the SPANISH YEARBOOK of INTERNATIONAL LAW

Continuity and change in the *Spanish Yearbook of International Law*

Angel J. Rodrigo[1]

The *Spanish Yearbook of International Law (SYbIL)* publishes its volume 25 corresponding to 2021. This is a relevant milestone that began in 1991 when the Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales (AEPDIRI) decided to create the *SYbIL*, directed by Carlos Jiménez Piernas (vols. 1-10). Since then, Alejandro Rodríguez Carrión (vols. 11-14), María Isabel Torres Cazorla (vols. 15-17) and Mariano J. Aznar (vols. 18-24) have assumed the direction of the publication.

During this last period, *SYbIL* became a free access electronic publication, which has contributed to improve its accessibility and also its visibility. In addition, it changed its structure, in which the 'Classic's Corner' section was introduced with the aim of publishing translated reference works of the Spanish doctrine produced throughout the 20th century in order to facilitate their knowledge beyond the community of readers in Spanish. The result has been its consolidation as a reference publication for Spanish internationalist scientific doctrine and about the Spanish doctrine and practice (the 'Agora section' has contributed decisively to this).

This transformation is the result of the involvement and work of a numerous of people, the previous editor-in-chief M. Aznar, the different members of its Editorial Board and, of course, the members of its Peer-Review Board who have made the effort to supervising the scientific quality of contributions submitted to *SYbIL*.

Now, a new period starts with the aim of embracing both continuity and change in *SYbIL*. On the one hand, *SYbIL* is the result of a continuous effort for almost thirty years by a large number of people who have made it possible. The purpose, therefore, is to give continuity to the objective that justified its origin and that explains its progressive evolution. And, on the other hand, *SYbIL* wants to

[1] Editor-in-Chief, SYbIL, Associate Professor of Public International Law, Universitat Pompeu Fabra. Email: editor@sybil.es

 DOI: 10.17103/sybil.25.0

incorporate some changes that allow it to maintain or improve its attractiveness for the new generation of internationalists. Also, these changes will enhance its relative position with respect to other publications in a context of technological acceleration and transformation of the media for the dissemination of scientific knowledge. The changes may affect formal aspects, the indexation of the publication, its structure and its relationship with other publications and social networks. The new Editorial Board is working on it and these novelties will begin to be implemented in volume 26, corresponding to 2022.

The current volume is a bridge, a transition between one period and another, and it has necessarily been affected by COVID-19, just like so many areas of our daily lives.

As the previous Editor-in Chief stated, "*SYbIL* tries to be a new tool in the hands of what Oscar Schachter labelled as the "invisible college of international law". I make these words my own and complete them: *SYbIL* wants to be a useful tool to the "visible Spanish College of International Law" in the scientific debate in English.

 DOI: 10.17103/sybil.25.0

the SPANISH YEARBOOK of INTERNATIONAL LAW

Catalonia independence claim: An analysis from the standpoint of international law

Robert KOLB* **& Tarcisio GAZZINI****

Abstract: The article offers a systematic analysis of the independence claim of the Autonomous Community of Catalonia (hereinafter "Catalonia") from the standpoint of international law and includes a concise discussion of the key concepts of statehood, territorial integrity and recognition. It then examines the right of peoples to self-determination, which remains the crux of the matter, and defines its content in the colonial context and beyond it. It demonstrates that outside the colonial context and with the possible exception of remedial secession (which can be excluded in the case of Catalonia), there is no legal entitlement to secede. The right to self-determination must be implemented within the jurisdiction of Spain. It thus becomes essentially a matter of autonomy and powers distribution. It is within the current legal framework, based primarily on the Spanish Constitution and the Catalan Statute of Autonomy that the parties must hammer out a political solution, which must follow the road map designed by the Constitutional Court in a series of decisions rendered throughout the crisis. The Court has consistently upheld the unity and territorial integrity of Spain, the full enjoyment by Catalonia of all the powers contained in the Statute of Autonomy, and the right to Catalonia to project, within the constitutional and statutory limits, its activities at the international level. The article concludes that the current legal framework is sufficiently clear and flexible to accommodate the rights and responsibilities of the central government to preserve the unity of Spain as well as the legitimate ambitions of Catalonia to develop and pursue its policies in accordance with the Constitution and the Statute.

Keywords: Spain – Catalonia independence – Sovereignty – Self-determination

(A) INTRODUCTION

The attempt by the authorities of the Autonomous Community of Catalonia (hereinafter "Catalonia") to break away from Spain and create an independent State has dominated the political agenda in the country for almost a decade. It has provoked an unprecedented showdown between the Government and Catalan authorities, created a sharp divide at the national level and within the population of Catalonia, and triggered several important pronouncements by the Spanish Constitutional Court.

The purpose of this article is to provide a systematic assessment of the independence claim put forward by Catalonia from the standpoint of international law. Clarifying the respective rights and obligations of Spain and Catalonia under international law is indispensable for the purpose of conducting meaningful negotiations towards a satisfactory political solution of the crisis consistent with the Constitution.

The article first offers an overview of the events leading to the 2017 referendum and its consequences, focusing on the articulation by Catalan authorities of the independence claim through several legal and political documents, the reactions of the Spanish Government and the relevant decisions of the Spanish Constitutional Court. It then examines the key international law principles

Article received on 5 June 2021, accepted on 22 August 2021 and published on line on 31 January 2021.

* Professor of Public International Law, University of Geneva. Email: Robert.kolb@unige.ch.
** Professor of Public International Law, Università di Padova. Email: tarcisio.gazzini@unipd.it.

 DOI: 10.17103/sybil.25.1

and concepts without which it would be impossible to proficiently deal with the question of the Catalan independence claim. Particular attention will be paid to statehood, territorial integrity, recognition and, most importantly, the right of peoples to self-determination, which is considered a cornerstone of modern international law, despite its normative indeterminacy. It finally assesses the Catalan claim to independence and its implications. The analysis includes the so-called "right to decide", which is peculiar to the Catalan claim, and offers some indications on how Spain and Catalonia may eventually reach a mutually satisfactory agreement along the lines elucidated by the Constitutional Court.

(B) OVERVIEW OF THE EVENTS RELATED TO THE CLAIM OF INDEPENDENCE

The 1978 Constitution of Spain provides that "[n]ational sovereignty is vested in the Spanish people, from whom emanate the powers of the State" (Article 1.2). It also proclaims "the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards" and guarantees "the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all" (Article 2). Article 149 defines the exclusive competences of the State, while Article 97 specifically reserves to the Government *inter alia* the direction of foreign policy. Article 148 indicates the matters that may fall within the competences of Autonomous Communities.[1]

The right to autonomy of the nationalities and regions has been implemented through the adoption of several statutes of autonomy governing the relationship between the central government and the autonomous communities, as well as the distribution of the respective powers. Regarding Catalonia, the first Statute of autonomy was adopted in 1979. According to Article 1(1), Catalonia, as a *nationality*, was constituted as an Autonomous Community in order to achieve self-government, in accordance with the Constitution.[2]

In 2005, the Catalan Parliament adopted a draft for a new and more sophisticated Statute, which declared that Catalonia, as a *nation*, exercises self-government through its own institutions and is constituted as an Autonomous Community in accordance with the Constitution and the Statute itself.[3] The final version of the Statute of autonomy, however, emphasised that Catalonia's self-government is founded on the Constitution and the historical rights of the Catalan people.[4] It also proclaimed the wish of Catalonia "to develop its political personality within the framework of a State, which recognises and respects the diversity of identities of the peoples of Spain". It also reverted to Catalonia as a *nationality* (instead of a *nation*).

The Statute was then the object of a rather controversial decision by the Constitutional Court.[5] This complex decision deals with many legal issues and declared unconstitutional several provisions of the Statute. Throughout the decision, the Court adamantly insisted that Catalonia autonomy was based on and must be exercised in accordance with the Constitution. In a key passage, it held that the Statutes of Autonomy are subordinated to the Constitution and that the provisions of the Statutes are not expression of a sovereign power, but merely of a devolved autonomy. It also distinguished

[1] Spanish Constitution 1978, text here.
[2] The Statute was adopted by the Parliamentary Assembly on 16 December 1978 and approved through a referendum held on 25 October 1979, text here.
[3] Proposal approved by the Plenary Assembly of Parliament, 30 September 2005, BOPC 224, 3 October 2005.
[4] Organic Act 6/2006, 19 July 2006, preamble.
[5] STC 31/2010, 28 June 2010.

 DOI: 10.17103/sybil.25.1

"Spanish people", as the sole holder of national sovereignty at the origin of the Constitution, from "people of Catalonia", as the as the holder of the public powers to be exercised in conformity with the Constitution and the Statute of autonomy.

The decision, which was later described as causing "the partial revocation and complete denaturing" of the 2006 Statute of autonomy,[6] ignited the firm reaction of the Catalonian Parliament. Two resolutions marked the rupture with the previous approach respectful of the Constitution. Resolution 742/IX, introduced the "right to decide" and announced Catalonia as "a new State of Europe" based on the imprescriptible and inalienable right to self-determination as democratic expression of its sovereignty as nation.[7] The Catalan claim to independence was then reiterated with force in Resolution 5/X containing a declaration of sovereignty and claiming the right of the people of Catalonia to decide their political future in accordance with nine principles, and most importantly *sovereignty* understood as "the character of a sovereign political and legal subject".[8]

The path to independence was further defined by the *Generalitat* in a White Paper.[9] The document is extremely comprehensive and was intended to guide the process of independence from popular consultations to the effective creation of a new State, passing through the declaration of independence and the adoption of a Constitution. It also deals with the succession of international treaties and the distribution of assets between Spain and the new State.

Without hesitation, the Constitutional Court declared Resolution 5/X unconstitutional and null as "only the Spanish People are sovereign, exclusively and indivisibly, no other subject or State body or any part of the people can be endowed with sovereign status by a public power". The Court also held that the "right to decide" cannot be considered unconstitutional if it is interpreted not as "a manifestation of a right of self-determination, or as an unrecognized attribution of sovereignty", but rather as a political aspiration in accordance with the Constitution and the principles of "democratic legitimacy", "pluralism" and "legality", all of which were expressly proclaimed in Resolution 5/X.[10]

In a subsequent decision, the Court further clarified that under Article 149.1.3 of the Constitution, international relations are understood as relations between international subjects and governed by international law. Accordingly, "any foreign action carried out by Autonomous Communities should be limited to actions that do not involve exercising this *ius contrahendi*, do not generate immediate and actual obligations *vis-à-vis* foreign public powers, do not affect the State's foreign policy, and do not entail its liability *vis-à-vis* foreign States or inter or supra-national organizations".[11]

The Constitutional Court's decisions notwithstanding, the Catalan parliament accelerated the process by adopting first Law 10/2014 [12] and then decree 129/2014,[13] providing for non-binding consultations, which took place on 9 November 2014. The President and some members of the Catalan Government were subsequently found responsible of grave contempt to the Constitutional Court and banned from office by Catalan High Court of Justice and Supreme Court. The provision of Law 10/2014 dealing with the referendum were eventually found unconstitutional,[14] while decree

[6] Explanatory Memorandum on Law 19/2017, at Law-19_2017-on-the-Referendum-on-Self-determination.pdf (gencat.cat) 3. See also Resolution 5/X, 23 January 2013.
[7] Resolution 742/IX, 27 September 2012.
[8] Resolution 5/X, *supra* n. 6.
[9] Government of Catalonia, *White Paper on the National Transition of Catalonia. Synthesis* (2014).
[10] STC 42/2014, 25 March 2014, Ground 3.
[11] STC 46/2015, 5 March 2015, Ground 4.
[12] Law 10/2014, 26 September 2014.
[13] Decree 129/2014, 27 September 2014.
[14] STC 31/2015, 25 February 2015.

 DOI: 10.17103/sybil.25.1

129/2014 was declared unconstitutional and null.[15]

The saga continued nonetheless with the adoption of Resolutions 1/XI,[16] 263/XI [17] and 306/XI.[18] The first document announced "the start of the process to create an independent Catalan State in the form of a republic". The second prospected the "disconnection" with the law of the Spain and a "unilateral mechanism of democratic exercise" meant to activate the convening of the Constituent Assembly.[19] The third proclaimed without any further elaboration the right to self-determination of Catalonia and defined the general political orientation of the Government of Catalonia.

All resolutions were declared unconstitutional and null by the Constitutional Court, respectively, in Judgements 259/2015,[20] 170/2015 [21] and 215/2016.[22] In the first decision, in particular, the Court categorically rejected the reference to "sovereignty" and reiterated that "the sovereignty of the nation, vested in the Spanish people, necessarily entails the unity of the nation" as provided for in Article 2 of the Constitution.[23]

Meanwhile, Catalonia adopted Law 16/2014 on external action and relations with the European Union (*Acción y del Servicio Exterior del Estado*),[24] which designed the projection of Catalonia at the international level through policies, actions, activities and initiatives with regard to the EU as well as non-EU governments and other international organisations.

Law 16/2014 was challenged by the Spanish government before the Constitutional Court. Several provisions of the law were declared unconstitutional.[25] The decision offered the Constitutional Court the opportunity to admit and delimit the external projection of Catalonia, while unambiguously reiterating the unity and territorial integrity of Spain.

In turn, the Spanish parliament adopted Law 15/2015 aimed at the effective enforcement of the judgments of the Constitutional Court.[26] The law was considered constitutional in two appeals made by the Governments of Catalonia [27] and Basque region.[28] The Court pointed out that the measures aimed at enforcing its decisions were not peculiar to non-compliance by Autonomous Communities but could equally apply to the central authorities.

On 6 September 2017, the Catalan Parliament promulgated Law 19/2017, providing for a binding referendum on self-determination. According to Article 2, "[t]he people of Catalonia are a sovereign political subject and, as such, exercise its right to freely and democratically decide upon their political condition".[29] Although Law 19/2017 was suspended by the Constitutional Court the day following its adoption, the Catalan Parliament adopted Law 20/2017, on "Juridical Transition and founding of the Republic".[30] The law was intended to allow Catalonia "to function immediately and with

---

15 STC 32/2015, 25 February 2015.
16 Resolution 1/XI, 9 November 2015.
17 Resolution 263/XI, 27 July 2016.
18 Resolution 306/XI, 6 October 2016.
19 Para 7.
20 STC 259/2015, 2 December 2015.
21 STC 170/2016, 6 October 2016.
22 STC 215/2016, 15 December 2016.
23 Ground 4, relying on decision 42/2014, *supra* n. 10.
24 Law 16/2014, 4 December 2014.
25 STC 268/2014, 22 December 2016.
26 LAW 15/2015, 16 October 2015.
27 STC 215/2016, 15 December 2016.
28 STC 185/2016, 3 November 2016.
29 Law 19/2017.
30 Law 20/2017.

