To this end, nothing better than starting with what the EU and the United Kingdom agreed to do in practice with the European citizens affected by Brexit.

(E) THE TRUE LIMITS OF EUROPEAN CITIZENSHIP: WELCOME BACK TO INTERNATIONAL LAW

On 30 January 2020, the EU and the United Kingdom of Great Britain and Northern Ireland reached an agreement on the withdrawal of the latter from the EU and the European Atomic Energy Community.[120] The Agreement was accompanied by a Political Declaration on future relations between the European Union and the United Kingdom.[121]

The basic lines of the scheme envisaged for EU and UK citizens derived from both texts are quite simple and based on common sense, self-interest and reciprocity.[122] Until 31 December 2020 the free movement of EU citizens continues as if nothing had happened. After that date, provision is made for exemption from visas for short visits (up to three months within a six-month period) and business visits, and compliance with the respective migration provisions in force for those wishing to settle in the UK or the EU. For nationals of both sides who were residing on the territory of the other on 31 December 2020, their status is maintained if they met the requirements for permanent residence. Otherwise, they are given a temporary residence permit until they complete the time required to acquire permanent residence.[123] Obviously, the Agreement assumes the disappearance of the European citizenship of British nationals at the end of the transitional period.

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[117] See Strumia, *supra* n. 87, at 751ff.

[118] Mindus, *supra* n. 15, at 68-69; Strumia & Hadzimusic, *supra* n. 99, at 13-14.

[119] See House of Lords, *supra* n. 99, at 31ff.

[120] Published in the OJ 31 January 2020, L 29.

[121] Political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, OJ 31 January 2020, C 34.

[122] In fact, this word, or its derivatives, is repeated up to six times in the Political Declaration.

[123] See Herbert, Smith, Freehills, *Brexit Legal Guide. Migration*,

Considering that there are currently around three million EU nationals working in the UK, and over one million British nationals living and working in EU countries,[124] no classic international lawyer would have been surprised by the agreement reached. The sovereign interest of the parties, built on reciprocity of obligations, plus an elementary sense of justice based on the protection of legitimate expectations generated during the UK's membership of the Union left little room, in a law of a contractual nature, for other types of agreements. But they would have raised their eyebrows in awe before the legal theories that proposed maintaining the "acquired rights" of millions of people despite having lost their EU citizenship as a result of the withdrawal of the state of which they are nationals from an international treaty.[125]

In view of the doctrinal contributions seen above, this does not seem to be the case for those who are currently approaching international law. Contemporary international law has at least a complex relationship with the notion of state sovereignty —in Bodin's classic words, the absolute and perpetual power of a Republic,[126] 'organized hypocrisy', for Krasner"—,[127] and its implications.

Indeed, the existence of the sovereign state is a *sine qua non* of international law since its birth, and even its possibility of being depends on the existence of independent political entities acting with the conviction of being linked on an equal footing. At the same time, state sovereignty is an obstacle to the development of international law as an order capable of dealing with global problems, and a real threat to its legality. After all, what kind of order would this be if its subjects could dispose of it at will according to their interests?

Many international lawyers have solved this basic dialectic in their discourse -the state is a requirement for the emergence of international law and its survival an obstacle to its advancement- by resorting, on the one hand, to technical-legal formalisms of the type "consensus", "general principles of law", "common material values", or "*ius cogens*" which guarantee the total non-availability of the law in the hands of its subjects and, therefore, its normative character.[128]

On the other hand, they have resorted to the notion of progress, perceptible in seminal works such as Friedmann's *Changing Structure of International Law*, by inscribing that dialectic in an inexorable *continuum* that goes from the initial sacrosanct sovereignty of states to "internationalism", "globalism" or the "constitutionalisation of the international legal order". Those developments will allow us, in a Kantian cosmopolitan vein, to transcend state borders in the solution of problems that go beyond the artificial territorial barriers. As Martti Koskenniemi, the so-called "rock star" of international law, rightly summed up, international lawyers have used sovereignty to limit sovereignty itself.[129]

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[124] See UK (Office for National Statistics), *Population by Country of Birth and Nationality Report: August 2015*.

[125] See J. Herbst, "Observations on the Right to Withdrawal from the EU: Who are the 'Masters of the Treaties'?", 6 *German Law Journal* (2005) 1755-1760 [doi:10.1017/S207183220001467X].

[126] J. Bodin, *Los seis libros de la república* (Tecnos, Madrid, 1997), at 47-48. The original work is from 1576.

[127] S.D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, Princeton, 1999).

[128] See I. Forcada, "El concepto de Derecho Internacional Público en el umbral del siglo XXI: la "Nueva Corriente", IX *Anuario Argentino de Derecho Internacional* (1999) 181-220; and "La enseñanza del Derecho Internacional Público en España: una perspectiva desde el análisis crítico del discurso", 3 *REEI* 1-28.

[129] See M. Koskenniemi, "What Use for Sovereignty Today?", 1 *Asian Journal of International Law* (2011) 61-70, at 62 [doi:10.1017/S2044251310000044]. We owe the name *rock star* to Janne E. Nijman, Academic Director of the T.M.C. Asser Institute, in the preface to the *Fourth Annual T.M.C. Asser Lecture* taught by Koskenniemi in 2018 and available at M. Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (T.M.C. Asser Press, The Hague, 2019), at v.

From there to think that, faced with a sovereign decision to withdraw from a treaty, and thus erase with the stroke of a pen the citizenship rights of more than sixty million people, one could, like Moses and the Tables of the law, turn to the international legal order, including its courts, and find limits with which to curb state sovereignty, i.e., political decisions, was a small step that many, according to the literature studied in these pages, have not hesitated to take.

At the very least, a waste of time. At best, a serious conceptual error that affects, on the one hand, what European citizenship means; on the other, the role of sovereignty in a law of a contractual nature such as international law. An error which explains the concern of some, in the style of what happened with the debate on fragmentation, with the wave of populism that sweeps through international relations, and the renewed academic interest in finding limits to the withdrawal from multilateral treaties.[130] Let us take it one step at a time and start with the misperception of European citizenship.

It is obvious that the creation of a European citizenship had no intention of usurping any essential competence of the Member States.[131] In fact, the EU had borrowed a concept with a heavy political and legal legacy, citizenship, and incorporated it into its conceptual system by stripping it of its traditional content and meanings.[132] What really interested the EU in a concept such as citizenship was the symbolism contained in it. The European Commission itself recognized this when it declared, with that style of political communication typical of the EU, in which the institution itself becomes a product to be "placed" within a strategy of "brand development",[133] that European citizenship was intended to promote the idea of a European identity which, in turn, would guarantee citizens' support for the integration project.[134]

The implicit assumption therefore in the invention of European citizenship is that it would serve to reaffirm European identity. The greater the European identity, the greater the support for the

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[130] On the advance of populism and its repercussions on the international liberal law that we had been experiencing, see J. Crawford, "The Current Political Discourse Concerning International Law", 81 *The Modern Law Review* (2018) 1-22 [doi:10.1111/1468-2230.12314]; and M. Koskenniemi, *Far Right..., supra* n. 133, at 1ff., and the literature that is cited in both. For an example of this renewed interest in withdrawal from multilateral treaties, see H. Woolaver, "From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal", 30 *European Journal of International Law* (2019) 74-104 [doi:10.2139/ssrn.3352437].

[131] Its derivative character, first, and complementary, later, are there to testify.

[132] As we have seen, European citizenship was derived from state nationality, and was basically a mere systematization of rights, which already existed under the Treaties, and secondary law. See C. Closa, "The Concept of Citizenship in the Treaty on European Union", 29 *Common Market Law Review* (1992) 1137-1169.

[133] See J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have An Emperor?' and Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999) cited in T. Tsaliki, "The Construction of European Identity and Citizenship Through Cultural Policy", 24 *European Studies* (2007) 157-182, at 166 [doi:10.1163/9789401204156_010].

[134] "Citizenship of the Union conferred on all nationals of all Member States by the Maastricht treaty is meant to make the process of European integration more relevant to individual citizens by increasing their participation, strengthening the protection of their rights and promoting the idea of a European identity". EC Commission, Second *Report from the Commission on the Citizenship of the Union,* Doc. COM (97) 230 final (1997), at 1. In the third report, the Commission recognized that citizenship was "both a source of legitimation of the process of European integration, by reinforcing the participation of citizens, and a fundamental factor in the creation among citizens of a sense of belonging to the European Union and of having a genuine European identity". EC Commission, *Third Report from the Commission on the Citizenship of the Union,* Doc. COM (2001) 506 final (2001), cited in M. Vink, , "The Unbearable Lightness of European Citizenship", 6 *Citizenship, Social and Economics Education* (2004) 24-33, at 25.

integration project. From this point of view, citizenship became a useful propaganda tool not only to secure the consent of "Europeans", but also to create, in the first place, the very category of Europeans.[135]

But, as we have seen, European citizenship was stripped of the traditional content of the institution, reduced to its symbolic potential, and used as a marketing instrument to sell on the market, as true citizenship, what was only a reinforced variant of free movement of persons provided for in the Treaties. Something radically insufficient to make it the engine of the citizen's approach to institutions desperately in need of popular legitimation. This is why the polls continue to show us, for more than 30 years, that national sentiment continues to be the master identity of Europeans.[136]

The title of the issue No. 30 of the journal *Politique européenne*, "*L'identité européenne, entre science politique et science fiction*", is therefore a good summary of the state of play of the citizenship/identity binomial in the EU. The obsession of institutions, doctrine and surveys with the identity question, with people's opinions, feelings or beliefs about the EU, has made them lose sight of the fact that what is really interesting is what people did or could do in an integrating Europe.[137] Not their feelings, but their actions.

However, relying on the CJEU jurisprudence, the most pro-European academic doctrine, always more concerned with debating the normative potential of institutions than with its actual use, has projected onto European citizenship its great cosmopolitan illusions of a post-national state based on a *demos* that the citizenship itself would contribute to give birth. And it has devoted, consequently, its disciplinary effort to discover the conditions in which a "true" European citizenship would be possible.

Deep down, a waste of time. The jurisprudence of the CJEU, which was exceptional and interpreted restrictively afterwards, did not really say what they thought. And what is worse, all that potential that the doctrine spoke of, that "milestone" in the integration process, only really affected a little more than two percent of the population.[138] As one author put it, "the great promise of UE citizenship had only ever really taken hold in the ivory towers of academic imagination and the European Court of Justice".[139]

But the problem does not end up there. If European citizenship was to promote European identity, and thus ensure greater public support for the integration project, then we can only speak of a resounding failure. The percentages of support for the integration project have not changed significantly in the last 30 years because they respond to other conditioning factors. What is more serious, empirical studies show that these European citizens who have chosen to settle in another country of the Union and who, as such, make full use of the new possibilities offered by integration, are

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[135] See Shore, *supra* n. 34, at 31.

[136] The graphs with the temporal evolution and the divergences between countries can be seen in S. Ciaglia, C. Fuest. & F. Heinemann, "What a feeling?! How to promote 'European Identity'", 2 *EconPol Policy Report* (2018) 1-65, at 16-17. This work also contains an interesting breakdown of the different determinants that influence the shaping of European identity, such as education, social class, economic resources, personal characteristics.

[137] See A. Favell, "European Identity and European Citizenship in Three 'Eurocities': A Sociological Approach to the European Union", 30 *Politique Européenne* (2010), 187-224, at 197 [doi:10.3917/poeu.030.0187].

[138] See M. Benton & M. Petrovic, *How free is free movement? Dynamics and drivers of mobility within the European Union* (Migration Policy Institute Europe, Brussels, 2013), at 3. This explains why 60 percent of Eurobarometer respondents do not know what their rights are as EU citizens. Also explains why the supposedly informed friends whom I asked out of curiosity, while writing this article, about European citizenship, all looked at me as if I had asked them about the fusion of weak vector bosons.

[139] O'Brien, *supra* n. 66, at 974

far from showing more interest and attachment to the construction of a political community on a European scale than the other Europeans.[140]

In reality, the conceptual error that explains both the academic drift in search of a non-existent Holy Grail, and the incongruous institutional effort to use part of the legal repertoire of the nation state to increase popular adherence to a post-national project, has to do with the widespread belief in a democratic deficit, and the subsequent search for legitimacy to reduce it.[141]

Instead of looking at the actual use of mobility rights, in which the fundamental freedoms provided for in the Treaty are translated, considering this mere use alone as legitimizing the European project, the EU institutions and the Europeanist doctrine that supports them, fundamentally incapable of moving away from the paradigm of the nation state, embarked into the search/creation of a European people on which to democratically support the entire integration project. With that idea in mind, the creation of a European citizenship was obviously a good choice whose only defect could only be the timidity of the content with which it was designed.

Nothing could be further from the truth. It is the historical and social factors, woven into the fabric of people's daily lives, that give substance and legitimacy to a political community. Not the social engineering exercises based on political marketing. Instead of opting to favor mobility policies which, through small gradual changes, end up generating these historical and social factors, they wanted to start by putting the cart before the horse, deceiving us with the claim that, overnight, we had all become European citizens.

Hence the confusion with which this doctrine we have analysed welcomed the British decision of Brexit. The dreams of a European *demos*, of the overcoming of the nation-state and its sovereign freedom, of a post- or trans-national European citizenship that would do away with national ethnocentric particularisms, were dashed by a democratic decision of a markedly nationalistic nature, based on eternal national sovereignty, which erased with the stroke of a pen the obviously unacquired mobility rights of more than 60 million supposed European citizens.

From there also the desperate recourse to international law which, thanks to its recent drift towards human rights, and its connection with concepts such as *ius cogens* and *erga omnes* obligations, which make it possible to assert the unavailability of the law on the part of its subjects, has seen its juridical basis grounded in something more solid than the changing will of the state. The problem is that the international law that they sought to use as a limit to the exercise of national sovereignty existed only in their imagination, and not only because sovereignty has obviously not disappeared.[142] These errors are the result of a paradigmatic reductionism, a set of historically contingent and aprioristic ideas that controlled their disciplinary thinking

The first paradigmatic error they made fully affects treaties as a source of rights and obligations. Fleeing from accusations of irrelevance and non-legal character,[143] and relying weakly on what appears

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[140] See Favell, *supra* n.137.

[141] See A. Moravcsik, "In Defense of the "Democratic Deficit": Reassessing Legitimacy in the European Union", *Center for European Studies Working Paper No. 92* (2003) who maintains that concern about the democratic deficit in the EU is misplaced.. Cf. A. Follesdal & S. Hix, "Why there is a democratic deficit in the EU: A Response to Majone y Moravcsik", *Journal of Common Market Studies* (2006) 533-562 [doi:10.1111/j.1468-5965.2006.00650.x].

[142] See S. Krasner, "Think Again: Sovereignty", *Foreign Policy*, 20 November 2009.

[143] See C. Douzinas, *Human Rights and Empire. The political philosophy of cosmopolitanism* (Routledge-Cavendish, Abingdon/New York, 2007). Professor Douzinas does not seem to hold international lawyers in high

to be a *de facto* concordance between norms and state behaviour to demonstrate the relevance and legal character of the former, many authors devoted their disciplinary energy to demonstrating a normativity of treaties that went so far as to bind states regardless of their interests or opinions. Forgetting along the way that, as the classics already warned,[144] it is economic calculation based on rational decisions, and the interest and power of states, including the long-term interest of obeying a rule that goes against their apparent short-term interest, that explain state adherence to regimes or treaties, and also their withdrawal.[145] Something that led John R. Bolton, who was Assistant Secretary of State for International Organization Affairs, Permanent Representative of the United States to the United Nations, and National Security Adviser with Donald Trump, to affirm before the Relations Committee Internationals of the US Congress, without dropping his rings, that "in their international operation, treaties are simply 'political,' and not legally binding".[146]

The second error concerns the role, function, and limits of international jurisdictions in the functioning of the international legal order. Based on some jurisprudential decisions that seemed to limit sovereign options, such as the aforementioned *Nottebohm* case, or the expansive jurisprudence of the CJEU in matters of European citizenship, they wanted to seek insurmountable limits to state sovereignty there as well. Forgetting once again that international courts, much more than other high courts of the internal order, are exceptionally sensitive to questions of legitimacy that can damage their survival. It is simply then inconceivable that they could adopt decisions that would counteract other sovereign decisions of a democratic nature that affect millions of people, as it is proven by the irrelevance in the real world of the *Nottebohm* doctrine, or the turnaround in the Court's case law on matters of European citizenship.[147]

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regard: "Academically, international law is seen as a peripheral exercise, closer to the doubtful pursuits of international relations rather than to a fully formed legal discipline"; "One is tempted to say that there is something seriously flawed with this branch of law"; "Its palindromic nature makes it more elastic than a rubber band"; "one concludes that people are not wrong to remain in their blissful ignorance and indifference towards this branch of law"; "International law practice is closer to the Protestant tradition under which individuals interpret the holy texts freely rather than to the Catholic authoritative renditions by the Church"; "The international lawyer is the lawyers' lawyer, someone who spends a lifetime pouring over the text of treaties, their *travaux préparatoires* and the few 'soft' decisions of international tribunals"; "The international lawyer's professional identity is in direct conflict with her practical effectiveness. As a result, international lawyers live in a permanent existential crisis. Their *hazar professionel* is that they are the ultimate exponents of a law whose power is in reverse proportion to its certainty...Their endless musings about the status of their discipline is quite unique in the legal academy...Conferences often seem to become exercises in group therapy"; "International law with all its contradictions and paradoxes is leading us into empire", at 198, 215, 233, 234.

[144] See M. Koskenniemi, "The Advantage of Treaties: International Law in the Enlightenment", 13 *Edinburgh Law Review* (2009) 27-67 [doi.org/10.3366/E1364980908000954].

[145] See J.L. Goldsmith & E.A. Posner, *The Limits of International Law* (Oxford University Press, Oxford, 2005) at 83ff.

[146] See K.L. Kirgis, "Treaties as Binding International Obligation", 2 *ASIL Insights* (1997), at 1.

[147] On the irrelevance of the *Nottebohm* doctrine in subsequent practice, see Spiro, *supra* n. 106. On the explanation of the change in the jurisprudence of the CJEU, see M. Blauberger *et al.*, "ECJ Judges read the morning papers. Explaining the turnaround of European citizenship jurisprudence", 25 *Journal of European Public Policy* (2018) 1422-1441 [doi.org/10.1080/13501763.2018.1488880]. The sensitivity of the CJEU to the political views of the Member States does not detract from the fact that its decisions have a high impact on their policies. See M. Blauberger & S.K. Schmidt, "The European Court of Justice and its political impact", 40 *West European Politics* (2017) 907–918 [doi:10.1080/01402382.2017.1281652].

The third error consists in forgetting that international law, as a cultural expression of the species, enjoys a strictly epiphenomenal nature, that is, secondary and derived from another main or determining phenomenon. In other words, an accessory phenomenon that accompanies the main phenomenon, the sovereignly expressed will of the state, and which does not have much influence on it. This oblivion is what has allowed many to approach international law through a technical-legal analysis typical of the discipline, accepting without further ado the marginal task of deciding the bureaucratic details of political negotiations.[148] As Morgenthau correctly summarized, trying to exorcise social ills through the tireless repetition of magic formulas.[149]

Ultimately, these errors are written on a background image of the fragility of international law and serve to encourage those who turn to it to focus on technical problems like compliance, enforcement, or on criminal, procedural or administrative law. Thus, directing attention to the development of mechanisms, strategies, or institutional initiatives to overcome what is thought to be an innate predisposition on the part of governments to ignore international commitments when they appear to be inconvenient. As Douzinas noted, "normative jurisprudence has acquired its own unreality because of its total neglect of the role of law in sustaining relations of power and its descent into uninteresting exegesis and apologia for legal technique".[150]

A paper world incapable of reflecting the world in which the rest of the people live,[151] i.e. a "world where nations, individually or in groups, decide for themselves, guided by their own morality and sense of justice and order".[152] For Kagan, this is the world we live in, and the only world we have ever lived in. A world where those in power, believing that the law is on their side, impose their sense of justice on others.[153] The world of international law.

I am aware that these words may seem somewhat cynical, and that cynicism, even in international law, does not get a good press.[154] Although I consciously practice κυνικός (cynicism), in its philosophical meaning, i.e. *anaideia*, *adiaphoria* and *parresia*,[155] I do care quite a lot about the world I live in. That is why I do not want to close this writing without resorting to an argument of authority that would strip it of any irreverent stain.

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[148] See O. Korhonen, "New International Law: Silence, Defence or Deliverance", 7 *European Journal of International Law* (1996) 1-28, at 11 [doi:10.1093/oxfordjournals.ejil.a015485].

[149] Phrase that Morghentau applied to the formalists of the inter-war period. See H. Morghentau, "Positivism, Functionalism and International law", 34 *American Journal of International Law* (1940) 260-284, at 260 [doi:10.2307/2192998].

[150] C. Douzinas, *The End of Human Rights* (Hart, Oxford, 2000), at 7, cited in D. Kritsiotis, "When states use armed force", in C.H. Reus-Smit, (ed), *The Politics of International Law* (Cambridge University Press, Cambridge, 2004) 44, at 78 [doi:10.1017/CBO9780511491641]. See also M. Koskenniemi, "The Fate of Public International Law: Between Technique and Politics", 70 *The Modern Law Review* (2007) 1-30 [doi.org/10.1111/j.1468-2230.2006.00624.x].

[151] See M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (3rd ed., Basic Books, New York, 2000), at xix.

[152] See R. Kagan, *Paradise and Power* (Atlantic Books, London, 2004) at 130.

[153] Ibid., at 131.

[154] See Koskenniemi, *Far Right..., supra* n. 129.

[155] Irreverence or provocation; indifference; and frankness or freedom of speech. On *parresia* it is always illustrative to take a look at what Foucault said about it in the series of lectures he gave at the University of Berkeley (California) in 1983.

If anyone wants to know, by reading just one of the articles quoted here, the legal intricacies and political possibilities triggered by Brexit, I recommend reading the article written by Jean-Claude Piris, even before the Brexit referendum, on the legal aspects of the UK's withdrawal and the effects of the different options being considered.[156]

Piris is one of those excellent jurists who, like Claus-Dieter Ehlermann, have directed the legal services of the European institutions. It is likely that, despite their impeccable academic training, their passage through the real world has made them temper the tendencies towards legal musings that are so abundant in the academic world, thus acquiring an extraordinary power of synthesis to address what, in International life, are always complex legal-political problems.

In the case of Brexit, after describing the content of Article 50 TEU and the possible options that were opening up (all not too good for the UK), Piris addressed, and dispatched, in a few highly predictive lines, the problem of European citizenship:

> "Personally, I would not think that one could build a new legal theory, according to which "acquired rights" would remain valid for millions of individuals (what about their children and their grand children?), who, despite having lost their EU citizenship, would nevertheless keep its advantages for ever... It is mostly probable that solutions, at least ad interim, would be found rapidly. Any agreement would be based on classic international law and in particular on the principle of reciprocity. This means that all rights obtained in favor of British citizens in EU Member States (which will not be able to negotiate individually with the UK, as they are all bound together by EU law on these issues) will have to be granted to nationals of all twenty eight EU Member States".[157]

Quite right, isn't it?

[156] See J.C. Piris, "Should the UK Withdraw from the EU: Legal Aspects and Effects of Possible Options", *Robert Schuman Foundation /European Issues*, Policy Paper n. 355 (2015) 1-13.

[157] Ibid. at 10.

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Economic Crimes against Humanity: a legal challenge for the positive regulation of crimes against humanity in the Article 7 of the Rome Statute

Libia ARENAL*

Abstract: This paper aims to highlight some of the most important challenges that international law will face in the coming decades, namely the possible international criminalization of serious economic abuses -the so called "economic crimes against humanity"- characterised by the violation of basic human values that are recognised and protected by the international community. This article will focus on analysing, on the one hand, the importance of the category of crimes against humanity, as a teleological and normative framework, for a legal development for "economic crimes against humanity" in international law; on the other hand, it will present the difficulties for the inclusion of these serious economic abuses in the regulation of crimes against humanity in Article 7 of the RS Rome Statute, based on the analysis of the common elements of the context in which the conducts must take place – threshold clause or chapeau clause-. It will end with some contributions for the construction of a contextual element for "economic crimes against humanity", on the grounds of the definition of crimes against humanity in the Rome Statute, to become crimes of concern to the international community as a whole.

Keywords: crimes against humanity – serious economic abuses – International Criminal Court

(A) INTRODUCTION

The renowned financial analyst and professor at Harvard University, Shoshana Zuboff, published in 2009 an article entitled "Wall Street's economic crimes against Humanity".[1] The author made a plea against the dehumanization of the financial system and pointed out that the crisis, derived from the abuses that had been committed within it, was not only about to destroy the economic foundations of the countries most affected by it, but also had an unexpected and alarming impact on fundamental areas for the lives of millions of people in various regions of the world.

Zuboff underlined in her work that although the economic crisis was not equivalent to the Holocaust, it derived from a business model characterized by the same type of remoteness, lack of reflection and widespread abrogation of individual moral judgment that Hannah Arendt had observed in Adolf Eichmann's behaviour regarding the commission of Nazi crimes. She encapsulated this reflection in the expression "the banality of evil".[2]

According to Zuboff, this "economic narcissism" paved the way for the execution of a "large-scale administrative economic massacre"[3], showing that the serious nature and consequences of this type of economic abuse lay in the fact that it affects a series of basic and universal human values, recognized

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1 S. Zuboff, "Wall Street's economic crimes against humanity", *Businessweek*, 20 March 2009, accessed 11 August 2020.

2 H. Arend, *Eichmann en Jerusalén: Un estudio sobre la banalidad del mal* (Lumen, 2003)

3 S. Zuboff, *supra* n.1.

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by the international community with the same gravity as other serious criminal behaviour that had already generated international interest and had been the object of categorizing in the international legal system.

Zuboff's argument, joined by other representatives of academia and professional practice[4], thus connected serious contemporary economic and financial abuses with crimes against humanity.[5] This is a category of international crimes introduced by the Statute of the International Military Tribunal of Nuremberg (IMT) after World War II[6], and after a long evolution has become conventionally defined in Article 7 of the Rome Statute (RS)[7] of the International Criminal Court (ICC) together with the instrument of the Elements of Crimes.[8] Likewise, it is important to take into account the work of the International Law Commission (ILC) on a convention on prevention and punishment of crimes against humanity, developed between 2015 and 2019[9]. In fact, in this last year, the Commission adopted, on second reading, the Draft Articles on Prevention and Punishment of Crimes against IIumanity and decided, in conformity with article 23 of its statute, to recommend the Draft Articles to the General Assembly.[10]

The fundamental purpose of the prohibition of crimes against humanity has been to control the abuse of political power of the State against individuals through the commission of acts considered aberrant and inhumane such as murder, extermination, forced displacement, slavery, torture, grave sexual violence, enforced disappearance and other inhuman acts of similar character acts intentionally causing great suffering or serious injury to physical integrity or mental or physical health,

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4 L. Benaría and C. Sarasúa, "Delitos y crímenes económicos contra la humanidad", *Revista de Economía Crítica*, nº 12, Segundo Semestre (2011); J. Torres, "Crímenes económicos contra la humanidad", published on 27 May 2013, last access 11 August 2020; Fundación Internacional Baltasar Garzón (FIBGAR) "Principios de Madrid-Buenos Aires sobre Jurisdicción Universal".

5 Statute of the International Military Tribunal of Nuremberg (signed at London, on 8 August 1945), accessed 11 August 2020.

6 For an analysis of the evolution of this category of crimes see C. Márquez Carrasco, *El proceso de codificación y desarrollo progresivo de los crímenes contra la humanidad* (Secretariado de publicaciones Universidad de Sevilla, 2008).

7 Rome Statute of the International Criminal Court, *2187 UNTS 3* (adopted 17 July 1998, entered into force 1 July 2002).

8 ICC, Elements of Crimes. The Elements of Crimes are reproduced from the Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10, September 2002 (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B.

9 At its sixty-sixth session, in 2014, the International Law Commission (ILC) decided to include the topic "Crimes against humanity" in its programme of work, on the basis of the recommendation of the Working Group on the long-term programme of work. The Commission decided to appoint Mr. Sean D. Murphy as Special Rapporteur for the topic who has submitted four reports to the ILC. *First report on crimes against humanity By Sean D. Murphy, Special Rapporteur* (hereafter "First Report"), UN Doc. A/CN.4/680, 17 February 2015; *Second report on crimes against humanity By Sean D. Murphy, Special Rapporteur* (hereafter "Second Report"), UN Doc. A/CN.4/690, 21 January 2016; *Third report on crimes against humanity By Sean D. Murphy, Special Rapporteur* (hereafter "Third Report"), UN Doc. A/CN.4/704, 27 January 2017; *Fourth report on crimes against humanity By Sean D. Murphy, Special Rapporteur* (hereafter "Fourth Report"), UN Doc. A/CN.4/725, 18 February 2019.

10 See the *Draft articles on Prevention and Punishment of Crimes Against Humanity 2019,* adopted by the ILC at its seventy-first session, in 2019, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/74/10), *Yearbook of the International Law Commission, 2019*, vol. II, Part Two (hereinafter *Draft articles*).

when they are committed in the context of a widespread or systematic attack against the civilian population.

Crimes against humanity entail the international criminal responsibility of the individual[11], are not subject to a statute of limitations[12] and must and can be prosecuted by States in the exercise of universal jurisdiction[13], all by virtue of the fact that these crimes constitute an affront to their direct victims and to humanity as a whole[14].

Although originally the category of crimes against humanity was not intended to prosecuting economic-financial, economic-political or ecological crimes, and to date these kind of crimes have not been identified with crimes against humanity in positive public international law, this does not imply that the elements that make them up do not fit into the category of crimes against humanity. However, if international law once evolved by criminalizing the serious abuses of political power of States committed against their own citizens, something inconceivable until after World War II, today we must consider if it would be possible this category of crimes to move towards an integral protection of the human beings from serious abuses of economic and economic-political power committed by both states and non-state actors.

The objective of this paper is to analyse whether this category of international crimes under the Article 7 of RS of the ICC is from a teleological and juridical-positive perspective adequate to address the serious economic and economic-political abuses resulting from the neoliberal economic globalization and the framework of important changes in the exercise and distribution of power in the international society.

(B) THE SOCIAL CONTEXT FOR THE EMERGENCE OF THE TERM "ECONOMIC CRIMES AGAINST HUMANITY"

As we have already said, Shoshana Zuboff formulated the expression "economic crimes against humanity" in the article entitled "Wall Street's Crimes against Humanity". The author pointed out clearly the following: "That in the crisis of 2009 the mounting evidence of fraud, conflicts of interest, indifference to suffering, repudiation of responsibility, and systemic absence of individual moral judgment produced an administrative economic massacre of such proportion that it constitutes an economic crime against humanity".[15]

What is interesting about Zuboff's proposal is that it makes a connection between crimes against humanity, a category of international crimes, and emerging serious economic abuses related with the context of neo-liberal economic globalization. Zuboff believes that this kind of egregious conducts are new risks and threats to fundamental values protected by the international community. In this vein, the concept "economic crimes against humanity" aims to invoke a reflection on the economic

[11] IMT, *Judgement*, 30 September, 1 October 1946, in Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, vol. I (Nuremberg, 1948), at 223.

[12] Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, 754 *UNTS* 73 (adopted 26 november 1968, entered into force 11 november 1970).

[13] Rome Statute (RS), Preamble "[...] is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

[14] All these components have been confirmed in the *Draft articles on Prevention and Punishment of Crimes Against Humanity 2019, supra* n.10.

[15] S. Zuboff, *supra* n.1.

paradigm as shaping new expression of crimes threatening humanity at this contemporary moment in the history of international society.

"Economic crimes"[16] is a relatively new concept in international law. In fact, today, it does not exist a general definition of these crimes[17], neither conventional nor customary law. There is also no agreement on the different conducts that could be included under this expression.[18] It is only possible to verify a non-exhaustive list of behaviours that qualify as an economic crime under treaty-based international law – i.e. the United Nations Convention against Corruption of 2003[19] including acts of corruption, illicit enrichment, embezzlement, kleptocracy, bribery, money laundering, influence peddling, abuse of functions, falsification, identity theft, tax evasion or tax fraud and cybercrimes.

Bearing in mind these legal limitations on the definition of economic crimes, we must start the study of the expression "economic crimes against humanity" from a broad conception of these crimes: serious abuses by their nature and consequences on fundamental and universal legal values, including human rights[20]; generating significant human, social, environmental and economic damage;

[16] The term "economic crimes" is a translation of the Anglo-Saxon term "economic crimes." The first references to the expression economic crimes, or also the so-called "White-collar crimes", can be found in the works of the sociologist Sutherland, who highlighted how "white collar" crimes were committed through dishonest practices - manipulation of accounts, bribes, embezzlement, tax fraud or embezzlement, among many others in different professions. He also developed the "differential association theory" highlighting that white-collar criminals often have the cooperation of other actors and significant social or relational capital that serves as coverage. See J. W. Coleman, "Toward an Integrated Theory of White-Collar Crime," *American Journal of Sociology*, vol. 93, no. 2, September (1987), 406-439 [doi:10.1086/228750]. The economist Becker also presented his economic theory of crime in which the criminal is represented as a maximizing agent, which analyses risk factors, reward and punishment when considering the economic and social environment fundamental to the commission of the crime. See G.S. Becker, "Crime and punishment: An economic approach", *in Essays in the Economics of Crime and Punishment*, UMI, (1974) 1-54 (Published online 15 October 2015).

[17] Bill McCarthy and Lawrence E. Cohen have stated that there is no widely accepted definition of the term economic crime and that it is impossible to list briefly all the definitions, theories, and offenses included in this category, see B. McCarthy and L. E. Cohen, "Economic Crime: Theory", *Encyclopedia of Crime and Justice.* Along these lines, Barroso González points out that the acceptance of a common definition of economic crime in international Criminal Law is still conflictive. See J. L. Barroso González, "Economic crimes from a criminological perspective", *Journal of the Institute of Legal Sciences of Puebla* , Mexico, Year IX, January – June (2015) 95-122.

[18] B. Zagaris, *International White-Collar Crime: Cases and Materials* (Cambridge University Press, 2010). The author states that economic and financial crime refers to a variety of activities that cannot be included under the same rubric. In the Spanish legal system, for example, "economic crimes" are included in the Criminal Code under different headings. In Title XII the "crimes against heritage and socioeconomic order" are typified, and it is these crimes that are considered the essence of economic crimes. However, there are also crimes of content or economic impact, not included in the previous group, but which end up affecting economic values. With this perspective, they can be included in the group of economic crimes, due to the economic importance of some such as: environmental crimes, since the majority go through a business policy that despise the forecast of environmental damage, which it implies a saving in costs and an increase in benefits, to the detriment of the environmental value, of the value of the affected place itself and of the conditions of fair competition; the crimes of officials with economic significance, for example; corruption, crimes against consumers; crimes against public finance and social security; G. Quintero Olivares, *Los delitos económicos* (Editorial UOC, S. L. 2016); C. M. Buján Pérez, *Derecho Penal Económico y de la Empresa. Parte general* (Tirant lo Blanch, 2016); A. Galán Muñoz and E. Núñez Castaño, *Manual de derecho penal, económico y de la empresa* (Tirant lo Blanch, 2017).

[19] United Nations Convention against Corruption, *2349 UNTS 41* (adopted by the UN General Assembly in October 2003, entered into force in December 2005).

[20] M. Ollé Sesé, *Crimen internacional y jurisdicción penal nacional: de la justicia universal a la jurisdicción*

committed by entities, groups or organizations holding economic and economic-political power and a great capacity to victimize population with impunity.

The expression "economic crimes against humanity" could therefore integrate a long list of different actions. It is worth mentioning a category of "economic-political crimes" [21] that may be considered conceptually original with respect to this expression "economic crimes against humanity". We are referring to national or international economic and political decisions that can lead to serious and unprecedented social crisis. The impact of the financial crisis of 2008 on human rights resulted in widespread unemployment, loss of housing and social safeguards such as insurance against unemployment, health and education, eroding the living standards of communities, leaving millions of people in poverty.[22] The global financial and economic crisis also revealed a collective feeling that the people responsible for this behaviour were unpunished by pointing to the market system, as an abstract entity, being primarily responsible for this economic massacre.[23] In the same vein, we wonder right now about the consequences of the national and international policies adopted in the matter of COVID and its impact on the protection or even the regression of human rights.[24]

Other facts that highlight our thesis are related to the emergence of other crises related with the financial and economic decisions, such as the food crisis linked to the production of biofuels with devastating effects on the poorest populations in the global South countries.[25] While the United States and the European Union have provided enormous assistance to the agricultural and biofuel industry from 2007 within the framework of their energy diversification policies[26], the prices of crops or palm

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penal interestatal (Thomson Reuters Aranzadi, 2019), at 154.

[21] Naucke defines "economic-political crimes," in the context of the 2008 economic and financial crisis, as those politically powerful economic processes that harm individual citizens by destroying vital spheres for their lives, executed by an authoritarian and powerful sector of society that offers enormous resistance to legal responsibility for these economic decisions. See W. Naucke, *El concepto de delito económico-político. Una aproximación*, (Marcial Pons, 2015).

[22] *Report of the Office of the United Nations High Commissioner for Human Rights on the impact of the global economic and financial crises on the realization of all human rights and on possible actions to alleviate it,* UN Doc. A/HRC/13/38, 18 February 2010; *Report of the United Nations High Commissioner for Human Rights on austerity measures and economic and social rights*, OHCHR, 7 May 2013; P. Swagel "The Cost of the Financial Crisis: The Impact of the September 2008 Economic Collapse", Briefing Paper#18 Cost of the Financial Crisis. The initial results were presented in the public event, "Financial Reform: Too Important to Fail," sponsored by the Pew Financial Reform Project, 18 March 2010.

[23] S. Zuboff, *supra* n.1.