 DOI: 10.17103/sybil.25.1

maximum effectiveness" in the transitional period between the referendum on self-determination and the adoption of the Constitution by the Constituent Assembly. Defined as the supreme law of the Catalan legal system (Article 3), Law 20/2017 resembles to the typical constitution of a modern State, although it contains some features of authoritarian national populism including the power of the President of the Generalitat to appoint and remove the judiciary.[31]

It is composed of 89 articles plus the final provisions. The general provisions (Title I) proclaimed *inter alia* the constitution of the Catalan State (Article 1) and the national sovereignty of the people of Catalonia (Article 2). Article 4 dealt with the internal status of European Law and international law. The same provision declared the commitment of Catalonia to comply with international law. The sovereignty of Catalonia territory was to be exercised, under Article 6, within the territory of Catalonia as well as its airspace and maritime zones in accordance with the law of the sea. Articles 14 and 15 further established the continuation of the application of, respectively, European Law and international treaties.

Law 20/2017 too was suspended by the Constitutional Court on 12 September 2017. Nonetheless, the Catalan Parliament went ahead with the referendum, despite serious clashes between segments of the local population and the police. The election campaign was not neutrally overseen, nor the census and the vote counting submitted to a rigorous control. According to the authorities of Catalonia, however, 92,01% of voters were in favour of the independence of Catalonia, while the turnout was 43,03%. On 10 October, the President of Catalonia assumed "the mandate of the people whereby Catalonia becomes an independent State" but proposed the Catalan Parliament to suspend the effects of the referendum and to engage in dialogue with the central government.

The same day, the MPs of the pro-independence bloc, who defined themselves as the "legitimate representatives of Catalonia", issued a declaration of independence, which was approved by the Catalan parliament on 27 October 2017. The declaration invoked the right to self-determination as recognised in international law and exercised through the referendum. It then declared "the suspension of self-government in Catalonia and the application of a *de facto* state of exception" and proclaimed the Catalan Republic, as an "independent, sovereign, democratic, social State under the rule of law". Finally, it pledged to enter negotiations with the Spanish State, on a foot of equality and without preconditions, in order to establish a collaborative framework for the benefit of both parts.[32]

The Constitutional Court unanimously declared null and unconstitutional both the Law on Referendum,[33] and the Law of Juridical Transition.[34] It held unambiguously that the Constitution *obviously* does not recognize any right to unilateral secession. Quite the contrary, the law on referendum was deemed inconsistent with several articles of the Constitution, including Articles 1.2 and 2 dealing, respectively, with national sovereignty being vested in the Spanish people, the indissoluble unity of the Spanish Nation, and the guarantee of the right to autonomy of the nationalities and regions composing Spain.

The decision also touched upon international law from three perspectives. First, it observed that reliance on the international treaties and resolutions referred to in the Law was entirely misplaced, since these instruments clearly confine the right to unilateral secession to the colonial context. Second,

[31] A. Queralt Jiménez, 'The Populist Drift of the Catalan Pro-independence Movement', in J.A. Kämmerer, M. Kotzur, J. Ziller (eds.), *Integration and Desintegration in Europe* (Baden Baden: Nomos, 2019) 253.

[32] More information here.

[33] STC 114/2017, 17 October 2017.

[34] STC 124/2017, 8 November 2017.

and for the sake of argument, the Court held that a treaty hypothetically providing for unilateral secession outside the colonial context could not become part of domestic law, or be applied within the jurisdiction of Spain, since it would be contrary to the Constitution. Third, the Court emphasised that Article 4.2 of the Treaty Establishing the EU protects *inter alia* the territorial integrity of the member States.

On 17 October, the central government for the first time triggered the application of Article 155 Constitution, which led to the adoption of a series of serious measures, including the dismissal of the President and the Catalonia Government. His functions were assumed by central authorities.[35] On 27 October, the President and some members of the Catalan Government fled to Belgium, while the Vice-President and other members were arrested and charged with several criminal offences. The later were eventually found guilty of sedition and misuse of public funds and sentenced by the Supreme Court.[36]

The Catalan declaration of independence met the firm dismissal of the European Union (EU)[37] and its members, as well as virtually all States.[38] The Commission immediately declared that the referendum "was not legal. […] If a referendum were to be organised in line with the Spanish Constitution it would mean that the territory leaving would find itself outside of the European Union".[39] The President of the Parliament echoed it by defining the declaration of independence as "a breach of the rule of law, the Spanish Constitution and the Statute of Autonomy of Catalonia, which are part of the EU's legal framework" and warning that no one in the EU would recognise it".[40]

(C) CLAIM TO INDEPENDENCE

The legal basis of Catalonia's claim to independence has not been the object of a specific legal document or legal opinion by the authorities of Catalonia. Rather, the legal argument underpinning the independence claim must be construed through the relevant elements contained in the numerous legal and political documents adopted throughout the crisis. Such argument has been developed along two intertwined axes, namely the right to self-determination and the right to decide. The invocation of the "imprescriptible and inalienable right to self-determination" dates back at the latest to 1989 and was almost systematically reiterated in every subsequent legal or political documents. Yet, the solemn proclamation of the right was not supported by any specific legal argument. The right to decide, in turn, was formally introduced in 2013, and associated with several principles and most prominently "sovereignty".[41]

It appears that the White Paper published by the Catalan Government in 2014 was the first attempt to articulate the legal claim to independence. According to the document, the process towards independence is grounded on "three main principles": (a) self-determination in application of a

[35] Order PRA/1034/2017 Section A. See M.J. García Morales, 'Federal Execution, Article 155 of the Spanish Constitution and the Crisis in Catalonia', 73 *ZOR* (2018) 791.

[36] Supreme Court, Criminal Chamber, Judgment No. 459/2019, 14 October 2019. English translation available. See Agora, *Catalonia Secession before the Spanish Supreme Court*, 24 *SYbIL* (2020) 272.

[37] See R. Caplan, Z. Vermeer, 'The EU and Unilateral Secession: The Case of Catalonia', 73 *ZOR* (2018) 474.

[38] See, for example: State Department, Press Statement, 27 October 2017, according to which "Catalonia is an integral part of Spain, and the United States supports the Spanish government's constitutional measures to keep Spain strong and united"; United Kingdom, Statement on UDI made by Catalan Regional Parliament: 27 October 2017.

[39] European Commission, Statement on the Events in Catalonia, Brussels, 2 October 2017.

[40] European Parliament President, Statement on the situation in Catalonia, 27 October 2017.

[41] See Resolution 5/X, *supra* n. 6.

 DOI: 10.17103/sybil.25.1

democratic principle; (b) self-determination as an inalienable right of a national community; and (c) self-determination as the last resort to remedy an unjust situation".[42] The document is drafted in terms of "defence" or "justification" of the process of self-determination. It refrains from defining self-determination, identifying its legal foundations, holders and content, or explaining how it may be invoked by Catalonia to break away from Spain. Instead, it looks at self-determination from three different perspectives.

The first perspective construes self-determination as a response to the democratic principle to be exercised by a "unit of collective decision-making (*demos*)", which includes the ability to decide to become such "unit", combined with the right of individuals in a "regional collective" to set up an independent State, provided that certain conditions are satisfied (including economic and political viability, protection of minorities). The second perspective considers the right to self-determination in two sequential steps: "first, because of its status as a nation, as a national community is the ultimate repository of its sovereignty, and secondly, in application of the democratic principle, as this community has the right to exercise this sovereignty". The third perspective relates to remedial secession, which according to some States and scholars may be permitted under international law in situations of massive and systematic violations of human rights. In the context of Catalonia's claim to independence, those situations were placed in "descending order of doctrinal agreement" and featured at the first three places: "massive violations of human rights; unfair military annexations and occupations, especially those that took place after the express ban on territorial conquest wars in 1945; and "violations by the central Spanish State of the aspirations of self-governance and internal agreements on regional autonomy".[43]

The document later explained that the legality or legitimacy of a consultation may be reinforced by "rights and principles" of EU and international law, such as the democratic principle, the right to self-determination, and the protection of national minorities. It nonetheless conceded that the three rights and principles were "more as value and principles than rights in the strict sense".[44]

The official Explanatory memorandum attached to Law 19/2017 offered a more sophisticated attempt to define the legal claim to independence. It considered the referendum as an exercise of the right to self-determination guaranteed under the Charter of the United Nations and the 1966 UN Covenants, all ratified by Spain and now part of domestic law. It also referred to the right to democracy proclaimed by the UN,[45] and relied on unidentified "recent opinions" by the ICJ, which are construed as holding that

> "during the second half of the 20th century, there have been cases of new states that have exercised the right to self-determination without the exercise of this right to decide being motivated by the end of imperialism. The Court notes that the right of peoples to decide has evolved, and that, to counter this evolution, no new rule or custom has arisen at an international level to prohibit these new practices. The only limitation on the right to decide that the Court regards as enforceable is the unlawful resorting to force or other serious violations of the rules of international law."[46]

Law 19/2017 itself combines the exercise of the right to self-determination through the referendum (Article 1) and the right of the people of Catalonia, as a sovereign political subject, to decide upon their political condition freely and democratically.

---

[42] *Supra* n. 9, 19.
[43] At 20.
[44] At 26.
[45] *Supra* n. 6.
[46] At 2.

(D) CATALONIA PATH TOWARDS STATEHOOD

From the standpoint of international law, the first question to be addressed, relates to how far Catalonia has gone in the process toward statehood. The Catalonia bid to independence was marked by a crescendo of declarations on "the process to create an independent State" and on the ambition of becoming a "new State of Europe", which culminated in the proclamation of a "sovereign political subject". Several documents also addressed the question of statehood and referred to the requirements set by the 1933 Montevideo Convention.

The 2014 White Paper, in particular, expressly mentioned "a legitimate authority [that] exercises its competences effectively over the population and territory", but conceded that "in the event that the process is not fully agreed, some temporary problems with overlapping authority and territorial control may occur".[47] The document also emphasised the importance of recognition, which could be sought even before the declaration of independence and may serve to demonstrate Catalonia's capacity to enter into relations with other subjects of the international community.[48]

(1) *Statehood*. In international law, attempts to define statehood systematically start by referring to Article 1 of the Montevideo Convention on the Rights and Duties of States. According to this Convention, a State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with the other states.[49] The definition is undoubtedly correct, but of limited assistance. It offers a static picture of statehood and fails to fully capture the factual and normally incremental process that leads to the creation (and conversely disappearance) of States.

A less famous but arguably more accurate description of the attributes of statehood was elaborated by the Permanent Mandate Commission in 1931 in relation to the independence of Iraq following the termination of the British mandate. According to the Commission, statehood requires (a) a settled Government and an administration capable of maintaining the regular operation of essential Government services; (b) capacity of maintaining territorial integrity and political independence; (c) ability to maintain the public peace throughout the whole territory; (d) adequate financial resources to ensure the performance of governmental functions; (e) laws and judicial organisation which will afford equal and regular justice to all.[50]

Indeed, the essence of statehood is a government exercising effectively and independently its authority. According to Judge Anzilotti, independence "is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that a State has over it no other authority than international law".[51] Likewise, Judge Huber held that "[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".[52]

It follows that statehood depends on factual circumstances rather than on constitutive elements. The English High Court held, with regard to the *de facto* government competing with the *de jure* government in the context of the Spanish Civil War (1936-1939), that "[t]he law, based on reality of

---

47 *Supra* n. 9.
48 At 124.
49 Concluded in Montevideo on 26 December 1933, into force on 26 December 1934, 165 *LNTS* 19.
50 Report to the Council, 9 – 27 June 1931, O. 4522. M, 176, 1931 VI.
51 *Austrian – German Custom Union Case* [1931], PCIJ, Ser. A/B, No. 41, p. 37.
52 *Island of Palmas case*, 2 *UNRIAA* (2006) 829, 838.

 DOI: 10.17103/sybil.25.1

facts material to the particular case, must regard as having the essentials of sovereignty a government in effective administrative control over the territory in question and not subordinate to any other government".[53] This view is solidly supported in literature.[54] From this perspective, territory and population are the domain over which the government exercises its authority, rather than constitutive elements on their own.[55] Accordingly, the absence of a clearly defined territory,[56] do not necessarily prevent a government from being independent and effective. Likewise, variations of the territory and the population of a State do not affect statehood if the government continues to function independently and effectively.[57] The capacity to enter into relations with other states is a consequence or a manifestation – rather than a constitutive element – of statehood. In all these regards, the declaratory element prevails over the constitutive one. But the latter is not wholly absent from the picture.

A useful distinction has been introduced between the *rights inherent in statehood*, which a government enjoys for the very fact that it exists, and the *optional relations*, which it may develop with other subjects of the international community.[58] The first category includes rights which cannot be withhold and most notably the right to the inviolability of territorial integrity.[59] A denial of such rights would encroach upon the sovereignty of the new subject.[60] The optional relations are typically the exchange of diplomatic missions or the conclusion of treaties. It stands to reason that from the standpoint of timing, the inherent rights appear first and the optional rights develop later and on a case-by-case basis.

(2) *Time and Process*. By progressively interacting with other subjects of the international legal community, a State expresses its international legal personality. The State is then the holder of all rights and obligations it is capable to act upon.[61] Consequently, it can bring and receive international claims in accordance with the law on State responsibility.

The independence of the United States offers an excellent example of the process. The 1776

---

[53] England, High Court [Bucknill J.], *Arantzazu Mendi* [1938] L.R. 233, 245. The House of Lords [Lord Atkin], *Arantzazu Mendi* [1938] A.E.R. 267, held that "there is no difference for the present purposes between a recognition of a State *de facto* as opposed to *de jure*".

[54] For T-C. Chen, *The International Law of Recognition* (New York: Green, 1951) 48, if a State "exists in fact, [it] must exists in law". J. Crawford, *The Creation of States*, 2nd ed. (Oxford: OUP, 2006) 62, stresses that "[i]ndependence is the central criterion for statehood." See also G. Jellinek, *Allgemeine Staatlehre*, 3rd ed. (Berlin, Häring, 1922) 332; G. Arangio-Ruiz, *L'Etat dans le sens du droit de gens et la notion du droit international*, 26 *ŐZFOR* (1975) 3; T. Grant, *Recognition in International Law* (Westport, London: Praeger, 1999); I. Brownlie, 'Recognition in Theory and Practice', 53 *BYIL* (1982) 197. See also the resolution adopted by the Institut de droit international, 30 *Annuaire* (1936) 300.

[55] As emphasised by H. Lauterpacht, *Oppenheim's International Law*, 8th ed. (London: Longmans, Green & Co, 1955) 452, "[t]he importance of State territory lies in the fact that it is the space within which the State exercise its supreme authority." According to Crawford, *supra* n. 54, 52, "[t]he requirement of territory is rather a constituent of government and independence than a distinct criterion of its own". For J. Dugard, *The Secession of States and their Recognition in the Wake of Kosovo* (Leiden: Brill, 2013) 122, the territory is the "spatial context for the existence of the State".

[56] See Permanent Court of International Justice, *Monastery of Saint-Naoum*, Advisory Opinion, 4 September 1924, Ser. B No 9.

[57] G. Arangio-Ruiz, *Sulla dinamica della base sociale nel diritto internazionale* (Milano: Giuffrè, 1951), esp. para 47.

[58] See S. Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: *Tertium non Datur*?', 75 *BYIL* (2004) 101, 148-154, who relies on Hans Blix, *Contemporary Aspects of Recognition*, 130 *RdC* (1970) 587, 623.

[59] Article 13 of the 1948 Charter of the Organisation of American States, expressly provides that "[t]he political existence of the State is independent form recognition by other States. Even before being recognised the State has the right to defend its integrity and independence", 119 *UNTS* 3, entered into force 13 December 1951, amended by Protocol of Buenos Aires, 721 *UNTS* 324.

[60] See Talmon, *supra* n. 58, 153.

[61] G. Arangio-Ruiz, *Gli enti soggetti dell'ordinamento internazionale* (Milano: Giuffè, 1951) 573.

Declaration of independence contains at once the repudiation of any authority above the government of the thirteen colonies and the proclamation of the aspiration to become a new sovereign State, or an entity *superiorem non reconoscens*.[62] Obviously, the declaration was not enough. The would-be government needed to concretely establish and exercise its effective and independent control over population and territory. The process leading to statehood was painfully achieved when at the end of the war the new independent and effective government imposed itself as the ruler the thirteen colony, eventually exercising *physical power* [63] over them.

As independence and effectiveness are matters of degree, issuing a State with a birth certificate may be extremely difficult. Especially in the context of ongoing violence or precarious peace, assessing the stability and future prospects of an entity involves a delicate and unavoidably subjective judgment.[64] In the *Aaland* Case, the Commission of Rapporteurs held that Finland could not be considered as a State until "a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territory of the State without the assistance of foreign troops".[65] The creation of States appears under this lens to be a process rather than an act, and its scrutiny an art more than a science.

(3) *Legality*. The fact that the creation of a State is a legal fact – and not a legal act [66] – does not mean that the international community must assist powerless to the creation of the new subject, regardless to the circumstances in which this has occurred. The question of *whether* the new subject exists is independent from the possible consequences and reactions to *how* it has come into existence and *how* it behaves. As pointed out by Talmon, "[a]n international wrongful act does not prevent the creation of a State which is a question of fact, and a State which exists in fact attains its legal status solely on the basis of existence, independent of recognition".[67]

Yet, the creation of States does not occur in a vacuum. Other States and International organizations could react on the basis of political of legal considerations and ultimately influence or even determine the outcome of the entire process.[68] On the one hand, the Security Council may resort to its powers under Chapter VII of the Charter in order to maintain and restore international peace and security, even in the absence of any breach of international law committed by the new government.[69] It may impose non-military measures under Art. 41 of the Charter and even authorise member States or regional Organisations to take military action. It can also call for member States not to recognise the new subject,[70] or enter into relation with or provide any assistance to it. The General Assembly may also recommend the latter set of measures.

On the other hand, States and International Organizations may react to breaches of international

---

[62] Declaration of Independence, 4 July 1776.

[63] As pointed out by Justice Holmes, *McDonald* v. *Mabee*, 243 U.S. 90, 91 (1915), "[t]he foundation of jurisdiction is physical power".

[64] See Brownlie, *supra* n. 54, 206.

[65] LNOJ Supplement No 4, 1920, 8-9. For H. Lauterpacht, *Recognition in International Law* (1947) 28, what is needed is "a sufficient degree of internal stability as expressed in the functioning of a government enjoying the habitual obedience of the bulk of the population".

[66] G. Abi-Saab, 'Conclusions', in M.G. Kohen (ed.), *Secession: International Law Perspectives* (Cambridge: CUP, 2009) 471.

[67] Talmon, *supra* n. 58, 180.

[68] See Dugard, *supra* n. 55, 27.

[69] H. Kelsen, *The Law of the UN* (New York: Praeger, 1950) 736.

[70] As it occurred, for instance, with regard to Rhodesia, see SC resolution 216 (1965), 12 November 1965. In SC resolution 217 (1965), 20 November 1965, the declaration was considered as having "no legal validity". See also GA Res 2024 (XX), 11 November 1965.

law committed by the new government by adopting countermeasures or any other measures permitted under international law. Moreover, under customary international law, they are obliged not to recognise when statehood has been achieved through violations of international law and peremptory norms.[71] This is particularly important in the context of the use of force and self-determination.[72]

(4) *Catalonia*. Turning now to Catalonia, there is no doubt that statehood existed only on paper. The process toward the creation of a new State was ignited by solemn proclamations but was not followed by the concrete emergence and consolidation of an independent and effective government. Far from functioning as a sovereign entity, Catalan authorities continued to be subject to the effective authority of the central government, which eventually dismissed and replaced the Government of Catalonia and its President.

Even under the criteria of the 1933 Montevideo Convention, which was invoked in the White Paper, it is clear that no new State was formed. The criteria indicated in the Convention, namely the existence of a territory, a population, a government and the capacity to enter into relations with other international subjects belies any *international* legal personality. The absence of an independent government (*superiorem non recognoscens*) effectively exercising its jurisdiction over the population living in a given territory triggers the default on the last two of the requirements of the 1933 definition.

(E) TERRITORIAL INTEGRITY

The conclusion reached in the previous section that at no point an effective and independent government functioned in Catalonia means that the present inquiry should focus on the independence claim put forward by the Catalan authorities. If there is no new State, the discussion should switch to the claim to form a new one. To assess such a claim, however, it is necessary to examine preliminarily the principle of territorial integrity, which lies at the heart of the international legal order since the conclusion of the treaties of Westphalia (current section), and also the issue of recognition under international law (next section).

The treaties of Westphalia (1648) can be considered as the outcome of an incremental process leading to the creation of sovereign states entitled to freely organise themselves (internal dimension) without any interference from outside (external dimension). In this perspective:

> "[t]he state, as a spatial unit, results in the fundamental ordering of international relations through a central reliance on territorial conception. Respect for the boundary of states is crucial and results in derivative legal ideas of territorial jurisdiction, sovereign equality, and non-intervention. […] Jurisdictional ideas about the reciprocal allocation of authority to govern territorially distinct units of space achieved great prominence through the logic of Westphalia."[73]

The principle was later proclaimed in Article 10 of the Covenant of the League of the Nations[74] and Article 2.4 of the UN Charter,[75] although in both cases from the standpoint of military force. It

[71] Article 41, paragraph 2, 2001 Articles on Responsibility of States.

[72] See J. Dugard, *Recognition and the UN* (Cambridge: CUP, 1987) 154 ff; Crawford, *supra* n. 54, 107 ff.

[73] R.A. Falk, *'The Interplay of Westphalia and Charter Conceptions of the International Legal Order',* in R.A. Falk, C.E. Black (eds.), *The Future of the International Legal Order* (Princeton: PUP, 1969) Vol.1, 32, 43-44. See also A. Miele, *La comunità internazionale*, 3rd ed. (Torino: Giappichelli, 2000) 6; S. Besson, 'Sovereignty', IX *MPEPIL* (2012) 366, 368; B. Fassbender, "Die Verfassungs- und völkerrechtsgeschichtliche Bedeutung des Westfälischen Friedens von 1648", in I. Erberich *et al*. (eds.), *Frieden und Recht* (Stuttgard: Springer, 1998) 21-33.

[74] See A. Verdebout, 'Article 10', in R. Kolb (ed.), *Commentaires sur le Pacte de la Société de Nations* (Bruxelles: Bruylant, 2015) 425.

[75] See A. Randelzhofer, O. Dörr, 'Article 2(4)', in B. Simma *et al*. (eds), *The Charter of the UN. A Commentary*, 3rd

eventually found a full treatment, also in respect of the right to self-determination, in a series of General Assembly resolutions, most importantly Resolution 1514, according to which "any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter"[76] and 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, which reiterated that "[t]he territorial integrity and political independence of the State are inviolable".[77]

More recently, in the Millenium Declaration, UN member States formally declare: "we rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect for their territorial integrity and political independence, […] the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States".[78] The International Court of Justice held that respect for territorial integrity between independent States "is an essential foundation of international relations",[79] or "an important part of the international legal order", enshrined *inter alia* in the UN Charter and in particular in Article 2, paragraph 4.[80] Importantly for the purpose of this inquiry, it also held that "the principle of territorial integrity is confined to the sphere of relations between States".[81]

To appreciate how deeply the principle of territorial integrity is rooted in the legal conscience of States, it suffices to look at the legal stand taken by them in the context of the *Kosovo* advisory opinion. States typically declared that "respect for territorial integrity is an integral component of the principle of sovereignty recognised under international law. The guarantee of the territorial integrity of States ensures the stability of the international order";[82] "the principle of respect for State sovereignty and territorial integrity […] has constituted the most important principle of international law and the basic norm governing international relations";[83] "respect for the sovereignty and territorial integrity of States is inscribed in the essential, non-derogable core of the basic principles of international law";[84] "[t]he principle that states should respect the sovereignty and territorial integrity of other states is axiomatic and applies to all states";[85] and "respect for the territorial integrity of States is a well-established principle of international law, without which the very existence of international law, as a corpus of rules governing primarily the relationship among sovereign entities, could not be

ed., (Oxford: OUP, 2012) 200.

[76] GA Res. 1514 (XV), 14 December 1960, Para 6. The principle was clearly reaffirmed in Res. 2625 (XXV), 24 October 1970, preamble, as well as Res. 71/292, 22 June 2017 (Request for *Chagos Archipelago* advisory opinion, *infra* n. 112).

[77] GA Res. 2625 (XXV), Annex. See G. Arangio-Ruiz, *The Normative Role of the general Assembly of the UN and the Declaration of Principles of Friendly Relations*, 137 *RdC* (1972-III) 137, 419. See also Helsinki Final Act, 1 August 1975, I (a) IV.

[78] GA Res. 55/2, 8 September 2000, para 4. See also GA RES. 60/1 (World Summit Outcome), 24 October 2005, para 5.

[79] *Corfu Channel Case*, *I.C.J. Reports 1949*, Judgment, p. 35.

[80] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, *I.C.J. Reports 2010,* p. 403, para 80.

[81] *Ibidem*. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, paras. 52-53; *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *I.C.J. Reports 2004*, p. 136, para. 88).

[82] Switzerland, Written Statement, 25 May 2009, para 54.

[83] China, Written Statement, 16 April 2009, p. 3.

[84] Spain, Written Statement, 14 April 2009, para 25.

[85] United States, Written Statement, 17 April 2009, 69.

envisaged".[86]

(F) RECOGNITION

A constant concern of the Catalan authorities was to obtain the international recognition of Catalonia. The nature and legal effects of international recognition have been debated by generations of international lawyers and need to be concisely recalled.[87] The debate on recognition has revolved essentially around two main and opposite theories.

(1) *Constitutive or Declaratory?* According to the constitutive theory (or *status-creating*), recognition is an indispensable element for the existence of a State.[88] This theory is in great part an expression of an outdated, positivist view of the international legal order as a purely consensual system.[89] It presents several problems. What is the status of an entity that is recognized by some but not all other States, like currently it is the case of Kosovo?[90] Does it exist only in bilateral relations? This relative existence is not easy to manage in a modern, interconnected world, which is not any more the one of the XIX century. Furthermore, States may refuse to recognise the new entity not only because they do not believe it is independent and effective, but also for political reasons.

Besides, as the practice of States shows, the existence of the new entity cannot simply be ignored in legal affairs, even if recognition is withheld. Thus, it may be necessary: (a) to establish the international responsibility of the unrecognized entity; (b) to allow the circulation and recognition of certain private acts concluded within the jurisdiction of the non-recognised entity; and (c) to protect the inhabitants of the non-recognised entity in accordance with international law.[91] However, the rejection of the constitutive theory does not mean that with regard to *certain legal positions* recognition may not have constitutive status.[92] The point here is that recognition does not create the *State* in itself or in conjunction with some other constitutive elements. Conversely, collective non-recognition may indeed preclude the enjoyment of statehood in the international community, as is the case with the so-called Islamic State.[93]

According to the declaratory theory (or *status-confirming*), the State exists regardless of its international recognition. This view is today largely accepted and reflects State practice.[94] As maintained by the Arbitral Commission of the Conference on Yugoslavia, "[t]he existence or disappearance of a State is a question of fact".[95] Membership in a horizontally structured legal

---

[86] Argentina, Written Statement, 17 April 2009, para 69.

[87] For a sceptical view about the entire debate, see Brownlie, *supra* n. 54, 197.

[88] See, in particular, L. Oppenheim, *International law* (1905); D. Anzilotti, *Corso di diritto internazionale* (Roma Athenaeum: Rome, 1928) 147 ff.; H. Kelsen, 'Recognition in International Law', 35 *AJIL* (1941) 605; Lauterpacht, *supra* n. 65.

[89] Talmon, *supra* n. 58, 102.

[90] According to the Kosovo Ministry of Foreign Affairs, currently 114 States recognise Kosovo. Text here.

[91] ECtHR, *Cyprus* v. *Turkey*, 2001, Application no. 25781/94, Judgment, 10 May 2001, para 42-46.

[92] E.g. for treaty relations, diplomatic relations, the use of peaceful settlement of dispute mechanisms, etc.

[93] See O. Corten, 'L'*Etat islamique*, un Etat ? Enjeux et ambiguïtés d'une qualification juridique', in F. Safi *et al.* (eds.), *Daech at le droit* (Paris: LGDJ, 2016) 53ff.

[94] See, Brownlie, *supra* n. 54, 205; R.Y. Jennings, A. Watts, *Oppenheim's International Law*, 9th ed. (London: Longmans, 1992) 126; Chen, *supra* n. 54; J. Charpentier, *La reconnaissance internationale et l'évolution du droit de gens* (1956); Talmon, *supra* n. 58; Crawford, *supra* n. 54, 26-27. See also the IDI resolution, *supra* n. 54.

[95] Opinion 1, in 31 *ILM* (1992) 1494. According to Abi-Saab, *supra* n. 66, 470, "[t]he State in the contemplation of international law is not a mere legal or 'juristic' person (*personne morale*), whose process of coming into being is prescribed by law. It is rather a 'primary fact', i.e. a fact that precedes the law, and which the law acknowledges only once it has materialised, by attributing certain effects to it, including a certain legal status".

community, such as the international legal order characterized as it is by the absence of any authority superior to States, does not depend on any acts by other subjects.

(2) *Question of Fact and Discretionary Nature*. Statehood remains essentially a question of fact. The People Republic of China (PRC) has unquestionably been a State since the establishment of an effective and independent government, which emerged during the civil war. The PRC was eventually proclaimed in 1949. The fact that several States did not recognize it for more than two decades did not undermine its statehood. Indeed, the PRC was treated as a State despite lack of recognition. For example, non-recognition did not prevent the United States from bringing before 1979 international claims against the PRC.[96]

Recognition is a discretionary political act, although one carrying important political and legal consequences.[97] The very fact that States have sometimes imposed conditions on the granting of recognition confirms that they did not feel obliged to recognize the new entity merely because of the existence of an independent and effective government.[98] Politically, recognising or not recognising an entity claiming independence may hugely influence the conduct of all actors involved, and in the case of secession of the parent State.