[24] For a broader view see G. L. Gardini (Ed.) *The world before and after COVID-19. Intellectual reflections on politics, diplomacy and international relations,* European Institute of International Studies (Salamanca-Stockholm, 2020).

[25] K. Paramaguru, *"Betting on Hunger: Is Financial Speculation to Blame for High Food Prices?" Science Time,* December 17 (2012); J. L. Vivero Pol and C. Porras Gómez, "Los biocombustibles y su impacto en la crisis alimentaria", en K. Cascante and A. Sánchez (eds.), *La crisis mundial de alimentos: alternativas para la toma de decisiones,* Fundación Alternativas. (Exlibris ediciones, Madrid, 2008), at 29-51.

[26] Prosalus (coord.) "Agrocombustibles, ¿Pate del problema o de la solución?" 1 vol. 86 pp. Prosalus, Veterinarios Sin Fronteras e Ingeniería Sin Fronteras. However, the European Commission is currently conducting an assessment of the impact of ongoing biofuel projects financed by the Union in the countries of Africa, the Caribbean and the Pacific (ACP) that could question the support given to investment projects in Biofuel production from food crops with a view to export to Europe. The European Commission is studying the consequences of biofuel production in developing countries from the point of view of the coherence of development policies, as evidenced by the commission commissioned study in this regard. Likewise, in the

oil raised rapidly generating food insecurity, land grabbing and environmental erosion in countries such as Indonesia, Cambodia, Guinea Bissau, Nigeria, Argentina and many more.[27] Multinationals such as Bunge, DuPont, Cargill, ADM or Syngenta controlled more than 70 percent of the supply chains of cereals and impose their prices with the collaboration of financial entities such as Goldman Sachs, JP Morgan, Bank of America, Banco Santander, BBVA and Deutsche Bank, speculating on the price of food. Jean Ziegler, former United Nations Rapporteur on the Right to Food, denounced the increase in basic food prices in 2008 due to speculation, stating that "it is the criminal economic structures that manufacture the daily hunger massacre"[28]. He also stated at the end of 2013 that burning tons of crops to produce biofuels was a crime against humanity, since it destroyed resources needed to produce basic food.[29] In a similar manner, in these days we appreciate how pharmaceutical companies producing the COVID-19 vaccine raise the value of their shares on the stock market[30] while the World Health Organization (WHO), has called the coronavirus vaccine to be considered a "public good" in its Annual Assembly.[31] In conclusion, speculation with essential goods for the protection of human life, such as food, but also others such as water, housing, vaccines or medicines, constitutes one of the worst contemporary forms of violation of human rights and a way to attack the population.

Other cases that illustrate our hypothesis are related to state corruption, misappropriation and plundering of public funds or "patrimonicide"[32] with the consequence of the submission of populations to extreme living conditions while those responsible for that behaviour often go unpunished.[33] This type of corruption is necessarily linked to the commission of other crimes of an economic nature, including "white collar" crimes, whose expansion has been possible in recent decades due to the construction of a "global space without control".[34] In it, the freedom of capital flows

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United States, there is uncertainty about the viability of the obligatory mixes from the moment it became clear that second-generation biofuels could not replace those produced from food crops as initially thought when adopting such policies. See FAO, Los biocombustibles y la seguridad alimentaria. Un informe del Grupo de alto nivel de expertos en seguridad alimentaria y nutrición del Comité de Seguridad Alimentaria Mundial, HLPE, (Roma, 2013).

[27] J. Ziegler, "Burning food crops to produce biofuels is a crime against humanity", Global development Poverty Matters Blog, *The Guardian*, 26 November 2013, last access 12 August 2020.

[28] *Ibid.*

[29] *Ibid.*

[30] See N. Dominguez & I. Fariza, "Especulación millonaria con las vacunas: las farmacéuticas disparan su valor con medicamentos aún sin eficacia demostrara", El País (17 November 2020).

[31] World Health Organization (WHO), Seventy-third World Health Assembly A73/conf./1 Rev.1 Agenda item 3 18 May 2020.

[32] The term 'patrimonicide' has been used by Ndiva Kofele Kale to refer to this contemporary form of political corruption that not only implies acts of predation against public heritage but also dimensions the destruction of moral, economic and social pillars of the nations that are victims of these practices. See N. K. Kale, "Economic crimes and international justice: Elevating Corruption to the Status of a Crime in Positive International Law" *Symposium on Corruption and its Implications for Human Rights Center for Human Rights and Democracy in Africa Alliance Franco-Camerounaise Center*, Buea, June 25 (2009).

[33] According to Transparency International "Grand corruption is the abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society. It often goes unpunished. It concerns millions of victims around the world". See information in the report "Transparency international to pursue social sanctions on 9 grand corruption cases. Contest to identify most symbolic cases of grand corruption reached millions of people", 10 February 2016, last access 12 August 2020.

[34] M. Villoria and J. López Pagán, "Globalización, corrupción y convenios internacionales: dilemas y propuestas para España", Documento de Trabajo 42/2009 23/07/2009, *Real Instituto El Cano* (2009), at 5, last

linked to deregulation of markets, lack of transparency, bank secrecy, capital investment in tax havens and other types of conduct outside the law. Among the most significant cases of corruption worldwide, it is worth mentioning the precedents in Equatorial Guinea[35], Philippines[36]; the Military Regime of the Chilean dictatorship[37], Venezuela[38]; or, finally, the case of Petrobas, the state-controlled oil giant in Brazil.[39]

Other economics abuses called to be included in the expression "economic crimes against humanity" have to do with the global integration of economies, including labour markets, appearing to offer many opportunities for working people and companies, and stimulated economic growth but not equal progress and benefits for all. According to data released by reports of the United Nations Office on Drugs and Crime (UNODC)[40] and the International Labour Organization (ILO)[41] millions of people fall victim to trafficking related to organized crime in this growing global market when they are looking for decent jobs. In many cases, vulnerable people are held in in debt bondage or slavery-like conditions, trapped in exploitative labour conditions that keep them in poverty and discrimination. Almost 21 million people are victims of forced labour or near slavery -11.4 million are women and girls, and 9.5 million men and boys-. Individuals or private companies exploit more than 19 million victims and the state or rebel groups closed to 11 million. 4.5 million victims suffer forced sexual exploitation.

Trafficking for sexual exploitation, particularly of women and children, is one of the most serious human rights violations that exist and this reality must to be confronted. This wide and growing phenomenon affects "the destiny of the most vulnerable people in the world and is an affront to human dignity and the challenge for each state, all people and every community.[42] According to the ILO, of the approximately 40 million people who are subject to modern forms of slavery, 4,800,000 people suffer forced sexual exploitation, of which ninety-nine percent are women.[43] Forced labour in the private economy generates illegal annual earnings of $150 billion per year while domestic work, agriculture, construction, manufacturing and entertainment are the most affected sectors.[44]

The Rana Plaza collapse case, the complaint against supplier companies in Argentina or Brazil of the spanish Inditex group for practices close to slavery[45], or the Associated Press of Journalists complaint about abusive practices close to slavery in the fishing industry in Southeast Asia[46], are some examples that highlight the perverse functioning of the system and the serious human rights violations

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access 12 August 2020.

35 Transparency International, *supra* n. 29.

36 N. K. Kale, *supra* n. 28.

37 *Ibid.*

38 N. Roth-Arriaza & S. Martinez, "Venezuela, Grand Corruption and The International Criminal Court", *UC Hasting Law, Legal Studies Research Paper Series,* Research Paper nº. 340, (May, 2019) [https://dx.doi.org/10.2139/ssrn.3381986]

39 Transparency International, *supra* n. 29.

40 United Nations Office on Drugs and Crime (UNODC), Global Report on Trafficking on Persons 2018, New York (2018), last access 12 August 2020;

41 ILO & Walk Free Foundation, Global Estimates of Modern Slavery: forced labour and forced marriage, Geneve 2017, last access 12 August 2020.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

45 F. Barón, Brasil implica a Zara en un caso de trabajo esclavo, *El País,* 19 August 2011.

46 The report "Seafood from Slaves" won the Pulitzer 2016, last accessed 24 November 2020.

committed as a result of the process of economic globalization.

This same process of neoliberal globalization has favoured some normative limbo, which has helped the growth of international or transnational criminal phenomena, such as drugs and drug trafficking, money laundering, terrorism and the trafficking of people fleeing from poverty and war. According to the United Nations, the smuggling of migrants brings enormous benefits to the perpetrators of these crimes and feed corruption and organized crime. In 2019, according to the OIM, there were 91,568 arrivals and 1,091 deaths in the Mediterranean. [47] Although there has been a considerable decline since 2015, when more than 1 million people fleeing war and poverty arrived on the borders of the European Union and 3,771 people died in the attempt [48], the problematic of the immigrants crisis reflects to only the urgency to address the illegal business behind it [49] but the enormous human rights crisis that leads to the concept of "necropolitics". It is understood as the public policy based on the idea that some lives do not matter. The object of this type of neoliberal policy is not kill those who do not serve but rather to let them die[50]. This concept is now starting to be used to define the policies of the European Union and its member states when they deny humanitarian treatment to displaced persons and refugees.[51]

In addition, environmental abuses and catastrophes[52] as a result of the development of policies of the irrational exploitation of natural resources have revealed the serious violation of human rights and collective rights of indigenous people. The case of massive pollution in the region of the northern Ecuadorian Amazon due to oil spills, a consequence of the extractive policies developed over decades by the American company Chevron - later Texaco -[53] ; the case of poisoning suffered by 500,000 people in 1983 in the region of Bhopal, India, after a leak that released gas into the atmosphere from a pesticide factory, 51% owned by the US company Union Carbide (part of whose assets were subsequently acquired by Dow Chemical) and 49% by the Indian government[54]; the case of the illegal transfer of hazardous waste to the Ivory Coast by the multinational oil company Trafigura which caused an

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[47] See the information here, last accessed 23 November de 2020.

[48] La OIM cuenta 3.771 muertes en el Mediterráneo en 2015, y más de un millón de llegadas de migrantes por mar, OIM, 01 May 2016, last access 12 August 2020; UNHCR reported on 23 December 2016 in Mediterranean See 100 people dead, bringing year total to 5,000, last accessed 23 November de 2020.

[49] UNODC, "Tráfico ilícito de migrantes, 2009, last accessed 23 November de 2020.

[50] C. Valverde, *De la necropolítica neoliberal a la empatía radical. Violencia discreta, cuerpos excluidos y repolitización*, (Icaria, 2015).

[51] This was argued at the meeting of the Permanent Peoples TRIBUNAL about the violations of the human rights of migrants and refugees with impunity. It took place in Barcelona on July 7 and 8, 2017. All the information on the meeting of the Permanent Peoples Tribunal at "Update Permanent Peoples Tribunal (PPT) Session on the Violations with Impunity of the Human Rights of Migrant and Refugee Peoples", 22 December 2018.

[52] Ecocide is the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been or will be severely diminished. See the Ecocide Project, A. Gauger, and Pouye Rabatel-Fernel, L. Mai and Kulbicki, Louise and D. Short and P. Higgins, *Ecocide is the missing 5th crime against peace.* Unspecified (Human Rights Consortium, London, School of advanced Studies, University of London, 2012, updated June 2013).

[53] The class action lawsuit against *Texaco-Chevron* brings together 30,000 people gathered around the Texaco Affected Assembly. See information in *Texaco /Chevron lawsuits (re Ecuador)* in the Business and Human Rights Resource Center, last access 12 August 2020.

[54] See information in *Union Carbide / Dow lawsuit (re Bhopal)* in the Business and Human Rights Resource Center, last access 12 August 2020.

uncontrolled spill that resulted in at least 16 deaths and affected more than 100,000 people[55], are some examples of attacks on the environment committed by companies seeking profit. These attacks have serious consequences on the foundations of the physical, social, economic and cultural life of individuals and peoples, on international peace and security[56], when the role of the national institutions is not always effective to the extent that there is an enormous gap between the capacity of national judicial systems to judge the crimes committed against the environment and the ability of the entities responsible for those crimes to avoid any type of control, sanction or compliance with reparation to the victims for the damages caused[57].

Therefore, there are millions of people who are victims of these serious economic abuses, which are not currently criminalized by international law because they do not fit with the traditional patterns of serious abuses attributable to the State under the exclusive exercise of political power

All the actions described in the preceding paragraphs are examples of different categories of conduct that could be considered serious economic abuse in the current system of neoliberal globalization, given that they are massive, systematic, escape the legal and jurisdictional control of States and affect fundamental values under the protection of the international community such as the human rights of individuals and peoples.

In this respect, it is possible to offer an approach to a definition of "economic crime against humanity" as the following[58]:

The categories of conduct describe above may constitute an "economic crimes against humanity" when they constitute a widespread or systematic economic attack on the population:

(a) Economic crimes such as political corruption, misappropriation, unfair administration, money laundering, financial speculation in broad sectors, including such sensitive sectors as food, medicine, housing and others, which cause serious harm to society and to the foundations of economies

(b) Economic and political crimes, such as acts carried out through economic, technical-financial and major political decisions that lead to the ruin of the economic system, with devastating consequences for citizens, including structural adjustment policies or austerity policies, when they act against the interests of society and prevent States from fulfilling their international human rights obligations

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55 See information in *Trafigura lawsuits (re Côte d'Ivoire)* en Business and Human Rights Resource Centre, last access 12 August 2020.

56 *Yearbook of the International Law Commission,* 1991, vol. II, Part 2. Report of the Commission to the General Assembly on the work of its forty-third session UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2) (hereinafter, *Yearbook International Law Commission,* 1991, vol. II, Part 2); ILC, *Draft code of crimes against the peace and security of mankind (Part II) including the draft statute for an international criminal court.* Document on crimes against the environment, prepared by Mr. Christian Tomuschat, member of the Commission Extract from the *Yearbook of the International Law Commission*: UN Doc. ILC (XLVIII)/DC/CRD.3, 27 March 1996 (hereinafter, Document on crimes against the environment, prepared by Mr. Christian Tomuschat 1996); *Yearbook of the International Law Commission,* 1996, vol. II, Second Part. Report of the Commission to the General Assembly on the work of its forty-eighth session. UN Doc. A/CN.4/SER.A/1996/Add.1, Part 2 (hereinafter, *Yearbook of the International Law Commission,* 1996, vol. II, Part 2).

57 A. Nieto Martín, "Bases para un futuro Derecho internacional penal del medio ambiente", *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2012), at 138.

58 L. Arenal Lora, *Crímenes Económicos en Derecho internacional: propuesta de una nueva categoría de crímenes contra la humanidad* (Aranzadi, 2019).

(c) Environmental crimes and serious and permanent damage to the natural environment and, consequently, to the health of human beings and their livelihoods, when they are the result of productive, industrial or extractive activities, the development of mega-projects, the hoarding of natural resources or other acts of a similar nature, some of them in connection with armed conflicts, dictatorial regimes or complex situations of political violence.

(d) Trafficking and smuggling of persons for the purpose of exploitation, including labour exploitation, and any other form of slave labour, in particular of women and children

(e) The crimes of murder, extermination, forcible transfer, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, enforced disappearance of persons, and other inhumane acts of a similar nature, when their commission, under different forms of authorship or participation, was part of the objectives, policies or procedures connected with the pursuit of activities of an economic nature by non-State actors

(f) Other inhumane economic acts of a similar nature which create dangerous or unworthy living conditions for the population and consequently cause great suffering or seriously threaten life, physical integrity or mental/physical health, personal and organizational freedom, work, access to adequate means of subsistence, including food and housing, education, a healthy environment and natural resources such as land and water.

For the purposes of paragraph 1, Economic attack means a course of conduct involving the commission of acts referred to in paragraph I to a large extent, on a large scale and with an impact on all human and peoples' rights, carried out with knowledge and awareness of the consequences, and in accordance with the policy of a State or non-State organization to commit such an attack or to promote such a policy.

In conclusion, the aetiology of the "economic crimes against humanity" has to be tackled because the urgency of recognizing the importance of the economic dimension in the construction of a form of power that intervenes deeply and intensely in the lives of people.[59] This economic dimension is creating new risks, threats and challenges for the international society and the international law subjected to regulating the traditional relations between States and the abuse of their political power towards their population[60]. However, the international law should evolve in order to respond the needs and interests of the international society in its own evolution.

(C) THE RELEVANCE OF THE CATEGORY OF CRIMES AGAINST HUMANITY AS A LEGAL FRAMEWORK FOR THE

[59] Some authors intend to explain the importance of the economic dimension in the configuration of a new form of power in the contemporary society of economic globalization using the concept of geo-economics, or geopolitics of modernity. They claim this terms has come to replace traditional geopolitics, which they blamed for the crimes committed during World War II, pointing out that it had come to an end, giving way to a new form of power typical of globalization that has caused a setback in sovereignty, hierarchy and political control of states over their territory in relation to other actors participating in the global market. See in J. L. Cadena Montenegro, "De la geopolítica a la geoeconomía ¿una forma virtual de colonización?, *Revista CIFE: Lecturas de economía social,* vol. 12, Nº. 16 (2010) pp. 79-94 [doi: 10.15332/S2248-4914.2010.0016.04].

[60] J. A. Carrillo Salcedo, Soberanía de Estados y Derechos Humanos en el Derecho internacional contemporáneo (Tecnos, Madrid, 1996), at 41.

REGULATION OF SERIOUS ECONOMIC CRIMES IN INTERNATIONAL LAW

Crimes against humanity constitute the category of crimes under international law that generates the greatest interest in order to establish a regulatory framework for serious economic abuses that are under consideration in "economic crimes against humanity".

The importance and significance of this category of international crimes is unquestionable, not only from a legal perspective, but also from ethical and political one, to face the great challenges that new threats to humanity pose for international law. The positive legal regulation of crimes against humanity is one of the most valuable expressions of protection of those fundamental human values that are the object of interest to the international community.

In this sense, the category of crimes against humanity is especially important because of the rank it occupies among the norms of international law. The prohibition of these crimes is a peremptory norm of general international law or international *ius cogens* [61] and its norms generate *erga omnes* obligations. Norms prohibiting crimes against humanity are also non-arguable nor are they subject to any statute of limitations[62], their *ultima ratio* being to put an end to the impunity of those responsible[63] and to ensure international justice for their victims[64].

From crimes against humanity, it is worth highlighting their evolution. If the origins of these international crimes were linked to International Humanitarian Law (IHL) and to armed conflicts, international or non-international[65], their development has affirmed the definitive disconnection from this element for the legal definition of the crimes[66] moving towards the *prima facie* protection of fundamental universal human values, such as humanity[67], international peace and human rights, both in war and peace time.

The notion of crimes against humanity has also been expanding its content and scope. The historical evolution of this category has sought to offer a legal response to acts of barbarism, due to their serious nature and consequences, not only for the effect on their direct victims, but also in the interests of all humanity; thus, charging the international community to prevent, prosecute and punish them.

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[61] In this vein, and despite a large discussion on this issue, the Preamble of the *Draft articles on the convention on prevention and punishment of crimes against humanity* states that "(...) the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*)", *supra* n. 10

[62] M. C. Bassiouni, *International Criminal Law. Sources, Subjects and Contents,* vol. I, (3rd. Martinus Nijhoff Publishers, 2008) at 173.

[63] M. C. Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court, *Cornell International Law Journal,* vol.32, Issue 3, Symposium (1999).

[64] *Ibid.*

[65] P. A. Fernández Sánchez (ed.) *The New Challenges of Humanitarian Law in Armed Conflicts. In Honour of Professor Juan Antonio Carrillo-Salcedo,* (Martinus-Nijhoff, 2005).

[66] With the exception of the ICTY Statute, although in this case the connection with an armed conflict was intended to establish the jurisdiction of the Tribunal over the acts it intended to judge.

[67] Humanity is understood by some authors as "a value, well linked to the concept of human dignity, or, in the opinion of others, as an intrinsic quality of the human being, its intimate essence, which characterizes all human beings as political animals " see A. GIL GIL, "Los crímenes contra la humanidad", in A. Gil Gil and E. Maculan (dirs.), *Derecho Penal Internacional,* (Dikynson, 2016) at 371, citing Luban and his exposition on "crimes against humanness and the political animal", in D. J. Luban, "A Theory of crimes against humanity", *Yale Journal of International Law* , vol. 29 (2004), at 109 et seq.

In this regard, the substantive or material scope of crimes against humanity has undergone an expansion: increasing the number of illicit acts underlying the category, because they have responded *ad hoc* to behaviour revealed to be inhumane and not classified as crimes against humanity hitherto. Some examples in this sense are found in the cases of sexual violence that occurred in the conflicts of the former Yugoslavia and Rwanda [68], the systematic and widespread practice of the forced disappearance of people during military dictatorships in Latin America in the 70s and 80s[69], and the crime of *apartheid*.[70] All crimes that have been definitively incorporated into the catalogue of illegal acts of Article 7 of the RS of the ICC.

Likewise, the definition of crimes against humanity includes a residual or final clause on "other inhuman acts", present since Nuremberg, which allows a certain margin of appreciation for illegal acts of an equally serious nature and consequences to those listed previously in the Article 7, but not strictly defined. The aim of this clause is not leaving gaps in the criminalization of egregious conduct which the vision of the legislator may not have been able to encompass.[71]

Besides, it is important to note the influence of International Human Rights Law in the evolution of the definition of crimes against humanity.[72] The principles of humanity for the protection of the

[68] I. Lirola Delgado et M. Martín Martinez, *Los crímenes de violencia sexual y conflictos armados* (Editorial Aranzadi, Pamplona, 2017).

[69] See M. L. Vermeluen, *Enforced Disappearance Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance* (School of Human Rights Research Series, vol. 51, Utrecht University Repository, 2012); A. A. Cançado Trindade, "Enforced Disappearances of Persons as a Violation of *Jus Cogens*: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights", *Nordic Journal of International Law* , vol. 81, Issue 1 (2012) 507-536 [doi: 10.1163/15718107-08104005]; J. Sarkin, "Why the Prohibition of Enforced Disappearance has attained "Jus Cogens" Status in International Law", *Nordic Journal of International Law*, vol. 81, Issue 4 (2012) 537–584 [doi: 10.1163/15718107-08104006]; K. Ambos (coord.), *Desaparición Forzada de Personas. Análisis comparado e internacional,* (Deutsche Gesellschaft für] Technische Zusammenarbeit (GTZ) GmbH, Editorial Temis S. A, 2009); J. L. Modolell González, "The crime of Forced Disappearance of Person according to the Decision of the Inter-American Court of Human Rights", *International Criminal Law Review*, vol. 10, Issue 4 (2010) 475–489 [doi: 10.1163/157181210X518965]; F. Andreu-Guzman, "The Draft International Convention on the Protection of All Persons from Forced Disappearance", *Review of International Commission of Jurists*, Issue on "Impunity, Crimes Against Humanity and Forced Disappearances", n.73-106, Geneva, September (2001).

[70] P. Eden, "The Role of the Rome Statute in the Criminalization of Apartheid", *Journal of International Criminal Justice,* vol. 12, Issue 2, 1 May (2014) 171–191 [doi:10.1093/jicj/mqu024]; C. Lingaas, "The Crime against Humanity of Apartheid in a Post-Apartheid World", *Oslo Law Review,* Issue 2 (2015) 86-115; R. C. Slye, "Apartheid as a Crime Against Humanity: A Submission to the South African Truth and Reconciliation Commission", *Michigan Journal of International Law*, vol. 20, Issue 2 (1999) 273-300.

[71] T. Jyrkkiö, *"*Other Inhumane Acts' as Crimes against Humanity*", Helsinki Law Review* 2011/1 (2011) 183-207, at 184 [doi: 10.2139/ssrn.1871883]

[72] Schabas has pointed out "Crimes against humanity may usefully be thought of as a cognate of gross and systematic violations of human rights. Many of the definitional developments in crimes against humanity since they were first codified in the Charter of the International Military Tribunal, such as the addition of apartheid, torture, and enforced disappearance, reflect developments in human rights law. (...)The International Law Commission (ILC), which is now preparing components of a treaty on international law, once even proposed abandoning the label 'crimes against humanity' in favour of 'systematic or mass violations of human rights'". See W. A. Schabas, "Prevention on Crimes Against Humanity", *Journal of International Criminal Justice* 16 (2018), 705-728 [doi:10.1093/jicj/mqy033]. See, C. Márquez Carrasco, *supra* n. 6, at 87.

civilian population in war time, contained in the Martens clause[73], has evolved by integrating intrinsic values into the concept of human dignity recognized by the most important international human rights treaties[74], becoming the object of supranational protection.[75] Thus, the definition of these values and their protection on the basis in the prohibition of crimes against humanity has evolved in the evolution of the contemporary society threatened not only by wars, but also by other violent forms of social interaction.

This category of crimes under international law is likewise transcendental because it generates individual criminal responsibility for its perpetrators. The rules regulating crimes against humanity have included some limitations on the principle of immunity for Heads of State or official positions, on the excuse of obedience to orders from superiors[76], as well as the rejection of immunities under the ICC.[77] In addition, the states have an obligation to extradite or prosecute - *aut dedere aut udicare* - which means the State must exercise its jurisdiction to prosecute crimes fairly and effectively[78] when it can't

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[73] E. Kwakwa, *The International Law of Armed Conflitt: Personal and Material Fields of Application*, (Kluver Academic, Dordrecht, 1991), at 36. Jean Pictet interprets the concept of humanity in the sense that "(...) humanity demands that the capture be preferred to the wound, the wound to death, which, as far as possible, does not attack non-combatants, to be injured less severely - so that the injured can be operated and then healed. And in the least painful way, and that captivity is as bearable as possible in J. Pictet, "Development and Principles of International Humanitarian Law", *Henry Dunant Institute*, Geneva (1987), at 74. On the idea of humanity as the basis of the limitations of *ius in bello* see the work of Professor E. W. Petit De Gabriele, *Las exigencias de humanidad en Derecho internacional tradicional. El marco normativo y doctrinal de la intervención de humanidad y de la asistencia humanitaria* (Tecnos, 2003).

[74] On the notion of human dignity as a protected legal good in crimes against humanity see R. A. Alija Fernández, *La persecución como crimen contra la humanidad,* (Publicacions i edicions de la Universitat de Barcelona, 2011), at 218-231. On the idea of the progress of the concept of human dignity linked to the normative development of human rights, see M. C. Bassiouni, "Human rights and international Criminal justice in the twenty first Century", M. Ishay, "Human Rights and International Criminal Justice: Looking Back to Reclaim the Future",), at 99-114, and L. Wilkerson, "The Past, Present and Future of International Criminal Justice and Human Rights", at 123-134, all of them in M. C. Bassiouni, (ed.), *Globalization and its impact on the future of human rights and international criminal justice*, (Intersentia Ltd, 2015);

[75] M. Ollé Sesé, *Justicia internacional para crímenes internacionales* (La Ley, 1ª ed. 2008), at 247-257.

[76] C. Rueda Fernández, *Delitos de Derecho Internacional. Tipificación y represión internacional* (Bosch, 2001), at 92.

[77] M. E. Reyes Milk, "El principio de inmunidad de los Jefes de Estado en actividad y su regulación en el Estatuto de Roma que crea la Corte Penal Internacional", *Agenda Internacional Año XV*, N° 26 (2008), at 69-106.

[78] A. Remiro Brotóns, *"La persecución de los crímenes internacionales por los tribunales estatales: el principio de universalidad",* in *Derecho Internacional (*Tirant lo Blanch, Valencia, 2007), at 494 y 495. See M. C. Bassiouni, *Crimes against Humanity. Historical evolution and contemporary application,* (Cambridge University Press, First paperback edition, 2011), at 271; M. C. Bassiouni and E. M. Wise, *Aut dedere aut iudicare, The duty to Extradite or Prosecute in International Law* (Nijhoff, Dordrecht, 1995); M. Ollé Sesé, *Justicia internacional para crímenes internacionales, supra* n. 66; On the relationship between the principle "*aut dedere aut iudicar*" and the principle of universal jurisdiction see M. Martín Martínez, "Jurisdicción Universal y Crímenes Internacionales", *University of Miami Law School Institutional Repository,* vol. 9 (2001), at 184 et seq; A. Gil Gil, "Jurisdicción de los Tribunales españoles sobre genocidio, crímenes contra la humanidad y crímenes de guerra" *Revista española de derecho militar*, n. 87 (2006), at 55-88; A. Gil Gil, "La sentencia de la Audiencia Nacional en el caso Scilingo", *Revista electrónica de ciencia penal y criminología*, nº. 7, 2005; See also P. A. Fernández Sánchez, "La resistencia de los Estados a reprimir as violaciones graves de los derechos humanos" en P. A. Fernández Sánchez (coord), *La Desprotección internacional de los derechos humanos (a la luz del 50 aniversario de la Declaración Universal de los Derechos Humanos)* (Universidad de Huelva, Publicaciones 1988), at 42.

grant an extradition order. In accordance with the ILC Draft article on the prevention and punishment con the crimes against humanity the States undertake to prevent the crime, so they would accept a specific obligation in conformity with international law.[79]

Related to the prosecution of crimes against humanity, the States can prosecuted the responsible even invoking the principle of universal jurisdiction. This principle, based on the theory of the international nature of the offense, gives the state the power to exercise jurisdiction over a crime, regardless of nationality, territory, or any other link between the state and the criminal offence[80], by virtue of each state's interest in combating crimes that all nations have condemned.[81]

At the same time, the ICC has a complementary jurisdiction over national ones to prosecute crimes against humanity[82], except when the Prosecutor's Office acts *ex officio* or the Security Council has requested it.[83] The complementary jurisdiction of the ICC affirms that the effectiveness of international criminal law does not have to fall on the Court, but on the firm action of the States through national regulations and their institutional capacity to prevent, investigate, extradite and/or prosecute these crimes. States must comply with obligations *erga omnes* because they derive from fundamental norms of international *jus cogens*[84]. When the States don't exercise or are not able to exercise their jurisdiction to prosecute these crimes, the ICC may act in order to avoid the responsible go unpunished.

Because of all these legal arguments, the category of crimes against humanity would constitute an appropriate teleological and legal framework to integrate or regulate serious economic abuses in international criminal law. In this vein, Professor Bassiouni points out regarding the definition of

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[79] See *Draf articles, supra* n. 10, art. 4. See, W. A. Schabas, *supra n.* 70.

[80] M. C. Bassiouni, "Introduction to International Humanitarian Law", in Bassiouni, *supra* n. 53, at 280.

[81] A. Sánchez Legido, *Jurisdicción universal penal y Derecho internacional* (Tirant lo Blanch, 2003). On the matter of the principle of complementarity between international criminal court and national courts see J. T. Holmes, "Complementarity: National Courts versus the ICC", in A. Cassese, P. Gaeta , J. R.W. D. Jones, *The Rome Statute of the International Criminal Cour*t (Oxford University Press, 2012); M. Ollé Sesé, "La aplicación de Derecho penal internacional por los tribunales nacionales" in A. Gil Gil & E. Maculan , *Derecho Penal Internacional*, supra n. 58, at 129-156; M. Benzing, "The complementarity regimen of the international criminal court: international criminal justice between states soverignity and the fight against impunity", *Max Planch Yearbook of United Nations Law* 7 (2003) 591-632 [doi:10.1163/138946303775160250].

[82] According to Sean Murphy, Special Rapporteur for Crimes against Humanity, International Law Commission, the central idea in the ILC *Draft articles on prevention and punishment of crimes against humanity* is "to build up national laws and national jurisdiction with respect to crimes against humanity and to place states parties in a cooperative relationship on matters such as extradition and mutual legal assistance. While the creation of international criminal courts and tribunals provides one path for punishing such crimes, a different path focuses on harnessing national institutions towards that end, so as to develop a worldwide net that provides no refuge for offenders." See in S. D. Murphy, "Foreword", *Journal of International Criminal Justice* 16 (2018), at. 679-682 [doi:10.1093/jicj/mqy044]

[83] J. Alcaide Fernández, "El Principio de Complementariedad entre la Corte Penal Internacional y las Jurisdicciones Nacionales: ¿Tiempos de "Ingeniería Jurisdiccional"?" in J. A. Carrillo Salcedo, *La Criminalización de la Barbarie: la Corte Penal Internacional* (Consejo General del Poder Judicial, 2000), at. 383-433; I. Lirola Delgado & Martín Martínez, *M., La Corte Penal Internacional. Justicia versus impunidad*, (Ariel Derecho, 2001), at. 156 seq.

[84] M. C. Bassiouni, "Crimes against Humanity: The Case *for a Specialized Convention", Washington University Global Studies Law Review*, vol. 9, Issue 4, 2010, 575-593, at 592-593. See to Whitney R. Harris World Law Institute, "Iniciativa sobre Crímenes de Lesa Humanidad", *Washington University School of Law*, august (2010).

crimes against humanity "(this) has not yet settled into its final form. Its nature, scope, application, and legal elements are still somewhat unsettled"[85] and this approach represents an opportunity for the identification and repression of serious economic abuses that occur on a large scale and systematically in contemporary society, constituting new forms of victimization of the population.

(D) THE INCLUSION OF SERIOUS ECONOMIC ABUSES IN THE LEGAL-POSITIVE REGULATION OF CRIMES AGAINST HUMANITY IN THE ARTICLE 7 OF THE ROME STATUTE

The possible integration of some acts that constitute economic crimes, including ecological ones, in the material scope of crimes against humanity is not a novelty. This task was part of some of the proposals studied by the ILC in the context of its work on the elaboration of the Draft code of crimes against peace and security of mankind.[86]

The former Special Rapporteur for this Draft Code, Mr. Doudou Thiam, proposed in the 80s some illegal activities, such as international terrorism and colonial domination, serious damage to the environment, and mercenary or economic aggression to be included in crimes against the peace and security of humankind[87], and in particular into the scope of crimes against humanity.[88] However, these proposals did not prosper. The ILC pointed out the Draft Code would not cover acts related to piracy, illicit drug trafficking, trafficking of women and children, slavery, among others, because the crimes considered to be part of the Code had been considered an indivisible concept, limited to those containing a political element and endangering and disrupting the maintenance of international peace and security.[89]

Nevertheless, the need to recognize the serious nature and consequences of these economic abuses so-called "economic crimes against humanity" because of the significant human, social, environmental and economic damage they create for the fundamental living conditions of the population has led some judicial initiatives in international judicial instances.

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[85] M. C. Bassiouni, "Revisiting the architecture of crimes against humanity: almost a century in the making, with gaps and ambiguities remaining – the need for a specialized convention" in L. Sadat, L., (ed.), *Forging a convention for crimes against humanity* (Cambridge University Press, 2011), at 43-58.

[86] *Yearbook of the International Law Commission,* 1991, vol. II, Part 2.

[87] *Report of the International Law Commission on the work of its Thirty-fifth session*, 3 May - 22 July (1983), UN doc. A/38/10*, paras. 46-49; *Report of the International Law Commission on the work of its Thirty-sixth session*, 7 May - 27 de July (1984), paras. 52-65; *Report of the International Law Commission on the work of its Thirty-seventh*, 6 May - 26 July (1985), UN doc. A/40/10*; *Yearbook of the International Law Commission, 1991*, vol. II, Part 2. Among the crimes proposed to be incorporated as crimes against the peace and security of humanity are colonial domination and other forms of foreign domination (Article 18); systematic or massive human rights violations (Article 21); recruitment, use, financing and training of mercenaries (Article 23); Intentional and serious damage to the environment (Article 26), at 103-105.

[88] *Report of the International Law Commission on the work of its Thirty-eighth session,* 5 May – 11 July (1986), UN doc. A/41/10*, paras. 93-102; *Report of the International Law Commission on the work of its Thirty-eighth session Forty-first session*, 2 May – 21 July (1989), UN doc. A/44/10*, paras. 142-210; *Report of the International Law Commission on the work of its Thirty-eighth session Forty-second session*, 1ç May - 20 July (1990); *Eighth report on the draft Code of Crimes Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur*, 8 March – 6 April (1990), UN doc. A/CN.4/430 y Add.1.

[89] M. C. Bassiouni, *Crimes against Humanity..., supra n. 69, at* 178, footnote 46.

This has been the case of the report on the situation in Ecuador presented to the Prosecutor of the ICC in 2014 by the representatives of the victims of a massive pollution, which today affects more than 2 million hectares of the Ecuadorian Amazon. The legal representatives of the *Texaco-Chevron company* were accused of crimes against humanity of homicide, extermination, forced displacement and other inhuman acts.[90] The Office of the Prosecutor did not investigate the communication because it considered that the facts were not intrinsic to the crimes subject to the material jurisdiction of the ICC. However, the purpose of the legal representatives, and of the more than 30,000 direct victims, was to attract social attention to the legal vacuum existing in international law to address these types of serious human rights violations that clash against the conscience of the humanity.

Some national judicial forums have advanced a more progressive approach related to the recognition of the importance of the connection between the development of private economic activities and the commission of crimes against humanity regulated in the RS, even equating certain economic crimes with this category of crimes under international law. In this vein, the Office of the Attorney General of Colombia announced the crime of "conspiracy to commit aggravated crime" a crime against humanity in 2017. The Prosecutor's Office has argued that the illegal financing of paramilitary groups by banana companies, with the purpose of achieving control of territorial and social area, as well as facilitating acts of homicide, forced displacement of civil population, forced disappearance of people, gender-based violence, illegal recruitment, torture, among other inhuman acts constitute crimes against humanity.[91] In the opinion of this judicial organ, it is possible to maintain that penalizing the crime against humanity may be imposed on those businesses who voluntarily contributed to and financed armed groups outside the law –FARC, EPL, ELN and la Corriente de Renovación Socialista (CRS) in the area of the Urabá.[92]

At the same time, some courts of member states of the European Union have admitted claims based on the existence of a connection between economic activities and crimes against humanity. These include the case before The Hague courts against *Franz van Anraat,* convicted of complicity in international crimes for supplying the Iraqi government with chemicals necessary for the production of mustard gas used in the massacres committed against the Kurdish minority in Iraq[93]. See also the case against *Gus Kouwenhoven,* convicted in 2017 for illicit arms trafficking and for complicity in crimes against humanity during the war in Liberia.[94] Lastly, the case against the cement company

[90] ICC, Communication on the situation in Ecuador presented to the Office of The Prosecutor of the International Criminal Court, March 2015.

[91] Communication of the Office of the General Attorney of the Nation, Bogotá, 2 February 2017, in which it was stated that in the providence issued by the Office of the Prosecutor, it is decided that the conduct that some banana entrepreneurs could incur it can be raised to the crime against humanity. The position of the in this particular case is adjusted not only to international analyses and concepts, but to the discretion by the Supreme Court of Justice, which has considered the non-applicability of statute of limitation in the concert to commit crimes when it turns out to be connected to crimes against Humanity, last access 10 August 2020.

[92] *Ibid.*

[93] *Public Prosecutor v. Frans Cornelis Adrianus van Anraat* (Case Nº. 09/751003-04), District Court of The Hague, The Netherlands, Sentence, 23 December 2005, last access 10 August 2020.

[94] *Public Prosecutor v. Guus Kouwenhoven* (Case Nº. 2200433306), Court of Appeal of The Hague, The Netherlands, Judgment, 10 March 2008, last access 10 August 2020.

Lafarge, which was denounced for complicity in crimes against humanity in Syria before the French courts, in 2018.[95]

Regardless of these incipient demonstrations of legal connectivity between economic activities and international crimes, the task of addressing the possible integration of economic abuses into the positive regulation of crimes against humanity in Article 7 of the RS implies a great legal challenge. So, the conducts that are economic abuses should be carried out in a context of gravity similar to crimes against humanity, meaning "as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack [...] pursuant to or in furtherance of a state or organizational policy to commit such attack".

(1) An expansive approach to the notion of "attack against the civilian population" for economic crimes against humanity"

The history of the evolution of the legal definition of crimes against humanity, influenced by the development of jurisprudence and the contributions of doctrine, has well established that the "generalized and systematic attack against the civilian population" constitutes the context for the legal classification of certain illegal acts as crimes against humanity.

The notion of "attack" according to Article 7 (II) (a) of the RS consists of a "the multiple commission of acts referred to in paragraph I against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".

In the RS, according to Alija Fernández's opinion, the notion of attack is defined restrictively and ambiguously. On one hand, the relevant acts of violence would be limited to those listed in Article 7 as crimes against humanity. On the other hand, it seems to require the multiple commission of these acts to be in the presence of an attack.[96] Therefore, the notion of attack generally accepted indicates that its content and description is the very realization of the illegal acts of Article 7, with a total equivalence between the attack and the criminal acts that shape the contours of the general aggression.

However, the legal definition of crimes against humanity, according to customary international law, is today disconnected from armed conflicts[97] -the attack doesn't need to be a military attack[98] —or acts of a strictly violent nature[99]. This allows us to move towards a broader definition of the notion of attack against the civilian population based on behaviour or illegal acts other than those listed in Article 7 of the RS.

In this vein, the actions integrating the so-called "economic crimes against humanity", such as political corruption, serious, extensive and long-term or permanent damage to the environment,

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95 Information on *Lafarge lawsuit* (re complicity in crimes against humanity in Syria), last access 10 August 2020.

96 A. R. Alija Fernández, *supra* n. 65, at 254.

97 A. Cassese, *International Criminal Law,* Oxford University Press, Second Edition, 2008, at 99.

98 M. C. Bassiouni, *Crimes Against Humanity...*, *supra* n. 69, at. 365.

99 Imposing an *apartheid* system or exerting pressure on the population to act in a certain way may enter the scope of an attack. See ICTR-96-3, *The Prosecutor v. Rutaganda*, *Judgment and Sentence*, 6 December 1999, para. 70: "An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article I of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner may also come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner".

human trafficking, economic-political decisions, such as adjustment or austerity policies, among others, can be considered a form of "economic attack" on the civilian population, when they are systematic or generalized, the result of the policy of a state or non-state organization, and when they are carried out with knowledge of the attack, creating a situation of sufficient gravity to be considered by international criminal law.

The fact of separating the idea of the of attack from the multiple commission of illegal acts established in Article 7(I) of the RS, would contribute to breaking the supposed circularity of its definition. In fact, the proposal of separate the underlying acts of crimes against humanity from the idea of the attack is a possibility that the international jurisprudence has already recognized. The British Court of the occupied zone, after World War II, in application of the Law of the Control Council No. Io in the *Strafsache* 78/48 case, considered a form of attack "the despotic domain of violence of the Nazis", in addition to the destruction of a cultural asset -the synagogue - that constituted conduct sufficiently connected with the attack on charges of a crime against humanity.[100] The ICC has recently made some consideration in this regard, since in the *Katanga* case it has declared the need to consider the attack, the rating of the attack and the underlying acts in separate steps.[101] Likewise, the Program of the European Union for Social Cohesion in Latin America, has referred to corruption as a way to "attack" the civilian population in the following terms:

> "Corruption also threatens society, affecting the moral order and trust; it directly harms a significant number of people receiving public services or benefits, affecting the most vulnerable sectors of society deprived of essential conditions such as health, education, housing, work, employment security and justice. This promotes the increase in poverty and exclusion due to diversion of resources and hinders the implementation of public policies that ensure social and cultural economic rights".[102]

A more contemporary interpretation of the definition of the term "attack against the population", from the perspective of the study of economic crimes, also suggests a critical approach to the meaning of the term "against." According to the jurisprudence of the international criminal courts, in particular the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICC, the word "against" indicates that a civilian population is the *main target* of the attack, rather than an incidental victim[103], also pointing out that the term refers to the intention and not to the physical outcome of the acts.[104] When we are talking about "economic crimes against humanity" as attacks of an economic nature —including environmental ones— the victims of these actions are not casual or circumstantial to them because the harm on the civil population is the result of the natural position that they occupy in the

[100] See in E. Schmidt, *Taking economic, social and cultural rights seriously in international criminal law* (Cambridge University Press, 2015), at. 93, footnote 90.

[101] ICC-01/04-01/07, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga, Judgment pursuant to Article 74 of the Statute,* 7 March 2014, paras. 1096-1099.

[102] *Ibid.*

[103] IT-96-23-T& IT-96-23/I-T, *The Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic, Judgemen*t, 22 February 2001(hereinafter, *Kunarac case* 2001).

[104] ICC-01/05-01/08, *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, 15 June 2009 (hereinafter, *Bemba case* 2009) paras. 76 and 94; 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, para. 82; ICC -01/04-02/06, *Situation in the Democratic Republic of the Congo in the case of the Prosecutorv. Bosco Ntaganda*, *Decision on the Prosecutor's Application under Article 58, 13 July 2012*, paras. 20 and 21.

context in which economic abuses are committed. This means that in some cases the victims are the main objectives of these economic abuses –i.e. the crime of human trafficking which has as its purpose victimizing people to obtain a benefit- and in other cases when victims are indirect targets as a result of the externalities of policies behind these abuses of economic nature – i.e. the crime of corruption and the deaths that occur accordingly among vulnerable populations as a result of the illicit diversion of public funds.

Therefore, it is suggested to employ the expression "attack on the civilian population" because it would mean the victims were an inherent consequence to the development of the economic crimes causing damage or destruction, not only or strictly a direct target.

The use of the expression "attack on the civilian population" allows us to address the question of the intention and knowledge of the attack from a risk-oriented approach. In this sense, the Draft Code of crimes against peace and security of humanity of 1991 proposing the incorporation of "intentional and serious damage to the environment" seems to illuminate this approach to the mental element.

This Draft Code would sanction "those who intentionally cause or instigate the cause of serious, long-term and widespread damage to the environment".[105] Although the essential element of the definition of crime was provided by the adverb intentionally, which referred to the express or specific purpose of causing the damage, some members of the ILC judged the following: if the deliberate violation of certain regulations related to the protection of the environment was carried out for other reasons —i.e. for profit— and caused extensive, long-term and serious damage then this would constitute a crime against humanity regardless of whether the purpose had been or not been to cause damage. This particular opinion of some members of the ILC was intended to reconcile the apparent contradiction between Article 26 and Article 22 on the war crimes of the Draft Code, which also dealt with the protection of the environment. According to Article 22, a war crime was not only the use of methods or means of war that would have been conceived to cause damage, but also that of those who were expected to cause damage, even when the purpose of using those methods or means would not have been explicitly to cause damage to the environment.[106]

Translating this idea to the field of human, social, economic and environmental damage caused by the commission of serious economic abuses, it could be affirmed that, although carrying out practices and using methods or means that have not yet been conceived to cause specific damage to a civil population, they can be foreseen. Thus, the intention does not exclude the possible classification of those acts as crimes against humanity.

The notion of attack, in line with this interpretation, could be detached definitively from its etymological origin, which emanates from the Italian word *attaccare* and which can be translated as "start a fight" and linked to a violent or impetuous act carried out with the express purpose of harming, destroying or defeating someone or something. Therefore, we could move towards a new dimension of the concept of attack that would encompass abuses of an economic nature undertaken principally to obtain a profit, benefit or maintain a position or balance of political-economic power, however, not with the express purpose of doing harm. Although these forms of economic abuses are indirect, even

[105] *Draft Code of crimes against peace and security of mankind*, Art. 26, in *Yearbook of the International Law Commission,* 1991, vol. II, Part 2.

[106] *Ibid*, comment 6, at 116.

structural, they may have a violent effect on a civil population which can be harmed, damaged or destroyed.

According to the above, even though the definition of attack connected with armed conflicts, or with acts of direct violence, finds a very solid basis in international law, a strict interpretation of this term based exclusively on the commission of acts listed in the RS, does not fully correspond to a broader protective function underlying the prohibition of crimes against humanity[107]. The actions, forms and means used to attack the population can today be expressed in a diverse manner and do not necessarily require the use of armed force or physical violence to end life or hurt someone directly or indirectly[108]. Instead, it can be carried out through serious economic abuses that are not part of the current catalogue of conduct that constitute crimes against humanity.

A reformulation of the definition of the expression "attack against the civilian population" for the legal definition of crimes against humanity in Article 7 of the RS would allow the creation of a way to prosecute serious abuses committed on populations based on behaviour of an economic nature before the ICC. The acceptance of a new dimension of the concept of attack would allow admitting international crimes of murder, forced displacement, extermination, slavery, rape and submission to other inhuman acts when they are committed in contexts of violence other than war, such as circumstances of instability or political violence. These crimes could be qualified as international crimes under the jurisdiction of the ICC when they are a consequence of generalized or systematic practices including but not limited to corruption, economic-political crimes, illicit and serious human damage to the environment; thus becoming an economic attack on civilian populations.

Definitely, the recognition in international law of a new dimension of the concept of attack under the chapeau-clause of crimes against humanity, such as "economic attack", is central to establishing a solid connection between crimes against humanity and the so-called "economic crimes against humanity."

(2) A re-conceptualization of the policy element the organizations behind politics in the Rome Statute

Regardless of whether the policy element in crimes against humanity is a procedural or jurisdictional element or if it meets both criteria, or is an additional matter to the above[109], what seems to be affirmed is that the existence of the element of policy confers substance on the connection among the illegal acts. Furthermore, the policy element contributes to the understanding of the concept of attack and confirms that behind it there is some form of organizational authority, with capacity to commit crimes against humanity, moving away from the idea that these are actions attributable to individual and spontaneous behaviour, which would be otherwise outside the jurisdiction of the ICC.[110]

When we think on "economic crimes against humanity", and on how to interpret the policy element from the definition contained in the RS, two questions arise. First, if the RS points out in Article 7(11)(a)

[107] E. Schmidt, *supra* n. 89, at 77 *and* 78.

[108] *Ibid,* at 77. The author notes that violence can be understood more broadly, going beyond the direct violence inflicted through weapons, machetes or physical force.

[109] C. Márquez Carrasco, *"Los elementos comunes de los crímenes de lesa humanidad", Revista General de Derecho Penal* 9, (2008), at 32.

[110] *Ibid,* at 50.

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that the attack must be "(...) in accordance with the policy of a state or an *organization* to commit that attack or to promote that policy"[111]: does it mean the policy element must be exclusively from the state and the organizations within its structure, but also from other non-state organizations? Second question arises if the answer to the first question is affirmative: what should be the characteristics of the policy element attributable to those non-state actors?

Before analysing the question of the policy for "economic crimes against humanity", we will proceed to a preliminary examination of the actors behind this policy. Which actors responsible to serious economic abuses could be integrated into the definition of the term *organization* of Article 7 (II)(a) of the RS.

Some of the entities responsible for the commission of the so-called "economic crimes against humanity" are clearly state-like and they can be identified without too many obstacles. When they act it is possible to isolate a state policy behind the crimes –i.e., the highest authorities of the state might hold a policy of illicit use of public resources for their own benefit, through an institutionalized system of corruption, resulting in death among the population by starvation by not financing food programs-.

However, other actors responsible of serious economic abuses are non-state in nature. We are talking particularly about private actors whose principal aim is to make profits because of their economic activities. It would be worthwhile to interpret a new concept of the policy element for these actors in parallel to the concept of the state policy –i.e., a multinational company due to following of an austerity policy in investment causes serious, extensive and long-tern damage to the environment, thereby seriously undermining the integrity and physical health of the population; also, an international criminal group that carries out a systematic practice related to human trafficking for labour exploitation-.

Next, we will proceed to analyse the possible inclusion of non-state actors acting by economic motivation within the concept of Article 7(II) of the RS, based on some decisions adopted by the IIC that may shed some light on this issue.

The *Decision authorizing an investigation into the situation in Kenya 2010* [112] has particularly addressed this question of how the term "organization" should be interpreted in the definition of crimes against humanity after the post-electoral violence carried out by the criminal acts of some eminent political representatives of the "Orange" Democratic Movement, media representatives, former members of the Kenyan police and army, kalenyin elders, local leaders, and criminal organization Mungiki.[113] In this decision, most of the judges of the Chamber expressly rejected the idea that "only organizations similar to the states" could be considered as organizations for the purposes of

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[111] *Italics ours*.

[112] 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, para. 90.

[113] This decision was followed in ICC-01/09-01/11, *Situation on the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, 8 march 2011 (hereinafter, *Ruto case* 2011); too ICC-01/09-01/11, *Situation on the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute*, 23 January 2012. The case against *Ruto* and *Sang* ended in 2016 through the acquittal of those caused. The document is not yet available on the page of the International Criminal Court. It can be seen, however, in "case information sheet", electronically available.

Article 7(II)(a).[114] This thesis has been subsequently confirmed in the *Kenyatta, Muthaura and Hussein Ali Appeal Request Decision of 2011*[115] and in the *Decision confirming charges* against *Kenyatta, Muthaura and Hussein Ali of 2012*[116]. This is of great relevance in light of this study.

(a) *The concept of "organization" in the Rome Statute and its applicability to non-state actors in "economic crimes against humanity"*

The possibility that other actors other than the State to commit crimes against humanity does not mean minimizing its role in international law neither degrade the category of this category of international crimes.

The Article 7 of RS of the ICC, in the extend that defines crimes against humanity as those committed "pursuant to or in furtherance of a State or organizational policy to commit such attack"[117] would lead to reflect on the question of whether the integration of the term "organization" in the Statute would allow extending its material scope to organizations that are not exclusively criminal organizations into the State apparatus or state-like organizations.[118]

In order to initiate this task regarding the study of the inclusion of the expression "organization" in the RS, it has been considered appropriate to make a brief reference to the expression "criminal organization" used in the Nuremberg trials to deal with the massive, organized, voluntary and intentional criminality the Nazi government.[119]

In Nuremberg, this form of mass criminality was understood as a new phenomenon. A large number of perpetrators had participated and produced a huge number of victims and this circumstance required new procedures to ensure that war criminals did not escape from punishment by reason of the enormous material and procedural difficulties that would arise to prove their individual responsibility.[120]

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[114] S. D. Murphy, First Report of the Special Rapporteur on Crimes Against Humanity (February 17, 2015). United Nations International Law Commission, A/CN.4/680; GWU Legal Studies Research Paper No. 2015-12; GWU Law School Public Law Research Paper No. 2015-12, at 79-80.

[115] ICC-01/09-02/11, *Situation in the Republic of Kenya*, *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 8 March 2011.

[116] ICC-01/09-02/11, *Situation in the Republic of Kenya, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute,* 23 January 2012 The ICC has closed the case against Kenyatta due to lack of evidence. See ICC-01 / 09-02 / 11-1005, *Decision on the withdrawal of charges against Mr Kenyatta*, 13 March 2015.

[117] RS, Article 7(II)(a) expressly states that: "Attack against a civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;(...)"

[118] In this sense the opinions of Schabas and Bassiouni in M.C. Bassiouni, *Crimes Against Humanity...*, *supra* n. 69; W. Schabas, *The International Criminal Court*, (Oxford; OUP, 2010)

[119] R. Arens, "Nuremberg and Group Prosecution", *Washington University Law Review*, vol. 1951, issue 3 (1951), 329-357; D. Fraser, "(De) Constructing the Nazi state: Criminal Organizations and the Constitutional Theory and of the International Military Tribunal," *39 Loyola of Los Angeles International and Comparative Law Review* (2017) 117-186, at 131; N. Jørgensen, "A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organizations in the Context of Justice in Rwanda," *Criminal Law Forum*, vol. 12, Issue 3, 371-406 (2001) [doi:10.1023/A:1014980232159].

[120] N. Jørgensen, *supra* n. 106, at 393.

The United Nations Commission on War Crimes, in order to avoid this circumstance, proposed through the Subcommittee possible solutions, among them, that the subjects involved in those crimes of aberrant nature could be held individually responsible on the basis of their voluntary membership in an organization declared criminal.[121]

The Nuremberg Statute, on the basis of these recommendations, in its Articles from 9 to 11, instituted of power to the Military Criminal Court to declare that a group was a criminal organization. This meant that in subsequent proceedings the criminal nature of the group could not be questioned, and an individual could suffer punishment for the crime of belonging to that organization, in addition to other possible punishments for their participation in the criminal activities of said organizations.[122]

Although the Statute of the Nuremberg Tribunal made no reference to the definition of the term criminal organization, six groups of organizations were charged by prosecutors from the United states, France, Britain and the Soviet Union: the Cabinet of the Nazi Government (Reichkabinett), the Senior Management of the Nazi Party (Leadership Corp of the Nazi Party, the SS, the Gestapo, the SA and the General Staff and Senior Officers of the German Armed Forces (General Staff and IIigh Command of the German Armed Forces).[123]

According to the characteristics presented by these accused organizations, Justin Jackson, who was Chief Prosecutor during the main trial within the Nuremberg Proceedings, declared that the collective criminality of those organizations rested on five essential features:

i) The group or organization be "a group of associated persons in an identifiable relationship with a collective or general purpose" or with "common action plan";

ii) The membership in the group "must be generally voluntary";

iii) "The purpose of the organization must be criminal", in the sense of the crimes contained in the Nuremberg Statute referring to crimes against peace, war crimes and crimes against humanity;

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[121] This was the proposal presented by France in 1945, in accordance with the provisions of Articles 256-267 of the French Criminal Code, in the Subcommittee created by the United Nations Commission on War Crimes. See in N. Jørgensen, *supra* n.106, at 388.

[122] The Nuremberg Statute referred to these issues in Articles 9, 10 and 11 in the following terms:

Article 9: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have the power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard."

Article 10: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any case the criminal nature of the group or organization is considered proved and shall not be questioned. "

Article 11: "Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization."

[123] D. Fraser, supra n. 108, at 131. Also, in Jørgensen, *supra* n. 106, at 389 and 390.

iv) "The criminal objectives or methods of the organization must be of such character that their members can in general be correctly accused of their knowledge";

v) "Some individuals accused must have been a member of the organization and must be convicted of any act, on the basis that those organizations have been declared criminals".[124]

The Military Criminal Court provided a definition of criminal group or organization as follows[125]:

> "A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the state for membership, unless they were personally implied in the commission of acts declared criminal by Article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations".

Nuremberg's lesson was that in order to effectively address the issue of the responsibility of a multitude of perpetrators, who had participated in countless aberrant crimes, and who had left an alarming number of victims, it was necessary to establish new procedures to avoid impunity , being that for this the concept of criminal organization, and the scheme of individual criminal responsibility on the basis of belonging to a qualified criminal organization, was designed as a method to deal with this type of mass criminality.[126]

The United Nations General Assembly, through resolution 95 (I), 11 December 1946[127], affirmed the principles of international law recognized in the Statute and in the judgments of the Nuremberg Tribunal. The ILC adopted a formulation of those principles in the year 1950[128] giving the concept of criminal organization a place in international law. However, it has not been invoked or subsequently developed[129] despite the fact that extraordinary events of violence developed in a framework of macro-criminality have occurred later.[130]

The Plenipotentiary Conference, held in Rome for the creation of the ICC, neither allow to prosper the idea of including legally defined (criminal) organizations within the framework of the RS in line with the precedent of the organizations contemplated at Nuremberg, once the proposal submitted by France of Article 23 on criminal liability of legal persons was rejected.[131]

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[124] UNWCC, History of the United Nations War Crimes Commission and the Development of the laws of the war, (1948), at 305.

[125] IMT, *Trial of the major war criminals before the IMT*, Nuremberg, 14 November 1945 - 1 October 1946 (Published At Nuremberg, Germany1947) Volume I, Official Text in the English Language Official Documents, at. 256.

[126] See R. Arens *supra* n.108, at 329-357; F. Fraser, *supra* n. 108; N. Jørgensen, *supra* n. 106.

[127] GA, Res. 95 (I), 11 December 1946, "Confirmation of the Principles of International Law recognized in Nuremberg".

[128] *Yearbook of the International Law Commission,* 1950, vol. II. Documents of the second session including the report of the Commission to the General Assembly. UN doc. A/CN. 4/SER.A/1950/Add. I, 6 June 1957. Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with commentaries, at 374 and seq.

[129] Jørgensen, *supra* n. 106, at. 397.

[130] See the conflict in Rwanda and the criminal acts carried out by the *Interahamwe*.

[131] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June -17 July 1998. Official Records Volume II Summary records of the plenary

Although the negotiations for the adoption of the RS could be considered a failure for not having included the idea of legal persons -organizations or groups- as responsible for crimes against humanity, the instrument incorporated the term "organization" in the Article 7(II) when referring to the fact that the crimes will be "pursuant to or in furtherance of a State or organizational policy to commit such attack". However, the concept of organization was defined neither by the RS nor the document of the Elements of Crimes leaving unclear what kind of entity could be integrated into this expression. For this reason, the ICC is expected to play an important role in this matter, its jurisprudence specifying the content of this expression.

In this respect, it must be said that it has been some relatively recent decisions of the ICC that have shed some light on the scope of the term organization, showing a position of some flexibility or openness to the possible extension of its definition of different types of organizations, including private groups such as companies or international criminal groups as typical actors of "economic crimes against humanity".

The Pre-Trial Chamber II of the ICC in the *Decision on the authorization of the investigation on the post-electoral situation in Kenya 2010* [132] has particularly addressed this question of how the term "organization" should be interpreted in the definition of crimes against humanity. Also, the *Decision* has stated the criteria that must be met for an entity or group to be included within the concept of organization of Article 7 of the RS in what is called the "capacity test". These criteria have been subsequently confirmed in the *Appeal Decision for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* of 2011[133], in the *Decision confirming charges against Kenyatta, Muthara and Hussein Ali of 2012*[134], as well as in the *Decision confirming charges against Ruto and Sang of 2012*.[135]

In the *Authorization Decision of an investigation on Kenya in 2010* , the majority of the Pre-Trial Chamber II confirmed that the decisive element for the definition of an organization within the meaning of Article 7 of the RS was that the group had the capacity to carry out acts that violate basic human values[136] , also proposing a schema of non-exhaustive criteria or factors that would help

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meetings and of the meetings of the Committee of the Whole. UN Doc. A / CONF.183/SR.1 to 9 (Vol. II). Proposal submitted by France UN Doc. A/CONF. 183/C. 1/L.3).

Art. 23: (criminal organizations): "5. when the crime was committed by a natural person on behalf or with the assent of a group or organization of every kind, the Court may declare that this group or organization is a criminal organization. 6. In the cases where a group or organization is declared criminal by the Court, this group or organization shall incur the penalties referred to in Article 76, and the relevant provisions of Articles 73 and 79 are applicable. In any such case, the criminal nature of the group or organization is considered proved and shall not be questioned, and the competent national authorities of any state party shall take the necessary measures to ensure that the judgement of the Court shall have binding force and to implement it".

[132] 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.

[133] ICC-01/09-02/11, *Situation in the Republic of Kenya, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 8 March 2011.

[134] ICC-01/09-02 /11, *Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute,* 23 January 2012.

[135] ICC-01/09-01/11, *Situation on the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute*, 23 January 2012.

[136] *Ibid,* para 93.

determine said ability to act, without these being a rigid legal definition in themselves; nor was it required that all these elements should be fully satisfied.[137]

These criteria established by Pre-Trial Chamber II of the ICC to define which entity should be integrated in the definition and scope of the concept of organization within the RS, can be summarized as follows[138]:

i) the group is under a responsible command, or has an established hierarchy;
ii) the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;
iii) the group exercises control over part of the territory of a State;
iv) the group has criminal activities against the civilian population as a primary purpose;
v) the group articulates, explicitly or implicitly, an intention to attack a civilian population;
vi) whether the group is part of a larger group, which fulfils some or all of the above mentioned criteria.

Pre-Trial Chamber II understood that according to these criteria there were sufficient grounds to investigate whether post-electoral violence in Kenya, which appeared to have been planned and organized in advance by an association or network of authors composed by political representatives of the Democratic Movement 'Orange', representatives of the media, former members of the Kenyan police and army, Kalenyin elders, other local leaders and the Mungiki criminal organization, a sympathizer of the National Unity Party. All these acts of violence seem to result in the commission of crimes that fell within the scope of the *ratione materiae* of the ICC.[139]

The majority of the judges of this Chamber, in the different decisions on the situation of violence in Kenya, expressed that they considered Mungiki organization [140] a criminal organization. [141] This organization met the requirements to be integrated into the definition and scope of the concept of organization under the RS because it operated as a hierarchical, vast and complex structure with a clear internal division, and its members subject to obedience to internal rules. It also carried out military training tasks, in order to carry out violent operations, including executions. In addition, Mungiki exercised control over fundamental aspects of social life in the poorest residential areas, which included basic services such as electricity, water, sanitation, and a community justice system,

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[137] 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, para. 93: "it is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled."

[138] 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, para. 93; ICC-01/09-01/11, *Situation on the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang. Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute*, 23 January 2012, para. 185; correction of the *Decision under Article 15 of the Rome Statute concerning the authorization of an investigation into the situation in the Republic of Côte d'Ivoire*, ICC-02 / 11-14-Corr., paras. 45 and 46, October 3, 2011.

[139] 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, para. 94.

[140] ICC-01/09-02/11, *Situation in the Republic of Kenya, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012.*

[141] *Ibidem,* para. 206.

also having control over transport and business, as well as charging taxes and fees, among other illicit activities.[142]

However, these decisions regarding the situation on Kenya were not taken unanimously by all the judged of the Pre-Trial Chamber II. Judge Hans-Peter Kaul showed dissenting opinions in the *Authorization Decision on Kenya 2010*[143], in the *Appeal Request Decision in 2011*[144] *and* in the *Confirmation of Charges Decision in 2012*.[145] The judge noted that the arguments presented had been excessively liberal. Likewise, he introduced a much stricter definition of the term organization by arguing that the position that had been defended by the majority of the members of the Chamber had been built on a human rights approach that was not impeccable and which clashed directly with the principle of legality set up in the RS. This contains the principle of the strict construction of crimes, the prohibition of analogy and the mandate to interpret the definition of a crime in favour of accused in the case of ambiguity.[146]

According to the dissenting opinion of Judge Kaul, this *Decision* implied a teleological interpretation of crimes against humanity. It could be said that this interpretation rested on the argument that the ultimate object of these crimes under international law was the protection of basic human values. The fact to extend the protection of these values seems to be the reason why admitting an extensive construction of the concept of organization of Article 7(II) of the RS.[147] In the opinion of Judge Kaul, this broader or more flexible definition would turn crimes against humanity into a term used to address all kinds of mass atrocities that were not strictly isolated or particular acts of violence, and included in the scope *ratione personae* of the ICC to a large number of organizations with the capacity to orchestrate a policy of committing the crimes included in crimes against humanity in a massive or systematic way, which could also be prosecuted in the places where they were committed, thereby disregarding the reasons that originally led to the definition of crimes against humanity as crimes under international law.[148]

Although it seems that, according to the opinion expressed by Judge Kaul, the approach adopted by the ICC could be wrong, and as stated by Robinson the so-called "victim-focused teleological

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[142] ICC-01/09-02/11, *Situation in the Republic of Kenya*, *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 8 March 2011, para. 22.

[143] 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, see *Dissenting opinion of Judge Hans-Peter Kaul,* para. 51.

[144] ICC-01/09-02/11, *Situation in the Republic of Kenya*, *Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, 8 March 2011, *Dissenting opinion of Judge Hans-Peter Kaul.*

[145] ICC-01/09-02/11, *Situation in the Republic of Kenya, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012 Kenyatta case* 2012. *Dissenting opinion of Judge Hans-Peter Kaul.*

[146] 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*, see *Dissenting opinion of Judge Hans-Peter Kaul,* para. 51.

[147] C. Kress, "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision" *Leiden Journal of International Law,* 23, 2010, 855–873, at 859 [doi:10.1017/S0922156510000415]

[148] 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, para. 43.

reasoning" is one of the interpretative fallacies of international criminal law[149] it has been accepted by a part of the specialized doctrine.

Some authors have concluded that the majority of Pre-Trial Chamber II in the *Authorization Decision of a 2010 Kenyan investigation,* as well as in subsequent decisions, did not exclude the possibility that non-state organizations, such as private groups, could be involved in crimes against humanity. This opinion found supported in commentary 5 to Article 21 of the Draft Code of crimes against peace and security of mankind of 1991[150] which referred to those individuals endowed with *de facto* power and organized into criminal gangs or groups, whose acts could fall within the scope of the Project of the ILC.[151]

De Filippo, for example, has pointed out that "the associative element, and its inherently aggravating effect, could eventually be satisfied by purely private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by "territorial" entities or by private groups, given the latter's acquired capacity to infringe basic human values".[152] Robinson also suggests that "some organized entity directing, instigating or encouraging crimes" would qualify as an organization under the Statute of the ICC.[153] Sadat, in the same vein, has cautioned that a limited application of the term organization of Article 7(II) to organizations with state characteristics would ignore the development of international criminal law from Nuremberg.[154]

The failure to recognize the capacity of other actors than states to commit the most serious crimes against humanity making them responsible for their criminal policies and the failure to expand the jurisdiction *ratione personae* of the ICC, would mean not measuring or properly treating the serious nature and consequence of the new threats that contemporary economic abuses are for the humanity.[155]

Therefore, it would be an exercise of a fair appreciation of reality, not only in terms of legal requirements, but also ethical and political, to move towards the integration organizations or groups of any economic nature within the scope of Article 7 of the Statute of Rome submitting them to the jurisdiction of the ICC when they are involved in crimes against humanity. This is an inherent part of a proposal for "economic crimes against humanity".[156]

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[149] D. Robinson, "The identity crisis of international criminal law," *Leiden Journal of International Law*, 21, 2008, 925–963, at. 933-946 [doi:10.1017/S0922156508005463].

[150] Although not already mentioned in the Draft Code of 1996

[151] H. G. van der Wilt, "Trafficking in Human Beings: A Modern Form of Slavery or a Transnational Crime?" *Amsterdam Center for International Law*, No. 2014-07, Amsterdam Law School Research Paper No. 2014-13 (2014) 297–334, at 307 [https://dx.doi.org/10.2139/ssrn.2393338]

[152] M. Di Fillipo, "Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes", *European Journal of International Law*, vol. 19, (2008) at 564–70 [https://doi.org/10.1093/ejil/chn027].

[153] D. Robinson, "Essence of Crimes against Humanity Raised by Challenges at ICC", *Blog of the European Journal of International Law*, EJIL *Talk!*, 27 September 2011.

[154] L. Sadat, "Crimes against Humanity in the Modern Age", *The American Journal of International Law*, vol. 107 (2012) at 334-377 [doi: 0.5305/amerjintelaw.107.2.0334].

[155] M. Kremnitzer, "A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law," *Journal of International Criminal Justice*, vol. 8 (2010) 909-918, at 915 [doi:10.1093/jicj/mqq036].

[156] It is important to note that the ILC *Draft articles on prevention and punishment of crimes against humanity*, in the Article 6 on the matter of criminalization under national law, includes a provision in the paragraph 8 to stablish the liability of legal person for the crimes against humanity in the following terms: "Subject to the

(b) *A parallel concept of the policy element for "economic crimes against humanity"*

Recognizing that non-state or private actors may have the capacity to infringe basic human values and commit widespread and systematic attacks on the civilian population means that these acts must be committed in accordance with an organizational policy.[157]

Bassiouni, although he points out that Article 7 cannot be construed a new development for crimes against humanity, in particular its application to non-state actors, does claim that expanding the *ratione materiae* of the ICC towards entities such as the mafia, or even *al-Qaeda,* would go against the spirit of this article.[158] IIe further notes that in the case of accepting the involvement of non-state actors in these crimes, a new concept of policy element would have to be shaped, parallel to the traditional concept of the state policy.[159] IIowever, an amendment in this regard to the Statute of the ICC as an expression of the interpretation of the meaning of the term "policy of an organization" is considered distant.[160]

This new concept of "organizational policy" should not only be inferred from a broader interpretation of the element of the policy, which has been carried out by the jurisprudence od *ad hoc* International Criminal Courts and the ICC, but should be endowed necessarily with new content.

In this vein, this content of the proposed concept of organizational policy would mean that it necessarily must confers entity to criminal acts: it must relates them and determines that they are not a consequence of fortuitous or isolated events; it must consist in the promotion of particular objectives, purposes and interests which are aimed at obtaining an economic profit, or maintaining a position or balance of economic-political power as a specific purpose; for those propose the illegal acts underlying crimes against humanity are intentionally committed or assuming a risk-oriented approach in the realization of the illegal acts.

This organizational policy by economic actors, as required by state policy, and following the jurisprudence of the *ad hoc* International Criminal Tribunals, it could be said that it need not be a formally adopted policy[161] nor expressly or precisely stated[162], nor strictly planned[163], but could be

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provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative", *supra n. 10*

[157] T. Rodenhauser, "Beyond state Crimes: Non-state Entities and Crimes against IIumanity," *Leiden Journal of International Law* 27, 2014, 913–928, at 926. [doi:10.1017/S0922156514000417].

[158] M. C. Bassiouni, *Crimes Against Humanity*, *supra n. 69.*

[159] *Ibid*, at 42

[160] M. C. Bassiouni, *supra n. 73,* at 585.

[161] ICTR-96-4-T, *The Prosecutor v. Jean-Paul Akayesu*,Trial Chamber Judgemente, 1, 2 September 1998, para. 580; ICTY-IT-94-I-A y IT-94-I-A bis, *The Prosecutor v. Tadić*, Appeals Chamber, Judgment in Sentencing Appeal - Dissenting Opinion of the Judge Shahabuddeen, 26 February 2000, para. 653; ICTR-96-3, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Chamber I, Judgment and Sentence, 6 December 1999, para. 69; ICTR-96-13-A, *The Prosecutor v. Alfred Musema,* Trial Chamber I, *Judgment and Sentence,* 27 January 2000, para 204; ICC-01/04-01/07, *Situation In The Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga,* Judgment pursuant to Article 74 of the Statute,7 March 2014, para 1109: ICC-02/11-01/11-432, *Situation In The Republic Of Cote D'Ivoire in the case of the Prosecutor v. Laurent Gbagbo,* Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(i) of the Rome Statute, 3 June 2013, paras. 211, 212 and 215.

[162] ICTY IT-95-14-T, *The Prosecutor v. Tihomir Blasick*, Appeals Chamber, Judgement, 29 July 2004, para. 204.

[163] ICC-01/04-01/07, *Situation In The Democratic Republic of the Congo in the case of the Prosecutor v. Germain*

deduced from the repetition of acts, by the way in which the preparatory activities of the acts that give rise to the crimes are conducted [164]. It could be considered a policy of active promotion or encouragement [165], notwithstanding a policy of deliberate omission, in exceptional circumstances, provided that it was aimed at favouring or facilitating an attack of an economic nature.[166]

Concluding and according to Carrillo Salcedo, the process of diffusion of power implies important changes, both in nature, and in the distribution of it among the different actors on the international society, not today exclusively state-like.[167] Recent experiences have shown us that non-state actors can, and do, carry out the commission of crimes against humanity[168] having revealed the capacity, strength and power necessary to victimize the vulnerable, and thus qualifies their behaviour as crimes under international law. This is why one of the most important challenges for international law in contemporary society is to regulate the activities of non-state actors, who have the capacity to infringe values that are subject to the protection of the international community, given the predominance of the economic paradigm in the composition of the new forms of the exercise of power and the profit policies that favour them.

International criminal law should move on these transformations and must legally address the power of non-state actors, preventing, prosecuting, and punishing the exercise of economic power that has definitively become a new *leitmotiv* of crimes of international law.

(E) CONCLUSIONS

The purpose of this work has been to study the possibilities offered by international law to address the criminalization of the serious economic and financial abuses underlying a category called "economic crimes against humanity".

The legal-positive regulation of crimes against humanity has been a historic milestone in the development and humanization process in international law. The purpose and foundation of this category of international crimes has been expressly the protection of human beings from the most aberrant behaviour committed in the exercise of abuse of political power, creating a system of *jus puniendi* and individual criminal responsibility in international law.