(3) *Premature Recognition*. There is a settled rule of international law prohibiting premature recognition when the new entity has not yet established a sufficiently stable and effective government and is not fully independent.[99] The issue arises mainly in the context of secession. Such premature recognition is considered as an unlawful intervention in the internal affairs of the parent State, from which the new entity has not yet fully separated. It may be unclear at what time exactly a new entity has attained a sufficient independence. For instance, some considered that the recognition of Kosovo in 2008 was precipitate. Premature recognition may cause diplomatic protest and possibly originate international disputes.

(4) *Legal Effects*. Recognition has important legal effects. In the first place, it certifies the perception by the recognising States on the statehood of the newcomer and contributes to stabilize the legal situation.[100] Recognition also paves the way to the establishment of diplomatic relations and facilitates the conclusion and implementation of treaties. It renders the new situation opposable to the recognizing State,[101] especially with regard to possible territorial claims. In the context of such specific legal positions, recognition is "constitutive". Thus, when considering the question under the double lens of statehood and of the specific legal positions of the new entity, recognition is declaratory

[96] In 1954, for instance, the United States protested with the PRC for the shooting down of a British aircraft in which three US citizens were killed as well as for the military operations preventing the humanitarian rescue operations. The US considered the PRC in breach of international law and sought *inter alia* compensation and assurances of non-repetition, see Department of States Press Release, 27 July 1954, in M. Whiteman, *Digest of International Law*, Vol. 2 (Washington, 1963) 650-1.

[97] There is no duty of recognition, as sometimes maintained in literature, see, for instance, Lauterpacht, *supra* n. 65. Brownlie, *supra* n. 54, 209, however, warns that "if an entity bears the marks of statehood, other States put themselves legally at risk if they ignore the basic obligations of State relations".

[98] European Community, *Declaration on Yugoslavia and on the Guidelines on the Recognition of New States*, 16 December 1991, 31 *ILM* 1485 (1991).

[99] See Jennings, Watts (eds.), *supra* n. 94, 143 ff; J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaire* (1975), 566 ff. On premature recognition as unlawful intervention, see C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 *RdC* (1999) 236.

[100] In *Reference Re Secession of Quebec* [1998] 2 R.C.S., para 155, Canadian Supreme Court observed that "the ultimate success of a secession would be dependent on recognition by the international community".

[101] See Charpentier, *supra* n. 94, 217 ff.

 DOI: 10.17103/sybil.25.1

in certain respects and constitutive in others.[102]

(5) *Catalonia*. The attempt made by the Catalan authority to detach recognition from statehood, in the sense that recognition could be sought before the definitive acquisition of international legal personality, is unpersuasive. The EU and its member States, as well as all other States, correctly refrained from recognizing Catalonia and emphasised the imperative need to respect the territorial integrity of Spain. Even before any consideration on territorial integrity, the evident absence of any independent and effective government instantaneously ruled out any possibility of granting Catalonia international recognition. This is not even a question of premature recognition. The question is that there was no entity to recognise. A hypothetical recognition would have been deprived of any legal effects from the standpoint of the relationships between the recognizing State and the entity recognised. Furthermore, it would also have amounted to an intervention in the domestic affairs of Spain.

(G) SELF-DETERMINATION IN THE COLONIAL CONTEXT

From an international law perspective, one of the most challenging questions raised in relation to the Catalan claim to form an independent State is the invocation of the right of peoples to self-determination. To assess such a claim, it is appropriate to discuss the origins, nature and content of the right to self-determination, both within the colonial context (current section) and outside it (next section), and then the question of unilateral secession (section I).

The origins of the right of peoples to self-determination can be traced back to the American Declaration of Independence. The Thirteen Colonies rejected any authority above themselves and claimed the right to freely organize themselves internally and to enter into relations with other States on an equal footing. In other words, they declared themselves to be a sovereign State. The declaration was obviously not enough. Statehood could be achieved either through an agreement with the British government, the authority exercising its jurisdiction over the population and the territory of the Thirteen Colonies, or by military force. In the second case, the effective creation of the new State would depend on the outcome of the hostilities.

At the end of the War of independence, the Washington government was the effective and independent ruler over the territory and population of the newly established United States. Through the conclusion of international agreements with other States – such as the Treaty of Amity and Commerce between the United States and France[103] – the United States demonstrated its capacity to enter into relations with other States. Other States, conversely, recognized the new situation characterised by the creation of a new States.

At the beginning of the XX century, the right of peoples to self-determination found not only political recognition in President Wilson's Fourteen Points,[104] but also concrete application in the bilateral treaties Russia concluded with the Baltic States for their independence. In the treaty with Lithuania, for instance, Russia recognised without reservation the sovereign rights and independence of the Lithuanian State on the bases of "the right of all nations to free self-determination up to their complete separation from the State into the composition of which they enter".[105]

---

[102] See K. Zemanek, *The Legal Foundations of the International System*, 266 *RdC* (1997) 82-83.

[103] Agreement, concluded on 6 February 1778.

[104] 8 January 1918, Fourteenth point. Text here.

[105] Concluded on 12 July 1920, 3 *LNTS* 106 (Article 1) – UN translation. See also the treaties with Estonia, 2 February

The right of peoples to self-determination was then formally proclaimed in Art. 1.2 and Art. 55 of the UN Charter.[106] With the Charter, self-determination was elevated from political postulate to an inchoate "legal standard of behaviour".[107] From the very beginning, however, it was made clear that the right to self-determination could not be construed as to undermine international borders and destabilize the international legal order. During the San Francisco Conference, self-determination was understood as implying "the right to self-government of people and not the right of secession".[108] Moreover, self-determination did not at that time extend to colonial peoples.[109]

Subsequently, the vague proclamation of self-determination in the Charter was translated in concrete customary and treaty norms, and celebrated in a multitude of resolutions and declarations, mainly in the colonial context. Two resolutions adopted by the General Assembly are of paramount importance. Resolution 1514 proclaimed that all peoples had the right to self-determination, by virtue of which they freely determine their political status, pursue their economic, social and cultural development, and achieve complete independence.[110] Resolution 1541, adopted the following day, specified three modalities for the exercise of self-determination by Non-Self Governing Territories, namely: (a) emergence of a sovereign independent State; (b) free association with other States: or (c) integration with other States.[111]

In the advisory opinion concerning the *Chagos Archipelago*, the ICJ considered that Resolution 1514 (XV) reflects customary international law with regard to the right to self-determination.[112] In *East Timor* v. *Australia*, the ICJ had already held that the right to self-determination is "one of the essential principles of contemporary international law" having *erga omnes* character.[113] The International Law Commission and some authors have even qualified self-determination as a peremptory norm (*jus cogens*).[114]

These resolutions call for three important considerations. Firstly, the right of peoples to self-determination was tightly linked with the process of decolonisation, and in particular situations of peoples under colonial or other forms of alien domination or foreign occupation. Resolution 1514 (XV), in particular, proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations".[115] The limited application of the right was

1920 (Article II), 11 *LNTS* 30; and Latvia, 11 August 1920 (Article 2), *LNTS* 1965.

[106] Amongst the numerous studies on self-determination, see M. Pomerance, *Self-Determination in Law and Practice* (The Hague: Nijhoff, 1982); H. Hannum, *Sovereignty and Self-Determination* (Philadephia: PPU, 1990); A. Cassese, *Self-Determination of People. A Legal Reappraisal* (Cambridge: CUP, 1995); D. Raič, *Statehood and the Law of Self-Determination* (Leiden: Brill, 2002); F.R. Tesón (ed.), *The Theory of Self-Determination* (Cambridge: CUP, 2016).

[107] Cassese, *supra* n. 106, 43.

[108] Commission I, General provisions, Summary Report of the 6th Meeting, 15 May 1945, UNCIO, Vol. VI, 296. *The Aaland Island Questions, Report presented to the Council of the League of the Nations by the Commission of Rapporteurs*, Doc. B.7.21/68/106 (1921) 28, reads in part: "To concede a minority, either or language or religion, or to any fraction of a population the right of withdrawing from the community to which they belong […] would be to destroy order and stability within States and to inaugurate anarchy in international life; it would be to uphold a theory incompatible with the very idea of the State as a territorial and political unity".

[109] See Chapter XI of the Charter. For the period before decolonization, M. Bourquin, *L'Etat souverain et l'Organisation Internationale* (New York: Manhattan Publishing,1959), 205 ff.

[110] GA Res 1514 (XV). See also Res 637 A (VII) 16 October 1952, para 1 and 2.

[111] GA Res 1541 (XV), Principle VI.

[112] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, para 152. See also *Kosovo* advisory opinion, *supra* n. 80, para 142.

[113] *East Timor (Portugal v. Australia)*, Judgment, *I.C.J. Reports 1995*, p.102, para 29. See also *Construction of* the *Wall,* advisory opinion*, supra* n. 81*,* paras 155-156, *Chagos Archipelago*, advisory Opinion, *supra* n. 112, para 180.

[114] 2001 Articles on Responsibility of States, Commentary to Art. 26, para 5. See also Crawford, *supra* n. 54, 101.

[115] See also *Western Sahara*, Advisory Opinion, *I.C.J. Reports 1975*, p. 12, para 55.

consistently upheld by the ICJ in a series of decisions and advisory opinions. In the *Namibia* advisory opinion, in particular, the ICJ declared the right to self-determination contained in the UN Charter applicable to all non-self-governing territories referred to in Chapter XI of the Charter.[116] In the *Kosovo* advisory opinion, it emphasised that "[d]uring the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation".[117]

Secondly, the creation of an independent State through the detachment from the parent State was not the only option for the exercise of the right to self-determination, even if it became by far the most popular one.[118] Secession was not automatic.[119] It should not be equated to self-determination.[120] Furthermore, since the Non-Self Governing Territories enjoyed a temporary special status (until the right to self-determination has been fully exercised), it is not accurate to describe the formation of independent States as instances of secession. Rather, as pointed out by Higgins, "there was no suggestion that the old colonial rules should stay in State X, with 'the people' seceding, but rather that the colonial rules should *go*. Secession was not in issue in this context".[121]

Thirdly, these resolutions are fully respectful of the principle of territorial integrity. They cannot be construed as to authorising or encouraging "any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States".[122] Quite the contrary, "[a]ny attempt at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the UN Charter",[123] or, as recently maintained by the African Union (AU), the right to self-determination was *intrinsically* linked to the principle of territorial integrity.[124]

The territorial unit for the exercise of the right to self-determination was therefore the territory of the non-self-governing territories.[125] In the *Chagos Archipelago* advisory opinion, the ICJ unambiguously held that "the peoples of non-self-governing territories are entitled to exercise their

[116] *Namibia Case, supra* n. 81, p. 31.

[117] *Kosovo* advisory opinion, *supra* n. 80, para 79. In *Council* v. *Front Polisario*, Case C-104/16, 21 December 2016, para 88, the European Court of Justice held that the principle of self-determination is "applicable to all non-self-governing territories and to all peoples who have not achieved independence yet".

[118] T. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (Paris: Découverte, 1999).

[119] J. Crawford, 'State Practice and International Law in Relation to Unilateral Secession', in A.F. Bayefsky (ed.), *Self-Determination in International Law. Quebec and Lessons Learned* (The Hague: Kluwer, 2000) para 17.

[120] The British government, however, declared that "the right to self-determination equates automatically to a right to secession", 14 February 1997, 68 *BYIL* 587 (1998).

[121] R. Higgins, 'Self-Determination and Secession,' in J. Dahlitz (ed.), *Secession in International Law: Conflict Avoidance – Regional Appraisal* (The Hague: Asser Press 2013) 21, 35. Crawford, *supra* n. 54, 39, further observes that Resolution 1514 "did not advocate or support unilateral rights of secession […] except where self-determination was opposed by the colonial power".

[122] Resolution 2625 (XXV), *supra* n. 77. This is part of the so-called safeguard clause, text *supra* n. 200. See also Resolution 1573 (XV), 19 December 1960 and Resolution 1274 (XVI), 20 December 1961 (Question of Algeria). In Resolution 2066 (XX), 16 December 1965, para 4, the General Assembly invited the administering Power "to take no action which would dismember the Territory of Mauritius and violate its territorial integrity". In Resolution A/RES/2357, 19 December 1967, the General Assembly expressed deep concern over the continuation of policies aiming at the disruption of the territorial integrity territories entitled to self-determination.

[123] A/RES/50/6, 24 October 1995.

[124] Written Statement, 15 May 2018, *Chagos Archipelago*, Advisory opinion, *supra* n. 112, para 181. See the previous Written Statement, 1 March 2018, esp. paras 143-157.

[125] The preamble of GA Res. 1514 (XV) emphases that "[a]ll people have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory."

right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power".[126] This is without prejudice to the possibility that the people of the concerned territory freely and genuinely decides otherwise.

This is also in line with the *uti possidetis iuris* doctrine developed in South America in the XIX century,[127] as well as the decision taken by the AU in 1964 to maintain the colonial borders of the newly independent States.[128] As pointed out by the ICJ in 1986 with regard to the conservation of colonial borders in Africa, *uti possidetis iuris* is "a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power".[129]

Several specific obligations (or enforceable concomitant duties)[130] corresponded to the right to self-determination: a negative obligation to cease all armed action or repressive measures directed against dependent peoples; another negative obligation to refrain from any forcible action which would deprive concerned peoples of the full enjoyment of their right to self-determination; and a positive obligation to adopt immediate steps to transfer all powers to the dependent peoples, in accordance with their freely expressed will and without any conditions, reservations or distinction as to race, creed or colour.

A distinct obligation is also imposed upon all States, namely the obligation not to recognize as lawful a situation created by violation of the right to self-determination, nor render aid or assistance in maintaining that situation, as the obligation to cooperate to bring such situation to an end through lawful means.[131] This was echoed in the *Construction of the Wall* advisory opinion. The Court's argument was based on the *erga omnes* character of the obligations related to the right of self-determination, which trigger the duty incumbent upon all States "while respecting the UN Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end".[132] Although the content of the right to self-determination in the colonial context is sufficiently clear, its implementation has been problematic in a significant number of cases, including, in the past, Rhodesia and South West Africa, and currently Western Sahara.[133]

---

[126] *Chagos Archipelago*, Advisory opinion, *supra* n. 112, para 160. See also text *supra* n. 192. In the *Quebec Case*, *supra* n. 100, para 127, the Canadian Supreme held that the international law principle of self-determination "has evolved within a framework of respect for the territorial integrity of existing states."

[127] See, in particular, M.N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis* Juris Today', 67 *BYIL* 75 (1996); G. Nesi, *L'Uti* Possidetis Iuris *nel diritto internazionale* (Padova: CEDAM, 1996); S.R. Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States', 90 *AJIL* (1996) 590.

[128] AHG/Res. 16(I), 1964.

[129] *Frontier Dispute*, Judgment, *I.C.J. Reports 1986*, p. 554, 565.

[130] T. Franck, in Bayefsky, *supra* n. 119, 75, 76.

[131] 2001 Articles on Responsibility of States, Art. 26 (1) and (2).

[132] *Supra* n. 113, para 157. Writing in 1995, Cassese, *supra* n. 106, 134, observed that "in actual practice, Stats have only seldom made use of their right to demand compliance with international standards on self-determination by a given States."

[133] In literature, see T. Franck, 'The Stealing of Sahara', 70 *AJIL* (1976) 694; M. Shaw, 'The Western Sahara Case', 49 *BYIL* (1978) 118; S. Simon, 'Western Sahara', in C. Walter *et al*. (eds.), *Self-Determination and Secession in International* (Oxford: OUP, 2014) 255. The UK Government has declared that it "does not recognize a *de jure* administering power in Western Sahara. Morocco exercises *de facto* control over part of the territory […] The option for a referendum on the self-determination of Western Sahara, as set out in the UN Secretary General's 1990 report and the 1991 MINURSO mandate, have not changed. The United Kingdom fully support UN-led efforts to encourage Morocco and the Polisario Front to agree a lasting and mutually acceptable political solution that provides for the self-determination of the people of Western Sahara", HC Written Questions, 12 January and 20 November 2015, 86 *BYIL* (2015) 401.

 DOI: 10.17103/sybil.25.1

(I) SELF-DETERMINATION OUTSIDE THE COLONIAL CONTEXT

The UN Charter as well as several universal and regional human rights treaties, including the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights,[134] and the African Charter on Human and Peoples' Rights,[135] provide for the application of the right to self-determination to *all* peoples.[136] This right has systematically been accompanied by reassurances that its exercise must be respectful of the territorial integrity of States. Outside the colonial context, all peoples were thus entitled to claim and enjoy the right of peoples to self-determination *within* the jurisdiction of their own State. Conversely, the right of peoples to self-determination could not be invoked to unilaterally alter international borders.

The 1984 General Comment 12 by the Human Rights Committee[137] and, in even more eloquent terms, the 1996 General Recommendation by the Committee on the Elimination of Racial Discrimination,[138] have reiterated that the right of self-determination has an internal dimension, granting to all peoples the right to pursue freely their economic, social and cultural development, as well as an external dimension, granting to all peoples in situations of colonialism, alien subjugation, domination, and exploitation the right to determine freely their political status.

Article 20 of the African Charter on Human and Peoples' Rights recognises the right of colonized or oppressed peoples to free themselves from the bonds of domination by resorting to any means permitted in international law.[139] It also upholds their right to receive the assistance of the States parties to the convention in their liberation struggle against foreign domination. The practice and jurisprudence of the African Commission, however, amply confirm that Article 20 does not imply any departure from the traditional approach to self-determination, which permits secession only in the colonial context.[140]

In *Congrès du people katangais* v *Democratic Republic of Congo*, in particular, the Commission held that self-determination means "independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the peoples but fully cognisant of other recognised principles such as sovereignty and territorial integrity".[141] In a more recent case, while finding that the people of Southern Cameroon can legitimately claim to be a "people" for the purpose of Article 20, the Commission felt "obliged to uphold the territorial integrity of the Respondent State" and could not "envisage, condone or encourage secession, as a form of self-determination".[142]

(1) *Definition of Peoples*. Outside the colonial context, the right to self-determination suffers from

[134] Resolution 2200A (XXI), 16 December 1966, entered into force, respectively on 23 March 1976, 999 *UNTS* 171, and 3 January 1976, 993 *UNTS* 3, Common Article 1.1.

[135] African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 *ILM* 58 (1982), Article 20.

[136] See R. McCorquodale, 'Self-Determination: A Human Rights Approach', 43 *ICLQ* (1994) 857.

[137] HRI/GEN/1/Rev.9 (Vol. I). According to para 4, the realisation of the right to self-determination "is an essential condition for the effective guarantee and observance of *individual* human rights and for the promotion and strengthening of those rights" (emphasis added).

[138] U.N. Doc. HRI\GEN\1\Rev.6 at 209 (2003), para 4. See also *Quebec Case*, *supra* n. 100, para 126.

[139] See R. Murrey, *The African Charter on Human Rights and Peoples' Rights. A Commentary* (Oxford: OUP, 2019), Article 20.

[140] African Commission, Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2010) para 41. See also Resolution on the situation of the North of the Republic of Mali, ACHPR/Res.217(LI)2012, 2 May 2012, points iv and ix.

[141] Communication 75/92, 22 March 1995, para 5.

[142] *Kevin Mgwanga Gunme* et al. v. *Cameroon*, Case 266/03, 27 May 2009, para 190.

two serious congenital deficiencies, namely the lack of any definition of "people", [143] and, consequently, the lack of criteria to identify who is entitled to represent and speak on behalf of a "people". As pointed out by the Canadian Supreme Court, there is "little formal elaboration of the definition of 'peoples' which left the precise meaning of the term" open.[144] A Group of Experts appointed by UNESCO has attempted to identify some characteristics inherent in a *description* (not a *definition*) of "people". They include: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; and (g) common economic life.[145]

The term "people" is then used as holders of the right to self-determination *within* the jurisdiction of a State. It may refer to regions, provinces, other territorial entities as well as minorities or indigenous peoples. This implies the concrete possibility of different (potentially overlapping) communities claiming to be entitled as "peoples" to exercise the right to internal self-determination.[146] This could generate a complex legal framework with variable geometry in which each "people" may hold its own right to internal self-determination.

In spite of the indeterminacy of "people", it is generally accepted that the right of peoples to internal self-determination applies "within the territorial framework of independent States"[147] and refers to the legal relationship between a State and the subjects within its jurisdiction.[148] From a theoretical point of view, peoples can be considered either as the holder or the beneficiaries of the rules protecting the right to self-determination.[149] Either way, the attendant obligations for the realization of self-determination no doubt fall on States.[150]

(2) *Content of the Right*. In spite of the solemn proclamations, the precise content of this extended right to self-determination remains mysterious.[151] In 1992, the European Community Arbitration Commission on Yugoslavia, conceded that "international law as it currently stands does not spell out all the implications of the right to self-determination".[152] The content of the right to internal self-determination and the correlated obligations of States are difficult to be established in abstract terms as they can vary in space and time.

The ductility of the right to self-determination has been stressed by the African Commission according to which it may be exercised "in any of the following ways independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty

[143] Writing in 1956, I. Jennings, *The Appraisal of Self-Determination* (Cambridge: CUP, 1956) 55-56, argued that "[o]n the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until someone decides who are the people".

[144] *Quebec Case*, *supra* n. 100, para 123.

[145] International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, Paris, 27-30 November 1989, SHS.89/CONF.602/7, para 22.

[146] *Ibidem*, para 23, "[i]t is possible that, for different purposes of international law, different groups may be a *people*".

[147] M. Shaw, 'People, Territorialism and Boundaries', 8 *EJIL* 478 (1997).

[148] R. Higgins, 'Postmodern Tribalism and the Right to Secession', in C. Brölman *et al*. (eds.), *Peoples and Minorities in International Law* (Dordrecht: Nijhoff, 1993) 31.

[149] See Cassese, *supra* n. 106, 142-3.

[150] Cassese, *supra* n. 106, 141.

[151] According to C. Drew, 'The East Timor Story: International Law on Trial', 12 *EJIL* (2001) 651, 658, the right to self-determination "is plagued by an excess of indeterminacy both in terms of scope and content".

[152] Opinion 2, 31 *ILM* (1992) 1496, 1497. For a critique on the opinion, see M. Craven, 'The European Community Arbitration Commission on Yugoslavia', 66 *BYIL* 333 (1995).

 DOI: 10.17103/sybil.25.1

and territorial integrity".[153]

Attempts by States and scholars to define internal self-determination have led to rather general assertions. In the context of the *Kosovo* advisory opinion, for instance, Germany maintained that "[i]nternal self-determination means enjoying a degree of autonomy inside a larger entity, not leaving it altogether but, as a rule, deciding issues of local relevance on a local level".[154] Scholars, in turn, have referred to "the right of people to govern, that is to have a democratic system of government",[155] or "the right of people to choose their political status within a State, or of exercising a right of meaningful political participation".[156] In 1995, Cassese observed that "both customary and treaty law on internal self-determination have little to say with respect to the possible mode of implementing democratic governance. Nor do they provide guidelines on the possible distribution of power among institutionalized units or regions. Still less they furnish workable standards concerning some possible forms of realizing internal self-determination, such as devolution, autonomy, or 'regional' self-determination".[157] This conclusion seems to remain accurate more than 20 years later.[158]

It seems therefore appropriate to understand internal self-determination as a concept built up of all individual and collective human rights that allow "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state".[159] Such rights include typically freedom of expression, freedom of assembly, freedom of association, the right to take part in the conduct of public affairs, the right to vote in free elections.[160]

Under these circumstances, a pragmatic and flexible approach may be inescapable. The right to self-determination could be seen as an evolving umbrella concept – comparable to sustainable development [161] – under which a comprehensive catalogue of human rights are exercised individually and collectively. From this perspective, the meaning of internal self-determination is built up by several heterogeneous rights related to the protection of minorities,[162] the enjoyment of cultural and linguistic rights, the right to democratic governance,[163] and so on.

---

[153] *Congrès du people katangais* v *DRC, supra* n. 141.

[154] Written Statement, 15 April 2010, 33. According to Article 3.1 of the Council of Europe, European Charter of Local Self-Government, 15 October 1985, "[l]ocal self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population".

[155] A. Rosas, 'Internal Self-Determination', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Nijhoff, 1992) 225, 232.

[156] S. Joseph, J. Schultz, M. Castan, *The International Covenant on Civil and Political Rights. Case, Materials and Commentary* (Oxford: OUP, 2000) 103.

[157] Cassese, *supra* n. 106, 332.

[158] See P. Macklem, *Self-Determination in Three Movements*, in Tesón (ed.), *supra* n. 106 110.

[159] *Quebec* Case, *supra* n. 100, 126. As noted by Macklem, *supra* n. 158, 108, "[t]he spectrum of institutional possibilities short of sovereign independence contemplated by internal self-determination ranges from guaranteed representation in the political institutions of the broader society to constitutional or legislative arrangements that secure a measure of autonomy for ethnic, cultural, and religious communities".

[160] In *Quebec* Case, *supra* n. 100, 126, the Canadian Supreme Court also referred to the "prominent positions" occupied by Quebecers in the central government".

[161] According to V. Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle *et al*. (eds.), *International Law and Sustainable Development* (Oxford: OUP, 1999) 30, sustainable development is a "label for a general policy goal which may be adopted by states unilaterally, bilaterally, or multilaterally".

[162] See F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities*, 1977, UN Doc. E.91.XIV.2.

[163] See T. Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46.

(J) RIGHT TO SECESSION

Secession can be defined as "the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter".[164] It is undisputed that parts of the territory of a State (i.e. a province or a region) may depart from the parent State with the consent of the later and provided that the decision reflects the genuine will of the majority of the population involved and is consistent with human rights. This is done by way of agreed separation. This is how Montenegro became a State in 2006. Article 60 of the 2003 Constitutional Charter of the State Union of Serbia and Montenegro granted each State the right, to be exercised upon the expiry of a three year period, "the right to initiate the proceedings for the change in its state status or for breaking away from the state union of Serbia and Montenegro".[165] This was indeed the outcome of the referendum held in Montenegro on 21 May 2006, which was followed by a Declaration of independence and the international recognition of Montenegro as independent State.[166] This was thus a (lawful) separation and not a (violent) secession.

Some scholars have suggested to resolve the issue of secession by applying the "earned sovereignty" approach.[167] Such approach is based on an articulated process through which national self-determination movements gradually acquire and exercise increasingly broader government powers up to – although not necessarily – complete independence.[168] It may certainly be the most appropriate one for resolving sovereignty-based conflicts to the point of leading to full independence, if the territorial State is prepared to accept it.[169] Being entirely based upon the agreement between the movement and the territorial State, however, it becomes inconsequential when the territorial State resists – possibly by force – the claim to full independence from a national movement. The question then is whether the unilateral claim to full independence is legally protected under international law. Whether a right to unilaterally secede – intended as a "positive entitlement",[170] "legally enforceable entitlement",[171] or simply a "legally protected entitlement" – exists outside the colonial context requires an inquiry on State practice in search of a permissive customary rule,[172] while keeping in mind that customary international rules are created and evolve through "a process of continuous interaction, of continuous demand and response".[173]

State practice indicates that a *legal claim* on unilateral secession outside the colonial context has not been clearly articulated by a significant number of States and has even less attracted the critical mass of acceptance, or at least acquiescence, indispensable to create a customary rule. Quite the contrary, States have consistently and massively opposed the invocation of self-determination outside the colonial context (or the quasi-colonial context of racist regimes and foreign occupation) as legal

[164] M. Kohen, *Introduction*, in Kohen (ed.), *supra* n. 66, p. 3.
[165] Text here.
[166] The same path would have been followed by Scotland, had the outcome of the 2014 referendum be in favour of independence.
[167] Testimony of P.R. Williams, House Committee on Foreign Affairs, "U.S. Policy toward National Self-Determination Movements", 15 March 2016, footnote 2 at p. 10.
[168] See P.R. Williams, F. Jannotti Pecci, 'Earned Sovereignty: Bridging the Gap between Sovereignty and Self-Determination', 40 *Stanford JIL* (2004) 347.
[169] Williams, *supra* n. 168, 6.
[170] *Kosovo* advisory opinion, *supra* n. 80, p. 56.
[171] Report by T. Franck (Question 2), in Bayefsky, *supra* n. 119, para 2.1.
[172] Since there are no applicable treaty rules. It is not sufficient that international law does not prohibit secession, since from an absence of prohibition no *right* to do something can be derived.
[173] M.S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 *AJIL* (1955) 353, 354 (1955).

 DOI: 10.17103/sybil.25.1

basis to alter territorial integrity – with the only and still rather controversial issue of remedial secession (see section X).

The international community of States has accepted as *fait accompli* the unilateral secession of a not insignificant number of States. Secession occurred in the context of internal conflicts and possibly in the context of State dissolution or dismemberment – as in the case of former Yugoslavia – or following external military intervention – as in the case of Bangladesh. It is not possible, however, to extrapolate from these cases the general acceptance of any legal claim or legal entitlement for the breakaway entity to obtain independence. The creation of States remains largely a question of *fact*, while secession is not prohibited by international law.

State practice does not manifest any significant acceptance by States of secession as a *right* under international law. As observed by the Canadian Supreme Court "international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state".[174] Likewise, the Independent International Fact-Finding Mission on the Conflict in Georgia held that "[o]utside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in [the] form of a secession is not accepted in state practice".[175]

It is true that in recent instances of territorial entities breaking away from the parent State, States have not consistently and uniformly opposed the creation of the new State, or indeed even the annexation to another State. It has even been suggested that "a sizeable majority of States now accept the right of people to secede from existing under certain circumstances".[176] The argument is based on the observation that many of the States that have opposed the Crimean "secession" had previously supported the Kosovo secession. Leaving for the moment aside the rather controversial exception of remedial secession,[177] the cases of Kosovo and Crimea hardly support the view that the generality of States has accepted that the right to self-determination can be exercised to the point of claiming full independence.