Due to the accelerated changes in the international society, such as the distribution and the exercise of power by state and no-state actors and the new social and economic threatens for the humanity, it is necessary to contemplate the protection of fundamental and universal principles and values not only by the customary o conventional law that prohibits crimes against humanity but for conceptual

Katanga, Judgment pursuant to Article 74 of the Statute,7 March 2014, para. 1110.

[164] ICC-01/04-01/07, *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga, Judgment pursuant to Article 74 of the Statute,* 7 March 2014, para 1109; 1109; see also ICC-02/11-01/11 ICC-02/11-02/11, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters*, 11 March 2015, paras. 211, 212 and 215.

[165] ICC, *Elements of Crimes*, at. 10.

[166] *Ibid.*

[167] J. A. Carrillo Salcedo, "Derechos humanos y Derecho internacional", *ISEGORIA/22* (2000).

[168] A. Gil Gil and E. Maculan, "Qué es el Derecho internacional penal" en A. Gil Gil and E. Maculan, *supra* n. 56, at 40.

innovation of the legal mechanism necessary for the modernization and reform of international law.

The development of the category of "economic crimes against humanity" is an expression of these new tensions and challenges currently facing international law. The integral protection of the individual and peoples from the most serious economic and economic-political abuses is not easy to fit into the conventional architecture of the classical international system.

The category "economic crimes against humanity", which would cover economic abuses of serious nature and consequences due to having a general dimension that would affect fundamental universal human values recognized by the international community. However, this category are not currently part of the material scope of crimes against humanity included in the RS and. Thus, it would not be possible to use this instrument for the prosecution of these illegal acts, via connection with the crimes that are strictly enumerated in its Article, nor to demand international criminal responsibility for its perpetrators.

An opportunity of expanding the scope and content of crimes against humanity to face these challenges would have been expected from the ILC works for the elaboration of a convention on prevention and punishment of crimes against humanity. However, both in the four reports presented by the Special Rapporteur from 2015 to 2019, as well as in the contributions made by the States, as well as other actors involved, there is no consensus on expanding the catalogue of crimes. In fact, the definition of crimes against humanity replicates article 7 of the RS following the consensus reached by the international community in this vein. The evolution of the Draft articles regarding the RS can be found in those aspects related to build up national laws and national jurisdiction with respect to crimes against humanity and to place states parties in a cooperative relationship on matters such as extradition and mutual legal assistance.

Despite the above, it is clear that the so-called economic crimes against humanity has an impact on vital areas for human beings and peoples, generating significant human, social, environmental and economic damages, which would be committed by entities, groups or organizations that would hold an extraordinary economic and economic-political power, and that would have a great capacity for victimization and acting with impunity. If international law once evolved by criminalizing the abuse of the political power of states against their own citizens, something that seemed inconceivable until after World War II, due to the lack of interference by this law in the state sovereignty, today it is necessary to advance towards an integral protection of human being from the abuses of economic and economic-political power by virtue of the progressive development of norms and institutions of international criminal law, even though it represents a huge legal challenge.

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Agora

The Catalonia independence process before the Spanish Supreme Court

A Decent Supreme Court Judgment

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Spanish Supreme Court Judgment 459/2019, of 14 October 2019, on the Catalan independence process, was a remarkable effort of intellectual honesty due to its legal reasoning and moral rectitude in upholding Spanish democracy.

The Spanish Supreme Court judges should be thanked for that effort at a time when so many from the pro-independence trenches are committed to ripping the Spanish high court to shreds. The Supreme Court judgment has also been attacked from democratic positions, which view it as lacking punitive harshness and legal categorizations to suit their tastes. This extreme criticism is unmerited, especially from those who advocate the rule of law. After all, in light of the successive failures to act of the Rajoy government [right-wing People's Party (PP)] at the peak of the pro-independence escalation and, later, of the social-populist Sánchez government, the Supreme Court has proved to be the last bastion of the rule of law in Spain.

The Supreme Court Criminal Chamber judges are decent jurists who made a great intellectual and technical effort in a difficult and complex situation to deliver their judgment unanimously. And they fulfilled the expectations of the decent jurists that — without arrogance or sectarianism — exist in Spain.

Whilst the judgment of 14 October 2019 may not coincide with the position I have defended in several articles on the severe *institutional* violence of the Catalan independence parties,[1] the second chamber of the Supreme Court has rendered a technically meticulous judgment, i.e. with knowledge of the laws that it is required to apply to the facts being judged. It is reasoned and reasonable. Any excesses or shortcomings that it may have in terms of categorization can all be chalked up to the mediocre 1995 Spanish Criminal Code, drafted by the Socialist government in power at the time.

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[1] "Violencia desde las instituciones de Cataluña", *El Mundo*, 25 October 2018; or "España indefensa", in the monograph: "¿Cataluña independiente?", 71-72 *El Cronista del Estado Social y Democrático de Derecho* (2017, October-November) 12-15.

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The Supreme Court is not to blame for the outdated 1995 Criminal Code made by old-fashioned constitutionalists and criminal lawyers thinking more about the military uprisings and attempted coups of the 19th century than the threats to democracy in 21st-century Spain. The antiquated 1995 Criminal Code has a nineteenth-century understanding of violence based only on armed force.

It is the current Criminal Code that fails to protect against political violence, to account for institutional rebellion or the moral violence suffered by non-nationalist citizens in Catalonia, and to address the path of consummated institutional illegal acts. The 1995 Criminal Code does not make it a crime for the institutions of a Spanish self-governing region, or "autonomous community", to proclaim the independence of a territory of Spain as long as it does so with smiles and hugs. For the Criminal Code, a unilateral declaration of independence is symbolic; so the TS concludes in its judgment. A state with this code should tremble for the future of its territorial integrity.

Democracy and freedoms are defenceless in Spain with this code that seeks only to avenge the military uprisings of the 19th century and not to administer justice, now, in the 21st century, against the coups of the pro-independence politicians and their anarchist hatchet men. Clearly the Supreme Court cannot invent rules or stretch the Criminal Code —nor did it do so— with the reasonings in which we lawyers might engage without procedural constraints and guarantees.

The Supreme Court cannot undertake extensive or restrictive interpretations as it sees fit, as the Constitutional Court used to do in regional matters, inventing an accommodative Constitution in each judgment that could be moulded, at least until 2017, to the needs of the clientelist pacts with the nationalists. Those concessions of statehood by the Constitutional Court and by the governments of both parties that governed Spain between 1979 and 2017 —the Socialists (PSOE) and the PP— led to the pro-independence radicalization of the Catalan nationalist parties.

Today, the international order accepts an evolved notion of armed aggression and other forms equivalent to it in the case of virtual or cyber violence against sovereignty, independence or territorial integrity. The space under attack that is the object of an aggression is not only the land, air and sea, but the diffuse cyber space that has come to be integrated as part of sovereignty. And cyberattacks between states are aggressions, although in place of tanks and bombings, they are executed with a smile and a magic touch upon inserting a device in an enemy USB port.

There has been a legal mutation of the concept of violence and of all its legal determinants, as evidenced by the "Tallinn Manual" on international cyber warfare.[2] Violence has grown

[2] The 2013 *Tallinn Manual on the International Law Applicable to Cyber Warfare* — an updated version of which, known as the *Tallinn Manual 2.0*, was published in 2017 — was prepared by a select group of experts from NATO together with observers from the International Committee of the Red Cross. It is an unofficial, non-binding document intended to serve as a guide for purposefully adapting the law of the Hague and the law of Geneva to cyber warfare.

more sophisticated. In Catalonia, too. Yet the Criminal Code that the Supreme Court had to apply could not correct for its 19th-century rigidities or punish the rebellion — which existed *de facto*.

The Supreme Court judgment convicting the institutional leaders who proclaimed independence twice in a single month also includes reasonings of exquisite legal logic. Nothing is simply because. The judgment is meticulous — at times exasperatingly so — in refuting the defences' objections and allegations. The arguments are protracted to demonstrate their consistency with the case law of the European Court of Human Rights, as required under Article 10.2 of the Spanish Constitution.

The sections devoted to debunking the simplistic "right to decide" are both pedagogical and technically accomplished. Like the Supreme Court of Canada in its opinion of 20 August 1998, the Spanish Supreme Court finds no basis for this right in international law or constitutional law, nor does it find any violation of human rights. There is no human right to create states by neighbourhood, to each person's liking; nor are Catalans a superior people in relation to the rest of Spain's regions, whose peoples are also entitled to a state, as the Supreme Court clearly justifies. The Court strives to convey a reasoning that would be no different anywhere else in the EU, such as Bavaria or Lombardy.

The sections devoted to the Canadian Court's opinion are excellent. It is a pity that the separatists, so resistant to rational argument, will not read them. The Spanish Supreme Court likewise makes excellent use of UN General Assembly Resolution 2625 (1970), a general international legal rule (binding and universal according to the International Court of Justice), establishing a rational limit to self-determination. It is well-known that this Resolution neither authorizes nor encourages "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States [...] possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." True, the Supreme Court does not cite Resolution 2625 directly, but rather refers to resolutions subsequent to the 1970 text that reproduce that paragraph of it. Nobody's perfect.

I was pleased that the Spanish high court cited the examples of two judgments by the constitutional courts of Italy (2015) and Germany (2016) denying the right to decide to regions of those countries. I had cited them in a much-discussed newspaper article in a futile effort to engage the famous football coach Pep Guardiola,[3] a populist rebel against rational thought. For the independence movement's footballing leader, the global model of democracy with a right to decide is the Qatari dictatorship.

Likewise satisfying was the Spanish Supreme Court's reference to the statement endorsed by nearly 400 international law professors from Spain (including around 40 from Catalan universities). The statement — which we promoted and drafted with utmost care to occupy

[3] "Guardiola por el mundo", *El Mundo*, 22 June 2017.

the space of truth and commitment of decent people — denies any foundation for independence based on current international law.[4]

The Supreme Court's handling of the scholarly literature of the Committee for the Elimination of Racial Discrimination, deep and respected in matters of self-determination, was commendable and appreciated: it approached it without fear. Likewise, its handling of the literature of the Venice Commission. What a shame that the Catalan government failed to read this respected constitutional and international literature back in the day, or these sections of the Spanish judgment now. I recommend readers focus on pages 197 to 254 of the Supreme Court judgment (pages 194 to 248 of the English-language version) to examine the high-calibre reasoning of the Spanish Supreme Court. At least so that neither the Catalan people nor anyone else can be lied to about some unlimited right to decide; they cannot keep saying, so simply, that they were convicted for "putting out ballot boxes".[5]

However, the judgment is hardly the solution to all problems. I always thought the Supreme Court would lead us into a loop with few ways out. Nor does the second-rate Criminal Code help with its seemingly severe punishments, such as the 13-year prison sentences for several of those found guilty of sedition: that is what will echo and linger in the streets and the international press. In reality, when the systematic reductions provided for under penitentiary law are combined with the sectarian and arbitrary pro-independence government — which is responsible for prisons in Catalonia, due to the transfer of that competence by a PP government — none of the people convicted has spent or will spend more than four years total in jail.

As stated, the Supreme Court does not deserve the harsh criticism it has received; it has been the last bastion for the defence of the rule of law. Former Prime Minister Rajoy and his centre-right party failed to use (all) the means they had at their disposal to prevent the crime and head off the pro-independence escalation. Instead, with treachery and premeditation, he chose to allow the separatists to reach the end, allowing them to stage their declaration of independence twice (on 10 and 27 October 2017). The crime could have been prevented if the constitutional intervention, under Article 155 of the Spanish Constitution (CE), had been carried out when the two bills were being prepared or, at least, as soon as Catalan Law 19/2017, of 6 September, on the self-determination referendum,[6] and Catalan Law 20/2017, of 8 September, on the Legal and Foundational Transition to the Catalan Republic,[7] were passed.

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[4] "Declaración sobre la falta de fundamentación en el derecho internacional del referéndum de independencia en Cataluña", 70 *REDI* (2018-1), at 297. The original and an English translation of the statement are available here.

[5] A summary and a link to the full judgment can be found here. An English-language summary and link to an English translation of the full judgment can be found here.

[6] Sitting as a full court, the Constitutional Court unanimously declared this Catalan law null in Judgment 114/2017, of October 17 (Official State Gazette (*BOE*) No. 256, of 24 October 2017). The Constitutional Court has made a translation of the grounds and ruling of the judgment available in English, in French and in German. The Court's Press Office also published an English summary of the Judgment.

[7] Sitting as a full court, the Constitutional Court unanimously declared the so-called "foundational law of the Republic" null in Judgment 124/2017, of 8 November (BOE No. 278, 16 November 2017). A translation of the grounds and ruling of the Constitutional Court judgment is available in English, in French and in German. The Court's Press Office has also published

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If the intervention under Article 155 CE had taken place then, rather than on 27 October, several crimes could have been forestalled and, with them, the costly and pointless criminal trial. Former Prime Minister Rajoy hid behind the judges and prosecutors (I said as much in the newspaper *El Mundo* on 26 November 2016); rather than stepping up to tackle the separatist challenge politically, the right-wing government preferred to expose and sacrifice the King of Spain. In a grave speech to the nation, the King had to draw on the "reserve" of his abstract powers in defence of the Constitution. And then, as a last-ditch effort, the judiciary assumed its responsibility in defence of the rule of law in Spain.

a summary of the judgment in English and in French.

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Agora

The Catalonia independence process before the Spanish Supreme Court

Assessment, in light of European Union law, of the constitutional framework from which the Spanish supreme court has approached the prosecution of the Catalan separatist leaders

Pedro TENT ALONSO*

Because the Supreme Court had agreed to consider various preliminary issues concerning the hypothetical violation of fundamental rights, in the first sessions of the trial of the separatist leaders (hereinafter, the trial), several defences questioned the very constitutional framework from which the trial was to be approached.

This point is of paramount importance insofar as — with more or less accuracy — the Catalan independence movement has continually cast doubt on the characterization of the Kingdom of Spain as a state governed by the rule of law, thereby denying it any legitimacy to exercise its jurisdictional power over the conduct under review attributed to the (since convicted) defendants.

The defences (and the Catalan independence movement in general) have pointed to key aspects such as *(i)* the independence of the judiciary, no longer simply in reference to ordinary matters that can be addressed through the recusal mechanism (profusely employed by the defences and discussed *in extenso* in the judgment itself), but also in relation to its very constitutional structure and the mechanisms for appointing Supreme Court justices with the involvement of the General Council of the Judiciary and *(ii)* the effective existence of a true system of protection of fundamental rights (especially those related to political freedoms) in order to underscore that the Kingdom of Spain does not meet the standard for the "rule of law"

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resulting from the founding treaties of the European Union (the main assessment criterion on which this first section will focus).

(A) CONCEPT OF THE RULE OF LAW

It is therefore essential to elucidate the concept used by European Union law to identify political-constitutional structures that qualify as governed by the "rule of law" and thus have the political and legal legitimacy intrinsic to that status.

Article 2 of the Treaty on European Union (TEU) states that the "rule of law" is one of the Union's founding values and is part of the common legal heritage of all Member States.

One of the first references to this complex concept was made in the Communication from the European Commission of 15 October 2003, in which it addressed the essential conditions for applying the current Article 7 TEU. This article, which was introduced by the Amsterdam Treaty and amended by the Nice Treaty, provides for the application of sanctioning mechanisms to Member States that stray from the founding values of the Union laid out in Article 2 of the Treaty, including, as seen, operating in accordance with the concept of the "rule of law".

This first reference is significant not because of the effort to define the term "rule of law" (which is not attempted), nor for the commitment regarding the justiciability of the sanctioning instrument in Article 7 TEU (which is directly denied), but rather because of the categorical confirmation that the scope of Article 7 TEU goes beyond the limits of EU secondary law, such that it is still applicable even in matters that are the exclusive competence of the Member States (paragraph 1.1.),[1] a circumstance that gives the measure of the importance of the "rule of law" value.

A second major milestone was the European Commission Communication regarding "A new EU Framework to strengthen the Rule of Law", dated 11 March 2014. This time, much more thoroughly and with extensive references to case law, the Commission stated that the "(...) case law of the Court of Justice of the European Union ('the Court of Justice') and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU. Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law."

The European Commission's reference to the Venice Commission is not only remarkable

[1] This idea would have an important reflection in the CJEU Judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15.

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for the detailed body of scholarly literature that that institution has generated on the concept of interest here (a highly prestigious institution, it should be recalled, to which former Catalan President Puigdemont unsuccessfully appealed in an attempt to have the pseudo-referendum of 1 October 2017 internationally recognized),[2] but because in one of its main studies on the matter (512/2009, of 4 April 2011), the Commission happened to highlight that, unlike others, the Spanish Constitution [CE] included especially concrete provisions concerning the term "rule of law".[3]

In that study, the Venice Commission listed the following constituent elements of the "rule of law" concept: the principle of legality (including the existence of a transparent, accountable and democratic process for the passage of laws), legal certainty (understood as the prohibition of arbitrariness but not of reasonable discretionary power), access to justice before impartial courts[4] including judicial review of administrative acts, respect for human rights,[5] and non-discrimination and equality before the law.

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[2] See the appeal referenced here.

[3] "The notion of the rule of law (or of Rechtsstaat/Etat de droit) appears as a main feature of the state in a number of constitutions of former socialist countries of Central and Eastern Europe (Albania, Armenia, Belarus, Bosnia and Herzegovina, Croatia, the Czech Republic, Estonia, Georgia, Hungary, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, "the former Yugoslav Republic of Macedonia", Ukraine)[;] it is more rare in old democracies (Andorra, Finland, Germany, Malta, Norway, Portugal, Spain, Sweden, Switzerland, Turkey). It can be mostly found in preambles or other general provisions. There are, however, more concrete provisions in Spain, according to which "the Courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action"; courts as well as prosecutors are subject to the rule of law." Indeed, Article 9.3 CE systematizes (unlike virtually any other constitution) some of the main characteristics of the "rule of law" concept.

[4] With regard to this critical concept, the Venice Commission highlights:

"56. The role of the judiciary is essential in a state based on the rule of law. It is the guarantor of justice, a fundamental value in a law-governed State. It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology.

"57. The judiciary must be independent and impartial. Independence means that the judiciary is free from external pressure, and is not controlled by the other branches of government, especially the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. The judges should not be subject to political influence or manipulation. Impartial means that the judiciary is not — even in appearance — prejudiced as to the outcome of the case.

"58. There has to be a fair and open hearing, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service. As justice should be affordable, legal aid should be provided where necessary.

"59. Moreover, there must be an agency or organisation, a prosecutor, which is also to some degree autonomous from the executive, and which ensures that violations of the law, when not denounced by victims, can be brought before the courts.

"60. Finally, judicial decisions must be effectively implemented, and there should be no possibility (save in very exceptional cases) to revise a final judicial decision (respect of *res judicata*)."

[5] The Venice Commission specifies the human rights most strongly linked to the rule of law: "The rights most obviously connected to the rule of law include: (1) the right of access to justice, (2) the right to a legally competent judge, (3) the right to be heard, (4) inadmissibility of double jeopardy (*ne bis in idem*) (Article 4 of Protocol 7 to ECHR), (5) the legal principle that measures which impose a burden should not have retroactive effects[,] (6) the right to an effective remedy (Article 13 ECHR) for any arguable claim, (7) anyone accused of a crime is presumed innocent until proved guilty, and (8) the right to a fair trial or, in Anglo-American parlance, the principle of natural justice or due process; there has to be a fair and open hearing, absence of bias, and a reasonable period within which the case is heard and decided. Additionally, there must be a recognised, organised and independent legal profession, which is legally empowered, willing and *de facto* able to provide legal service, and the decisions of which are implemented without undue delay."

(B) ARTICLE 7 TEU: THE "RULE OF LAW" ENFORCEMENT PROVISION

In light of this characterization of the "rule of law" concept, it is publicly and well known that the European Commission (which, under Vice-President Timmermans paid special attention to these matters) activated the pre-sanctioning mechanism described in its Communication of 11 March 2014 against the Republics of Hungary, Poland and Romania. Not only has the possibility of using it against the Kingdom of Spain never been considered, but when former President Puigdemont's circle sought to trigger its application through a popular legislative initiative,[6] the Commission rejected it outright due to the radical impertinence of its form, without at any point activating the dialogue mechanism for which it is exclusively competent described in the Communication of 11 March 2014.

If, in addition to this fact, other no less significant circumstances are taken into account such as *(i)* the detection by the Court of Justice of the European Union of problems related to judicial independence in contexts that have nothing to do with Spain (cases C-64/16 and C-216/18 and joined cases C-508/18, C-82/19 and C-509/18, concerning the Republics of Portugal, Poland and Germany, respectively, to name but a few); *(ii)* the figures for the Kingdom of Spain in relation to the main rule-of-law quality standards;[7] or *(iii)* the number of rulings against the Kingdom of Spain by the European Court of Human Rights;[8] and — for merely illustrative purposes — they are compared to the very serious constitutional shortcomings found in the Law on the Legal and Foundational Transition to the Catalan Republic (*Ley de transitoriedad jurídica y fundacional de la República*), voted on 7 September 2017 (striking shortcomings not only in the procedure used to pass it but also in its substantive content, enshrining a sort of principle of cooperation between the executive and judiciary), there can be only one conclusion: for all the stated reasons, the Kingdom of Spain operates in complete accordance with the principle of the rule of law as it is conceived in European Union law, which makes the internal constitutional framework in which the trial of the Catalan independence leaders was carried out fully legitimate in legal terms.

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[6] See a reference here.
[7] See the data gathered by the World Justice Project here.
[8] See an appraisal here.

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Agora

The Catalonia independence process before the Spanish Supreme Court

The "right to decide" in International Law as grounds for exclusion of unlawfulness

Helena TORROJA MATEU*

(A) THE RIGHT TO DECIDE AND THE RIGHT TO SELF-DETERMINATION

It is impossible not to notice that the entire secessionist process has been based on the existence of a "right to decide", convincing the population that this right is protected under international law. Likewise, albeit with some qualifications, from the outset of the trial, all the defendants argued that the so-called "right to decide" is one of the rights referred to in the grounds for exclusion of unlawfulness provided for under Article 20.7 of the Spanish Criminal Code.[1] It was a question that the Supreme Court had to resolve, and it does so in section 17.1 (pp. 198 to 223) of the judgment (pp. 194 to 218 of the English-language version),[2] inquiring into the existence of international, constitutional or statutory foundations, beginning with one undeniable fact: the expression "right to decide" is non-existent in both international legal texts and the 1978 Spanish Constitution [CE] and Catalan Statute of Autonomy. The following paragraphs will review the analysis of its lack of foundation in international law.[3]

The Court begins with the defendants' arguments concerning this right. Because the expression is not reflected in the law, they attributed a political nature to it, whereby the right would be based on a supposed democratic principle, namely, the right of every community to decide its own future. For the Court, the "right to decide" is a euphemism used to explain an "evolved conception" of the right to self-determination contained in Article 1 of the International

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1 "The following persons shall not be criminally accountable: (...) Any person who acts in (...) the lawful exercise of a right (...)."

2 A summary and a link to the full judgment can be found here. An English-language summary and link to an English translation of the full judgment can be found here.

3 An analysis at the European level is provided in the contribution of Javier Roldán Barbero in this same Agora.

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Covenant on Civil and Political Rights (ICCPR), through an "adaptive effort" (p. 200; p. 196 of the English version), combined with the transformation of the monist conception of sovereignty on which the 1978 Spanish Constitution is based into a diffuse and shared conception of sovereignty.

The judgment excellently demonstrates this right's non-existence in international law, using three lines of argument.

(B) THE RIGHT TO SELF-DETERMINATION IN INTERNATIONAL TEXTS

The first argument focuses on the interpretation of "international treaties". The Court explains that it will not address the historical evolution of the right to self-determination, nor delve into the content of the right or the distinction between its internal and external dimensions, nor exhaustively cite all the relevant international texts. It resolves the complexity of the topic — which is indeed complex — through a very successful argument to address the defendants' "artificial assimilation" and "adaptive effort" (p. 200; p. 196 in English): not all interpretations are valid; far from a reading based solely on the "literal tenor of their content", the interpretation of treaties must be "comprehensive" (p. 200; p. 196 in English). This statement is quite commendable.[4]

This *criterion* leads the Court to reasonably conclude that the right to self-determination has consistently been formulated indissociably from a provision safeguarding the territorial integrity of already constituted states, which would be the limit of the right's external dimension (p. 204; p. 200 in English). There is no legal purchase for the "right to decide" in it. Even broadening the possibilities afforded under customary international law or the general principles of law as far as possible does not lead to the opposite conclusion (p. 200; p. 196 in English). The Supreme Court's conclusion is entirely reasonable, in accordance with international positive law agreed upon by the states, and aligned with the virtually unanimous opinion of the international legal literature.[5]

Those familiar with public international law will be surprised by the path the Court took to reach this conclusion. It sufficed to follow the trail left by the International Court of Justice in its references to this fundamental principle of international law (a pre-emptory or *jus cogens* norm, of a customary nature, incorporated into our domestic system automatically (monism), all of which goes unremarked by the Court) and stick to the basic essential texts considered to make up the right of self-determination, as the Supreme Court of Canada did, rather than examine the

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[4] As I have noted elsewhere, these texts must be interpreted in accordance with the legal method specific to international law. Amongst other things, the Court has highlighted, in its own words, the need to eschew "isolated literal errors of interpretation" (H. Torroja Mateu, "Libre determinación de los pueblos *versus* secesión", *Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz 2018* (Thomson Reuters Aranzadi, 2019) 237-388).

[5] As reflected in the "Declaración sobre la falta de fundamentación en el Derecho Internacional del referéndum de independencia que se pretende celebrar en Cataluña" [Statement on the Lack of Foundation in International Law of the Independence Referendum in Catalonia] (of 19 September 2017), signed by more than 400 members of the Spanish Association of International Law and International Relations Professors (*Asociación Española de Derecho Internacional y Relaciones Internacionales*, AEPDIRI) and cited by the Supreme Court elsewhere in the judgement, at 158. See n. 4, *supra*, for a link to the full text of this statement in various languages. See also my comments on the statement in: H. Torroja Mateu, "Reflections on the 'Statement on the Lack of Foundation on International Law of the Independence Referendum that Has Been Convened in Catalonia' on the occasion of its third anniversary", 8 *Paix et Sécurité Internationales – Journal of International Law and International Relations* (2020).

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long list of resolutions, many of them subsequent to 1970 and non-binding.[6] "Nobody's perfect", Dr Araceli Mangas quips about this choice and rightly so (see "A Decent Supreme Court Judgment" above). Nevertheless, this fact in no way undermines the comprehensive interpretation of the international texts or the accuracy of the conclusion reached by the Supreme Court.

(c) The 1998 Opinion of the Supreme Court of Canada

The second argument focuses on the opinion issued by the Supreme Court of Canada on 20 August 1998. The opinion had to be addressed because the defendants had repeatedly cited it as if it were a binding international norm for Spain. In some cases, they even asked the Court to follow the model of its Canadian counterpart and propose a "solution to the territorial conflict". The Court denied this request as falling beyond the constitutional scope of its judicial function, noting, amongst other things, that the Canadian government's request for an advisory opinion from the Supreme Court of Canada in no way resembles the criminal trial for the unilateral act of secession attributed to the defendants (p. 207; p. 202 in English).

That said, the Court used the opportunity to establish the true meaning of the Canadian court's opinion, which is far from the (once again contrived) interpretation presented by the defendants as if it somehow "legitimise[d] the unilateral secession of a part of the territory of any other State" (p. 207; p. 203 in English). The Court dedicated nearly six pages to the inclusion of extensive excerpts from the Canadian Supreme Court's opinion (pp. 205-210; pp. 201-206 in English). Briefly, it shows that the opinion holds that Canadian constitutional law, like all democratic constitutionalism, upholds a dynamic conception of the Constitution and recognizes the right of the participants in the federation to initiate constitutional change. Thus, if a clear majority of Quebecers no longer wished to remain in Canada, they could not be denied the right to initiate negotiations. It is a "right [...] to pursue secession", but not unilaterally; it must be done with the participation of all the co-holders of sovereignty (the federal government and the other provinces and territories of the Canadian federation). Furthermore, importantly, these negotiations must always take into account that "democracy [...] means more than simple majority rule". The components of the federation had been creating material ties of interdependence for the last 131 years [at the time of the opinion] based on shared values, which include federalism, democracy, constitutionalism and the rule of law and respect for minorities. Case closed: the Canadian Supreme Court's opinion does not in any way establish a right to unilateral secession under Canadian law.

Finally, the Spanish Supreme Court also cites a paragraph from the Canadian opinion on international law, which explains that Quebec does not enjoy a right to self-determination as it is neither a colonial people, nor an oppressed people, nor a people that has been denied meaningful

[6] Fundamental texts include the United Nations General Assembly Resolutions 1514 (XV), of 1960, and 2625 (XXV) of 1970, and common Article 1 of the 1966 Human Rights Covenants. Additionally, it makes no sense not to cite the territorial integrity safeguard provision of paragraph 7 of Res. 2625 (XXV) of 1970, only to then cite much later resolutions that simply reiterate what the states agreed on in it. However, it is quite commendable that it cites General Recommendation No. 21 of the United Nations Committee for the Elimination of Racial Discrimination, of 1996, due to its clarity regarding the non-existence of a "right to secession".

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access to government to pursue its political, economic, cultural and social development. Something similar can be said of the people of Catalonia.[7]

In any case, in my view, the Spanish Supreme Court is not bound by another country's domestic rules and case law. Comparative law can serve as inspiration, but it can never compel. There is no international rule obliging Spain to allow a vote on the separation of one of its autonomous communities or any other fraction of its territory. None. Territorial organization is a discretionary sovereign competence of states. The principle of sovereign equality and respect for territorial integrity and national unity prevail here. And, in any event, what the Canadian opinion says is not so different — in its essence — from what the Spanish Constitution already allows: nothing prevented nor prevents the Catalan government from taking its secession plan to the two chambers of the Spanish Parliament (Article 168 of the Spanish Constitution of 1978) to debate and *negotiate with the participation of all the co-holders of sovereignty* a future constitutional reform there. That is what the Canadian Supreme Court suggests be done. In the case at hand, in my view, this is what the representative of another autonomous community did honestly, intelligently and peacefully a few years ago, showing greater loyalty to Spanish society and the country's constitutional law than the defendants have.

(D) OTHER PROCESSES FALSELY CITED AS PRECEDENTS

Finally, the third line of argument in the Court's judgment that we will explore here addresses the comparative references invoked by the defences as legitimizing precedents of secessionist processes, including the case of Montenegro, the attempted secession of Scotland and the case of Kosovo. An international lawyer cannot help but smile inwardly at the thought that the defence teams sought to justify the defendants' action against the Spanish Constitution with examples from other states. The Court could once again have resorted to pointing to the principle of sovereign equality of states and the non-existent international obligation to follow these examples. Instead, it kindly laid out in detail the circumstances of each case, before concluding that they had nothing to do with the present situation.

Montenegro's separation was provided for in the 2003 Constitution of the former state of Serbia and Montenegro. Scotland's attempt was the result of a formal negotiation process between the Scottish authorities and the British government for which there was no constitutional obstacle, a fact facilitated by the lack of a written constitution in the United Kingdom. Kosovo is a singular case, *sui generis*, with a marked origin in an ethnic and political conflict, and it thus cannot be exported as a precedent for other cases, as reiterated both by the states that have recognized it and by the European Union itself.[8]

The Court's assessment of the International Court of Justice's conclusion in its advisory

[7] Amongst other aspects of this argument by the Supreme Court of Canada that I do not share, I am critical of the third ground for being a holder of the right to self-determination of peoples, as it is the product of an isolated literal interpretation of the provision safeguarding the territorial integrity of a state contained in paragraph seven of General Assembly Resolution 2625 (XXV), of 1970, a ground that the Court itself considers *lege ferenda* elsewhere in its statement. I have discussed the misguided nature of this paragraph of the Supreme Court of Canada's decision elsewhere (see H. Torroja Mateu (2019), *op. cit.*).

[8] The end of this argument inexplicably includes an excerpt from UN General Assembly Resolution 68/153, of 18 December 2013. It is most likely a mistake, as Kosovo was not subject to "colonial or alien domination or external occupation", but rather was under the interim administration of a United Nations peace-keeping operation (UNMIK) (at 219).

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opinion on Kosovo, of 22 July 2010, is quite accurate. The fact that the Court found Kosovo's unilateral declaration of independence to be in conformity with international law does not mean that it also found it to be "the result of a right to create a separate State". The legal reasoning is commendable: it cannot be inferred from the absence of an international prohibition on unilateral declarations of independence that the ICJ is affirming that there exists a right of unilateral separation from a state. The Spanish Supreme Court could not have said it better.

In short, there is no right to decide in international law. It was a figment of the defendants' imagination, to which they attracted nearly two million Catalans, who voted for them trusting that the leaders were operating in the realm of reality, the realm of the reasonable, the logical, and the true, in which the subject adapts to the observed external object. The Court shows quite well that this was not the case. In the next section of its judgment (17.1.5), it demonstrates the non-existence of the "right to decide" in the scope of the Spanish domestic legal system (examined elsewhere in this part of the Agora).

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Agora

The Catalonia independence process before the Spanish Supreme Court

Issues related to European human rights law: the European Court of Human Rights

Santiago Ripol Carulla and Rafael Arenas García*

(A) The shadow of the European Court of Human Rights

The references to the European Court of Human Rights (hereinafter, ECtHR) have been a mainstay of the sessions of the trial for Special Proceedings No. 20907/2017.

In the trial's first session, for example, the defendants' lawyers had the opportunity to make their initial arguments, reserved for arguments concerning violations of fundamental rights. All of the defences argued that the state's action constituted an infringement of, amongst other things:

- the defendants' rights to life and liberty (e.g. due to having suffered degrading treatment, abusive use of pre-trial detention, or breach of the right to criminal legality);
- their political rights (e.g. the right of assembly or ideological freedom); and
- their procedural rights (e.g. the right to evidence, in relation to the non-admission or rejection of certain evidence; the right to an impartial court; defencelessness due to the defendants' lack of access to all the documentation — since the case was divided between several courts — as opposed to the Public Prosecutor (*Fiscalía*), who did have this global vision of the proceedings; etc.).

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In their arguments, the defences referred to the catalogue of fundamental rights set out in Title I of the Spanish Constitution, but also, and especially, to the violation of the European Convention of Human Rights (ECHR). And they announced their intention to apply to the ECtHR. The Supreme Court saw the defendants' intention to take the case to the Strasbourg Court in the multiple applications made for members of the trial Court to recuse themselves, observing that the defences conceived of the recusal mechanism as a "tedious and needless intermediate step towards the European Court of Human Rights" (Legal Grounds A.5.3).

When challenging the defences' arguments, the Office of the Public Prosecutor (*Ministerio Fiscal*) also referred to the ECHR and the Strasbourg Court, as did the Spanish government's legal counsel (*Abogacía del Estado*) and the private prosecution on public interest grounds (*Acusación Popular*).

Finally, even the presiding judge of the trial court mentioned the ECtHR in his first remarks. Specifically, on the first day of the trial, when telling the parties how much time they would have to make their arguments, Presiding Judge Marchena referred to the solution provided for in the ECtHR Rules, which he adopted as a reference. Two days later, when responding to the defences' arguments regarding the fragmentation of the subject of the proceedings, i.e. the fact that they were being heard by various courts, and its consequences for the principle of equality of arms, he responded with an analysis of the ECtHR judgment in *Chambaz v. Switzerland*, of 5 July 2012, which the defences had cited.

(B) THE EUROPEAN COURT OF HUMAN RIGHTS AND SPAIN

In 1950, the Council of Europe adopted the European Convention of Human Rights or Rome Convention. Section I of this treaty contains a list of rights that the states that ratify the treaty undertake to incorporate into their domestic law. Amongst other things, Section II creates the ECtHR, an international court to which the states parties to the Convention grant jurisdiction to hear claims brought by individuals residing in their territories against the state itself, insofar as its government or courts and judges have violated one of the rights or liberties included in Section I.

Albeit with some differences, the catalogues of rights included in the ECHR and the national constitutions are largely the same; it is no coincidence that all Council of Europe member states are democratic countries that respect human rights and have ratified the ECHR.

The role of the ECtHR should thus be understood as follows: it is an international body for the oversight of Spain's compliance with its obligations under the ECHR. Or, from a different perspective, it is a third level of protection of fundamental rights (after the ordinary courts and the appeal for constitutional protection of fundamental rights) that, in ratifying the ECHR, Spain accepted as an additional guarantee for individuals who, having exhausted the remedies provided for under Spanish law, consider that Spain has violated one of their rights.

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From the time Spain acceded to the ECHR and accepted the ECtHR's jurisdiction to the present (31 December 2018), the ECtHR has handed down 167 judgments in which Spain was a defendant. Three of these cases were concluded by means of the friendly settlement procedure provided for in Article 39 ECHR; another four refer to the question of just satisfaction addressed in Article 41 ECHR (former Article 50). As for the judgments on the merits, in 48 cases (34% of the time), the Strasbourg Court found that the violation alleged by the plaintiff had not occurred; in another 112 cases, however, the ECtHR ruled that Spain had breached one of the rights and freedoms recognized under the Convention (62%).[1]

Spain is one of the countries bound by the Convention to be found by the ECtHR to be in violation of it least often. Based on these 112 judgments, it ranks 22nd in absolute terms with regard to the number of rulings against it; furthermore, no country with a population larger than Spain's has been found to be in violation fewer times. In fact, in terms of the number of convictions per million inhabitants, Spain has the second-lowest conviction rate, trailing only Germany (2.39 per million inhabitants in Spain versus 2.35 per million inhabitants in Germany). By way of comparison, the figures for other European countries would be 4.7 convictions per million inhabitants for the United Kingdom, 11.5 for France, and 15.9 for Belgium. Spain is thus one of the countries to have been reproached the fewest times by the ECtHR.