In the case of Kosovo, a significant number of States openly rejected that Kosovo could exercise any legally enforceable (or legally protected) entitlement to statehood and proclaimed the sanctity of international borders in accordance with General Assembly resolution 2625.[178] More importantly, the States not opposing the Kosovo secession carefully refrained from admitting any such legal entitlement.

In the case of Crimea, one hundred States voted in favour of the General Assembly resolution affirming the territorial integrity of Ukraine and calling upon all States to desist and refrain from action inconsistent with it.[179] Several States supporting the resolution clearly reiterated that Crimea did not have a right to secede and the borders of Ukraine could be changed only through agreement and in accordance with human rights standards.[180] Some of them even adopted countermeasures

[174] *Quebec Case*, *supra* n. 100, para 111.

[175] Report, vol II (September 2009) 141.

[176] Y. Shany, 'Does International Law Grant the People of Crimea and Donetsk a Right to Secede?', 21 *Brown Journal World Affairs* (2014) 233. See also T.D. Grant, 'Annexation of Crimea', 109 *AJIL* (2015) 68.

[177] Section J.

[178] See, for instance, *Kosovo* advisory opinion, Written Statement by the Russian Federation, 16 April 2009, esp. para 19-22.

[179] GA Res. 68/262, Territorial integrity of Ukraine, 1 April 2014.

[180] See, in particular the intervention made by EU, A/68/PV.80, 3, 27 March 2014, 4; United States, 6; Liechtenstein, 7; Canada, 9; Japan, 10; Georgia, 11; Turkey, 11, China, 11; Iceland, 12; Norway, 14; Uruguay, 15; Saint Vincent and the Grenadines, 15; Guatemala, 18; Singapore, 18; Argentina, 18; Chile, 19; Qatar, 20; Thailand, 22; Moldova, 22; Peru,

against the Russian Federation, expressly condemning the violation of Ukraine sovereignty and territorial integrity.[181]

Amongst the States voting against the resolution or abstaining from voting only the Russian Federation put forward a clearly articulated legal claim in favour of Crimea's entitlement to break away from Ukraine.[182] There is little trace of any entitlement in the interventions of the other 10 States voting against and even less in those of the 58 abstaining from voting it.

The conclusion that "State practice since 1945 shows very clearly the extreme reluctance of States to recognise or accept unilateral secession outside the colonial context"[183] remains valid. Recent practice confirms rather than weakening such conclusion. As Judge Yusuf reminds us, the right of unilateral secession "would reduce to naught the territorial sovereignty and integrity of States and would lead to interminable conflicts and chaos in international relations".[184] This view is overwhelming in literature.[185]

There is another important reason for which States have adamantly opposed the right to secede. It is extremely difficult to identify the holder of the right to secession and there is thus a risk of opening a Pandora box. Practical problems are manifold in this context. For example, why should the territorial entity breaking away, possibly based on some historical claims, be allowed to secede from the parent State, but not a minority within that entity, which would prefer to remain within the jurisdiction of the parent State or wishes to establish its own independent entity? Why should Croatia make a claim against former Yugoslavia and not the Krajina region against Croatia itself?[186] Within the context of the claim of independence of Quebec, the aboriginal people Crees challenged the right of Quebec to secede not only because there is no such right under international law, but also because the independence of Quebec would violate their own right to self-determination.[187]

Yet, international law remains neutral or indifferent to the phenomenon of secession itself. As pointed out by the United States, the fact that the principles of sovereignty equality, political independence and territorial integrity "are axiomatic does not preclude entities from seeking to emerge or actually emerging as new states on the territory of the original state".[188] This means that

22; Azerbaijan, 23; Jamaica, 24; Algeria, 24, Honduras, 25; Ecuador, 25, Botswana, 26; Libya, 26; Costa Rica, 27; Paraguay, 27.

[181] See, in particular, EU, Council Decision 2014/512/CFSP, OJ L 229/13, 31.7.2014, preambular paragraph 1. United States' President Executive Order 13660, 10 March 2014, Federal Register, Vol. 79, No. 46, refers to the threat to the sovereignty and territorial integrity of Ukraine.

[182] The Russian Federation declared that it "could not refuse the Crimeans' wish to support their right to self-determination in fulfilling their long-standing aspirations. Historical justice has been vindicated. Crimea was an integral part of our country for several centuries. It shares with our country a common history, culture and, most important, a common people", A/68/PV.80, 27 March 2014, 3.

[183] J. Crawford, 'State Practice and International Law in Relation to Secession', 69 *BYIL* 85 (1998). See also, H. Gross Espiell, *The Right to Self-Determination: Implementation of UN Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980), esp. para 90.

[184] Separate Opinion, *Kosovo* advisory opinion, *supra* n. 80, para 10. Higgins, *supra* n. 148, 36, points out the right to unilateral secession trigger endless "disintegrative processes".

[185] See Crawford, *supra* n. 54, 415; T. Franck, R. Higgins, A. Pellet, M.N. Shaw, C. Tomushat, *L'intégrité territorial du Québec dans l'hypothèse de l'accession à la souveraineté* (English translation), in Bayefsky, *supra* n. 119, 241. Amongst the authors admitting a right to secede, see L. Brilmayer, 'Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec', 16 *YJIL* (1991) 177; Buchanan, *supra* n. 119.

[186] T.M. Franck, *Fairness in the International Legal and Institutional System*, 240 *RdC* (1993) 9, 136.

[187] *Factum of the Grand Council of the Crees (Eeyou Istchee)*, in Bayefsky, *supra* n. 119, 351.

[188] United States, Written Statement, *supra* n. 85, p. 69. In the same vein, the British Government, Written Statement, 16 April 2009, para 5.33, observed that international law "neither, in general, does it prohibit secession or separation, or guarantee the unity of predecessor States against internal movements leading to separation or independence with the

secession remains "basically a phenomenon not regulated by international law".[189] The principle of effectiveness operates here in the sense that the establishment of an independent and effective government may eventually be recognized as *fait accompli*. But effectiveness "is not a norm. It authorizes nothing and justifies nothing. In particular, it does not authorize secession as a matter either of right or privilege".[190]

This factual approach is without prejudice to the legal consequences that may be attached to violations of international law committed during the process leading to secession. As held by British Government in relation to the *Kosovo* advisory opinion, "there can be cases where separation or secession from a State raises issues of illegality under international law; indeed such cases can involve issues of fundamental concern. They may involve external aggression or intervention, or widespread violation of basic human rights".[191] But the illegality does not relate to the claim of secession itself, but rather to the conduct the outcome of which is secession. Thus, a secession may be upheld by a use of force of a third State; it is then this use of force which makes the process illegal and prompts a duty of non-recognition.

It follows that Catalonia has no *right* under international law to break away from Spain. The right of self-determination does not confer any legal entitlement for the creation of new States, except in the context of colonialism, and even in this case only as one of the possible options available to the peoples. The practice of States and international organisations, including most importantly the UN and the AU, is unequivocally against a right to unilateral secession regardless to the unfairness of the State borders. The process of decolonisation itself has been conducted and is still conducted on the firm assumption that the right to self-determination must be exercised by the people living within the colonial borders, unless an agreement with the metropolitan States provides otherwise. The recent ICJ *Chagos Archipelago* advisory opinion has also confirmed that "[b]oth State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination".[192]

The construction of the ICJ position on self-determination by Catalan authorities is inaccurate.[193] In the first place, the ICJ has not referred to the "right to decide", but to the "right to self-determination". The immediate form of the exercise of the right to self-determination relates to the inalienable right of every *State* to choose its political, economic, social and cultural systems without outside interference. This is undisputed both in the practice of the UN and the jurisprudence of the ICJ. The right is understood as a manifestation of State sovereignty, not the possible legal entitlement of territorial entities to break away from a State. Further, in the *Kosovo* advisory opinion the Court did not hold – as alleged by Catalonia – that unlawful use of military force or other serious violations of international law are the only "enforceable limitation" to the right to decide.[194] What the ICJ said was that the unlawful use of military force or other serious violations of international law make illegal

support of the peoples concerned". Likewise, Japan, Written Statement, 17 April 2009, 3, argued that "[i]nternational law, in general, neither approves nor prohibits secession or independence by an entity which meets the requirements of Statehood". According to G. Abi-Saab, in Bayefski, *supra* n. 119, 84, international law "permits secession and will recognize it if successful, but neither prohibits nor encourages it in non-colonial situations". See also Lauterpacht, *supra* n. 65, 8.

189 Abi-Saab, *supra* n. 66, 474.

190 Reply of the Attorney General of Canada, in Bayefsky, *supra* n. 119, 375.

191 Written Statement, 17 April 2009, para 5.34.

192 *Chagos Archipelago*, advisory Opinion, *supra* n. 112, para 160.

193 Section C.

194 Explanatory memorandum, *supra* n. 29, p 2.

declarations of independence, when otherwise international law is indifferent to such declarations.

While not generally prohibited under international law, secession is clearly unlawful under the Spanish Constitution,[195] as well as under other Constitutions.[196] The Spanish Constitutional Court correctly drew a clear line separating "autonomy" and "sovereignty" as a matter of domestic law.[197] For the purpose of this article, however, it suffices to note that internal self-determination becomes then essentially a matter of distribution of competences between central and local authorities.

(K) REMEDIAL SECESSION

The only possible, yet controversial, exception to legally justify the breaking away of a minority or territorial entity is the so-called remedial secession. The argument was hinted at already in the *Aaland* case, when the Commission conceded that a minority could consider separation from the parent State and incorporation into another "as an altogether exceptional solution, a last resort when the [parent] State lacks either the will or the power to enact and apply just and effective guarantee".[198] The exceptional remedy was further developed in literature and expanded in order to include not only the possibility of incorporation into another State, but also the creation of a new State. Buchheit, in particular, maintained that depending on the level of oppression inflicted by a government upon a minority or territorial entity, "international law recognizes a continuum of remedies ranging from the protection of individual and collective rights to minorities rights, and ending with secession as the ultimate remedy".[199]

The argument frequently relies on the so-called "safeguard clause" which has been inserted in Resolution 2625[200] as well as in the 1993 Vienna Declaration.[201] The clause has been interpreted *a contrario* as admitting unilateral secession when the parent State does not comply with the principle of equal rights and self-determination of peoples.[202] This reading of the resolution was shared in the context of the Kosovo advisory opinion by several States, including Switzerland[203] and the Netherlands,[204] as well as Judge Yusuf.[205]

The literal argument based on the "safeguard clause" is far from convincing. As clearly pointed out by Arangio-Ruiz, the clause "is meant to protect the political unity and the territorial integrity of all the parties duty-bound under this principle, namely all States, whether possessed of colonies or similar overseas territories or not; whether multi-national or multi-racial; whether monolithically compact in the ethnic composition of their peoples or ruling also over minority groups of different

[195] *Supra* n. 1, Article 2.

[196] For instance, Art. 5 of the Italian Constitution proclaims the unity of the Republic. See also Constitutional Court, Decision 118/2015, 29 April 2015, para 7.2.

[197] The view that the right of autonomy "is not and cannot be mistaken for Sovereignty", as held by the Constitutional Court in the decision 124/2017, *supra* n. 34, Ground 5, is well settled in its jurisprudence, see in particular judgments 4/1981, 2 February 1981, Ground 3; and 25/1981, 14 July 1981, Ground 3.

[198] *Supra* n. 108, 28.

[199] L.C. Buchheit, *The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) 222.

[200] *Supra* n. 77, Principle 5, para. 7.

[201] World Conference on Human Rights, Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, Point I.2.

[202] Buchheit, *supra* n. 199, 93.

[203] Written Statement, 25 May 2009, para 61.

[204] Written Statement, 17 April 2009, para 3.7.

[205] Separate Opinion, para 12.

origin, culture, or creed".[206] This interpretation has been shared by several States in the *Kosovo* proceedings.[207] It would be strange if a radical consequence, such as the one flowing from the recognition of a right of secession, was conceded tacitly by some *a contrario* acrobatics linked to a potentially ambiguous text. This conclusion would be even more questionable when considering that the Resolution 2625 considered as sacrosanct the principle of territorial integrity and at any rate is recommendatory in nature.

Since there is no conventional basis for such a right, State practice and *opinio juris* must be assessed with a view of determining, from the standpoint of customary international law, the existence of a generally accepted legal claim to remedial secession. State practice is not dense and generally offers only marginal references to the right to secede and no legal claim seems to have been clearly articulated. [208]

The *Kosovo* advisory opinion, however, offered an incomplete, but quite reliable test on the alleged right to remedial secession. The test is incomplete since only 43 States participated in the written or oral phase of the proceedings and the Court limited itself to observe that differences existed regarding whether international law provides for a right of remedial secession and whether the circumstances which some participants maintained would give rise to such a right were present in Kosovo.[209]

A significant number of the States that have submitted written statements in these proceedings declared that in extreme circumstances the right to self-determination may be exercised to the point of claiming independence even outside the colonial context.[210] According to Germany, for instance, self-determination "may exceptionally legitimize secession if this can be shown to be the only remedy against a prolonged and rigorous refusal of internal self-determination. This kind of remedial right of secession would not endanger international stability, as it would come into play only under circumstances where the situation inside a State has deteriorated to a point where it might be considered to endanger international peace and stability in itself".[211] These States have consequently articulated a legal claim according to which the right to self-determination could exceptionally be invoked beyond the colonial context in case of massive and systematic violation of fundamental rights.[212] Some States seem to have acquiesced to such a claim. The Russian Federation, in particular, admitted that secession could be permitted in "truly extreme circumstances, such as an outright armed attack by the parent State, threatening the very existence of the people in question".[213] Other States have just mentioned remedial secession without taking position,[214] or neglected it altogether.[215]

---

[206] G. Arangio-Ruiz, *The UN Declaration on Friendly Relations and the System of Sources in International Law* (Alphen aan den Rijn: Sijthoff, 1979), para 80. Shaw, *supra* n. 147, 483, observes that "such a major change [in the protection of territorial integrity] cannot be introduced by way of an ambiguous subordinate clause".

[207] See, for instance, Argentina, Written Statement, 17 April 2009, para 97.

[208] For a full analysis of these cases, see Dugard, *supra* n. 55, Chapter IV. See also A. Tancredi, *La secessione nel diritto internazionale* (Padova: CEDAM, 2001).

[209] *Supra* n. 80, para 82 *in fine*. The Court reluctance to deal with remedial secession was criticised by Judge Simma, para 6, and Judge Yusuf, para 17.

[210] On the position of the 43 States participating in the proceedings, see M. Milanovic, 'Arguing the Kosovo Case', in M. Milanovic, M. Wood, (eds), *The Law and Politics of the Kosovo Advisory Opinion* (Oxford: OUP, 2015) 21.