In terms of the content of the law, 66% of these judgments refer to the rights to a fair trial (50) and to a trial without undue delay (16) enshrined in Article 6 ECHR. The right to respect for private and family life (Article 8 ECHR) accounts for 10% of the judgments concerning Spain (16), whilst the prohibition of torture (Article 3), the right to liberty and security (Article 5), and freedom of expression (Article 10) each account for 5%.[2]

ECtHR case law has had a great influence on Spanish law, whether because Spanish lawmakers have adapted certain laws to it (e.g. the ECtHR judgments in the cases *Iglesias Gil* and *Ruiz Mateos* were the material causes, respectively, for the reforms of the Spanish Criminal Code and the Organic Law on the Constitutional Court) or because Spanish judges have applied the criteria established by the ECtHR to define certain concepts, such as those of a reasonable time of pre-trial detention (*Scott* case), a reasonable time to lodge an appeal (*Stone Court Shipping*), the reasonableness of the length of proceedings (*Unión Alimentaria Sanders*), judicial impartiality (*Perote Pellón*), etc.

The importance of ECtHR case law is clear. Not only has it "made the Convention a dynamic and powerful instrument to confront new challenges and consolidate the rule of law and

1 Including the *Olaechea Cahuas* judgment of 18 August 2006, referring to the violation of Art. 34 ECHR (interim measures), as well as the ECtHR judgment in *Drozd and Janousek v. France and Spain*, of 26 June 1992, formulated before Andorra was party to the ECHR. The stated percentages were obtained from the ECtHR publication *Statistics on Judgements by States 1959-2018* (Strasbourg: Council of Europe, 2018).

2 ECtHR, *Statistics on..., op. cit.*

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democracy in Europe", but it has also emerged as a benchmark for individuals, who view the Court as a main institution for the protection of their fundamental rights.

(C) THE EUROPEAN COURT OF HUMAN RIGHTS AND THE *PROCÉS*

As noted, the defences of the accused in Special Proceedings 20907/2017 have already announced that, once the proceedings have finished and the procedural requirements have been met, they will lodge complaints with the ECtHR against the Supreme Court judgment. They maintain that Spain has violated some of their rights and freedoms and that the Spanish courts have not and will not remedy this violation. They further argue that the investigation and prosecution carried out violated certain procedural rights.

In fact, some of the defendants have already sought protection from the ECtHR in other matters related to the *procés*. This is the case of the application lodged by 76 members of the Catalan Parliament against Spain in the case *Carme Forcadell i Lluís and Others*.

That case refers to Article 4 of Law 19/2019 of the Catalan Parliament, on the right to self-determination, which establishes that a self-determination referendum will be held and that, if the referendum results in a majority in favour of independence, Parliament will proceed to declare it.

The Law, which had been challenged before the Spanish Constitutional Court, could not be implemented because the Constitutional Court had suspended it. This circumstance was known to Parliament and to each and every one of its members. Nevertheless, the referendum was held and, in light of the results, two parliamentary groups —Together for Catalunya (*Junts per Catalunya*, JpC) and the Popular Unity Candidacy (*Candidatura d'Unitat Popular*, CUP)— requested that the Bureau of the Parliament of Catalonia (*Mesa*) convene a plenary sitting so that the president could assess the results of the referendum and declare independence. The Bureau granted the request. Immediately thereafter, the Socialist Parliamentary Group of the Parliament of Catalonia filed an appeal for constitutional protection with the Constitutional Court, which, by means of its Order of 5 October, declared the appeal admissible and ordered the suspension of the parliamentary sitting, initially scheduled for 9 October.

The 76 Catalan MPs who applied to the ECtHR argued that, because the Constitutional Court's order prevented the convening of the plenary sitting, it violated their rights to exercise political representation and prevented them from expressing the will of the voters who participated in the referendum of 1 October.

However, in its decision of 29 May 2019 (application 75147/17), the ECtHR rejects that the alleged violation occurred because, in provisionally suspending the convening of the plenary sitting of the Catalan Parliament, the Constitutional Court adopted a measure that was: 1) provided for by law and whose potential application was known to the applicants; 2) intended to protect the constitutional order (and the rights of the MPs in the minority and, indirectly, of citizens to participate in public affairs); and 3) proportionate to achieve these goals, a point

stressed by the Spanish Supreme Court (Legal Grounds B.17.3 and C.2.1.2).

Therefore, the ECtHR concluded, "the suspension of the Plenary session was necessary in a democratic society". In addition to describing the decision of the Bureau of the Parliament of Catalonia as a "manifest failure to comply with decisions given by the Constitutional Court", the ECtHR's decision affirms time and again that the Constitutional Court's decisions must be complied with. This is the key idea of the decision. For that is the only way to ensure the protection of the constitutional order.

If we have referred to this decision *in extenso*, it is not only because, according to the defences, it is the first in what is expected to be a long list of decisions concerning the *procés*, but also because it is illustrative of how the ECtHR will analyse future claims lodged with it.

The ECtHR has also decided on another case related to the *procés*. By means of its decision of 12 June 2019, the ECtHR declared inadmissible the application that Carme Forcadell had lodged with it concerning the pre-trial detention ordered for her as a precautionary measure. The reason for the non-admission was the failure to exhaust domestic remedies, as the applicant had not filed an appeal for constitutional protection with the Constitutional Court before applying to the ECtHR.

The defendants have since lodged this complaint regarding the inadmissibility of pre-trial detention with the Spanish courts. They consider the imposition of this precautionary measure contrary to the Spanish Constitution and the Rome Convention. Briefly, they argue that the maintenance of pre-trial detention "causes irreparable harm to their rights to liberty and the presumption of innocence". Additionally, as many of the defendants are or have been elected regional, national and even European MPs, they argue that this situation of pre-trial detention violates their fundamental right to participate in public affairs (Article 23 CE) by preventing them from taking part in parliamentary business.

The Supreme Court and, subsequently, the Constitutional Court responded to these complaints (see, amongst others, Constitutional Court Orders 22/2018, of 7 March, 38/2018, of 22 March, 54/2018, of 22 March, 82/2018, of 17 July, and 98/2018, of 18 September). In these decisions, the Constitutional Court examines the ECtHR judgment in *Selahattin Demirtaş v. Turkey*, of 20 November 2018, which the applicants had cited as an obligatory criterion for the Spanish high courts to follow when deciding on "the political rights of a parliamentary official in pre-trial detention and in what situations those rights (and those of their voters) are violated by an extended preventive deprivation of liberty". However, the Constitutional Court reasons that there are singular differences between the defendants' situation and the *Demirtaş* case (Constitutional Court Order 12/2019, of 26 February, Legal Grounds 3).

(D) FUNDAMENTAL RIGHTS AND ECTHR CASE LAW IN THE SPANISH SUPREME COURT JUDGMENT

In general, the defences' arguments concerning the violation of their clients' fundamental rights, which are addressed in detail in the Supreme Court judgment, seem to lack any basis in

the case law of the Strasbourg Court. In this regard, the alleged violation of the right to a trial by the judge predetermined by law — because the Supreme Court rather than a judicial body based in Catalonia is hearing the case — seems unlikely to prosper in an application to the ECtHR. As established in the court's own case-law guide,[3] the right to the judge predetermined by law means that the courts must have been established by law, not at the discretion of the executive (paragraph 73 of the guide). The Supreme Court is clearly a body established and predetermined by law.

Beyond that, and according to the ECtHR itself, potential violations of domestic rules of jurisdiction can be considered by the Strasbourg Court when there exists a flagrant violation of the provisions of domestic law on matters of court jurisdiction (paragraph 74 of the guide). In the matter at hand, the Supreme Court's jurisdiction to hear the case has been debated. The defences have argued that the core acts being tried were committed in Catalonia, which, in their view, would exclude the Supreme Court's jurisdiction. Without the need to question the defences' argument, it seems clear that, as some of the facts being tried took place outside Catalonia, the interpretation that the Supreme Court has jurisdiction is unlikely to be considered a flagrant violation of court jurisdiction rules under Spanish domestic law. The same is true of the joining of all the cases filed with the Supreme Court due to the existence of defendants both with and without parliamentary immunity. The Supreme Court's jurisdiction could be disputed based on Spanish domestic law; but such a debate would not in any case imply a flagrant violation of jurisdiction rules under Spanish law, the interpretation of which, in accordance with ECtHR case law, falls to the Spanish courts.

The same can be said of the lack of impartiality of the members of the Court alleged by the defences. ECtHR case law is based on the idea that the personal impartiality of the judges must be presumed unless there is proof to the contrary (see paragraph 95 of the aforementioned guide to the Court's case law). In this context, ECtHR case law has defined cases in which such partiality should be found to exist, with the ensuing consequences for the right guaranteed under Article 6 ECHR. These cases include those in which the judge has displayed some sort of hostility or arranged to be assigned a case for personal reasons (subjective proof of partiality). Additionally, there are objective elements based on which partiality can be concluded to exist. These elements are related to the existence of hierarchical or other links between the judge and other persons involved in the proceedings (see paragraph 100 of the aforementioned guide). They likewise include situations in which a judge has made pre-trial decisions in relation to the same case. However, these decisions must be of a certain entity. For example, the ECtHR rejected that partiality existed in the case of a decision on the merits by a judge who had participated in the investigation, but only in the questioning of some witnesses (judgment in the case of *Bulut v. Austria*, of 22 February 1996). In the case at hand, the defences argued that the investigating judge had been a member of the court that gave leave to proceed to the

3 Available here.

prosecution and had been at a dinner party with a city councillor for the People's Party (*Partido Popular*, PP). They also argued that the plaintiff, the Public Prosecutor, had been a judge in the Supreme Court Criminal Chamber and, thus, had been professionally acquainted with several of the judges who made up the trial court. In light of its case law, these circumstances seem unlikely to lead the ECtHR to consider that the right to an impartial judge was violated. It was also argued, in relation to the impartiality of the investigating judge, that he had used the phrase "the strategy targeting us" in one of his decisions. According to the defences, the use of the first person would indicate that he considered himself directly concerned by the facts being tried, which would affect his partiality. The Supreme Court rejected this claim on the understanding that the phrase was not significant; but the ECtHR will have to determine its scope, taking into account that, given the nature of the investigated facts, all Catalans were directly affected by what happened. This raises a question of some interest, namely, how to judge impartiality in crimes affecting an entire population.

As can be seen, in its response to the defences' arguments regarding violations of the defendants' fundamental rights (which the Court addresses in the same chapter in pursuit of a "more conventional systematic approach"), in order to define the content and possible restrictions of the fundamental rights under debate, the Supreme Court referred to its own case law, as well as that of the Constitutional Court and the ECtHR.

To this end, the Court notes that its case law on the legitimacy of the limitation of the right to two levels of jurisdiction for MPs and senators with parliamentary immunity is "in line with" that of the ECtHR (p. 99; p. 96 in English). It further states that its case law on the right to an impartial judge "is in accordance" with that of the Strasbourg Court (pp. 117 and 254; pp. 116 and 249 in English), as is its case law on the right to political representation (p. 248; pp. 242-243 in English) and on the principle of equality of arms (p. 186; pp. 182-183 in English).

Elsewhere, the Supreme Court notes that its arguments and decisions are in keeping with ECtHR case law. This is the case of the right to freedom of thought, which it examines as a result of the arguments made by one of the defendant's in relation to his detention, or the principle of the presumption of innocence (p. 247; p. 241 in English).

Nor does the Supreme Court hesitate to incorporate judgments by the Strasbourg Court into its reasonings; hence, its references to it when discussing the limits of parliamentary privilege (*inviolabilidad*) (p. 244; p. 243 in English), freedom of expression (p. 244; p. 238 in English), the right to assembly (p. 245; p. 239 in English), the pre-trial detention of political representatives (pp. 249-252; pp. 243-246 in English), or the principle of adversarial proceedings (*contradicción*) (pp. 163-164; pp. 160-161 in English), which it addresses when it examines the argument made by some of the defendants that the impossibility of checking witnesses' testimony against video documentary evidence led to a violation of their right to a fair trial (pp. 162 *et seq.*; pp. 159 *et seq.* in English).

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Agora

The Catalonia independence process before the Spanish Supreme Court

The Catalonia independence process and EU Law (2017-2020)

Javier ROLDÁN BARBERO*

(A) INTRODUCTION

The Supreme Court trial against the main political leaders behind the secessionist challenge may be the most politically and legally important trial related to the "Catalan case", but it is certainly not the only one from a domestic or international perspective.

In a large share of the domestic judicial proceedings, the European factor has emerged. Interestingly, despite the separatists' desire to internationalize and Europeanize their cause, the response of EU law to this insurrectional movement and to the Kingdom of Spain's response to it is fundamentally understanding and protective of Spanish interests and actions.

The following sections will focus on the arguments based on EU law invoked or invocable in relation to the Catalan independence movement (i.e. not only in relation to the general proceedings conducted before the Supreme Court against the movement's political leaders).[1] The analysis will be divided in two parts: the first up 1st December 2019 and the second from that date until December 2020.

(B) THE STATE OF THE QUESTION AROUND THE SPANISH SUPREME COURT'S JUDGMENT UNTIL 1ST DECEMBER 2019

Arguments based on EU law have been made in several domestic court proceedings linked to

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[1] Other arguments of international law, such as those arising from the UN or Council of Europe legal systems, fall fundamentally beyond the scope of these remarks. In any case, the considerations arising from the European Convention on Human Rights and its Court are inseparable from European Union law, for the Rome Convention is part of EU law as a general principle, and the standard provided by the convention serves as a reference for the EU Charter of Fundamental Rights.

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the *procés*. For instance, the National High Court's (*Audiencia Nacional*) (Judicial Review Chamber) judgment of 20 December 2018 is quite relevant. Using extensive citations of EU law, it confirms the fine imposed on the Catalan National Assembly (*Assemblea Nacional Catalana*, ANC) for violating data protection rules with the survey conducted in relation to the pro-sovereignty straw poll held on 9 November 2014.

The EU has shown confidence in the Spanish judges and courts to substantiate and settle the charges arising from the secessionist challenge.[2] Most notably, in July 2019, the European Commission deemed inadmissible the European Citizens' Initiative promoted by former President Puigdemont's circle ultimately aimed at triggering Article 7 TEU to sanction Spain for violating democratic principles. This provision, activated against Hungary and Poland, although it faces a challenging path forwards, ultimately provides for the imposition of sanctions on a Member State, in particular, the suspension of its voting rights in the Council of the European Union. Commission President Ursula von der Leyen has been more cautious — or, perhaps, ignorant — in her first statements on the Catalan trial, saying she needs to learn more about the matter before she can speak out. In my view, the secessionist pounding is not purely a Spanish domestic matter, as it also undermines the legal principles of European integration.

The political and legal charges against Poland and Hungary stem, mainly, from the pointed or already implemented attacks on the system of separation of powers, especially against the independence of the judiciary. The case law of the EU Court of Justice confirms that the state of a country's justice in this regard falls within the competences and concerns of European integration (see the CJEU judgment of 24 June 2019, *Commission v. Poland*, C-619/18).

It should be stressed that the refusals of the Belgian and German courts to grant the European arrest warrant in the terms requested by the Spanish Supreme Court have not been based on suspicions or criticisms regarding the state of human rights in the country. In other cases, albeit exceptionally, the CJEU has allowed that, in the case of violations of fundamental rights in the issuing country, the executing country may refuse to surrender the accused person. This has never happened in relation to Spain. In its October judgment in the trial of the leaders of the independence movement, the Supreme Court criticized the attitude of the court of Schleswig-Holstein in Germany.

Secessionism within a state seems to fly in the face of the general and seminal spirit of European construction, conceived of as a battering ram against nationalism, against exclusive and excluding identities, and as a vector of cohesion, connectivity and solidarity between nations, of pluralism and tolerance.

The basic legal argument refuting the Catalan separatist cause from an EU perspective is

[2] Information from the Europa Press news agency available here.

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contained in Article 4.2 TEU, which supports and protects institutional autonomy, the constitutional framework of each Member State. Specifically, Article 4.2. is worded as follows: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

Of course, the so-called right of self-determination invoked by Catalan separatism has no support in European Union law, whose sources include international law (as the Supreme Court judgment explicitly lays out). I do not believe that the EU will ever prohibit internal secessionism, but it certainly does not authorize it; on the contrary, it refers to and endorses the constitutional orders of its Member States. And these constitutional traditions of the Member States, which are general principles of European Union law, do not in any way enshrine the right to secession, as witnessed by the opinions of the German and Italian constitutional courts. The EU itself is essentially based on representative democracy.

As for so-called internal self-determination, i.e. the right of a people to democracy within the framework of a state, as we have seen, the basic pillars and values of European construction are democratic principles for itself and its Member States. Both orders — the state-level and the European — complement and fertilize each other. The European system requires fundamental rights and the rule of law from its Member States as a cornerstone of mutual recognition and trust. From the Spanish constitutional perspective, Constitutional Court Statement 1/2004 defined a hard, unrevisable core, made up of essential constitutional principles. Thus, the constitutional blocs of the EU and Spain mutually protect and respect each other.

Whatever the shortcomings of Spanish democracy — and it certainly has some — there is no reason to project from them, as Catalan secessionism has done to legitimate its cause and exonerate its leaders, a shadow of denigration or defamation.

As I recently wrote elsewhere, "If, due to the weakness or complicity of the government of the nation, a direct violation of our rule of law were to materialize, the European Union, as it has done with Poland, although in different circumstances — due to a state nationalism, let's say — would have to act against the Kingdom of Spain (...). Integration through law cannot allow the disintegration of one of its States without and against the law. The sudden, factual reform of the Spanish Constitution, if consented, would be a direct violation of European Union law, as neither constitutional order — the Spanish or the European — tolerates the reckless reform of laws, let alone primary and fundamental ones."[3]

[3] J. Roldán Barbero. "El desafío soberanista en Cataluña y el Derecho de la Unión Europea", 63 *Revista de Derecho Comunitario Europeo* (May-August, 2019) 387-404, at 401-402.

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The question of the status of elected MEPs, and the potential scope of their immunity, has prompted the first action of the EU Court of Justice directly linked to the *procés*, namely, Order of the President of the General Court of 1 July 2019 in the case *Puigdemont and Comín v. the European Parliament* (T-388/19 R). The order dismisses the application for interim measures by the two members elect of the European Parliament who have fled from Spanish justice, for the Parliament to override the Spanish authorities, which require the candidates to pledge allegiance to the Spanish Constitution in person, and welcome the applicants as MEPs regardless. Additionally, the Supreme Court requested a preliminary ruling from the CJEU on the question of the scope of the European Parliament immunity of the likewise elected Oriol Junqueras, currently in prison and already convicted by the Spanish Supreme Court. The hearing for this case took place on 14 October. Notably, no EU Member State appeared in court in the proceedings to make submissions. In contrast, the Supreme Court has rejected the preliminary question in reference to Puigdemont as he did not appear in court in the proceedings.

The Supreme Court judgment on the *procés* led the Court to reactivate the European arrest warrant for Puigdemont (only for him) with the Belgian justice system, this time on charges of sedition and embezzlement. The possible reform of this European arrest warrant will surely be considered in the new term inaugurated by the new European Parliament and the new Commission. For now, the most recent CJEU case law reaffirms that the executing judicial authority "must rely, in principle, on the assurances given by the issuing judicial authority" (Case C-128/18) in a case of possible inhuman or degrading treatment due to the conditions of detention in the country issuing the warrant (Romania). The CJEU's ruling on the question referred to it by the Belgian justice system in the case against the Balearic rapper Valtonyc will also provide some assessment criteria for the "Catalan case". It is thus beyond doubt that EU law, together with the European Convention and Court of Human Rights, will be crucial factors for both the legal and political resolution of the Catalan dispute. At both levels, my legal opinion is that European law, in general, will continue to align itself with the arguments of the Kingdom of Spain in defence of its constitutional order and territorial integrity. European construction cannot be based on the degradation of the rule of law by separatist forces, a movement that moreover fans the flames of Spanish nationalism on the opposite side, which is likewise disrespectful of democratic foundations.

(C) THE NEW DEVELOPMENTS OF THE CATALONIAN SECESSIONIST PROCESS IN CONNECTION TO EU'S LAW (SINCE DECEMBER THE 1ST 2019 UNTIL END OF DECEMBER 2020)

(1) General remarks

The Covid-19 pandemic has been a black swan and a game changer that has modified –even transformed– our political and social reality and the Catalan separatist movement is not an exception: the Catalan independence process has been postponed in the political agenda and it is no longer a top concern for citizens due to the pandemic.

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The *coronatimes* have certainly had a significant impact on the development of the secessionist *procés*. The spread of Covid-19 has led to appeals to release the Catalan leaders in jail[4], but it has also raised the contrafactual question about the capacity of a hypothetical independent Catalan state to manage the crisis. In more general terms, the devastating pandemic has sparked a sanitarian, humanitarian and economic crisis in Spain and has reopened the debate about the essence of the country and its quasi-federal structure, its ability to implement effective measures and the balance between security issues and civil liberties. Spain's reputation is consequently at stake and notoriously at risk anew, and this situation is irrefutably linked to the Catalan perception of its integration within the Spanish state. By the way, according to a recent opinion poll, support for independence is at its lowest level since 2011 and only 44.4% of the Catalan population would vote for independence if a referendum were held in November 2020[5].

Covid-19 has also shaken the foundations of the European integration to which an independent Catalan republic would aspire, although, according to a resolution adopted by the autonomous Catalan parliament, the decision to join the EU and other international organisations would be subject to a decision of the eventual sovereign parliament. This resolution certainly elaborates on the rather out-dated (mis)conception of sovereignty as an individual and full right instead of an interdependent and limited one.

Europe is facing the terrible and invisible menace of coronavirus, adding a new crisis to recent European history: the 2008 Great Recession, the 2015 migratory crisis, Brexit, illiberal tendencies, etc. It can be argued that the current global emergency could entail a more introspect and nationalistic view of Europe, which would be more fragmented due to diffuse and uncoordinated decisions of Schengen states, the new economic recession —a depression, really—, the external barriers of different kind erected in order to protect European citizens, etc. State nationalism, as well as many other divisive factors, will probably survive and may even be amplified by irrationality, which also penetrates the non-state peripheral nationalism, like Catalan or Scottish nationalism or, in cultural terms, the so-called Islamist separatism in France. It is still uncertain whether the post-coronavirus international scene will be more prone to unilateralism or multilateralism, but for now the European reaction to the current economic crisis has been quite different to that of the 2008 Great Recession: instead of the orthodox and *austeritarian* approach, a €750 billion Recovery and Resilience Facility (Next Generation EU) has been, among other measures, designed. For the first time in EU history the new fund addresses an embryonic common European debt and it constitutes a certain mutualisation of risk and solidarity. In spite of the problems that may arise from its

[4] A report submitted to the Parliamentary Assembly of the Council of Europe in 2020 by the Latvian socialist Boris Cilevisc (Motion of the Resolution 14802) called for the release of prisoners with political backgrounds, such as the Catalan politicians, in order to prevent the spread of the coronavirus. This report is foreseen to be debated by the Assembly by the end of the year. The Spanish Constitutional Court has dismissed this possibility: STC 38/2020, of 25 February 2020 (*BOE*, No. 83, 26 March 2020).

[5] Report published on 17 November 2020 by the *Instituto de Ciencias Políticas y Sociales* of Catalonia.

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implementation, this reaction is certainly more cohesive than the response to the 2008 Great Recession. As far as the Catalan separatist movement is concerned, EU institutions continue to avert the problem and avoid assuming a potential mediator role: the movement is considered a domestic issue, exclusively subject to the Spanish Constitution. However, the Catalan legal convulsion is not in substance only a Spanish problem, but by extension a European political and legal problem: the Constitutional rupture of a state is a European disturbing factor and a blatant violation of EU law (Article 4 (2) TEU).[6] Additionally, as it will be discussed in the next two sections, the ramifications of the *process* have had a significant impact on several judicial cases in the EU as well as the European system of human rights as a whole.

It is still early to conclude that dialogue is replacing unilateralism and legality is replacing illegality. Secessionist forces seem doubtful and divided regarding the roadmap to achieving political hegemony in Catalonia. The upcoming regional election scheduled for February 2021 may shed some light on this question. For now, given the parliamentary minority of the Spanish government, the influence of Catalan separatists in Spanish political life remains important: the support of secessionist parties is essential and the Spanish government has therefore adopted a more lenient attitude towards them. The possibility of pardoning the Catalan leaders in jail will be looked into and, alternatively, the Spanish criminal code may be reformed, with natural retroactive effect, in order to reduce the punishment associated to sedition, adapting it according to other EU states national law and thus favouring the recognition of European arrest warrants issued for this crime. It is worth noting that academic debate over the scope of the illegality of this conduct continues at the Spanish level[7], beyond the economic nature of the embezzlement charges.

However, we cannot forget the strategy of confrontation, denigration and weakening of the state pursued with no constitutional loyalty and characterised by legal disobedience –

[6] More data and ideas in J. Roldán Barbero, "El desafío soberanista en Cataluña y el Derecho de la Unión Europea", 63 *Revista de Derecho Comunitario Europeo* (2019) 387-404 [doi: http://doi.org/10.18042/cepc/rdce.63.01].

[7] H. Roldán Barbero has summarised the positions of his fellow criminal lawyers in relation to the events occurred in Catalonia during the disconnection process and the judgment rendered by Supreme Court concerning the main political leaders of the region. The different positions range from denying the crimes to claiming that there is a crime of rebellion, not only of sedition, as the Supreme Court established. "El delito de rebelión en la Segunda República" (to be published in tribute book to Javier Boix in 2021 by Tirant lo Blanch, Valencia).

In the international arena it is important to take into consideration the report published by the Venice Commission (European Commission for Democracy Through Law) on 8 October 2020 (Opinion No. 970 / 2019) entitled "Criminal Liability for Peaceful Changes for Radical Constitutional Change from the Standpoint of the European Convention on Human Rights". The report highlights the freedom of speech and tries, although ambiguously, to strike the right balance between individual rights and the state duty of preserving constitutional order and public security. In the Catalan case, individuals are not prosecuted on their right to freedom of expression, but on the violation of rulings and judgments of national authorities in a state governed by the rule of law. Accordingly, the Venice Commission has ratified its criteria –already included in its Code of Good Practice on Referendums in 2006-2007– concerning the referendums in a Report adopted on the same date (CDL-AD(2020)031) and entitled "Revised Guidelines on the Holding of Referendums". The Commission reiterates and emphasizes the need for referendums to respect the rule of law and, in particular, to comply with the legal system as a whole, especially with the procedural rules on constitutional revision.

leading, inter alia, to the judicial disqualification of the regional President[8]–, fake news, some of them disseminated by foreign powers like Russia, a project of a Digital Catalan Republic (thwarted by a Royal Decree-Law[9]), etc. The independent movement has not stopped trying to impose its own narrative at an international level. However, the Catalonia's external action plan for the period 2019-2022 has been deemed incompatible with regional competences and national unity in foreign policy by the Spanish Constitutional Court, which has therefore denied the international subjectivity of autonomous regions.[10] Spanish nationalism, languid until recently, has correlatively disquietingly woken up[11]. Nationalisms feed each other…

Although from a political point of view, Catalan independence has lost momentum, the legal front remains quite active and controversial. The Spanish Constitutional Court's rulings on some dozens of cases of different nature related to the *procés* have been unanimous in almost all of them, with the exception of some cases concerning preventive prison[12]. The separatist movement awaits, once exhausted the domestic remedies, for the final intervention of the European Court of Human Rights (ECHR), whose ruling on the *Forcadell* case was favourable to the interests of the Spanish state (dialogue between Spanish highest courts and the Strasbourg Court through the request of an advisory opinion is not possible in this case since Spain has not ratified Protocol no. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms). The Strasbourg Court ultimately underpins the criteria brandished by Member States "in a democratic society" and in defence of their own democratic order. It is important to bear in mind that the Catalan case is a very peculiar one insofar as it entails the impeachment and imprisonment of political representatives.

In these circumstances, the reputation of the rule of law and the separation of powers in Spain is of utmost importance in order to determine the legitimacy of both the constitutionalist and the secessionist stance. It must be emphasized that different international rankings have positively assessed the state of the Spanish democracy. Spain was again classified as "full democracy" by The Economist Intelligence Unit in 2019,[13] although the Catalan issue was recognised to have provoked a disturbing setback. Even Greco, the Group of the Council of Europe against Corruption, recognised some improvements in this field in Spain in 2019[14]. However, both Greco and the first report published in 2020 by the

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8 Judgment given by the Spanish Supreme Court (Criminal Chamber) on 28 September 2020.

9 Decree-Law 14/2019, 31 October 2020, on adopting urgent measures for public security reasons concerning digital administration, government procurement and telecommunications (*BOE* no. 266, 5 November 2019).

10 STC 135/2020, 23 September 2020 (*BOE* no. 289, 2 November 2020).

11 See Núñez Seixas, X. M.: *Suspiros de España. El nacionalismo español 1818-2018* (Editorial Crítica, Barcelona, 2018).

12 STC 155/2019, 28 November 2019 (*BOE*, no. 5, 6 January 2020). This decision, which concerns the preventive custody of Oriol Junqueras and deals with the judgment rendered by the ECHR on 20 November 2018 in the *Demirtas v. Turkey* case, had 3 dissident opinions.

13 See the information here. Other international indices ratify the health of the Spanish democracy.

14 See the information here.

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European Commission over the quality of the rule of law in the European Union[15] deplore the long-lasting impasse in the renewal of the members of the General Council of the Judiciary, which is the organ of governance of the judiciary in Spain. The proposal announced by the Spanish government to reform the appointment method of the General Council of the Judiciary has given rise to mistrust in Europe[16]. Moreover, the European Commission has warned against the appointment of the former Minister of Justice as General Prosecutor, pointing out its negative effect on the independence of the judiciary. Nevertheless, no reference whatsoever to the handling of the *procés* has been included in any of these international documents. It is important to underline the relevance of the independence of the judiciary within the European integration, as the different decisions taken by the European institutions, notably those regarding Poland, confirm.[17] In general terms, Spanish democracy is far from being ideal: some of its elements are deteriorating and some additional difficulties to the solution of political conflicts and the promotion of shared policies may arise, partly due to territorial disputes and the polarisation of the ideological spectrum. But democracy cannot be discredited as a whole and Catalan nationalists cannot be considered as a persecuted and oppressed minority entitled to international protection or the right to self-determination (a *secession remedy*). It is preposterous to invoke the flaws of the rule of law in Spain in order to legitimise an uprising against the whole legal system. As it has been said by the European Commission, the flaws of the Rule of Law in Spain are occasional and not systemic (and people are not persecuted for ideological reasons).[18] Law does matter!

(2) Recent European jurisprudence linked to the Catalonian *procés* and its interaction with Spanish jurisprudence

(a) *European elections and parliamentary immunity*

The relationship between national high courts and the Court of Justice of the European Union (CJEU) is sometimes sensitive and always crucial for the rule of law in Europe and the unity and primacy of EU law.

There has been some tension between the Spanish Supreme Court and the CJEU regarding their respective jurisprudence about overlapping matters in the past[19] and some of it still persists, especially in many cases concerning mortgage loan agreements and consumer

15 COM (2020) 580 final. 30 September 2020.

16 See the letter signed on 14 October 2020 by the President of Greco.

17 P. Martín Rodríguez, "Poland before the Court of Justice: Limited or Limitless Case Law on Article 119 TEU?", *European Papers*, 17 July 2020.

18 Interview with Didier Reyners, the European Commissioner of Justice, *El País*, 8 October 2020.

19 In a Judgment given by the European Court of the European Communities on 12 November 2009, in a case concerning tax functions of Land Registrars (Registradores de la Propiedad), the ECJ condemned a Member State for wrong jurisprudence emanated from its Supreme Court for the first time. *Commission v. Spain*. C-154/2008. In general terms, see D. Sarmiento, "La aplicación del Derecho de la Unión por el Tribunal Supremo en tiempos de crisis", 13 *Papeles de Derecho europeo e integración regional* (2012).

protection[20].

One of the most recent and relevant examples of the tension between both courts is in fact related to the Catalan *procés* as a consequence of the unprecedented request by the Criminal Chamber of the Spanish Supreme Court for a preliminary ruling of the CJEU in order to clarify the start of the mandate of Members of the European Parliament and the immunities accorded to them. The questions concerned the former Vice-President of the autonomous government of Catalonia, Oriol Junqueras, one of the main leaders of the illegal referendum and of the adoption by the regional parliament of the so-called *disconnection* laws in 2017.

The request and the implementation of this preliminary procedure spark many remarks:

First of all, it is surprising that the Supreme Court referred the matter to the European justice when a previous judgment of the European General Court regarding the former regional President Carles Puigdemont pointed to the relevance of national legislation and the need of national intervention in the verification of the credentials for elected Members to take their seats in the European Parliament[21]. This interpretation had already been included in the 2009 *Donnici* decision by the European Court of Justice (ECJ) and it was consistent with current practice and the Spanish stipulations[22].

Apparently, there was no "reasonable doubt" but an "acte clair" in this question. Yet, the ECJ ruling in the *Junqueras* case given on 19 December 2019 provided a different answer[23], which confirms the importance of preliminary rulings since in this case the *a quo* court seemed convinced of the opposite result. In its preliminary ruling the ECJ concluded that the status of Member of the European Parliament –and the immunities accorded to it– is acquired on the very day of the official declaration of the election results (on 13 June 2019) and declared in general terms that preventive imprisonment should be lifted. Consequently, Oriol Junqueras could only be prosecuted by national authorities through a request to the European Parliament and provided that it accepted it.

It is true that the ECJ changed the former criterion and did so without a solid grounded justification and motivation, which explains the critics to the ruling in scientific publications and the Spanish media. It has been deplored the confusion created and its collateral effects[24], describing the ruling as legislative[25] and *ultra vires*[26]. According to Paz Andrés, the ruling is very weakly grounded and unjustified as well as ambiguous and enigmatic, and it fails to take

[20] See, for instance, Judgment of 21 December 2016, *Floor Clauses*, Joined cases 154/15 and others, ECLI:EU:C:2016:980.

[21] Order of 1 July 2019, *Puigdemont and others*, T-388/19 R, ECLI:EU:T:2019:467.

[22] Judgment of 30 April 2009, *Donnici*, C-393/07, ECLI:EU:C:2009:275.

[23] Judgment of 19 December 2019, *Junqueras*, C-502/19, ECLI:EU:C:2019:1115.

[24] A. Mangas Martín, "Infinitos daños colaterales", *El Mundo*, 19 December 2019. X. Vidal-Folch qualifies the decision as "balanced", but "problematic". "Sentencia equilibrada y problemática". *El País*, 19 December 2019.

[25] E. Gimbernat: "La Sentencia del tribunal de Luxemburgo", *El Mundo*, January 2 2020.

[26] T. de la Quadra-Salcedo, "Junqueras: inmunidad y presunción de inocencia", *El País*, 3 January 2020.

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account of the conflict of interest, considering the constitutional relevance and the seriousness of the crimes involved[27].

But ECJ rulings are not subject to ordinary appeals, they are mandatory and must be executed on their own terms. Europeanist ideology should not be selective nor opportunist, and this ruling can certainly be considered Europeanist, since it pushes EU competences at the expense of national requirements. Naturally, the ECJ cannot demand the release of a prisoner or the annulment of the Spanish judgment[28] and it is also true that the ruling grants a margin of appreciation to the Supreme Court for its right implementation.

In this respect, it is hard to understand the position of the Supreme Court. It has already been pointed out that the preliminary ruling was surprising, but the performance of the *a quo* court was even more so. The Supreme Court went on with the procedure against the incidental nature of the preliminary process and pronounced its judgment on 14 October 2019 –two months before the ECJ ruling was published– condemning, inter alia, former Vice-President Oriol Junqueras.

Why was the preliminary ruling requested, then? —the Advocate General wonders[29]. The *effet utile* of the ECJ ruling was applicable not to Junqueras, but indirectly to the former President Puigdemont and the former regional minister Comín, who had fled to Brussels in order to avoid prosecution in Spain and acquired the status of Members of the European Parliament without going to Madrid (the Supreme Court itself had denied the pertinence of the preliminary ruling regarding Puigdemont on the basis he was a fugitive).[30] In the meantime, the criminal procedures and charges against them continue, as do the European warrant arrest and the supplicatory procedure (already under scrutiny in the European Parliament)

Immunity is usually lifted by the European Parliament, but it is appropriate to reflect on

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[27] P. Andrés Sáenz de Santa María: "Nadie es perfecto: el TJUE y el TS en el asunto de la elección de Oriol Junqueras al Parlamento Europeo", 50 *Revista General de Derecho Europeo* (2020). See also J. A. Vallés Cavia: "La adquisición de la condición de parlamentario europeo y el alcance temporal y material de la inmunidad. A propósito de la sentencia del TJUE en el asunto *Junqueras Vies*", 65 *Revista de Derecho Comunitario Europeo* (2020) 189-215; and M. Jordana Santiago, E. Zapater Duque: "La cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea a propósito del caso *Junqueras*: ¿un asunto de largo recorrido?", in J. J. Queralt (dir.): *La sentencia del procés: una aproximación académica* (Atelier, Barcelona, 2020) 187-210.

[28] Spanish domestic law contemplates the annulment of an internal judicial judgment, under certain conditions, in case of a decision taken against the Kingdom of Spain by the European Court of Human Rights, but not in case of a decision rendered by the CJEU.

[29] According to Advocate General Szpunar's opinion, the status of MEP is acquired solely from the electorate and it cannot be conditional on the completion of any subsequent formalities. Szpunar considers that the European Parliament should be able to decide whether it is appropriate to waive or defend the immunity of one of its Members, but he underlines that the reply would be hypothetical. ECLI:EU:C:2019:958.

[30] A. Ruiz Robledo has rightly asked for the formal derogation of Article 224.2 of the Organic Law on the General Electoral Regime (regarding the internal procedure in order to be inaugurated as a Member of the European Parliament), so as to to confer legal certainty to this kind of situations. A. Ruiz Robledo, "Inmunidad no significa impunidad", *El Español*, 19 December 2019. In the meantime, since the ECJ's judgment we must deem this provision inapplicable according to the classic *Simmenthal* doctrine established by the Court of Luxembourg in 1978.

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whether Spanish institutions are now willing to start a new judicial process with great media impact due to political reasons. Junqueras, who remains in jail, was not allowed to leave the prison because the Supreme Court, in disagreement with the State Attorney's position, who was in favour of Junqueras's release and the immediate petition to the European Parliament, argued that Junqueras had already been convicted when the ECJ ruling was published. On 23 October 2020, the Criminal Chamber of the Spanish Supreme Court declared that the prosecution of a person cannot be considered arbitrary if it has been initiated long before the announcement of the election results and has no relation with his or her parliamentary functions[31]. Moreover, the Spanish Constitutional Courts has affirmed that a popular vote cannot overrule a judicial decision[32].

As a matter of fact, there has been no formal defiance or disobedience to the ECJ, since its ruling delegated the final decision to the Spanish judicial authority and it later on rejected the appeals lodged by Junqueras concerning the measures implemented and the endorsement of the European Parliament of the position of the Spanish national authorities. The most recent and determining case of this jurisprudence saga is the Order of the Vice-President of the ECJ of 8 October 2020 that upholds the ECJ's dismissal of interim measures regarding the European Parliament's decision of 13 January 2020 that declared Junqueras's seat vacant with effect from 3 January 2020 and consequently rejected the urgent request to protect his immunity. As a consequence, the Vice-President of the ECJ ruled that in this context the European Parliament can only be informed of the expiry of the mandate since it is not its competence to comment on the national procedure that led to Junqueras's loss of the status of Member of the European Parliament[33].

Consequently, this case is completely different to the highly criticised ruling by the German Constitutional Court of 2020 regarding the quantitative easing policy of the European Central Bank, since in the latter a national court openly challenged the legality of a European secondary norm in spite of the ECJ's prerogative.[34] Nonetheless, the positions of the Spanish Supreme Court and the ECJ in the *Junqueras* case have certainly had a negative impact on the credibility and consistency of both courts.

(b) *The European arrest warrants*

Besides the question of the alleged immunities linked to the European election, there have

[31] Order of 23 October 2020. JUR/2020/303482.

[32] Waiting for further expected decisions on this matter by the Constitutional Court, see its order denying the suspension of the European arrest warrant issued by the Supreme Court against former Catalan President Carles Puigdemont. *Iustel - Diario del Derecho* (14 September 2020).

[33] Case 121/2020 P (R). We must also note the Order given by the General Court of the EU on 15 December 2020 (Case T-24/20) in which it declares an action brought by Oriol Junqueras against the statement by the European Parliament that his seat is vacant to be inadmissible. The General Court observes that the European Parliament has no competence to review the decision of the authorities of a Member State declaring an individual to be ineligible to hold office as a member of the European Parliament under national law.

[34] Decision 2020/440, 24 March 2020.

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recently been new cases of European arrest warrants (EAW) issued by the Spanish Supreme Court that have been rejected or delayed by judicial authorities of third countries.

As it has already been pointed out, the ECJ's ruling on the *Junqueras* case has eventually favoured Puigdemont's and Comín's admission as Members of the European Parliament. The Supreme Court has in fact ratified the EAWs regarding Puigdemont and Comín, which have, however, been unilaterally suspended in Belgium. Alongside the warrants, the petitions to the European Parliament have also been issued and are currently under discussion.

Additionally, two other former counsellors of the regional Catalan government that pushed the *disconnection* from Spain and are far from the scope of the Spanish judicial power have managed to evade EAWs. On the one hand, as far as Clara Ponsatí is concerned, the supplicatory procedure is also under examination because she is a Member of the European Parliament. In 2019 a Scottish police authority rejected the EAW issued against her because it deemed it "disproportionate", although it is well known that EAW is a mechanism that operates entirely and exclusively between the judicial authorities involved[35].

On the other hand, Lluís Puig, also a former member of the regional Catalan government, is currently in Belgium, where Catalan secessionists have been welcome so far too. On 7 August 2020, a Dutch-speaking judicial chamber in Brussels responded to the EAW in a shocking way: the EAW was rejected on the basis that the *a quo* judge had no jurisdiction over the case. This judicial chamber considered that the Supreme Court had therefore violated the right to effective judicial protection and the right to the lawful judge and supported its position with a report by a UN Working Group. There is no reference to the violation of human rights within the Spanish legal order but, as a matter of fact, this was the first time that an EAW was rejected on the basis that the judicial authority of the requesting state was not competent according to its national legal system, which is not a reason contemplated by EU law. This astonishing decision has raised new and increased indignation among constitutionalist lawyers and politicians in Spain and there have even been calls for the rupture of diplomatic relations with Belgium[36] as well as logically for a reciprocal response to the EAWs issued by Belgian judicial authorities[37].

Unionist forces in Spain have demanded the amendment of the EAW legal framework and functioning and, by extension, the revision of the framework for judicial cooperation in criminal matters in the European Union[38], which has become one of the few specifically European matters that are currently at stake in the Spanish political debate. The judicial response from other European countries –not particularly from the prosecutors, who have

[35] This decision has been condemned by C. Bautista in "Euroorden, la última frontera", *El Mundo*. 13 November 2019.

[36] J. A. Yturriaga, "Enésima afrenta judicial de Bélgica a España", *Sevillainfo*, 17 August 2020.

[37] See D. Berzosa, T. Freixes, "La justicia belga contra la Unión Europea", *El Mundo*, 17 August 2020.

[38] See the series of working papers published by P. Rivera Rodríguez, *La influencia del caso Puigdemont en la cooperación judicial penal europea* (Fundación Universitaria San Pablo CEU, Madrid, 2019).

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been in general more cooperative– has been qualified as denigrating and humiliating for Spanish democracy and sovereignty, and has certainly had a negative impact on the attitude of a part of the Spanish population towards the European identity.

However, as it has been pointed out, it would be wrong and unfair to speak of the disqualification of the Spanish judicial system by European organs in the framework of the Catalan secessionist challenge[39]. The Spanish government has stayed silent and launched a reform of the Spanish criminal code in order to harmonise the legal treatment of the crimes of sedition and rebellion with other European states. Meanwhile, the European Commission has overhauled the EAW mechanism and concluded that, in spite of some anomalous cases, its performance is on the whole satisfactory[40].

Finally, it is relevant to point out that the European Court of Human Rights has dealt with the execution of EAWs in the light of the European Convention on Human Rights. In the *Romeo Castaño* case, regarding Natividad Jáuregui, a member of the Basque terrorist organisation ETA[41] who has been eventually surrendered to the Spanish authorities, the Kingdom of Belgium was condemned not for rejecting the handing-over of the requested individual to Spain, but for not having thoroughly analysed the request.

[39] In this regard, see R. Alonso García, "Procés y hartazgo judicial", *El País*, 5 February 2020.

[40] Report on the implementation of the European Arrest Warrant and the surrender procedures between Member States. COM (2020) 270 final. 2 July 2020. It is also worth mentioning the letter sent from the Criminal Procedures Unit of the European Commission on 8 October 2020 to the "Foro de Profesores", an association of Spanish scholars defending the constitutional order. In this letter, the Commission promises to examine the national transposition of the EAW in Belgium and Germany, but it warns as well that the Commission is incompetent to revise the decisions taken by the domestic judicial organs in respect of these warrants. As far as the European Parliament is concerned, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) has passed on the 1st of December 2020 a resolution asking for an amendment of the EAW, aiming, *inter alia*, at the inclusion of the crimes against the constitutional order and the integrity of the State among the crimes subject to an automatic surrender. The proposal seems reasonable, as the violations of the national constitutional structure are at the same time a blow against European values and foundations. Therefore, these violations have an indirect European scope.

[41] A comment on this judgment by A. Sánchez Frías in "Convergencia de caminos entre el TEDH y el TJUE en cuanto al riesgo de vulneración de los derechos fundamentales como motivo de no ejecución de la euroorden. Un análisis de la Sentencia del TEDH de 9 de julio de 2019, Romeo Castaño", 65 *Revista de Derecho Comunitario Europeo* (2020) 167-187 [doi: https//doi.org/10.18042/cepc/rdce.65.05].

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Diplomatic protection and State liability: the judgment of the Spanish National High Court No. 494/2005, of 11 December 2019

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(A) INTRODUCTION

On December 2019, the Administrative Chamber of the National High Court[1] condemned the Spanish state to compensate the Spanish journalist Jose Couso's family for the damages resulting from the omission in the exercise of Spain's diplomatic protection following the death of the journalist in Baghdad (Iraq) on 8 April 2003. This pronouncement has reopened the discussion concerning the connection between the discretionary power of the State, according to international law in the exercise of diplomatic protection and the eventual State liability established in national law. The judgement has received opposing assessments: while some sectors are critical because they consider that it establishes a dangerous jurisprudential precedent that reduces the state's room for manoeuvre in international relations, others have given a very positive assessment of the National High Court's decision because they believe that due compensation has finally been recognised in a case that has also been affected by the vicissitudes that the principle of universal jurisdiction has suffered in our country and in which the journalist's family has been struggling before the courts for 17 years[2].

(B) THE JUDGMENT OF THE ADMINISTRATIVE CHAMBER OF THE NATIONAL HIGH COURT 4391/2019 OF 11 DECEMBER 2019: A STEP FURTHER IN THE PROTECTION OF THE INDIVIDUAL

The judgment resolves the contentious-administrative appeal that the Couso family requested against the General Administration of the State as the result of the rejection by silence of the claim of the State liability for damages resulting from the omission of the diplomatic protection of the State following the death of José Couso. By Writ of 4 September 2008, the procedure was suspended awaiting a final decision on the criminal procedure that had been opened

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[1] SAN 4391/ 2019, of 11 December 2019, ECLI:ES:AN:2019:4391.

[2] For a more detailed analysis of the judgment, see: B. Vázquez Rodríguez, "Protección diplomática y responsabilidad patrimonial del Estado: a propósito del asunto Couso", 39 *Revista Electrónica de Estudios Internacionales* (2020).

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simultaneously to define the competence of the Spanish courts as the result of the amendment of the legal order on universal justice[3]. Once the termination of the criminal case was accredited through its dismissal by the Supreme Court in 2016, the suspension of the contentious-administrative procedure was brought up by a Providence dictated on 18 July 2019.

(1) The arguments of the parties

According to the complainant, journalist José Couso was a person internationally protected by the Forth Geneva Convention of 1949 and by articles 51 and 79 of Additional Protocol I to said Convention, which applies to armed conflicts with an international character, and therefore his death constituted an internationally wrongful act which forced the United States to repair the damage inflicted. As for the requirements for the exercise of diplomatic protection under international law, the complainant considered the existence of the bond of nationality, the exhaustion of local remedies and the proper conduct of the injured party to be proven, and concluded that the omission made by the Spanish Administration constituted an improper functioning of the administration causing serious material and moral damage which the complainants were not under a legal obligation to bear.

On the other hand, the State Attorney rejected the complainant's argument for four main reasons: the discretionary power in the exercise of diplomatic protection; the previous judicial decisions of the Spanish courts requiring that the damage caused derives from an act of retaliation against a previous act of the Spanish administration; the absence of the exhaustion of local remedies and the fact that the family had already received a compensation according to the Royal Decree 8/2004, of 5 November, concerning compensations to the participants in international peace and security operations.

(2) The Judgement: the declaration of the State liability and its basis

Showing a good knowledge of the characteristics of diplomatic protection and its requirements in international law[4], the decision considers that the requirements for the exercise of diplomatic protection were fulfilled in the case, and in this regard it focuses in particular on the qualification of the act attributable to the armed forces of the United States as an internationally illegal act[5], although it is forced to recognize the discretionary power enjoyed by the State for its exercise[6]. Nevertheless, it also adds that

> "such a conception does not fatally determine the internal order of each State as to whether or not the citizen who is the victim of an international illicit act has a subjective right to have the State exercise of

[3] On these matters, see: SÁNCHEZ PATRÓN, J. M., "La competencia extraterritorial de la jurisdicción española para investigar y enjuiciar crímenes de guerra: el caso Couso", *Revista Electrónica de Estudios Internacionales*, nº 14, 2007; FERNÁNDEZ LIESA, C. R., "El asunto Couso en los Tribunales Nacionales y en las Relaciones Internacionales", *Revista Española de Derecho Internacional*, vol. LXIII, nº 2, 2011, pp. 145-169.

[4] See FJ. 7 (FJ: abbreviation of *legal basis* in Spanish).

[5] FJ. 8-11. At this point, it brings up the Advisory Opinion of the Council of State 1491/1991, of 30 January 1992, concerning the death of a journalist in Panama; it does so in order to justify the qualification as an internationally wrongful act and the lack of resources in the internal American judicial system. Otherwise, the case is not comparable because on that occasion the Ministry of Foreign Affairs requested the Advisory Opinion under the assumption that the exercise of diplomatic protection was applicable, and the Council agreed.

[6] FJ. 12.

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> diplomatic protection on his behalf";[7]

and although it accepts that "only a few States incorporate the obligation of the State to exercise protection"[8], the judgment focuses on the task of finding arguments in favour of such right.

The first argument can be found in the work of the International Law Commission (ILC), which points out that:

> "the institution of diplomatic protection is being adjusted in the last few years, recognizing the existence of a real obligation for the State to exercise diplomatic protection on behalf of its citizen if the requirements are fulfilled. Therefore, the International Law Commission of the United Nations (ILC) had initially rejected the possibility of establishing an obligation for the States in that regard, but finally, on the proposal of several of them, the ILC incorporated into the draft convention, received by the General Assembly by Resolution A/62/67 of 8 January 2008, a recommendation to that effect in article 19, according to which a State entitled to exercise diplomatic protection in accordance with the present draft articles should: Give due consideration to the possibility of exercising diplomatic protection, especially when a serious damage had occurred. Even though the articles on diplomatic protection have not been written into a treaty, internationalist doctrine emphasizes that they are now considered to be the definitive reaffirmation of rules of customary international law on this issue, as it would result from the way in which they are mentioned by the International Court of Justice in the Diallo case (Ahmadou Sadio Diallo Case - Republic of Guinea v. Democratic Republic of the Congo)."[9]

The second argument is based on the Spanish national system, since

> "there is no predetermination in our Legal Order of the regulatory source from which the State's obligation to exercise diplomatic protection derives, and so, in the absence of specific legal provisions, it may result from the need to give effect to constitutional values and principles, incorporated in or interpreted with or from international treaties regarding the values involved and the principles of international law to which the State (as a whole) must adapt its action"[10].

The National High Court defines this approach in the analysis of the case-law of the Constitutional Court and the Supreme Court. With regard to the first of these courts, the Administrative Chamber maintains the SSTC (Constitutional Court Judgement) 140/1995 and 18/1997 and from them concludes that

> "In these two decisions of our highest Court it is underlined that the starting point of its statements is that the State has, at least under certain conditions and presumptions, the obligation to perform its activity close to the State that has failed to comply with its obligations in order to achieve the satisfaction of the right of its nationals"[11].

With regard to the SC, the judgment refers to the SSTS (Supreme Court judgment) of 16 November 1974, 29 December 1996, 10 December 2003 and 17 February 1998, from which it concludes that "diplomatic protection constitutes an obligation of the State whose non-compliance, in certain circumstances, may involve its liability"[12]. All the above points lead to the conclusion that:

> "The application of the previous doctrine to the case under consideration here leads to the admission of the appeal and the declaration of the State's liability with the scope that we will later specify, since

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7 FJ. 12.
8 *Ibidem.*
9 *Ibidem.*
10 Previously, the judgment had admitted that "*in Spain, the only mention in this regard appears in Article 21.6 of Organic Law 3/1980, of 22 April, of the Council of State*" (FJ. 7).
11 *Ibidem.*
12 FJ.13.

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> the circumstances of the case made it necessary for the State to carry out its diplomatic activity on behalf of the victims of the death... Nevertheless, (and this has not been called into question in the reply to the complaint) the General State Office merely received and accepted the basis offered by the United States Administration regarding the fact that the attack against the [Direction XXX] was justified and that the death... was an unfortunate accident. There is no evidence of any action having been taken, not only to recognise the illegality of the attack (which the STS of the Second Chamber regrets), but also to compensate for the financial consequences in a reasonable manner. This was despite the numerous requests made in this regard by various parliamentary groups, as stated in the administrative record. ... the Spanish Administration was obliged to perform the necessary activity to promote before the offending State the compensation of the damage inflicted in an illegal way, which it did not do neither in the subsequent moments to the decease... nor to this date"[13].

(3) Assessment of the arguments of the Judgment: a questionable legal construction

In addition to indicating that the existence of a subjective right to diplomatic protection is wrongly compared with the right to invoke the State liability, it should be emphasized that the arguments used to declare the State liability are questionable. Regarding the stipulation in article 19 of the Commission's draft articles, it is a recommended practice that has not reached the condition of a customary law. In this regard, it is contradictory that, at first, the judgement itself describes it as a "recommendation",[14] and then, it attributes a customary character to all the articles of the Draft, mentioning for that purpose the internationalist doctrine —which denies it to article 19, as the Commission itself had previously done— and the Diallo case, in which the ICJ did not pronounce on this specific article[15]. However, quotations from the judgments of the CC are appropriate, since they can help to reinforce the individual's right to be compensated. On the contrary, this is not the case with the case-law of the SC, about which the judgment itself states:

> "It must be accepted that the cases analysed by the case-law of the Supreme Court differ from the present one, which does not allow its mechanical application, since they involved damages caused by a State to our nationals in retaliation for the actions carried out by Spain. There was therefore a causal connection between the activity of our authorities and the damage inflicted by another State on a Spanish citizen, damage which would not have been attempted to be compensated through the exercise of diplomatic protection or would have been in an inappropriate way. On the other hand, according to the case in question here, the death... was caused by the United States army without any causal connection with the actions of our authorities, since... he was a journalist who was performing his professional activity when his fatal death occurred"[16].

Probably aware of the lack of substance of its arguments, after proclaiming the upholding of the appeal and declaring the State's liability, the judgment appeals to other complementary arguments in the same legal Basis:

> "On the other hand, the international illicit act in question also affected a legal asset of first order such as the right to life, meaning that if, as we have stated, one of the essential duties of the State is the protection of its nationals, the State's obligation to provide such protection would reach a superlative degree in accordance with the constitutional relevance of the right to life ex art. 15 EC in connection with Art. 10.2 EC and the international conventions concerning said protection. Nor can it be ignored that the obligation to provide diplomatic protection to the family members ... relates to the specific duty

[13] FJ. 14.

[14] FJ. 12.

[15] In its Judgment of 24 May 2007 concerning the case of *Ahmadou Sadio Diallo (Republic of Guinea v. Republic of the Congo)*, the Court dealt with so-called substitute protection based on article 11 (b) of the Draft articles (see sections 86-93 of the Judgment).

[16] FJ. 13.

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> imposed by Article 39 EC, (...). This is an obligation established in Article 53.3 EC which, although it must be provided through the channels stipulated by the Legal Order, (...) it is evident that diplomatic protection was the ideal and necessary channel for our authorities to fulfil the duty imposed by the aforementioned Article 39 EC."

In addition, the court states that

> "the activity specifically developed involved the exercise of freedom of information - Article 20.1.d) EC - which, as constitutional doctrine has stated from its beginning (...) means "the recognition and guarantee of a fundamental political institution, which is free public opinion, indissolubly related to political pluralism, which is a fundamental value and a requirement for the functioning of the democratic State" (...) Consequently, this objective dimension of freedom of information also advocated in favour of the exemption of diplomatic protection as a form of protection of the aforementioned freedom by guaranteeing the indemnity of its exercise".[17]

This is certainly the most novel aspect of the judgment we are commenting on. According to the National High Court (Administrative Chamber), the right to life, the protection of the family and the freedom of information are constitutional rights and values whose protection may lead to justify the exercise of diplomatic protection and, in its absence, the State's liability. This surely explains the reference to "the constitutional values and principles" to which it alludes before bringing up the case-law of the Constitutional Court and the Supreme Court. But no matter how laudable the desire to repair a material injustice, it is still a pirouette of arguments insufficiently justified from the legal point of view and added after the decision as a complement. It is also surprising that the judgment then adds two more reasons to overcome the barrier of the discretionary power:

> "a) First of all, because the Administration does not provide any justification for its conduct. Not even in the file of liability that ended without an explicit resolution, [...] Although the control of the discretionary action bears specific characters and limits, it is precisely the reasoning of the act that may be one of the elements on which the judicial control of the discretionary power may be based, control that is stolen - or at least made difficult - by the absence of an administrative response. b) Secondly, because if reasons of foreign policy (which is the responsibility of the Government under Article 97 EC) had advised not to develop any diplomatic action in favour of the victims of the death [...] they would not have the legal obligation to bear individually the foreign policy developed in favour of the State as a whole and, ultimately, of the citizens as a whole. The imposition of this sacrifice exclusively on the complainants would be against the "principle of equality before public charges" to which the already cited STC 107/1992, of 1 July, FJ 3 in fine, referred, in order to discard the fact that the non-execution of a Judgment must be suffered by those favoured by it when the State has not developed the diplomatic action that can be expected. We would then be in the case of liability for the normal functioning of the Administration that individuals would not be legally obliged to bear"[18].

This is the conclusion of the argumentative disorder that characterizes this judgment. Without commenting on the obvious absence of a reasoning, which was inevitable because the complaint had been rejected by administrative silence, section a) above raises the question of whether the formal requirement of the existence of an explicit decision is required in all cases in which an individual claims liability for issues relating to the exercise of diplomatic protection. On its side, section b) contains the clearest basis that until now our case-law has offered on the subject under discussion, the principle of equality before public charges, and yet the Judgment does not include it in the central core of the reasoning that leads to its decision, it only mentions it in a secondary

[17] FJ. 14.
[18] FJ. 15.

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way in order to diminish the value of the characteristic of the discretionary power.

All the above leads us to consider that the legal construction of the judgment is questionable. Given the lack of previous court rulings, the Administrative Chamber of the National High Court could have chosen to go further and eliminate the requirement of a previous act of the Spanish Administration causing the illicit act of the foreign State, which the SC has maintained until now, in order to estimate the liability, which results to be excessively restrictive. The principle of equality before public charges and the need to prevent unfair prejudices to the individual provided the opportunity. It could also have elaborated the incidence of those constitutional values that it merely points out. This would have been especially appropriate if we consider that the SC's judgment determining its doctrine in this matter is pre-constitutional. However, the Administrative Chamber has opted for a less consistent and poorly structured argument, in which its main arguments, both those it considers to be based on international law and Spanish case-law, have no substance.

(C) WAITING FOR THE SUPREME COURT

The State Attorney has already filed a brief of preparation of the cassation appeal before the SC. It includes the discretionary power in the exercise of diplomatic protection, the absence of an individual's right to such protection and the conditions established in the previous judicial decisions of the High Court among the reasons cited[19]. Consequently, the Couso case offers the opportunity to confirm its previous doctrine or to take a further step, eliminating the requirement of the act of the Spanish Administration in the causal chain that leads to the damage suffered by the individual. The Administrative Chamber of the National High Court has been sensitive to the peculiarity of the Couso case, but its argumentative construction has some weak points. Hopefully, the SC will be able to find a balance between the discretionary power that the government should possess in the management of foreign policy and the protection on the internal level of the rights of the citizens who may be affected by political decisions taken in that field. In a Rule of Law, this aspect cannot be underestimated. Also, it can be expected that this will be done through more consistent and elaborate legal arguments than those in the decision discussed here. By doing so, it would continue to improve the path it opened in a remote year of 1974.

[19] Brief of preparation of the cassation appeal, State Attorney, No. 639/2020, 24 February 2020. The Minister of Foreign Affairs, European Union and Cooperation expressed a negative view of the National High Court's judgement, considering that the decision "opens up the right to consular protection [sic] in such an extensive manner that it is impossible for the State to assume", Statements by the Minister of Foreign Affairs, European Union and Cooperation, Arancha González Laya, *Europapress*, 3 March 2020.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

Soldados del Terrorismo Global. Los nuevos combatientes extranjeros. By Inmaculada Marrero Rocha (Tecnos, Madrid, 2020) 216pp.

This book, written within the framework of several prestigious research projects (some of them European), represents a new convincing and accurate book in the already long list of great works written by Inmaculada Marrero, professor of International Relations at the University of Granada and a widely recognized expert on the phenomenon of foreign terrorist fighters. Among her previous works, we must mention a recent book co-edited by her together with Trujillo Mendoza: *Jihadism, Foreign Fighters and Radicalization in the EU* (Routledge, London / NewYork, 2019).

The work I am reviewing offers a comprehensive study of the current foreign terrorist fighters, as well as the main issues from the perspective of international relations, focused on the European Union (EU) framework. The book has nine parts, the main aspects of which are going to be addressed here. Part 1, where the contents are presented, shows some important keys to fully understand the phenomenon of foreign terrorist fighters, being one of them an essential historical approach.

The analysis of the contents begins in Part 2, which makes reference to certain relevant elements of the evolution of the phenomenon of foreign fighters. After examining the classic foreign fighters, *"the heroes"*, represented by figures such as Lord Byron, Che Guevara or John Cornford (who left their country of origin to join the ranks of the foreign insurgency, fighting for noble causes), prof. Marrero starts the analysis on the nature and action of foreign fighters nowadays. Many of them are connected with jihadist terrorist organizations such as ISIS, Al-Nusra Front and other cells, affiliated entities or groups derived from Al-Qaida, which may be considered "*the villains*". The author focuses her research on the *villains*, although this does not prevent her from drawing attention to the fact that the evolution experienced by the phenomenon does not reflect the whole current reality, inasmuch as the figure of the classic foreign fighter still exists actually, but has ceased to be visible. Prof. Marrero also pays attention to the phenomenon of violent radicalization, not only from the perspective of International Relations, but also from that of behavioral and social psychology, thanks to the interdisciplinary tools provided by the research projects that have served as guidance and support for this book. Prof. Marrero accurately highlights a relevant factor of uncertainty concerning the measurement of the recent exodus of foreign terrorist fighters and their alleged incorporation to groups such as ISIS, that is connected to the fact that many States informed about the departures to Syria and Iraq without knowing which are the groups of destination, and therefore without taking into account either the large number of currently existing insurgent groups which the combatants might have

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joined (for instance, in Syria there are more than 100), many of which are not considered terrorist organizations and even enjoy some international support.

Part 3 addresses the issue of terrorist fighters in connection with global terrorism. Prof. Marrero analyzes three main aspects very wisely. In the first place, she studies the transition from international terrorism to global terrorism, and how the appearance of the latter (religious in nature, and linked to neo-Salafism, i.e., an extremist and violent version of Islam) has revolutionized the studies on terrorism, promoting a program of research within the critical security studies, called *critical studies on terrorism "which counteracts the vision of the mainstream and orthodox current of terrorism studies, more focused on developing a commonly accepted meaning of the term terrorism"* (p. 67). Second, decentralization and virtualization of global terrorism, which allow the development of a *"virtual caliphate"* in addition to another one proclaimed at the territorial level (which has now disappeared), are also analyzed. And, thirdly, Professor Marrero deals with the commitment of those affiliated to global terrorism and the problem resulting from the replacement of national identity with another of transnational or global nature, which makes demobilization and disengagement of the members especially complex.

Part 4 focuses on foreign terrorist fighters in relation to armed conflicts, and consists of two sections, referring successively, first, to the participation of foreign terrorist fighters in current armed conflicts, and secondly, to the relationships with other violent non-State actors in armed conflicts. Among other aspects, prof. Marrero examines the challenge that new global terrorism poses to the Westphalian model; the exercise of new extreme forms of violence by foreign combatants, which contributes to the *chronification* of many conflicts, that violence becomes structural, an irreconcilable rupture between the different sectors of the civilian population and the decrease of the possibilities for future reconciliation and pacification; likewise, there is a progressive increase in collaboration with organized crime.

Part 5 is devoted to the return of foreign fighters from the perspective of European security. Although the return of foreign fighters is nothing new, the alarm raised by the return of those who recently joined groups like ISIS in conflicts such as those in Syria and Iraq is something new. In fact, this aspect, linked to the situation of the members who are still in Syrian territory or in other foreign countries, along with the situation of their women and children detained in different detention camps, have been among the issues which have raised more media interest until the pandemic caused by Covid-19 displaced the focus of attention. These problems have not yet been solved by many States (even within the EU there is still division about it). Nonetheless, the author emphasizes that the data seem to show, so far, that foreign fighters are more attracted by the transnational nature of the fight than by local terrorism. Therefore, certain fears felt by political leaders (also by public opinion) might be unfounded, at least in part. In any case, States have international obligations that they are currently neglecting, as several representatives from international organizations have also pointed out.

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Part 6 refers to the treatment of the legal response against foreign fighters, limiting the scope studied to its *"efficacy and implications"*. Regarding this part, three main aspects are addressed: international humanitarian law; the response of the United Nations Security Council to the phenomenon (UNSC); and the EU's response. Regarding the first aspect, the author makes it clear that the Islamic State must be considered as one of the parties in conflict in the wars fought in Iraq and Syria. Beyond the acts of terrorism committed during these armed conflicts, the author rightly brings up the obligation to deal with war crimes, crimes against humanity and genocide, such as the one committed against the Yazidi minority. One of the bodies created by the UN to facilitate things in this area is, in particular, the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011, created by the UN General Assembly in 2016. Another body that must be mentioned in relation to its potential future works is the Investigation Team on Daesh crimes in Iraq, which is rather singular due to its origin which is a UNSC Resolution (2379 (2017)), with the power and possibilities it provides. In any case, in the next section prof. Marrero fully proceeds to the analysis of the second aspect, that is the most emblematic response of the UNSC, through its well-known resolutions 2178 (2014) and 2396 (2017), which has given a lot of scope to the doctrine, due to the various weaknesses contained in them. Concerning the third aspect, prof. Marrero reviews the reaction *of* and *within* the EU, highlighting how most of the instruments and measures adopted so far have been more repressive than preventive. I totally agree, although, in my opinion, one more word could have been added to the title of part 6. It is "legitimacy", because, in addition to the questions related to effectiveness, an approach to legality and aspects connected are equally needed (and present), not in vain harsh measures have been adopted without trial, including the revocation of nationality, the controversial nature of which is well known (and shown in the book).

Part 7 delves into the complex issue of de-radicalization, disengagement and integration of European foreign fighters. Regarding this issue, certainly, legal and international relations *per se* would not be able to take into account more than a part of the reality which must be considered to face the complex and sensitive problems faced. Despite the fact that the concern of the States and international organizations in this regard has not emerged until very recently, finally there are strategies and instruments that may be analyzed. The author faces key issues, such as the *"securitized"* perspective of the EU. On the one hand, she essentially examines cooperation in relation to the phenomenon of radicalization, analyzing among other initiatives, the contents and implications of one of the greatest achievements of the EU to date, namely the creation of the *Radicalization Awareness Network* (RAN). And, on the other hand, the most relevant national policies against violent radicalization are also considered, in particular the British strategy (*Prevent*); the Danish one (*Aarhus*) and also the German model.

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Part 8 approaches the response given by Spain to terrorist fighters and violent radicalization, through the study of the adaptation of the Spanish political-regulatory framework to the new manifestations of terrorism and the fight against violent radicalization in our country. The analysis carried out splendidly shows the main features that define our country's approach: a security approach, but providing all possible guarantees (still mentioning significant aspects to be reformed).

The above-mentioned part is the last one dedicated to the study of the material contents, since the final part, number 9, contains the bibliographic references, lacking one referred to the conclusions. I must confess that initially I missed that part, since it is common that research works contain a specific section where personal contributions are gathered. However, it is also true that the author compensates that lack from beginning to end: in the design of the work scheme, by splendidly taking control of the research object chapter by chapter, optimally choosing each and every one of the research questions and problems subject to examination, and finally making clear the possible solutions and also showing her own position on every relevant matter. In short, it is an excellent book, a reflection of the great intellectual maturity and expertise of its writer.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

The Routledge Handbook of European Security Law and Policy. By E. Conde (Ed. In chief), Z. Yaneva and M. Scopelliti (co-editors). (Abingdon: Routledge, 2020), 444 pp.

At the crossroad of legal, political and economic studies, *The Routledge Handbook of European Security Law and Policy* approaches EU security from a holistic point of view by covering diverse perspectives: the risks to security of European citizens, states, societies and values. Here relies one of the strongest elements of the book: a comprehensive approach to a complex topic such as that of European Security could only be successfully tackled through a multidisciplinary approach. The book covers all fronts, with studies written by experts with different backgrounds in the fields of law, political sciences and economy.

The book is divided into three main Parts: a general part which sets out the conceptual framework, by focusing on the institutions, policies and mechanisms used in the framework of the security and defense policies (I); a second part which revolves around selected topics with significant impact on the daily lives of European citizens and on the management of the 'global commons' (II); and a third part where the authors seek to analyze the EU's response to security challenges from perspective of its 'human' implications and EU fundamental principles and values.

Within Part I, chapter I, by Martinsen, focuses on the European Agenda on Security, offering a critical analysis of the international agendas of Russia, China and the United States (during the peculiar mandate of President Trump). Meško, Kozmelj and Lobnikar examine in Chapter 2 the police and prosecutorial cooperation in the European Union as a response to serious transnational crime, presenting the institutional and procedural efforts of the EU towards ensuring a high level of security through co-ordination and co-operation between police and judicial authorities. Chapter 3, by Newsome and Riddervold, is devoted to the role of EU institutions in the desing of the tools and mechanisms developed by the EU in the framework of the EU Common foreign and security policies (CFSP). The European Security Strategy 2016 is examined in Chapter 4 by García Cantalapiedra from the point of view of the complex process that led to the adoption of that document. The concept of 'strategic autonomy' of the European Union is the focus of the contribution of by García Pérez (Chapter 5), exploring the different interpretations and practical implications on this concept. Chapter 6 closes this first part of the book, with the analysis of Serrano Antón focusing on the impact of the budgetary decisions on EU security, examining the current reasons to increase the budged through the multiannual financial framework of 2012 and 2027.

Part II reunites the most diverse topics, starting with the analysis, in Chapter 7, by Sosvilla-Rivero and Gómez Puig, of the EU monetary and economic integration and its

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security related implications, focusing in the repercussions of the sovereign debt crisis, and exploring the challenges posed by the dichotomy of competitiveness and sustainability. Morley examines in Chapter 8 the economic consequences of *Brexit* analyzing, discussing the potential impact of *Brexit* on the UK and EU economy and its effects on security. The legal aspect of financing business in the digital economy is addressed by Jiménez in Chapter 9, providing insight in the challenges that enterprises face in the digital economy as well as the risks associated with intangible property. Pérez López examines in Chapter 10 the issue of cryptocurrency and the EU's options for its regulation and Anguita Olmedo delves into the question of organized crime in the European Union in Chapter 11. The challenges of extremism and terrorism are the focus of Chapter 12 by Rodríguez Ortega. In Chapter 13, Pedrazzi examines the EU space security policy, from the point of view of the strategic and military interests in space. Teijo García offers in Chapter 14 an analysis of the EU comprehensive approach to fisheries as global commons, focusing on its related security implications. Chapter 15 then deals, with the analysis of Lázaro Touza and Gómez de Ágreda, with the topic of climate change as an emerging threat to national security, human security and ecological security. Solera Ureña examines the energy security in the EU in Chapter 16. Closing this part of the book, Wessel devotes his chapter 17 to the issue of cybersecurity and the recent developments in EU law in this field.

Turning to the human dimension of security studies, Costas Trascasas offers a critical view on the EU counterterrorism policy and its human rights implications in Chapter 18. The pressing issue of migrant and refugee children and the response of the EU to their need of protection against trafficking and exploitation is analyzed by Pérez González in Chapter 19. Proelß offers in Chapter 20 a legal and political analysis of the issues raised by maritime border control in the EU. The drug policy of the EU and its shortfalls is examined in Chapter 21 by Manjón-Cabeza Olmeda. The focus of Chapter 22, by Pascual Planchuelo, is on the role of EU observation missions in the prevention and resolution of electoral conflicts in third States. The closing chapter of Part III, by Sanahuja Perales, offers a critical evaluation of the 2016 EU Global Strategy for Foreign and Security Policy (already introduced in Chapter 4).

The great variety of topics and perspectives as well as the multidisciplinary approach make of this book a unique collection of expert essays suitable to offer a complete critical view of the multifaceted security challenges that the EU faces nowadays. The complexity of the topic and the different perspectives through which they are analysed shall however not discourage the lay reader. The conception of the book in the format of a handbook makes it all the more accessible for both the newcomer and the well-informed reader, providing insightful analysis into a complex and multifaceted topic. Covering very different fields and thematic problems, the Handbook still manages to offer in-depth analysis and reflection at an advanced academic level. This is indeed a highly recommendable reading for all those wishing to deepen their knowledge in the intricate

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field of EU security law and policy, as well as for those experts already knowledgeable in the very various specific matters covered by the handbook.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

La construcción jurídica de un espacio marítimo común europeo. By J.M. Sobrino Heredia and G.A. Oanta (Coords.) (JM Bosch Editor, Barcelona, 2020) 1052 pp.

This book is the result of a previous international conference organized under the same heading by the Network of Excellence for Legal-Maritime Studies (REDEXMAR), which is a research network made up of four research groups from four Spanish universities: A Coruña, Córdoba, Santiago de Compostela and Vigo, comprised by almost fifty national and foreign researchers whose fields of research are related to the law of the sea, maritime law or labor law of the sea. Such international conference was the fifth of those already convened by this Network, held this time in A Coruña, in July 2019.