[211] Written Statement, April 2009, p. 34.

[212] J. Vidmar, *Democracy and Statehood in International Law* (Oxford: Hart, 2013) 168, has observed that remedial secession is "the last resort to end gross and systematic breaches of human rights" and emphasised that respect for human rights is quite different from implementation of democratic practices.

[213] Written Statement, 16 April 2009, para 88.

[214] United Kingdom, Written Statement, 16 April 2009, para 5.30 – 5.33.

[215] United States, Written Statement, 16 April 2009.

There has also been significant opposition to the right to remedial secession. This was notably the case of Spain, according to which Resolution 2625 cannot be read in the sense that "respect for sovereignty and territorial integrity of States is subservient to the exercise of an alleged right to self-determination exercised via a unilateral act, and which is of great significance as regards the existence of personality under international law".[216] China made a similar claim.[217]

International law is manifestly in a state of flux on this issue. For some, there is a "clear trend towards the acceptance of remedial secession".[218] Yet it is disputed that any rule in this sense has fully crystallized. It comes therefore as no surprise that scholars are divided on the existence of remedial secession.[219] The Independent International Fact-Finding Mission on the Conflict in Georgia rightly held that "a limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship. However, most authors opine that such a remedial 'right' or allowance does not form part of international law as it stands. The case of Kosovo has not changed the rules."[220] Thus, remedial secession remains for the time being "a fundamentally doctrinal ectoplasm, embellished with a few abstract positions States have taken with a cold mind".[221]

In any case and for the sake of the argument, the right to remedial secession poses formidable legal challenges, including establishing the meaning of "people" as well as of identifying whom can legitimately claim to represent such "people"; defining and applying the criteria indispensable to set the threshold of violation of fundamental rights – in terms of gravity, extension and duration; and determining in which forms other States and International Organizations may assist the effective exercise of such entitlement. From this perspective, it may be questioned whether in the Kosovo crisis a permanent change of territorial status was indispensable almost ten years after the violent repression of 1999 was ended.

What is sure, it that if a right to remedial secession exists, it can be exercised only in extreme circumstances, as systematically and unambiguously indicated by the States supporting it. While taking a quite sympathetic stand, the Supreme Court of Canada emphasised that "[a] right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances".[222]

Even the most cursory analysis of the enjoyment of human rights, rule of law and democratic governance in Catalonia would demonstrate that the situation is not even remotely comparable with what is required to invoke remedial secession. To start with, the record of Spain regarding compliance with the European Convention on Human Rights denotes a rate of condemnations which is absolutely incompatible with the situation of massive and egregious violations of human rights that could trigger

---

[216] Spain, Written Statement, 16 April 2009, p. 17.

[217] China, Written Statement, 14 April 2009, p. 5, declared that in the exercise of the right to self-determination, "the territorial integrity of a sovereign State should be respected rather than undermined".

[218] M. Weller, *Escaping the Self-Determination Trap* (Leiden: Nijhoff, 2008) 64.

[219] Amongst the author arguing for the existence of the right to remedial secession, see, in particular, A. Buchanan, *Justice, Legitimacy and Self-Determination* (Oxford: OUP, 2004), Chapter 8; Raič, *supra* n. 106, Chapter 7; C. Tomuschat, *Secession and Self-Determination*, in Kohen (ed.), *supra* n. 66; Buchheit, *supra* n. 199; Weller, *supra* n. 218, 69. *Contra*, K. Del Mar, 'The Myth of Remedial Secession', in D. French (ed.), *Statehood and Recognition* (Cambridge: CUP, 2013) 79; S.F. van den Driest, *Remedial Secession. A Right to External Self-Determination as a Remedy to Serious Injustices?* (Antwerpen: Intersentia, 2013), Chapter 6.

[220] Report, vol II (September 2009) 141.

[221] R. Kolb, *'Autodétermination et "sécession-remède" en droit international public', Global Community* (2013) 57, 76.

[222] *Quebec Case*, *supra* n. 100, para 126.

 DOI: 10.17103/sybil.25.1

a plea of remedial secession. The argument is even more compelling considering the absence of any intra-State complaint filed against Spain. Further, violations on the scale required to justify remedial secession would certainly have led to the activation of the mechanism foreseen in Article 7 of the Treaty of the EU. There is no evidence that the application of Article 7 was ever envisaged in relation to the situation in Catalonia.

On a global level, respect by Spain of human rights under the numerous legal instruments it has ratified has been regularly monitored by the Human Rights Council and the other competent committees and bodies of the UN. Spain – as any other State of the organisation – has been found in breach of some of its international commitments on human rights. It is however impossible to detect any trace of the existence of a massive, egregious, and systematic violation of human rights, in Catalonia or elsewhere in the country.[223] Finally, no State has formally of informally complained or protested with Spain for massive, egregious and systematic violation of human rights. Even if remedial secession is accepted as legal entitlement under international law to break away from the parent State, it seems incontrovertible that the human rights situation in Catalonia – and generally in Spain – is not even remotely approaching the threshold that may trigger it.

(K) RIGHT TO DECIDE AND SELF-DETERMINATION

As seen earlier (Section C), the claim to independence put forward by Catalonia revolves essentially around the right to self-determination and the right to decide, sometimes conflating the two. The right to decide, which is quite peculiar to the Catalan case, deserves to be examined separately.[224]

The "right to decide" intended as legal entitlement to choose the political status of a minority or territorial entity to the point of breaking away from the parent State is unknown in international law. It would amount to a surrogate of a general right to secession, which, as demonstrated above, cannot be upheld. The territorial integrity of States has consistently been treated by States as a sacrosanct principle. Even in the context of colonial, alien or foreign domination, the holder of the right to external self-determination is the population of the territorial unit subject to such domination. Internal self-determination, in turn, must be exercised within the jurisdiction of States.

By assimilating the right to decide to external self-determination, Catalonia's claim deliberately disregards the fundamental distinction between self-determination within and outside the colonial context. Like internal self-determination, any right to decide must be construed by putting together the relevant human rights protected under treaty and customary international law *within* the jurisdiction of each State. These rights include typically the right to freedom of expression, freedom of assembly, freedom of association, the right to free and democratic elections, and the right to take part to the conduct of public affairs. It is worth noting that these rights continuously evolve and may be subject to restrictions when necessary to protect public interests.

It can also be recalled that the right to decide is not expressly provided for in Spanish law. As pointed out by the Constitutional Court, however, it expresses "a political aspiration that may be

[223] For an overview, see UN Human Rights Council, Spain, First and Second Universal Periodic Review, respectively 2010 and 2015, text here.

[224] See N. Levrat, S. Antunes, G. Tusseau, P. Williams, *Catalonia's Legitimate Right to Decide. Paths to Self-Determination* (2017), text here; D. Turp, N. Caspersen, M. Qvortrup, Y. Welp, *The Catalan Independence referendum: An assessment of the process of self-determination* (2017), esp. Ch. 7, text here.

upheld in the constitutional order"[225] and is built up – as it was done in resolution 5/X – by several legal principles protected under the Constitution, namely the principles of democratic legitimacy, pluralism and legality. What was crucial, for the Court, was that the right to decide must be exercised within the constitutional framework.

In a scholarly report published in 2017, the right to decide has been defined as reflecting "the liberal democratic principle that people have the right to democratic self-expression by popular vote. It does not refer to any purported right to external self-determination".[226] The report divides the process toward independence in three phases. The initial phase leads to the holding of a referendum and the declaration of independence. The final phase (or better the outcome) is "the requirement of statehood" or more precisely "what is required for a State to be considered as independent and legitimate". International law, the argument goes, is "well developed" regarding both phases. The second phase refers to everything that happens between the initial and final phases and is believed to be less developed in international law.

The study however examines only the first phase of the process and concludes that both State practice and international decisions show that international law does not prohibit "a sub-state entity from deciding its political destiny by assessing the will of its people" or a declaration of independence.[227] The conclusion is correct, but simply applies the ICJ findings in the *Kosovo* advisory opinion. Beyond that, the report does not substantiate any *right* to unilateral secession under international law. It simply provides an overview of recent declarations of independence and observes that in several cases they have been followed by the establishment of effective and independent governments, sometimes recognized by the member States of the EU. This is of no assistance for the purpose of demonstrating the existence of a *right* to unilateral secession and its articulation in legal terms.

The foregoing brings us back to internal self-determination. The vagueness of the content of the right as well as of the corresponding obligations incumbent upon Spain make the assessment of any complaints made by the Catalan authority rather arduous. From the standpoint of international law, however, it seems difficult to argue that Catalonia's current level of self-government does not adequately satisfy its right to internal self-determination. There seems to be little doubt that the people of Catalonia enjoy the right to freedom of expression, speech, and association, as well as the right to take part in periodic and free elections at both local and central level. Furthermore, Spain's legal order undoubtedly offers Autonomous Communities a particularly high level of decentralisation.[228] Both in law and fact, Catalonian authorities seem able to fully protect and promote their linguistic and cultural identity, most prominently in education. They seem capable to effectively decide without any undue interference by the central government on all matters falling within the scope of Article 148 of the Constitution. This allows Catalonia to freely develop and pursue its political and economic agenda within the limits of the Constitution.

The crux of the matter remains the tension that may arise when the enjoyment of internal self-determination by a people or a territorial entity is perceived as inadequate and may become confrontational and even lead to an attempt to break away from the State. The central State is not

[225] *Supra* n. 13, Ground 4.
[226] Levrat *et al*, *supra* n. 224. For no apparent reason, the definition is relegated in footnote n. 106 of the report.
[227] At 79.
[228] See E. Casanas Adam, 'The Constitutional Court of Spain: From System Balancer to Polarizing Centralist', in N.T. Aroney, J. Kincaid (eds.), *Courts in Federal Countries: Federalists or Unitarists* (Toronto: UTP, 2017), 367, 370.

 DOI: 10.17103/sybil.25.1

only entitled to choose the constitutional order it prefers but has also a duty to defend it when it is challenged by a territorial entity. Defending the constitutional order is of paramount importance for the protection of the rights and interests of the whole population of the country as well as those of other provinces. The measures adopted to defend the constitutional order, however, must be consistent with the international commitments of the State.

From this perspective, it is worth recalling that Law 15/2015 on the Constitutional Court, which modified Organic Law 2/1979, enhanced the powers of the Court to ensure the enforcement of its own decisions. The legislation was not intended to apply specifically to autonomous communities, but to have general application (i.e. applicable also to central authorities). Law 15/2015 was considered by the Council of Europe Venice Commission. The Commission stressed that "[d]isregarding a judgment of a Constitutional Court is equivalent to disregarding the Constitution and the Constituent Power, which attributed the competence to ensure this supremacy to the Constitutional Court. When a public official refuses to execute a judgment of the Constitutional Court, he or she violates the principles the rule of law, the separation of powers and loyal cooperation of state organs".[229]

In a document submitted to the Venice Commission, the Spanish Government declared that Law 15/2015 only objective was "safeguarding the supremacy of the Constitution in a State governed by the rule of law".[230] It also stressed that the measures envisaged in Law 15/2015, which could be applied at the national, regional and local level, must be proportionate and be lifted as soon as they achieve their objective, namely compliance with the Court decision.[231] It finally emphasised that analogous provisions can be found in the Constitutions of several European countries, including Germany, Austria and Switzerland.

On 5 October 2017, the Constitutional Court provisionally suspended, on the basis of Law 15/2015, the plenary sitting of the Parliament of Catalonia scheduled on 9 October 2017. It must be recalled that meanwhile, the Catalonia Parliament declared itself not "subject to the decisions of the institutions of the Spanish State, in particular the Constitutional Court".[232]

The Constitutional Court's decision was subsequently scrutinized by the European Court of Human Rights (ECtHR) from the standpoint *inter alia* of Article 11 (freedom of assembly and association) and Article 3 Protocol I (right to free elections).[233] In an unanimous decision declaring the application inadmissible, the ECtHR went through the conditions imposed by Article 11 to restrict freedom of assembly, namely that they are prescribed by law, pursue a legitimate aim and are necessary in a democratic society. It identified the legal basis for the Constitutional Court's decision in Article 56 of the Organic Law on the Constitutional Court, which expressly provides for the adoption on exceptional circumstances of preventive and provisional measures. It further held that the suspension of the plenary session of the Catalan Parliament was predictable, since such session was convened on the basis of Law 19/2917, which had itself been suspended by the Constitutional Court. Regarding the aim of the contested measure, the Court shared the position taken by the

[229] Opinion 827/2015, 13 March 2017, 14.
[230] Position of Spain, Executive Summary and Report, 29 September 2016, CDL-REF(2016)034, 7.
[231] *Ibidem*.
[232] Resolution 1/XI, *supra* n. 16, para 6.
[233] *Forcadell I Lluis* et al. v. *Espagne*, Requête 75147, Décision, 28 May 2019. See M. Miranda López, A. García de Enterría Ramos, 'La suspensión del pleno del Parlamento de Cataluña ante el Tribunal Europeo de Derechos Humanos Comentario a la Decisión de la Sección Tercera del Tribunal Europeo de Derechos Humanos, de 7 de mayo de 2019', 107 *Revista Cortes Generales* (2019) 21.

Constitutional Court in the decision rendered on 5 October that the suspension was intended to pursue a legitimate aim, namely the protection of the rights and freedom of the members of the Catalan Parliament belonging to the minority. Finally, the Court assessed the necessity of the measure restricting the freedom of assembly. In this respect, it held that the interference with the right to assembly was reasonable, even considering the reduced margin of appreciation enjoyed by State, as it addressed an "imperative social need".

As far as the right to free elections was concerned, the Court did not categorically rule out that a referendum could fall within the scope of Article 3, Protocol 1, provided that the free expression of the opinion of people in the choice of legislature is guaranteed. For the Court, this was not the case of the Catalan referendum as the session of the Parliament was convened in accordance with Law 19/2017, which had been adopted by the Catalan Parliament but suspended by the Constitutional Court.

(L) DECLARATION OF INDEPENDENCE

The question of whether international law prohibits an entity within a State to issue a declaration of independence was central in the *Kosovo* advisory opinion.[234] The Court held that "the practice of States does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence".[235] It also rejected the argument made by several States that "a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity as it held that the scope of the principle of territorial integrity is confined to the sphere of relations between States".[236] It further clarified that when unilateral declarations of independence were treated as illegal, this was not due to their unilateral character, "but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)".[237] This occurred, for instance, with regard to the unilateral declaration of independence made by a racist minority in Southern Rhodesia. It was not the unilateral character of the declaration or its objective that triggers the illegality of the declaration and the obligation not to recognize, but rather the violation of the norm on the right to self-determination. In other words, the racist regime was not the holder of the right to self-determination or had the competence to exercise it.[238]

The indifference of international law towards the declaration of independence is a corollary of the indifference toward secession itself. Thus, under international law the right to decide cannot be invoked to legally support a claim of independence from the general government. A declaration of independence is not in itself inconsistent with any rules of international law, as clearly upheld by the ICJ in the *Kosovo* advisory opinion. As a result, the declaration of independence issued by Catalonia does not imply as such any breach of international law.