The present volume has been coordinated by José Manuel Sobrino Heredia and Gabriela A. Oanta, and brings together the contributions of more than 40 renowned scholars, coming from 11 different countries. Among other entities that have collaborated to make the edition possible is the *Association International du Droit de la Mer* (AssIDMer).

As the authors graphically express in the Preface, the EU is a true "*maritime peninsula*", with "*more sea than land*", which has consequently attained a strong position in the international arena and fuelled enormous interests that are reflected in the process of legal creation of that maritime space to which the book refers. This space of dynamic construction has a lot to do with the sectorial policies that the EU has been building in relation to the sea and the oceans (those related to fisheries, navigation and ports, marine environment, marine research, marine energy, marine spatial planning, shipbuilding, maritime safety and security, tourism and employment, protection of people of the sea, development of coastal regions and foreign relations in maritime affairs), and to the Integrated Maritime Policy that it has been developing since 2007, through which the EU is addressing, from an inter-sectorial and holistic approach, the varied and enormous challenges that Europe faces regarding the sea, both in the background and the foreground. Thus, as the authors also declare, this enterprise's leitmotif is the search and analysis of the legal-public and legal-private consequences, both national and international, resulting from the progressive creation by the EU of a common European maritime space where an integrated strategy to promote blue growth is to be developed.

The book is divided into three parts on the following subjects: the European Common Maritime Area as a confluence of the different maritime sectorial policies of the European Union (Part I), the European Common Area as the scene of work at sea and human rights in the maritime environment (Part II) and the European Maritime Area as an Area of Maritime Protection and Safety in an international environment (Part III). This book, published in Spanish, includes several relevant contributions in English, as well as some in French and Portuguese. In total, 42 chapters devoted to very diverse and heterogeneous aspects, although forming a very consistent unified whole. Let us follow its guiding thread.

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Part I, referred to the European Common Maritime Area as the confluence of the different maritime sectorial policies of the European Union, is made-up of 13 chapters devoted successively to the following topics: scientific diplomacy in European Maritime Spaces (by Annina C Burgin); the management of migratory flows and their impact on labor relations on-board of merchant and fishing vessels (Laura Carballo); the solitude of Tunisian captains and fishermen in the Mediterranean (Patrick Chaumette); reflections on the question of the competences of the EU in relation to the UNCLOS (Miguel García García-Revillo); the preservation of the European maritime heritage through the control of atmospheric emissions from ships (Ruth García Llave and Juan Ignacio Alcaide); the 2019 fisheries agreement between EU and Morocco (Manuel Hinojo); the jurisdiction clauses and maritime contracts (Jacinto José Pérez Benítez); considerations on International Agreements in the framework of the European Maritime Space (Alice Pisapia); the limits to the principle of freedom in the seas (Ángel Rodrigo); the legal construction of a European maritime space: motivations and objectives regarding the Law of the Sea (Nathalie Ros); the *"tangle"* of Brexit in relation to the European Common Maritime Area (José Manuel Sobrino); the balance between the rights and duties of coastal States and those of other interested States with respect to living marine resources (Eva M. Vázquez); and the protection of underwater cultural heritage in a controversial legal area: The Strait of Gibraltar (Jesús Verdú).

The focus of Part II, as it has been already mentioned, is the Common European Space as a setting for work at sea and human rights in the maritime environment, which comprises 14 chapters, through which the following aspects are analysed: the social protection of workers of the maritime-fishing sector (Ignacio Camós); the Seafarers' working and living conditions and human rights (Joseph R. Carby-Hall); proposals to improve the social dimension of the sustainable fishing collaboration agreements negotiated by the EU with third countries (Xosé Manuel Carril); considerations on the occupational health and safety of self-employed fishermen (Belén Fernández Docampo); the role of intermediary agencies in determining the working and living conditions of seafarers (Irene Dozo); labor and Social Security peculiarities of the ship as a workplace (Marta Fernández Prieto); challenges and dysfunctions regarding fishermen salary from the perspective of International Labor law (Francisca Fernández Prol); the European Court of Human Rights as a place to address the protection of human rights at sea (Khagani Guliyev); occupational diseases in the fishing and aquaculture sector, emphasizing a gender analysis (Ana María Martín Romero); recognition of the professional contingencies of self-employed workers in the fishing sector (Nora María Martínez Yáñez); legal regime(s) for maritime labor in Portugal (María Regina Redinha); criteria for determining the causal link in the case of work accidents of the autonomous shellfish workers (Rosa Rodríguez Martín-Retortillo); the temporary legal regime for sea workers temporarily displaced in the context of Brexit (Emma Rodríguez Rodríguez); the

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coordination of Social Security systems at sea and the determination of the applicable law (Andrés Ramón Trillo).

Part III, which deals with the European Maritime Area as a Maritime Safety and Protection Area in an international environment, consists of 15 chapters, through which the following topics are examined: maritime security and the use of European naval forces against the challenge of immigration (Miguel A. Acosta); a vision of exploitation of the seabed from the international governance of the oceans (Ana M. Badía); the statute of the EU in the International Maritime Organization (Saïda El Boudouhi); Gibraltar, landfills and the environment in the face of Brexit (Inmaculada González García); Black Sea, European Maritime Space and Geostrategic Implications (Gabriel-Liviu Ispas); the particularities related to the preventive seizure procedure for civilian vessels in the Romanian legislative system and the effects of establishing such a measure within the European space (Petruta-Elena Ispas and Madalina Dinu); the freedom of high seas as interpreted by the International Tribunal for the Law of the Sea in the case M / V Norstar (Panama v. Italy) (Eduardo Jiménez Pineda); position and influence of the European Union within the International Maritime Organization (Guillaume Le Floch); the failed EU ship registry (EUROS) in an attempt to create a communitarian flag (Ana María Maestro); the order of the International Tribunal for the Law of the Sea in the case of Ukraine against the Russian Federation and its impact on the European Maritime Space (Artak Mkrtichyan); the legal framework for the establishment of marine protected areas beyond national jurisdiction (Laura Movilla); the participation of the EU in FAO and the effects of a possible withdrawal of one of its Member States (Gabriela A. Oanta); the EU action against marine waste (Belén Sánchez Ramos); the operation of Poseidon in the Aegean Sea and the developments in the governance of EU's maritime borders (Ioannis Stribis); Gibraltar waters and the question of whether it is a "*dry coast*" or a Spanish coast (Alejandro del Valle-Gálvez).

This book shows how the legal construction of the mentioned space presents enormous advances and successes, as well as difficulties and challenges, which are ultimately intertwined with European maritime governance itself and the blue growth of the EU. In short, it is a comprehensive writing, where both inter-disciplinarily across legal sectors and inner harmony succeed, since coherence is a distinctive feature throughout the book, along with the deep knowledge and expertise shown in relation to every topic. This edited collection is a great and useful read for experts, stakeholders and those interested in marine and maritime issues, including human rights and labour law.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

Controles migratorios y derechos humanos, by A. Sánchez Legido (Valencia: Tirant lo Blanch, 2020), 232 pp.

The book under review is an impressively organized work that seeks to enable a greater understanding about the tension between migratory controls by States and the protection of human rights. The book focuses on current policies, laws and regulations aiming to prevent the entry of migrants into the territory of States. As professor Sánchez Legido notes in the introduction, whilst the European migratory system has demonstrated a trend towards a set of mechanisms based on the rationale of protection according to human rights, there is room for concern that European States are lowering minimum standards, rather than ensuring high levels of protection. Within this framework, the author focuses particularly on the relocation of migration controls. It skillfully captures the challenges faced by migration and asylum policies and invokes in the reader the urgency required to address them. Not only is the study both timely and important, but also of great use to academics and to practitioners alike.

The metaphor of Fortress Europe is evoked by the author to explain the migration-security nexus in the current European scenario. Along this line, the author, whose background in researching migration and asylum policies and its legal implications is highly recognized and firmly consolidated, analyses the trends and policies which have made border control and the fight against illegal immigration the core element of European action on migratory issues. Sánchez Legido classifies the emphasis on migration control as bi-directional: alongside a *reactive dimension*, aimed at promoting the departure of irregular immigrants represented in the return and readmission policy there is a *preventive dimension*, aimed at avoiding not only the arrival, but also the approach of migrants to European territory.

The preventive dimension is the one developed in the book, which looks broadly at the measures adopted by States, mainly, European Union Member States. They are named as «interception measures» in the broad sense. This is understood to mean all legal, administrative and executive actions aimed at blocking or interrupting transit to European countries. The key question the author addresses is the following: to what extent the States powers to limit the entrance of nationals from third world countries are limited by human rights standards. Under international human rights law, the State holds obligations towards those within its territory. More controversial is the extent of its obligations to persons abroad whose human rights may be impacted by its actions. The author argues that governments should take a more comprehensive approach to the protection of people forcibly displaced in order to safeguard human dignity. It contends a proposal to reconceive forced migration as a human rights and humanitarian challenge, a solution

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which prioritizes protecting human dignity and ensuring comprehensive rights, a global protection framework, rather than focusing on borders.

The book offers a detailed description of the two extremes in which migration legislation transits: on the one hand, there is no general right to enter and stay in the territory of a State except for nationals , and on the other hand, migration control powers must be exercised in good faith and in a manner consistent with the State's international obligations. The problem lies in the fact that under the 1951 Refugee Convention refugee status is limited to those crossing an international border in fear of persecution on account of their race, religion, nationality, political opinion, or membership to a particular social group. It does not cover those who flee their homes and satisfy the refugee definition but have not crossed an international border.

The publication of this work in 2020 coincides with the year in which the European Commission launched the European Pact on Migration and Asylum, which prioritizes border security over access to asylum. Precisely, two of the pillars of the new European Pact are *return* which Sánchez Legido anticipates in his book as «the pillar of promoting departure» , and *strengthening partnerships with third states* which the author relates to the strengthening of incentives to obtain the collaboration of countries of origin and transit in migration control .

After the introduction, which serves to frame the phenomenon of European relocation of migration controls, the second chapter is dedicated to disentangle the main measures of externalization and outsourcing, beginning with the visa systems and the control by transport companies, and continuing with cooperation between countries of origin and transit, measures of maritime interception, building of walls, fences and ditches, and the spin-off and relocation of territories. Eloquently, within this section the author refers to «the European fervour for fences and walls» in which he explains the different historical moments in which walls and fences have been built in Greece, Turkey, Serbia and Croatia.

The third chapter deals with the *dialectic between inclusion and exclusion* inherent to offshoring strategies. The author deepens the differences between «arriving» and «not arriving» to the destination countries and connects these differences with the human development index. The gap that separates the North from the South is not only a constant and current phenomenon, but it will become deeper because of the pandemic, together with very substantial political violence and a high level of political instability accompanied by persecution of opposition groups which does not decrease in Syria, Afghanistan and Venezuela, among other countries. In fact, the pandemic risks undoing the gains made against poverty in the past two decades, and most affected will be developing countries, where more than 85% of these refugees are hosted. Therefore, the conditions that spur departures will continue. One of the most relevant statements made by Sánchez Legido is that «there is no legal text that generally and expressly aims to regulate what States can and cannot do to prevent unauthorized access to their territory». Based on this lax premise, which is a perfect diagnosis, he resorts to the Draft Articles on the expulsion of foreigners

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approved by the International Law Commission in 2004 to explore the trend towards such regulation. The Draft Articles restrict their scope to «the expulsion by a State of aliens present in its territory». In this sense, it does not answer the facts according to which States tried to avoid the entry. Behind the externalization measures there is a legitimate interest from the State to control the entrance to its territory, the necessity to counterbalance the difficulties in implementing return operations, and the desire to reduce the economic and administrative costs of irregular migration. However, these kinds of measures are exposed to intense challenges from the point of view of the legal requirements. In the process to restore the legal guarantees, the European Court of Human Rights offers interesting strands, particularly, through the judgments *Amuur v. France* (1996), *Al-Skeini and others v. United Kingdom* (2011), *Hirsi Jamaa v. Italy* (2012) and N.*D. and N.T. v. Spain* (2020), which are thoroughly explained in the book.

The fourth approach raises questions about the implementation of the European guarantee system to *other extraterritorial measures of interception*. To begin with, the author looks for the relationship between the notions of jurisdiction and attribution as stated according to the international responsibility doctrine; then he deals with the State's responsibility as a consequence of the performance of joint patrols with agents from third States, as well as the application of interception measures practiced by private actors such as NGOs, and finally, he wonders about the consequences of controlling borders by States of origin and transit and the eventual responsibility for incitement, assistance and cooperation. Finally, the author deals with the eventual responsibility for the respect of human rights of Frontex, considered one of the burning issues in the European migration field. More than a pending «rebuilding» doctrine, as the author names this chapter, all these activities will have to be *adjusted to new and creative measures* if Member States desire to maintain their reputation as full observers of the rule of law. Finally, the fifth chapter presents fifteen clearly exposed conclusions.

The three key words of this outstanding contribution are «offshoring», «extraterritoriality» and «externalization». The title could perhaps have alluded to the central object of the work, which is *relocation of migration control*. He goes beyond an analysis about migration control in the borders and human rights. In other words, the tendency for externalization is the central focus of the book, and this is not clear from the title (*Controles migratorios y derechos humanos*). An informed reader, however, will immediately assume that the rules on entry of third country nationals into the European Union member States give increasing relevance to the external dimension of the control, as professor Sánchez Legido remarkably explains in the book.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

La adopción internacional tras la Ley 26/2015. By María Dolores Ortiz Vidal (Tirant lo Blanch, Valencia, 2020) 262 pp.

During many years Spain has been one of the countries with more demand of International children adoptions, the second one after USA. This fact led to a chain of legal reforms since the 80's searching the more appropriated regulation in this field and focusing on the protection of the child's best interest.

The Act 26/2015, of 28th of July, on the reform of the protection system of infancy and adolescence is the last effort of the Spanish legislator to end with all inconsistences and mistakes of the former regime represented principally by the Act 54/2007, of 28th of December, on International adoption, that was elaborated to replace the old regime of previous Acts as well as the Civil code (article 9.5) but that it was born with many defects. The new Act aspires to give Spain finally the proper regulation on this ambit.

In the last years the phenomenon of International Adoption has drastically decreased in Spain as a consequence of several factors as the economic crisis. Having into account all the mentioned legal reforms and the new circumstances of the Spanish Society the book presented by Dr. Ortiz Vidal offers a comprehensive study of the International adoption in Spain with the Act 26/2015 as the cornerstone of this study. Together with the analysis of this Act the author refers to the RD 165/2019, 22 march, about the Regulation on international adoption as well as the rules of the 1993 Hague Convention, between others.

Definitely the work I am reviewing represents a very useful tool for the legal operators as well as the future parents who are interested in adopting a child. The book written by María Dolores Ortiz offers an accurate, stimulating and very useful book in a difficult and delicate institution as International adoption. The book has been written under a practical point of view having into consideration aspects that not always are well explained in this context.

The book is besides well written and has a logical structure that facilitates the comprehension of this complicated field in which many different interests are involved. The book has in particular four chapters, the main aspects of which are going to be addressed here. Maybe the author has not risked a lot having opted by a classical structure in this field but probably this is the best option thinking in the practical point of view.

Chapter 1, where the contents are presented, shows the relevancy of the best interest of the child principle as the key of the regulation of International adoption. In this sense, the author has concreted this principle in two important facts: 1) The familiar situation that becomes especially favorable to the child, in a phase that is crucial to his/her development

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as a person. This situation connects with the fact that the institution of adoption gives answer to one circumstance: the existence of children who need protection. 2) The eviction of adoptions that might be valid in the State of origin of the adopting parents but not in the State of origin of the child. Having into account these facts the author makes an interesting reference to the development of the institution from a sociological and legal (national and international) point of view.

From the evolution of the adoption institution, Dr. Ortiz examines the new concept of international adoption given by the Act 26/2015 that differs from the previous one. In particular it is defined expressly regarding the Title I of the Act "General Dispositions" (scope of application and administrative phase of international adoption). The adoption will be possible only in relation to "minors" that are under the condition of "adoptable", basically trough a psico-medical and social study of the child and the biological family in order to determine if the adoption is the more appropriate mechanism to protect the minor and to construct his/her project of life (according to the Report rendered by the General Secretary of the International social service of the Children rights found in http://www.iss-ssi.org/2009/assets/files/thematic-facts-sheet/esp/20.pdf).

The analysis of the international Adoption phases begins in Part 2, which makes reference to the administrative phase previous to the process of adoption constitution. In this phase several organisms are involved with a complicated distribution of competences and tasks between the General Administration of the Spanish State and the public regional administration (*Comunidades autónomas*) including the so-called accredited bodies (*Organismos acreditados*). Notwithstanding the difficulties of this phase, Dr. Ortiz explains in a very clear way all the competences and functions of all the Authorities and organisms implicated.

In particular, the Autonomous Communities are competent to process a request of international adoption, to elaborate a previous proposal of adoption and to grant the certificate of suitability (*certificado de idoneidad*) needed to consider the future parents as suitable to adopt. But they are also competent to control the phases of supervision and post adoption. However, the Spanish State is principally competent for the judicial phase, determining the cases in which the Spanish authorities might constitute an international adoption, the applicable law and the requirements needed to recognize in Spain (through its inscription in the Spanish Civil Registry) an adoption that has been constituted out from our country.

The author accurately highlights the differences existing in States as Russia, Filipinas or China in relation to the functions of the Central authorities and the accredited organisms in the framework of the 1993 Hague Convention depending on the requirements demanded in that or other countries regarding the children who can be adoptable. Out from this framework the author perfectly describes the process of the adoption according to the Act 54/2007 on international adoption taking into account the functions of the accredited organisms.

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Chapter 3 addresses the issue of the judicial phase of the International adoption. On the one hand, the author refers to the International jurisdiction of the Spanish courts to constitute the adoption including the possibility of declaring the nullity of an International adoption and that of converting a simple adoption into a full adoption. On the other hand, Dr. Ortiz examines the applicable law to the constitution of the adoption as well as the capacity of the adopted child and all the consents needed in this phase.

Finally, in the chapter 4 the author focuses her research on the recognition of effects in Spain of a child adoption constituted out from Spain and the inscription of the foreign resolution in the Spanish registry. This is the part I particularly consider more interesting and in this sense, it could have been done with more examples derived from comparative law to render the chapter more original and attractive. I remember years ago when I did an article and later a book with other colleagues- about the effects of children adoptions done in countries as Nepal where the differences and peculiarities existing in this context were really amazing. In any case this chapter 4 is impeccable done and offers a comprehensive study of this fundamental phase.

Dr. Ortiz pays particular attention to the absence of rules of Private international law in the EU regarding the recognition of national resolutions on children adoptions. This absence has led to the European Parliament to publish the resolution on 2-2-2017 with recommendations regarding International effects of adoptions with a clear objective: the elaboration of a Regulation in this specific field that could help to render easier all this process. In this sense, the author examines the challenge that new regulation of International adoption poses to this field in Spain and other European countries

Waiting for the future Regulation, the solution in Spain to recognize effects to adoptions constituted abroad will go on depending on the origin of the resolution and the consequent application of the 1993 Hague Convention or the Ley 54/2007 (reformed by Ley 26/2015). In both cases, the Authority responsible of the Civil Registry will control the adequacy of several requirements needed to render effective in Spain the foreign resolution on International child adoption: the control of the jurisdiction of the foreign Court, the compatibility with the public order in Spain and the equitable effects between the adoption constituted by foreign authority and that regulated in Spain, between others.

In short, we are in front of a very interesting and useful book that surely will interest all legal operators and future parents who desire to adopt a child.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

***Consensus-Based Interpretation of Regional Human Rights Treaties*, by F. Pascual-Vives (Brill/Nijhoff, 2019, 290 pp., Hardback)**

This work aims to examine the ways in which the ECtHR and the IACtHR use a consensus-based approach to interpret regional human rights treaties. This is an excellent work that is, at the same time, a study of international law theory, treaty interpretation and human rights. The central thesis that is defended in the work is that the notion of consensus, understood from the substantive point of view, "as the general agreement of a significant group of States that consider the scope of an international norm, constitutes the backbone of the interpretation of human rights treaties". If said consensus exists, the courts resort to the evolutionary interpretation of the rights recognized in the treaties. Instead, in the absence of such consensus, the courts resort to the notion of national margin of appreciation as a concrete application of the principle of subsidiarity in order to be more deferential to the sovereignty of States (p. 227).

The structure of the work has three parts divided into eight chapters. In the first part, the theoretical framework of the work is reconstructed around the notions of consensus, the sectorialization of international law and subsidiarity as a general principle of international human rights law. The second part analyzes the method for the evolutionary interpretation of the treaties and their application to regional human rights treaties, taking into account the existing consensus among the States parties regarding the provisions interpreted. And, in the third part, the technique of the national margin of appreciation and the intrinsic and extrinsic circumstances that condition its application by international tribunals, in particular those for the protection of human rights, are examined.

This work is an excellent work that is framed in what could be called the updated current of voluntarist positivism in Spanish doctrine that has its point of reference in the consensual conception of international law by C. Jiménez Piernas.[1] The consensus (*consensus generalis*) is conceived as "a general agreement of the actors involved in the international system that is indicative of their convictions and interests. This notion can help to explain the formation of customary and conventional rules, as well as to provide a plausible theoretical justification for the mandatory nature of public international law" (p. 226). Consensus has a formal and a substantive dimension. From the formal perspective, the consensus consists of a procedure for negotiating and adopting normative texts in the

[1] Vid., the works of C. Jiménez Piernas, "El papel de la noción de *consensus* en la fundamentación y el concepto de derecho internacional público", in Luiz Olavo Baptista and J.R. Franco da Fonseca (eds.), *O Direito internacional no Terceiro Milenio* (Sao Paulo: Editora Sal Paolo, 1998), pp. 103-119; and C. Jiménez Piernas (dir.), *Introducción al Derecho internacional público. Práctica española y de la Unión Europea* (Madrid: Tecnos, 2011) pp. 51-53.

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sphere of the institutional structure, both in the bodies of international organizations and in those of codification conferences.[2] In a substantive sense, consensus implies "a general agreement of the subjects operating in the international system. It represents their basic and common interest and convictions and allows them both to identify the content of the international rules applicable in their relations and to claim binding nature" (p. 14). This approach explains, from a dogmatic point of view, "the validity of public international law and to justify the binding character of customary rules and international treaties. In short, these norms are nothing but the result and expression of a general agreement reached by subjects of public international law. This social agreement (*consensus gentium*) is precisely what makes the effectiveness and efficacy of public international law likely among States and international organizations that apply and recognize customary rules and international treaties as a mandatory" (pp. 15-16). The book uses this conception of public international law to examine the interpretation of international treaties by regional courts for the protection of human rights, in particular the ECtHR and the IACtHR. However, the author himself warns of the need to differentiate this consensual approach from "most extreme voluntarist doctrines, inasmuch as it does not require specific evidence of the consent of all States to the acceptance of customary rules of a general scope. Further, this approach maintains the autonomy between the two elements that makes up customary international law. It is also compatible with the doctrine of persistent objector, while allowing the express opposition of a State to a customary rule at the time of this formation" (pp. 19-20).

F. Pascual-Vives examines the possibilities that the consensual approach has for the interpretation of international human rights protection treaties by means of two techniques: evolutionary interpretation and the doctrine of national margin of appreciation. Both, one and the other, as a general observation induced from the practice of regional courts for the protection of human rights, are used in different situations. In cases where there is thick consensus of the States in a certain sense, the courts resort to the evolutionary interpretation of human rights treaties in accordance with the social circumstances present at the time of their interpretation. This method of interpretation favors the adaptation of those treaties to contemporary social reality and allows the extension of the recognized rights to individuals (p. 72). However, the application of this method of interpretation generates significant tensions in the judicial practice of regional courts. On the one hand, evolutionary interpretation is at the center of the dialectic between the principle of sovereignty of States and the obligation to cooperate. On the other hand, a tension is also generated between the universal and the regional dimension of the consensus that explains the evolutionary interpretation. And, finally, there are tensions between international and constitutional jurisdiction in matters of human rights.

[2] J. Ferrer Lloret, *El consenso en el proceso de formación institucional de normas en el derecho internacional*, (Barcelona: Atelier, 2006).

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The author defends that regional human rights courts, before constitutional courts with a tendency to judicial activism, are international courts (chapter 5).

In the event that the thin consensus of the States regarding the interpretation of a provision, the courts resort to the technique of the national margin of appreciation. This technique is the object of study in the third part of the work and has a special interest. It examines the praetorian origin of this technique by the ECtHR in 1958 in the case *Greek v. United Kingdom* as an indeterminate legal concept. It is a concept that has a multifaceted character that, in the words of H. Waldock, allows the balance "between the exercise by individual of the rights guaranteed to him and the protection of the public interest" (p. 145). Professor Pascual-Vives offers a lucid and useful synthesis of the characteristics and operational possibilities of the national margin of appreciation as a multifaceted legal concept: the importance of the legal nature of the interpreted rule since it is not the same as that derived from positive or negative obligations or whose purpose is to protect the public interest or not; the parameters for evaluating the national restrictive measure are its necessity, legality and proportionality; the national margin of appreciation constitutes a legal expression of the principle of subsidiarity; this technique cannot be identified with the interpretation methods included in the VCLT; and the use in international practice is not homogeneous in the different international regimes depending on the degree of integration of the same, being the law of the European Union and the jurisprudence of the regional human rights courts the areas in which it has more yield (pp. 179-180). In sum, this author concludes that the national margin of appreciation cannot be conceived as a true legal doctrine but rather is a technique used by courts and dispute settlement bodies in light of the principle of subsidiarity to assess reasonableness of the conduct of a state through recourse to the principles of legality, proportionality and necessity (pp. 180-181). The application of the national margin of appreciation is conditioned, according to this author, by intrinsic and extrinsic circumstances to the interpreted norm. The intrinsic circumstances can be the legal nature of the rule (if peremptory or dispositive) or of the obligations (positive or negative) and by the kind of interest (public or private) that is at stake. One of the extrinsic circumstances that condition the application of the national margin of appreciation technique is the density (thick or thin) of the existing consensus regarding the norm. As a general rule, the possibility of application of the national margin and its performance in the jurisprudence of regional courts on human rights is inversely proportional to the existing consensus. The smaller this is, the more space the States have for their margin of appreciation and the greater the consensus, the less are the possibilities of resorting to the national margin (pp. 207 and 226-227).

In conclusion, in this work, the theoretical approach used, *consensualism* (which can be shared or not), can be the object of discussion, but is absolutely remarkable the coherence of the legal reasoning, the argumentative rigor, the variety and the quality of the legal practice and recourse to the inductive or empirical method as a scientific method. It is an excellent work where a solid theoretical framework is presented and applied to a legal

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problem such as the interpretation of human rights protection treaties. We are, in short, before an exemplary work that shows that it is only possible to carry out a relevant analysis of legal technique and international practice if there is a solid conceptual framework to give them shape and meaning.

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the SPANISH YEARBOOK of INTERNATIONAL LAW

Abrisketa Uriarte, J., *Rescate en el mar y asilo en la Unión Europea. Límites del Reglamento de Dublín III* (Aranzadi, Pamplona, 2020), 279 pp.

'Missing migrants' IOM project, which focuses on tracking deaths along migratory routes, announces in its website that 221 migrants have lost their lives in the Mediterranean only in 2021 (https://missingmigrants.iom.int/region/mediterranean). These figures hide stories of gross human rights violations, of people who have been forced to flee conflicts or situations of persecution in search of the protection that their countries are unable or unwilling to give them, of victims of human trafficking... The absence of legal and safe pathways to European territory has left smuggling networks in charge of managing these routes, placing migrants and people in need of international protection in a situation of extreme vulnerability. This, coupled with Europe's obsession with preventing arrivals and externalising border control, makes irregular migration by sea a phenomenon that condemns hundreds of human beings to die in the attempt to reach a safe port.

The book *Rescate en el mar y asilo en la Unión Europea* is an authoritative and timely contribution to an unfinished and (maybe) unending debate: the European Union (EU) governance of migratory flows irregularly arriving by sea and the consequences of its ineffectiveness in the field of international protection. As is well known, despite being a phenomenon that the EU and its Member States have been confronted with for decades, they have not yet managed to provide an effective and very much needed human rights centered response to it.

In general terms, the book elaborates a comprehensive analysis on the convergence between migrant rescue at sea and access asylum protection in EU law. In this regard, the author assumes that the Common European Asylum System (CEAS) is ineffective for a variety of reasons. First, because neither applicants nor Member States conform to it in practice. Second, because it is a cumbersome and slow system. Finally, because it disadvantages States with external borders in the EU. As known, according to Dublin principles, if the criteria for determining the Member State responsible for examining a third country national application for international protection (minors, family unification, irregular entry) do not apply, the State responsible will be first Member State where the application was lodged. But the system built between 2011 and 2013 does not address the phenomenon of migrants and refugees to be arriving by sea, nor does it offer effective solutions to the question of disembarkation and its legal consequences. In this framework, the author concludes that while the package of measures envisaged in the New EU Pact on Migration and Asylum is being negotiated, the task of reforming the Dublin III Regulation is unavoidable. This is because, given that the final criterion for determining responsibility for examining an asylum application is the place where the application is lodged, it perpetuates a system that is unsympathetic to EU States with external borders. The system is also dysfunctional and, as said, ineffective.

The book is divided into an introductory note, four chapters and a general conclusion. The first chapter engages with the general legal framework in which Dublin III Regulation is embedded.

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Here, the author provides an interesting analysis that traces the development of international refugee law and its connection to human rights protection. This analysis serves to frame the origins of the Area of Freedom, Security and Justice and CEAS. I firmly believe that this is a necessary analysis, insofar as it refers to the purposes that cooperation between the Member States and the common rules that they manage to agree on must not lose sight of.

Chapter two of the book deals with the substantive legal regime of Dublin III Regulation. The examination, and this is a general feature of the book, is exhaustive. After addressing the background of the system, it focuses on the principles that guide the application of the Dublin III Regulation, a system that has evolved on the basis of the search for a balance between "the criterion of responsibility and the principle of solidarity" (p. 100). Thirdly, the chapter examines one of the issues that I consider of central importance: that related to access to the procedure for examining an application for international protection. In this analysis, the author not only provides a detailed study of the criteria for determining the responsible Member State (pp. 121-137) and the so-called 'discretionary clauses: the sovereignty clause and the humanitarian clause (pp. 137-144). I find it particularly valuable that she also reflects on what she calls "the systemic deficiencies that prevent relocation", which have been identified by both the European Court of Human Rights and the European Court of Justice. By doing so, both European courts have set themselves up, also in this area, as the guarantors of the ultimate essence of the common asylum system: the protection of the rights of individuals in need of international protection.

Chapter three examines in detail the proposal on the reform of Dublin III Regulation launched in May 2016 by the European Commission. Thus, it first reviews what the author calls the main elements of the proposed reform of the Dublin III Regulation. Secondly, the chapter deals with the process that led to the launching of the Pact on Migration and Asylum in September 2020. The author is pessimistic about the Pact's chances of redeeming one of the 'cardinal sins' of the CEAS: the disproportionate burden on Member States that delimit the EU's common external border. This is because, although it introduces new criteria for determining the responsible Member State, it retains at the same time the criterion of the country of first entry. Therefore, "border states such as Spain, Greece, Italy, or Malta will continue to bear more pressure than the rest" (p. 181).

In chapter four, the author brilliantly addresses the questions of migrants' rescue at sea and disembarkation in a safe harbour in connection with Dublin III Regulation. This forces the author to look at a scenario in which international law (in particular the regime deriving from the 1982 UN Convention on the Law of the Sea, the SOLAS and SAR Conventions, and the International Convention on Maritime Rescue) as well as EU law, all come together. A central question regarding this issue, as the author identifies, is that of disembarkation in a safe port. Is this an obligation imposed upon EU Member States? How does this duty relate to the obligations deriving from the principle of non-refoulement? How are these dilemmas solved in practice? What is the role of NGOs? These are the questions that the author brilliantly addresses in the last part of the book.

What is particularly interesting in Abrisketa's analysis is that as well as being an exhaustive book, the fruit of genuine academic reflection, it is a profoundly honest work. Thus, the author draws our attention not only to the shortcomings of the system, which have been the subject of academic interest for decades, but also to its successes. From a strictly international law point of view, CEAS undoubtedly constitutes an advanced and necessary method of cooperation. And, in

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this sense, it is an opportunity to achieve better governance of migration flows, which are, moreover, a phenomenon inherent to the history of humanity.

In sum, this book is an invaluable resource for all scholars, practitioners and students of EU asylum law and policy.

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AEPDIRI Journals' Review*

Revista Española de Derecho Internacional (REDI), Vol. 72/1 (2020)

Irene BLÁZQUEZ RODRÍGUEZ, "El estatuto jurídico de los nacionales de terceros países: de la reacción ante la crisis migratoria a la sinergia necesaria", 72(1) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.1.2020.1.01]

The legal status of third-country nationals: from the reaction to crisis for necessary synergy

In the recent years, the legal status of third-country nationals has been a considerable impact by the EU`s geopolitical context, represented by the pressure of irregular migration across the Mediterranean Sea. As regards legal migration, priority and strongly supports has missed in order to ensure fair treatment of third-country nationals who reside legally on the territory of is Member States, at the same time develop an integration policy that grating them rights comparable that those of EU citizens. The EU legislation on the conditions of entry and residence result in the fragmentation, which consequence is unequal treatment among different categories (statuses) of third-country nationals, and between all these workers and EU citizens. In this context is essential to promote the necessary synergies between the internal and external dimension of the European migration policy, by the requirement that to recognise and ensure rights in matters of entry and set a high minimum standard in residential status.

Carlos ESPLUGUES MOTA, "La Convención de Singapur de 2018 sobre mediación y la creación de un título deslocalizado dotado de fuerza ejecutiva: una apuesta novedosa, y un mal relato", 72(1) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.1.2020.1.02]

The 2018 Singapore Convention on mediation and the creation of a delocalized enforceable instrument: an interesting proposal plenty of difficulties

The crisis of international commercial arbitration favors the use of other ADR mechanisms, such as mediation. An institution that provides the parties, both, with a simplified procedure and the possibility to reach acceptable solutions for their disputes. However, this support seems to be restricted to domestic disputes, and not to cross-border ones, in which the use of mediation remains very scarce. One of the alleged reasons for this situation is the absence of a harmonized international regime that facilitates the extraterritorial enforcement of mediation settlements, in line with what happens with the Convention New York of 1958 as regards arbitration awards. The enactment of the Singapore Convention on Mediation in 2018 represents a notable change in the current situation. Nevertheless, the Convention, which has

* This section has been prepared by Santiago Bernabé Hernández —student of Law/Business Studies at UJI— under the supervision of the *SYbIL* Editor-in-Chief and the aid of the editors of the *REDI and REEI*.

received a warm welcome, raises very relevant doubts as to its foundations, as well as important problems in relation to its content and solutions, which often are unclear and lacking further elaboration.

Laura GARCÍA MARTÍN, "Responsabilidad empresarial por violaciones de los derechos humanos en la justicia transicional: aportes del caso argentino", 72(1) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.1.2020.1.03]

Corporate accountability in transitional justice: insights from the case of Argentina

This article examines the issue of business participation in the commission of human rights violations within the framework of transitional justice. The analysis is based on a case study: that of the transitional justice process in Argentina, generally considered a regional protagonist in the field of transitional justice. Therefore, based on the context of the last Argentine dictatorship, this article examines how the transitional justice process has addressed the participation of companies in human rights violations committed during the military regime, as well as the possible options provided by the Institutional framework of Companies and Human Rights to demand responsibility from companies. Finally, some final reflections and some suggestions to address these issues in the future are presented.

Cristina GONZÁLEZ BEILFUSS, "Reflexiones en torno a la función de la autonomía de la voluntad conflictual en el Derecho Internacional Privado de familia", 72(1) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.1.2020.1.04]

Reflections on the role of party autonomy in International Family Law

The present study explores the rationale of party autonomy in International Family law. It distinguishes the abstract function of the choice of law rule from the reasons for activating it and concluding a choice of law contract. Whereas the reasons of the parties prevail in the latter, when parties select the applicable law in accordance to their interest and convenience, the function of the party autonomy rule is fixing the legal context of their relationship. This is particularly interesting since mobility has become circular and an increasing number of families leads a truly transnational life. It is also particularly adequate as a counterweight to objective rules designating the law of habitual residence. Party autonomy in choice of law is, however, not without risks in a context of family relationships where parties do not necessarily seek the maximization of individual interest and where gender roles emerge forcefully in connection to the care required by vulnerability and dependency.

Ángeles JIMÉNEZ GARCÍA-CARRIAZO, "Prospecciones turcas en aguas chipriotas, una nueva dimensión del enfrentamiento", 72(1) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.1.2020.1.05]

Turkish Surveys in Cypriot Waters, a New Dimension of The Confrontation

The discovery of natural gas in the waters surrounding the island of Cyprus has added a new dimension to the dispute between the Republic of Cyprus and Turkey, which has turned into a scramble for resources in the Eastern Mediterranean. That is in addition to the political conflict between the south and north of the island, encouraged by Turkey, which plays a fundamental role standing as an advocate of the rights of Turkish Cypriots as co-owners of the island of Cyprus. The different conception of maritime zones by Cyprus and Turkey, as well as the absence of definitive delimitation lines, hamper mutual understanding. In addition, the unilateral actions of both States increase the tension: Turkey has initiated surveys in maritime areas that would correspond to the island of Cyprus and the latter has submitted to the United Nations the outer coordinates of its exclusive economic zone and its continental shelf in order to protect its maritime zones from Turkish incursions.

Pilar POZO SERRANO, "Las repercusiones del Brexit sobre el proceso de paz de Irlanda del Norte: consideraciones provisionales", 72(1) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.1.2020.1.06]

The impact of Brexit on the Northern Ireland peace process: provisional thoughts

United Kingdom and Ireland membership of EU has provided the context for several dimensions in the Northern Ireland Peace Process. Concerns have been raised that the Withdrawal from the EU could lead to hard border between Ireland and Northern Ireland, thus jeopardising the Good Friday Agreement. The paper analyses, on the one hand, the direct and indirect influence of the European Union in the Northern Ireland peace process with the aim of exploring the areas that could potentially been compromised by Brexit. On the other hand, the article reviews the prominent position that Northern Ireland has occupied in the Brexit negotiations and the obstacles faced by the UK in order to get the Agreement approved by the UK Parliament. The conclusions point to some already visible effects of the process.

Antonio SÁNCHEZ ORTEGA, "La política exterior rusa y su relación con Occidente. Una visión desde el realismo neoclásico", 72(1) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.1.2020.1.07]

The Russian foreign policy and its relation with the West. An approach from neoclassical realism

This work aims to analyze Russia's foreign policy, especially with regard to its relations with the West. The main objective is to try to understand the motives that laid down behind the transition from pre-Western positions in the 1990s to a confrontational relationship. To carry out this analysis, the neoclassical realistic paradigm will be used as an interpretive element. Particular attention will be paid to the assessment of threats arising from systemic imperatives and to the elements that establish the relative power of the State.

Carlos ESPALIÚ BERDUD, "Locus standi de los estados y obligaciones erga omnes en la jurisdicción contenciosa de la Corte Internacional de Justicia", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1a.01]

Locus standi of states and erga omnes obligations in the contentious jurisdiction of the International Court of Justice

The ICJ has progressively incorporated the notion of obligations erga omnes and given it greater scope in its jurisprudence. In recent years, several decisions have explicitly or implicitly recognized the locus standi of non-injured States to bring cases before the Court for violations of obligations erga omnes partes. For the time being, the locus standi arising from obligations erga omnes in the strict sense has not been recognized. These developments demonstrate the relevance of collective values and of the international community in the international legal order. However, the extension of the locus standi derived from obligations erga omnes does not imply the disappearance of the requirement of other considerations required by the judicial nature of the Court, such as the existence of a dispute prior to the commencement of the proceedings and the consent of all the Parties to the proceedings.

José Ángel LÓPEZ JIMÉNEZ, "Bielorrusia existe: equilibrio inestable entre una política exterior multivectorial y el Tratado de Unión con Rusia", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1a.02]

Belarus exists: unstable balance between a multivector foreign policy and the Union Treaty with Russia

This article aims to research Belarus Foreign Policy from its constitution as an independent republic —after the dissolution of the Soviet Union— to the present moment. The construction of the nation state has been marked by several elements: the attempt to consolidate a neutral status, the strong dependence on Russia-economic, financial, military, cultural —and the configuration of a multivector policy. The difficulties derived from these three processes and the complexity to combine them —in some periods— during these almost three decades they also reflect the importance of internal politics in an autocratic system.

Jonathan PASS, "El statecraft institucional de China dentro del orden internacional liberal: el Banco Asiático de Inversión en Infraestructura", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1a.03]

China's institutional statecraft within the liberal international order: the Asian Infrastructure Investment Bank

A key debate amongst international relations theorists is how China's rise will affect the liberal international order (LIO). The launching of the Asian Infrastructure Investment Bank (AIIB) by Beijing, unsurprisingly, has generated much interest. The aim of this paper is to shed light on the claim that the AIIB constitutes a «counter-hegemonic» initiative (or «external innovation» in liberal terminology). After showing the complexity of Chinese institutional statecraft, the study reviews mainstream theoretical accounts of the AIIB. Both neorealism and neoliberalism, we hold, have contributed to a better understanding of the institution, but ontological and epistemological deficiencies prevent them from

satisfactorily explaining the complex social processes underway. By contrast, we set out a Neo neo-Gramscian perspective, which understands the AIIB as an institutional manifestation of the on-going interaction between the social forces emergent out of China's own statesociety complex on one hand, and their global counterparts, on the other. For the short term, we conclude, the AIIB is likely to reinforce the LIO. Over the medium to long term, however, this internationalisation of the state process, understood in connection with the Belt and Road Initiative, may pose a serious challenge to the LIO and, as a result, to US hegemony itself.

Beatriz PÉREZ DE LAS HERAS, "La Unión Europea en la transición hacia la neutralidad climática: retos y estrategias en la implementación del acuerdo de París", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1a.04]

The European Union in the transition towards climate neutrality: challenges and strategies to implement the Paris agreement

The Paris Agreement represents the international community's commitment to limit the temperature rise to 1.5 ºC by mid-century. As a regional organization of integration, the European Union (EU) was the first to adopt a legally binding framework to address the achievement of this global objective. Known as the «2030 climate-energy package», the expected results of this framework in terms of emission reductions do not correspond to what would be a sufficient contribution from the EU to its international commitments. In addition, perspectives indicate that the progress made by the EU so far will not be sufficient to meet its climate and energy targets by 2030. These predictions also jeopardize the EU's ambition to achieve climate neutrality by 2050. To accelerate the process, the European Commission has proposed the European Green Deal, a new integrated strategic framework that should guide the EU internal and external action towards climate neutrality and sustainability in the next decade. Its effective implementation involves a systemic transformation whose accomplishment will require a good dose of political will and a concerted action between public officials, economic agents and society as a whole.

Mª Ángeles SÁNCHEZ JIMÉNEZ "Acción de responsabilidad parental vinculada a un proceso de divorcio en el nuevo reglamento (UE) 2019/1111", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1a.05]

Parental responsibility action connected to a divorce procedure in the new regulation (EU) 2019/1111

The purpose of this work is to analyze the scope and consequences of the regulation introduced by art. 10 of Regulation 2019/1111 for the purposes procedure the concentration of jurisdiction in the cases in which an action in parental responsibility is connected to a divorce process. These assumptions, which find an express response in art. 12 of Regulation 2201/2003, are not subject to specific consideration in the new precept. The structure of art. 10, related to the «election of the court» as indicated by its heading, derives from the unification of the two cases distinguished by art. 12 (which is modified), respectively, the one in which the action on parental responsibility was linked to a matrimonial litigation (art. 12.1), and to which this action is presented independently (art. 12.3). Along with the structure, another essential reason that justifies the object being addressed, derives from the consideration of the content of art. 10, as its regulation is articulated on the basis of the one offered by art. 12.3 and, therefore, for the second of the cases indicated.

María Amparo ALCOCEBA GALLEGO, "Estudios sobre España y el derecho internacional: límites a la discrecionalidad del estado español en el ejercicio de la protección diplomática", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1b.01]

Studies on Spain and international law: limits to the discretion of the Spanish state in the exercise of diplomatic protection

The Spanish practice on Diplomatic Protection has followed the traditional model of Public International Law in relation to this topic: A State is not obliged under international law to exercise diplomatic protection on behalf of a national who has been injured as a result of an internationally wrongful act attributable to another state. There is a discretionary nature of the State's right to exercise diplomatic protection and there is not an individual right to Diplomatic Protection. Recently, a judgement of the Audiencia Nacional on 19th December 2019 has introduced a signification change to it. It has recognized, invoking several provisions of the Spanish Constitution, the right of the individual to receive diplomatic protection for injuries suffered abroad, which, must carry with it the corresponding duty of the State to exercise protection. Furthermore, it has considered the State responsible when the State's inaction resulted in a failure to exercise Diplomatic Protection, and thus contributing to consolidate the injury derived from a violation of the Individual's human rights. This Sentence is in line with the recent tendency in Public International Law to the increase of rights of the Individual in Public international law, but it is not customary law yet. This Sentence is very consistent with the role given to the State as guarantor and protector of Human Rights by the Spanish Constitution and with the rule of law.

Elena CRESPO NAVARRO, "Estudios sobre España y el derecho internacional: la naturaleza de la protección diplomática en el caso Couso: la compleja relación entre derecho internacional y derecho interno", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1b.02]

Studies on Spain and international law: the nature of diplomatic protection in the Couso case: the complex relationship between international law and domestic law

On December 11, 2019, the Contentious-Administrative Chamber of the National Court, Section 4, finally issued a judgment on the Couso case. The Judgment states the financial liability of the General State Administration and orders it to pay compensation for the omission in the exercise of diplomatic protection to which the Spanish State would be obliged on behalf of its nationals. It is a relevant Judgment due to its effects that, undoubtedly, transcend the specific case and may have consequences on the general interest. On February 24, 2020, the State Attorney's Office presented a pleading in preparation for the Supreme Court's appeal for violation of the domestic legal system and for the reversal interest for the Supreme Court. This article represents a critical analysis of the confusing argumentation of the Judgment from both an International Law and a Spanish domestic law perspective of the diplomatic protection's doctrine.

Ángel SÁNCHEZ LEGIDO, "Estudios sobre España y el derecho internacional: las devoluciones en caliente españolas ante el Tribunal de Estrasburgo: ¿apuntalando los muros de la Europa fortaleza?", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1b.03]

Studies on Spain and international law: the Spanish pushback policy before the Strasbourg Court: strengthening the walls of fortress Europe?

In *N. D. and N. T. vs. Spain*, the Grand Chamber of the ECHR flatly rejects the two great threats that the participating governments had posed to their powers of control. Neither attempts to artificially excise parts of its territory in order to exclude or limit the application of the Convention are admissible, nor it is acceptable to exclude non-admission measures from the scope of the ban on collective expulsions of aliens. However, through the surprising recourse to the doctrine of «culpable conduct», the Court sets as a general rule the compatibility with the Convention system of summary returns of aliens intercepted when irregularly crossing the border. The application of this doctrine is subject to conditions very loosely appreciated by the Court in favour of States, requiring the existence of effective and genuine means of access and that these means had not been used by the interested person due to imperative reasons not attributable to the respondent State. In this article it is suggested that, acting in this way, Strasbourg not only accepts the very questionable practice of hot returns, but also grants broad support to the policies of outsourcing of migration controls and to the safe State mechanisms.

Jesús VERDÚ BAEZA, "Estudios sobre España y el derecho internacional: España y los problemas de aplicación del Convenio de Aguas de Lastre en el área del estrecho de Gibraltar. A propósito del alga invasora *rugulopterix okamurae*", 72(2) *Revista Española de Derecho Internacional* (2020) [DOI: http://dx.doi.org/10.17103/redi.72.2.2020.1b.04]

Studies on Spain and international law: Spain and the problems of application of the Convention on Ballast Water in the area of the straits of Gibraltar. On the invasive alga rugulopterix okamurae

The Strait of Gibraltar is a unique marine space with an extraordinary environmental value motivated by its geophysical conditions and by the fact of being a meeting point of two seas and two continents. This area is being devastated by the presence of an invasive alga from Asia, called *Rugulopterix okamurae* with an adaptive capacity and explosive growth that has surprised the scientific community. This alga not only affects ecological balances, but also disrupts economic activities such as fishing and tourism, threatening the public health as well. All indications suggest that the introduction of the invasive seaweed occurred through some discharge of ballast water. The International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM) is the key international instrument in the fight against the dispersion of invasive species, one of the world's greatest ecological problems. This agreement presents certain difficulties of application, which are especially visible in the area of the Strait of Gibraltar. This area is characterized by a high legal and political unrest between the States present in the region, where the maritime spaces are not delimited, and there is not any border agreement. Additionally, as a strategic route for international navigation, the strait of Gibraltar has a particular legal regime provided for in the United Nations Convention on the Law of the Sea limiting the powers of the coastal States.

Revista Electrónica de Estudios Internacionales (REEI), No. 39 (2020)

Ángeles Lara Aguado "Claves del Reglamento (UE) 650/2012 a la luz de la jurisprudencia del TJUE: de la especialización a la (in)coherencia a través del mito del principio de unidad y las calificaciones autónomas unívocas", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.02]

Keys to Regulation (EU) 650/2012 in light of the jurisprudence of the Court of Justice of the European Union: from specialization to (in)coherence through the myth of the principle of unity and unambiguous autonomous qualifications

Regulation (EU) 650/2012 on successions revolutionized the legal regime of successions in EU Member States linked by the Regulation, and has generated a great deal of questions and problems of interpretation. Five years after its validity, the CJEU has uncovered some of these questions, although in doing so it has opened up new doubts and has not run out the difficulties of interpretation inherent in a subject as complex as rooted in national legal traditions. In some cases the court is highlighting the need for a single jurisdiction to hear the different issues related to the succession; in other cases, also to satisfy the principle of the unity of the succession, it delimits the scope of the Regulation by extending the succession matter as much as possible or imposing European qualifications even above national jurisprudence and extends the jurisdiction rules to national courts to issue national certificates of succession. However, on another occasion, it opts for a qualification of the jurisdictional function linked almost exclusively to the processes of contentious jurisdiction, thus, it seems to give in to the inconsistencies of the Regulation or contribute to them.

Marta Requejo Isidro "El artículo 3, apartado 2, del Reglamento nº 650/2012: autoridades no judiciales y otros profesionales del Derecho", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.03]

Article 3, paragraph 2, Regulation 650/2012: non-judicial authorities and legal professionals

In recent years, the CJEU has received several requests for a preliminary ruling originating from a notarial activity within the framework of different instruments for civil judicial cooperation. This text focuses on those related to Regulation 650/2012 – the "successions Regulation". It aims to provide an explanation of the judgments of the CJEU, while calling into question its method of interpretation. It reflects as well on the possible incorporation of the notaries (and other legal professionals) to the "judicial dialogue" with the CJEU, allowing them to directly refer requests for interpretation.

César Villegas Delgado "La Corte Internacional de Justicia y la paulatina humanización del Derecho consular: de Breard a Jadhav", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.04]

The International Court of Justice and the progressive humanization of consular law: from Breard to Jadhav

The process of humanization that international law has been experiencing has been progressively opening up, within consular law. The author analyzes in this article the evolution of the jurisprudence of the International Court of Justice regarding article 36 of the Vienna Convention on Consular Relations of 1963, asking to what extent the information on the right to consular assistance could be considered as a human right beyond the inter-State dimension of the Vienna Convention on Consular Relations. In the five cases that have been raised on this matter, the ICJ has ruled on the merits of four of them, and it is possible to perceive an evolution between the case law of the Avena and Diallo cases regarding the individual's position and the protection of his rights within an interstate dispute before the Court. However, the ICJ has avoided analyzing the debate on the nature of consular rights as human rights.

Joana Loyo Cabezudo "La Corte Penal Internacional y las amnistías aprobadas en procesos de transición: ¿la condicionalidad legitima jurídicamente su empleo?", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.05]

The International Criminal Court and amnesties approved in transitional processes: does conditionality legitimate juridically their use?

International Criminal Law, from its origins, has dealt with amnesties that States approved to prevent the sanction of international crimes. The present study analyses if after the progressive evolution of this sector of the legal system and, specially, after the adoption of the Rome Statute of the International Criminal Court, the scope of amnesties has changed. In order to achieve this aim, first, it examines the situation of amnesties from an international law perspective and it analyses some pronouncements of international human rights tribunals. Second, it focuses on the Rome Statute and evaluates critically the interpretation of amnesties given by the International Criminal Court. Finally, taking into account the amnesty law approved by Colombia, the study discusses the actual conditions that appear to be necessary in transitional justice processes and analyses their legal adequacy.

Xavier Pons Rafols "La COVID-19, la salud global y el Derecho internacional: una primera aproximación de carácter institucional", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.06]

COVID-19, global health and International law: a first approach of institutional nature

This study constitutes a first and urgent approach to some of the implications of the COVID-19 pandemic in International Law, with its multiple health, economic and social consequences. The study, after referring to global health and the globalization of health, is primarily concerned with the review of the work of the United Nations and the World Health Organization (WHO) in the face of the pandemic. This review critically assesses the lack of leadership and political impetus in the face of a health crisis of unprecedented magnitude. It also reviews the outcome of the World Health Assembly held on 18-19 May 2020 and devoted exclusively to the COVID-19, in a context of political competition and criticism of WHO's management of the emergency and with the announcement of the United States withdrawal.

Margarita Robles Carrillo "La gobernanza de la inteligencia artificial: contexto y parámetros generales", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.07]

The governance of artificial intelligence: context and general framework

Artificial intelligence (AI) has become the subject of a wide-ranging and controversial debate. The analysis of the debate shows two main problems: the conceptual problem arises from the absence of agreement on the definition of AI; and the functional problem derives from the different relevance given to the technical, ethical and legal components. There is a clear prevalence of the former, an insistent invocation of ethical aspects and little attention to legal discourse. From a legal standpoint, two issues must be distinguished: the application of AI to the study and practice of law and the regulation of AI. The model of AI regulation is approached from different methodological perspectives that confirm the need to adopt a proactive and open, non-formalist approach to the organisation of its governance. The study of practice shows, however, that very few States have adopted strategies or action plans in this area. In the international framework, most of the initiatives are located in organizations or forums participated by technologically developed countries. The international legal system must activate universal mechanisms, norms and procedures to respond to this situation and to the global challenge of AI governance.

Rosario Ojinaga Ruiz y Ruth María Abril Stoffels "La protección de las niñas asociadas con fuerzas armadas o grupos armados", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.08]

Protection of girls associated with armed forces or armed groups

The intersection between gender and age makes girls associated with armed forces and armed groups do not look is adequately protected by IHL. Despite latest regulatory and jurisprudential developments, the legal framework on the recruitment and participation of children in armed conflicts remains fragmentary and lacking a gender perspective. In this study the existing shortcomings in the protection of girls associated with armed groups, are analyzed both if they meet combat functions as if they carry out another type of functions, involving or not active participation in hostilities

Ruth Rubio Marín "Mujeres, espacio público, participación política y derechos humanos: ¿hacia un paradigma de democracia paritaria?", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.09]

Women, public space, political participation and human rights: towards a parity democracy paradigm?

This article analyses the extent to which human rights have supported a paradigmatic change in the conception of women's political participation. It describes human rights evolutions after the Second World War as framing a phase in which the lack of women's political participation in conditions of equality was perceived as a matter of equal rights, first under a logic of formal equality and then, as from the eighties and the adoption of CEDAW, as a matter of equal opportunities under a logic of substantive equality. The third section describes the steps that have been taken towards a new paradigm in the world of human rights since the mid-1990s which conceptualizes the absence of women in the public sphere (broadly

conceived) in terms of democratic legitimacy and not just of equality (formal or substantive). The fourth section, coinciding more or less with the beginning of the new century, identifies international and, more importantly, regional signs of the consolidation of the framework of parity democracy as a new paradigm through which to assess the importance of the political participation of women.

Juan Ruiz Ramos "The right to liberty of asylum-seekers and the European Court of Human Rights in the aftermath of the 2015 refugee crisis", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.10]

El derecho a la libertad de los solicitantes de asilo y el Tribunal Europeo de Derechos Humanos tras la crisis de refugiados de 2015

In the context of the 2015 refugee crisis, European States have pushed for tighter migration control policies by, inter alia, extending and toughening the practice of detaining asylum-seekers. The aim of this study is to assess how the European Court of Human Rights (ECtHR) constrains this worrisome practice. Does it grant States the same margin of appreciation as in other migration-related judgments, or does it adopt a more active role in protecting asylum-seekers' right to liberty? To answer this question, this study analyses the case law of the ECtHR after 2015 on the subject and evaluates it in the light of the relevant international human rights treaties, European Union law and scholarly opinion. In doing so, it especially seeks to identify any changes in the Court´s case law that might indicate a reaction of the Strasbourg Court to the political tensions of the refugee crisis.

Rosario Huesa Vinaixa "Una controversia bilateral con dimensión multilateral: cuestiones de jurisdicción y de *ius standi* en el asunto Gambia c. Myanmar (medidas provisionales)", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.11]

A bilateral dispute with a multilateral dimension: jurisdiction and ius standi issues in the Gambia v. Myanmar case (provisional measures)

In November 2019, The Gambia filed an application requesting the International Court of Justice to declare the violation, by Myanmar, of various provisions of the Convention against genocide in relation to the Rohingya population, as well as the indication of provisional measures. It is a dispute whose multilateral dimension makes it unique in relation to any other preceding case. This multilateral dimension is projected in a double field. On the one hand, the environment in which it has developed and forged, which is markedly multilateral in spite of the Gambian leadership. On the other hand, the multilateral nature of the obligations allegedly violated, in particular, their erga omnes partes character. The present study analyzes both aspects on the basis of the arguments put forward by the parties in relation to the indication of provisional measures and the subsequent ruling of the Court in this regard. It should be said -without neglecting its provisional nature- that the position adopted by the Court represents a significant step in the line towards the recognition of a suitable procedural space for this type of disputes, but poses the challenge of the progressive admission of actio popularis in international law.

Manuel E. Morán García "¿Foro exclusivo en materia de comercio transfronterizo de recursos genéticos y conocimientos tradicionales asociados en el marco del Protocolo de Nagoya de 2010?", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.12]

Exclusive jurisdiction on cross-border trade in genetic resources and associated traditional knowledge under the 2010 Nagoya Protocol?

The purpose of this contribution is to analyse the advisability of establishing an exclusive jurisdiction in cases of cross-border transactions concerning genetic resources (GR) and associated traditional knowledge (TK), as understood by the 2010 Nagoya Protocol. The Protocol obliges its Contracting Parties to check that trade in GR –the ultimate basis of biodiversity- and, where appropriate, that of the associated TK –developed by Indigenous and Local Communities- is carried out in accordance with a contract that must include, imperatively: the Prior and Informed Consent of the Provider Party of the GR/TK; the Mutually Agreed Terms between the Provider Party and the user of GR/TK; the reservation of a fair and equitable participation of the Provider in the benefits obtained by the user, arising from the access/utilization of GR/TK. Aware of the innate internationality of such transactions, the Protocol urges Provider Parties and users to manage the legal risks arising out of the contract. But is not the purpose of Nagoya's text to build a PIL system in this area, a task that falls on each Contracting State. Is well known that each sovereign is autonomous when designing his system of international jurisdiction, so the analysis starts taking in account the exceptionality of the establishment of exclusive jurisdiction fora and offers an strong arguments in the opposite way, based on the principle of proximity, the presence of substantive relevant public interests in the matter and the forum-ius correlation, in order to conclude by proposing the establishment of an exclusive forum in benefit of the Provider State of the GR/TK.

Esperanza Orihuela Calatayud "La autorización para investigar los crímenes cometidos en Afganistán. Luces y sombras de la sentencia, de 5 de marzo de 2020, de la Sala de Apelaciones de la Corte Penal Internacional", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.13]

The authorization to investigate the crimes committed in Afghanistan. Lights and shadows of the Judgment of 5 March 2020 of the Appeals Chamber of the International Criminal Court

The ICC Appeals Chamber's judgment of 5 March 2020 has found that the Pre-Trial Chamber committed an error of law in its decision of 12 April 2019 denying the Prosecutor authorization to open an investigation into crimes committed in Afghanistan. A conclusion which, being based on the analysis of the first ground of appeal raised, has prevented the Appeals Chamber from clarifying other aspects, in particular, the much-discussed issue of factors to be taken into account when assessing the interests of justice. The Appeals Chamber judgment has highlighted that the Pre-Trial Chamber's decision was based more on speculation than on criminal justice criteria. The Appeals Chamber has offered victims the possibility of having their interests recognized or at least being able to benefit from the assistance of the Trust Fund for Victims.

María José Pérez del Pozo "La expansión de la guerra informativa rusa (2000-2018)", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.14]

The expansion of Russia's information warfare (2000-2018)

This article analyzes the evolution of the means of soft power used by Russia since the year 2000. Starting at the study of the first public diplomacy initiatives, directed at countries of the post-soviet space, explores the similarities with the strategic objectives of Russian foreign policy. Firstly, the changes produced in the international society since the Russian-Georgian war of 2008, and the protests that have taken place in Russia at the end of 2011 and the beginning of 2012, result in a significant change of the objectives and strategies of the Russian soft power, and in an extreme radicalisation of informative narratives. The conclusions emphasize four elements: the evolution towards informative warfare operations as a defense strategy against Western initiatives in the Russian neighbourhood, the growing militarization of informative content based on informative warfare strategies, the parallelism between the propaganda within the country and in the international community and the use of discrediting information strategies against Western countries and media.

Rosa Ana Alija Fernández "Los tratados internacionales en materia de corrupción: una vía potencial para la persecución extraterritorial de violaciones graves de derechos humanos cometidas por empresas transnacionales)", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.15]

International treaties on corruption: a potential path to extraterritorially prosecute serious violations of human rights committed by transnational companies

Given the difficulties to prosecute serious violations of human rights amounting to international core crimes when there are transnational companies involved in their commission, punishing them as crimes of corruption merits consideration. International treaties in this field provide elements to defend this stance. Besides, this path provides some advantages, particularly the facilitation of their extraterritorial prosecution. However, although a potentially useful strategy, it also presents significant drawbacks.

Beatriz Vázquez Rodríguez "Protección diplomática y responsabilidad patrimonial del Estado: a propósito del asunto Couso", 39 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.39.16]

Diplomatic protection and State liability: the Couso case

Judgment 4391/2019 of the Audiencia Nacional of Spain has ordered the Spanish State to compensate the family of the journalist José Couso for the damages caused by the omission in the exercise of diplomatic protection. The ruling recognizes the patrimonial responsibility of the Spanish Administration, providing the novelty that it is the first time that it has been done without a causal link between the damage caused to a national by a third State and the behaviors previously developed by the Spanish administration. However, the legal construction of the Judgment is debatable, both as a consequence of some of the arguments used and by the weak development of others. The Supreme Court has the opportunity to confirm the progress or maintain its previous doctrine.

Revista Electrónica de Estudios Internacionales (REEI), No. 40 (2020)

Vicente Garrido Rebolledo, "Inmoralidad, inhumanidad, oportunidad e impunidad de la utilización de las armas químicas: el caso de Siria", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.02]

Immorality, inhumanity, opportunity and impunity of the chemical weapons' use: the case of Syria

Despite the frequent and extensive use of chemical weapons in armed conflicts, they were always considered as immoral, due to their uncontrollable and inhuman effects. The Chemical Weapons Convention (CWC) codifies the obligation to eliminate chemical arsenals on a global scale. The withdrawal and destruction of chemical weapons from Syria in 2014 will be the most important milestone of the non-proliferation regime and the greatest challenge for the Organization for the Prohibition of Chemical Weapons (OPCW). The process will be long and extremely complicated, due to the lack of cooperation from the Syrian government and the finding by the OPCW of the use of chemical warfare agents in the conflict (both by the regime and by non-state actors). The feeling of frustration in the face of the impossibility of acting against the perpetrators of the attacks with chemical weapons on Syrian territory, has led in the last two years to the launch of some international initiatives, which seek to ensure that these crimes against humanity do not go unpunished. All this, in parallel to a recent criminal and homicidal use of chemical agents that seemed already forgotten.

Joan David Janer Torrens, "La aplicación de la cláusula derogatoria del Convenio Europeo de Derechos Humanos con motivo de la crisis sanitaria derivada del COVID 19", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.03]

The application of the derogatory clause of the European Convention on Human Rights on the occasion of the sanitary crisis arising from COVID 19

The sanitary crisis caused by COVID-19 has meant that, in a period of only fifteen days, ten States parties to the ECHR have notified, during the first wave of the pandemic, the Secretary General of the Council of Europe of their decision to temporarily derogate from certain obligations of the Convention in order to be able to adopt restrictive measures of rights to contain the transmission of the virus among the population. However, the rest of the States, which have also been affected by the pandemic, have not considered it necessary to resort to the derogation clause considering that the restrictive measures adopted were compatible with the Convention. The objective of this study is to analyze the application of the derogatory clause of Article 15 of the Convention as a result of the sanitary emergency and assess its opportunity from the perspective of the human rights protection system established by the Convention, considering if perhaps it would have been preferable not to apply it.

Miguel Gardeñes Santiago "La circulación de personas físicas en el Acuerdo de Retirada del Reino Unido de la Unión Europea", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.04]

Movement of natural persons in the Agreement for the Withdrawal of the United Kingdom from the European Union

The withdrawal of the United Kingdom from the EU is an important political and legal challenge. Among the many issues it has raised, those related to mobility and residence of citizens and their families are of utmost importance. Even though UK nationals are no longer Union citizens, and Union citizens will not be able to exercise any more the rights related to EU citizenship in the territory of a State that is no longer a member of the Union, the second part of the withdrawal agreement allows to maintain, in part, the former statu quo for those citizens which, at the end of the transition period, find themselves in a situation covered by EU rules on the free movement of persons and intend to keep it afterwards. The withdrawal agreement is a rather complex instrument of transitional law, and this paper intends to analyse its context, principles, applicability criteria and the rights it bestows.

Jordi Mas Elias "La cohesión interna de las regiones: factores que contribuyen a su desempeño exterior", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.05]

Internal cohesiveness of regions: factors contributing to their external performance

In recent years, regions are taking a decisive role in world trade liberalization. Their greater activity and presence in the international scene indicate the existence of greater opportunities to study them from a comparative perspective. However, its study has been strongly limited from an internal viewpoint, aimed at describing and analyzing the internal characteristics of the region that favor its cohesion and its external performance. This is due to, among several reasons pointed to by the academic literature of regionalism and interregionalism, the difficulty of conceptually defining the region and its changing structure. This study aims to review the main contributions of the International Relations discipline in the field of regional cohesion and explore the possibilities of analyzing the regions from a comparative perspective. It concludes that there has been a special emphasis on analyzing cohesion from the perspective of regional institutions and state preferences, particularly in studies on the European Union. However, other factors of cohesion identified by academic literature, such as the distribution of power or regional coherence, have been developed to a lesser extent.

Romualdo Bermejo García y Eugenia López-Jacoiste Diaz "La crisis rusa en el Consejo de Europa: ¿un paso en falso de la Asamblea Parlamentaria?", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.06]

The Russian crisis in the Council of Europe: a false step of the Parliamentary Assembly?

The annexation of Crimea to the Russian homeland has taken its toll on the Council of Europe. The Parliamentary Assembly of the Council of Europe stripped the Russian Federation in 2014 of its right to vote and other rights of representation. In this study, the political and legal consequences of the "Russian crisis" are analyzed in detail, with special attention to the usurpation of power by the Assembly of the sanctioning competences of the Committee of Ministers. This crisis reflects, on the one hand, the constant anti-Russian attitude of old Europe, regardless of the political weight of Russia and its particularity, and,

on the other hand, the dangerous internal tensions in this Organization, on the occasion of the amendment of that gross mistake.

Montserrat Pi Llorens "La Unión Europea y la lucha contra los traficantes y tratantes de migrantes en Libia: balance tras el fin de la operación Sophia", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.07]

The European Union and the fight against smuggling and trafficking in Libya: balance after the end of operation Sophia

This article aims to take stock of the measures that the European Union has put in place to combat smugglers and human traffickers in Libya, at a time when one of the instruments that has played a leading role in this fight, Operation Sophia, has come to an end. The initial hypothesis is that these measures, or at least most of them, which have implied the adoption of policies of clear militarization and externalization, have been controversial and have been questioned since their incorporation, given that their effects not only do not correspond to the stated objectives but raise many doubts in both legal terms and regarding questions of efficiency.

Maria Julià Barceló "La Unión Europea y su cooperación flexible con Naciones Unidas en el mantenimiento de la paz: el caso de las misiones europeas", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.08]

The European Union and its flexible cooperation with the United Nations in peacekeeping: the case of European missions

The practice of European Union (EU) missions and their mechanisms for the creation and deployment show that the EU behaves as a regional organisation that acts autonomously in peacekeeping, under the parameters of Chapter VIII of the Charter of the United Nations and the legal framework of the Common Security Defence Policy (CSDP). In 2003, the formalization of this cooperation between the two organizations has been initiated and inter-agency mechanisms were established. Since 2013, the EU has designed a number of action plans that reflect its willingness to cooperate with the United Nations. Its peacekeeping missions are instruments of flexible cooperation with the United Nations and other regional organizations. Priority focus of intervention and cooperation include security and defence sector reform, the rule of law, advice and training, or support for peace in Africa. In its intervention, the EU has not in all cases had the prior authorisation of the United Nations Security Council (UNSC). Civilian missions (peacekeeping) have been created and deployed without this authorization, although in general the UNSC has subsequently validated them with its resolutions on the conflict. By contrast, most military operations (peace enforcement) have been authorized by the UNSC, proving the Union's willingness to participate in operations with concrete and time-limited mandates.

Jacqueline Hellman "Las vicisitudes de la Convención sobre el delito de genocidio en este nuevo siglo", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.09]

The vicissitudes of the Genocide Convention in this new century

The heinous acts committed during the Second World War constituted an undeniable incentive for a considerable number of States that decided to positively welcome the proposal concerning the adoption of an international legal instrument that aimed the criminalization of illicit that were similar to the ones committed during the referred armed conflict. Finally, in 1948, the Convention for the Prevention and Punishment of the crime of genocide was adopted and, in 1951, it entered into force. Hence, more than seventy years have passed since this severe crime was internationally codified. Thus, we will analyze and interpret the content of the latter in the light of current situations. All this will be made with the purpose of determining if the content of the agreement adopted at the Chaillot Palace, on December 9 of 1948, is a suitable one.

Beatriz Campuzano Díaz "Los acuerdos de elección de foro en materia de responsabilidad parental: un análisis del art. 10 del Reglamento (UE) 2019/1111", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.10]

Choice of court agreements in matters of parental responsibility: an analysis of art. 10 of Regulation (EU) 2019/1111

Choice of court agreements in matters of parental responsibility are subject to certain conditions in Art. 10 of Regulation 2019/1111, which are analysed in this article: the child must have a substantial connection with the Member State whose courts are chosen, in particular for any of the circumstances listed in Article 10; it is necessary the agreement of the parties, as well as any other holder of parental responsibility, which must be done in compliance with certain formal and temporary requirements; and the exercise of jurisdiction needs to be in the best interests of the child. The article takes as reference Article 12 of Regulation 2201/2003 and the ECJ decisions about its interpretation and application, to explain many of the changes introduced by Art. 10 of Regulation 2019/1111. The relations between the international jurisdiction rules of Regulation 2019/1111 and the 1996 Hague Convention are also analysed in this article.

Gloria Esteban de la Rosa "Método y función del Derecho internacional privado: hacia la más plena realización de los derechos humanos", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.11]

Method and function of Private International Law: towards the greatest realization of human rights

The Private International Law System is currently undergoing a certain transformation from the perspective of its scientific understanding (method) and function, as the impact of human rights is increasingly evident. This incidence takes place in the sectors of its content (international competence, applicable law and recognition of decisions) and in the techniques used to respond to international private situations. This contribution accounts for the aforementioned evolution, also providing the necessary historical perspective.

Miguel Á. Acosta Sánchez "Estrategias de seguridad marítima y medios contra la inmigración irregular: análisis comparado de España, Unión Europea y Unión Africana", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.12]

Maritime security strategies and resources against irregular immigration: comparative analysis of Spain, European Union and African Union

The current migration crisis that Europe has suffered in recent years has led to it being considered irregular immigration as a risk or threat to Security in the recent Maritime Security Strategies, specifically in the case of Spain, European Union and African Union. Therefore it's appropriate to determine from these Strategies, what degree of threat constitutes irregular immigration by sea and the available resources to fight against it, analyzing their possible regional compatibility, especially with regard to the possibility of joint actions making use, even of military resources.

Antonio José Pagán Sánchez "Internal tensions and economic opportunities: explaining the heterogeneous stance of EU Member States towards the Belt and Road Initiative", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.13]

Tensiones internas y oportunidades económicas:explicando la postura heterogénea de los Estados miembros de la UE respecto a la Nueva Ruta de la Seda

The European Union is one of the key destinations of the Belt and Road Initiative (BRI), officially announced by Chinese president Xi Jinping in 2013. Nevertheless, the EU has mixed feelings about it: while recognizing the initiative's capability to foster economic growth, it is still reluctant to participate, regarding the BRI as a challenge to European unity, norms and values. Regardless of the official stance of the European Commission, the EU member states have adopted a wide range of heterogeneous stances towards the BRI, ranging from an enthusiastic acceptance of the initiative to a refusal to join it. This paper will shed light on the driving factors behind this wide range of attitudes towards the BRI, focusing not only on the economic opportunities posed by the initiative to the main member states, but also on their relationship with the EU and the possible internal tensions with the European Commission. The joint examination of these two variables will provide a better explanation of EU member states´ stance towards the BRI than those analyses based merely on the explanation of economic factors. In fact, the main finding of this paper is that political factors outweigh the economic ones: there is no correlation between the economic opportunities offered by the initiative and the support it gets from beneficiary member states, while internal tensions inside the EU are encouraging some member states to join the initiative even though there might not be many economic benefits granted by their participation.

Jaime José Hurtado Cola "Responsabilidad civil corporativa por violaciones del Derecho internacional consuetudinario. Nota sobre la sentencia del Tribunal Supremo de Canadá en el caso Nevsun", 40 *Revista Electrónica de Estudios Internacionales* (2020) [DOI: 10.17103/reei.40.14]

Corporate civil liability for violations of customary International law. A case note on the Supreme Court of Canada decision in Nevsun

In its judgment rendered in February 2020 in the case of Nevsun v. Araya, the Supreme Court of Canada opens the door to civil claims for damages by individuals against corporations before Canadian courts for violations of customary international law allegedly occurred abroad. The opinion revisits and analyzes in depth the state of the Canadian common law with respect to fundamental and controversial legal issues such as state immunity, the act of state doctrine, the adoption of the customary international law into the domestic legal system, the direct application of norms of public international law to private actors, the extraterritorial jurisdiction of civil courts, the division of powers and justiciability in domestic courts of acts by sovereign states, as well as the corporate liability for violations of customary international law norms (including human rights international law).

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