---

[234] *Supra* n. 80.
[235] Para 79.
[236] Para 80.
[237] Para 81.
[238] Raič, *supra* n. 106, 134. See also V. Gowland-Debbas, *Collective Responses to Illegal Acts in International Law. UN Action in the Question of Southern Rhodesia* (Leiden: Brill, 1990).

(M) WAY AHEAD

The preceding sections have focused on the independence claim put forward by the authorities of Catalonia and demonstrated that from the standpoint of international law no legal entitlement to break away from Spain can be substantiated; and further that in fact no independence has been obtained by Catalonia at to this date. The still unresolved question of Catalonia must thus be tackled from a different perspective, namely the distribution of powers between the central government and Catalonia. While the internal organization of a State is in principle a matter for domestic law, the distribution of powers between the central government and its territorial unities has important implications for the international relations of the State.

It is worth noting that in July 2019 the Government of Catalonia adopted Strategic Plan for Foreign Action and European Union Relations 2019-2022.[239] Reminiscent of the Plan adopted in 2014, but limited to the relations with the EU, the Strategic Plan designs the role Catalonia intends to play on the international arena as "a country recognised around the world". The Spanish Government immediately challenged the Plan as inconsistent not only with the Spanish Constitution,[240] and its Article 149 in particular, but also with Law 2/2014 on the External Relations of Spain,[241] and Law 25/2014 on International Treaties concluded by Spain.[242] On 30 October 2019, the Constitutional Court suspended the Plan in accordance with Article 161.2 of the Spanish Constitution.[243] The suspension was further extended on 23 June 2020 in order avoid creating the appearance that Catalonia is a subject of international law which may cause irreparable damages to Spanish foreign policy should the Plan eventually be declared unconstitutional.[244]

The decision will certainly confirm the position consistently maintained by the Constitutional Court throughout the crisis as reiterated in Decision 28/2016,[245] which offers a comprehensive and systematic treatment on the roles and prerogatives of the central government and Catalonia, as well as on the external relations of Catalonia.

The Court first insisted that Spain is a composite State (*Estado compuesto*) and that its territorial entities with political autonomy are not subjects of international law and cannot therefore participate in international relations. It follows that the central government has the exclusive competence it the field of international relations, as clearly provided for in Article 149.1.3 of the Constitution and reflected in the principle of unity of action abroad, which is enshrined in Law 2/2014 on External Relations. The Court further clarified that the exclusive competence of the central government refers to the relations between international subjects and most prominently the conclusion of treaties (*ius contrahendi*), the external representation of the State (*ius legationis*), as well as to the creation of international obligations and the international responsibility of the State.

Despite the lack of international legal personality, an Autonomous Community is allowed to carry out its activities outside its territory and even outside the territorial limits of Spain, provided that such external projection is necessary or convenient for the exercise of its own powers and does not invade

[239] Government of Catalonia, Ministry for Foreign Action, Institutional Relations and Transparency, text here.
[240] Gobierno de España, Requerimiento de incompetencia al Gobierno de la Generalitat de Cataluña en relación con el Acuerdo GOV/90/2019, de 25 de junio.
[241] Law 2/2014, 25 March 2014.
[242] Law 25/2014, 27 November 2014.
[243] Text here.
[244] Constitutional Court, Informative Note N. 62/2020, 23 June 2020.
[245] Decision 28/2016, 22 December 2016.

the exclusive competence of the State in matters of international relations. In other words, nothing prevents an Autonomous Community from presenting itself as an *actor* playing a role at the international level, if this occurs within the constitutional and statutory framework. To ensure the unity and coherence of Spain external relations and to avoid or remedy possible damages to the direction and implementation of foreign policy, the central government is competent to establish appropriate measures to regulate and coordinate the activities of the Autonomous Communities with an external projection.

The decision deals in detail with the question of the competence to conclude international treaties. The Court confirmed its settled jurisprudence that the Spanish Constitution clearly provides for the exclusive competence of the State, being the only subject of international law, to conclude international treaties (*ius contrahendi*). The finding is nonetheless without prejudice to the exercise by Autonomous Communities of certain activities related to the process of drafting treaties (such as advocating their conclusion or contributing to design its content), as long as they do not undermine the State's powers to negotiate, conclude and if appropriate ratify them. The Court also admitted that the Autonomous Communities are entitled to conclude "collaboration agreements", as envisaged in Catalonia Law 16/2014, on condition that these agreements fall within the scope of the Autonomous Communities' powers and promote their interests.

Regarding consular and diplomatic relations, the Court reiterated that Article 149.1.3 of the Constitution confers the exclusive competence on the State in matters of international relations, including consular and diplomatic relations (*ius legationis*). Autonomous Communities, being deprived of international legal personality, are prevented from establishing permanent representative bodies to subjects with international status. Yet, this is without prejudice to the establishment by Autonomous Communities of autonomous offices to the EU for the promotion and protection of their interests related to the exercise of their powers and provided that the competence of the State in matters of foreign relations is fully respected.

By resolving the conflict of competences between the central government and Catalonia, or more generally Autonomous Communities, the Court has defined the current legal framework within which a political solution of the Catalan crisis has to be achieved and drew a clear line separating the exclusive competences of Spain as subject of international law and the activities through which Catalonia can project itself internationally.

Under the current legal framework, a solution of the Catalan question may be within the reach of the parties, provided they are committed to negotiate in good faith. Two essential conditions must then be satisfied. On the one hand, Catalan authorities must formally renounce to any project affecting the unity and territorial integrity of Spain. Nothing in international law would prevent the Spanish government from agreeing on the secession of Catalonia, provided that adequate guarantees – including a referendum – are put in place. Such a course of action, which would require an amendment of the Spanish Constitution, seems extremely unlikely. Catalan authorities must therefore respect the exclusive competences of the central government, especially with regard to international agreements and delegations abroad. On the other hand, the Spanish government must ensure that Catalonia fully enjoys its right to self-determination in its internal dimension, including the right to project its related activities outside the borders of Spain in accordance with the relevant constitutional and statutory provisions.

From the standpoint of international law, the parties benefit from the broadest freedom and can agree on whatever arrangements that may be mutually satisfactory and lead to full compliance of all

 DOI: 10.17103/sybil.25.1

international obligations of Spain. With regard to the conclusion of treaties, furthermore, "[n]o hard and fast rule defines the competence of less that fully sovereign States: everything depends on the special case".[246] What is crucial is the commitment of the parties and their willingness to recognise each other rights, interests and ambitions. After having traced the way ahead, the Constitutional Court can guarantee that the entire process is fully consistent with the current legal framework.

Finally, negotiations remain essentially a domestic matter. The assistance of third parties – presumably in the form of mediation, good offices, or conciliation – is allowed only with the consent of the central government. Absent such a consent, third parties would be liable of interfering within the internal affairs of the country. In the case of the Catalonian crisis, the Spanish government did not seek or consent to any external mediation, and the EU correctly declined to play any active role beyond encouraging the parties to engage in negotiations.[247]

(N) CONCLUSIONS

The article has examined from the standpoint of international law the long-lasting and still unresolved showdown between the Catalan authority and the central government, with the Spanish Constitutional Court playing a crucial role. The first element that emerges is that the documents and legal instruments adopted by the Catalan authorities contain vague and often inaccurate references to international law. Those authorities have frequently referred to the right to self-determination of people in a *crescendo* that led to bold claims to independence. The events leading to the referendum have been rather idiosyncratic and asynchronous due to the lack of any effective and independent Catalan government.

The article has demonstrated that Catalonia has no unilateral *right* to break away from Spain. The right of peoples to self-determination can be invoked only in the fight against colonial, alien, or foreign regime, or perhaps in the case of massive and systematic violations of human rights. Catalonia clearly does not fall in any of these categories. While the declaration of independence did not amount in itself to a breach of international law, the recognition of Catalonia would have been extremely premature.

A political solution to the showdown between Catalonia and the central government, in line with the decisions rendered by the Constitutional Court, is overdue and in the interest of both parties. The possibility of a consensual separation appears rather remote. Any solution must therefore be respectful of the territorial integrity and constitutional order of Spain and at the same time ensure that Catalonia fully enjoys its autonomy under the current Statute of Autonomy. All this can be done only in negotiations pursued with the right spirit. Time is the great master of life. Its eminent role in such intricate contexts as Catalonia's claims to independence is even more evident. *Tempus regit actum*, it is.

[246] Jennings, Watts (eds.), *supra* n. 94, 1217.
[247] Caplan, Vermeer, *supra* n. 37.

the SPANISH YEARBOOK of INTERNATIONAL LAW

From the right to political participation to an emerging right to democracy through the action of the United Nations and the international election observation

Víctor C. PASCUAL PLANCHUELO *

Abstract: The proliferation of electoral processes in most countries of the current international society leads us to consider that the right to political participation has become —according to international treaties and in practice— an obligatory right for the majority of States in the international arena. Apart from that, in this article we suggest that the right to political participation has been transformed into a right to political participation in democratic elections due to the action of the United Nations and the international organizations carrying out international election observation activities.

For it, after examining the United Nations organs actions to foster electoral democracy, we will study the role and the importance of the international election observation activities to promote the political participation in democratic elections. In line with it, this study examines the role of the international election observation missions as mechanisms of control, as means to promote democratic electoral practices worldwide, as instruments for the institutional reaction of the states and international organizations in case of failure to comply with international standards, and whether international election observation can even help set the foundations for the creation of international electoral customs. To end, we also analyze if this right to political participation in democratic elections can be moving towards a right to democracy.

Keywords: political participation – democratic elections – democracy – international election observation

(A) INTRODUCTION

According to data provided by the prestigious International Foundation for Electoral Systems (commonly known by its acronym IFES), 119 electoral processes were held in 2019, in which nearly two billion voters around the world headed to the polls to elect their leaders; in 2018, 115 elections were held; before these recent dates, with data confirmed, in 2015 more than 100 electoral processes were held worldwide, in which more than 804 millions of people exercised their right to vote; in 2014, 115 elections were held in which more than 2 billion people voted; in 2013, in 112 electoral processes, over 650 million people exercised their right to vote; and last in 2012, in 103 electoral appointments, more than 1.1 billion people were able to cast their ballots to choose their representatives.

This constitutes solid evidence of the essential nature of the electoral phenomenon in today's international society. The right to vote has become a right exercised frequently by citizens, and which goes beyond regions or continents; a right that is fulfilled by a large part of the world population in the multiple electoral processes that periodically take place. The world votes every day to elect its political representatives; voting has become a regular, natural and necessary act so that, among other things, these representatives can occupy their positions with legitimacy and popular support.

The strength of this data could lead us prima facie to conclude that political participation and democracy are generally accepted rights which enjoy the quasi-unanimous approval of the

Article received on 16 May 2021, accepted on 19 July 2021 and published on 31 December 2021

* Associate Lecturer of Public International Law, University Pontificia Comillas. Email: vcpascual@icade.comillas.edu

 DOI: 10.17103/sybil.25.2

international community. However, this conclusion is wrong if it is only based on this quantitative information; we must transcend the quantitative to delve into the qualitative. That is, the fact that there are elections in a country does not mean that the country is democratic, nor does it even imply that the right to the political participation of the people is adequately respected.

Therefore, although the holding of elections has become widespread in today's international society, we must be aware that even authoritarian, totalitarian regimes, and single-party political systems publicly boast of carrying out electoral processes to try to grant their government an aura of legitimacy. These are political regimes in which there may be a single candidate, or several candidates who do not see their right to stand as a candidate properly respected, and who are victims of acts of intimidation, or violence; or the processes may be fraudulent or manipulated by the party in power; or simply there are situations of inequality in resources and in the means to carry out the electoral campaign. We can point out the examples of Cuba and China, with single party regimes, without competitiveness and with a clear erosion of the freedoms necessary for the development of democratic elections, but which, nevertheless, claim to hold periodic elections to elect their representatives. This should lead us to the conclusion that not all elections are equal and that not all elections can be classified as democratic.

Hence, to speak of electoral democracy, the truly important thing is to know what those elections are like; that is, under what parameters and conditions they take place, if there are elections that can be classified as clean, transparent and democratic, and others that must be qualified as undemocratic or even fraudulent. This is the scope where the fundamental work of election observation by intergovernmental organizations, such as the UN, the OSCE, the European Union, and the OAS, is enclosed.

Nevertheless, it is important to highlight that, although the holding of elections is a *sine qua non* requirement of any democracy, however, we cannot speak of a democratic system on the account of the holding of elections only. And this is because the concept of "democracy" is broader than that of "democratic elections" or "free and fair elections". Democracy implies both the holding of elections and the separation of powers, the guarantee of the fundamental rights and freedoms, judicial independence, the plurality of the media, etc., although it is true that there is a very close connection between both concepts, given that the validity of these democratic requirements are manifested in the elections.

The concept of "democracy" is linked to the history of the human being from the first political organizations and continues to be current, due to its high technical, descriptive, political and philosophical value. From its classic, more idealistic vision as "power of the people", numerous conceptualizations of the term have followed one another according to pragmatic, empirical, utilitarian, sociological, technical, and other perspectives. This great plurality shows that we are in the presence of a polysemic, multifaceted concept that is subjected to historical, political, social and cultural fluctuations which have been determining its characterization and distinctive notes.

Due to its conceptual relevance and the consensus that generated, we are going to use Robert Dahl's definition of "democracy" or "polyarchy". In his work "The Polyarchy", the American professor tries to clarify when a political system can be described as "democracy" and when it does not meet the minimum requirements to hold such a title. Dahl established eight essential parameters for the definition and measurement of democracy or polyarchy:

 DOI: 10.17103/sybil.25.2

> "1. Freedom of association.
> 2. Freedom of expression.
> 3. Freedom to vote.
> 4. Eligibility for public service.
> 5. Right of political leaders to compete for support.
> 5.a. Right of political leaders to fight for votes.
> 6. Diversity of information sources.
> 7. Free and fair elections.
> 8. Institutions that guarantee that government policy depends on votes and other ways of expressing differences."[1]

As we can see, there is a clear separation between the broader concept of "democracy" proposed by Dahl and the limited concept of "democratic elections" or "free and fair elections", which is limited to the holding of elections according to international standards and norms. Undoubtedly, although democracy not only requires the holding of democratic elections, but also involves the other parameters mentioned above, democratic elections are an essential and irreplaceable *prius*, an essential and necessary element for a political system to be considered democratic.

Consequently, in the following sections, we will examine these concepts to delimit them precisely. On the one hand, democracy as a political system; and, on the other hand, the rights to political participation and to free and fair elections both as procedural and formal principles that lead the electoral processes of a country to be carried out in accordance with international standards and norms for democratic elections. This distinction will also drive us to analyse whether in the current international order we can speak of a "right to democratic elections" or even of a "right to democracy".

(B) THE RIGHT TO POLITICAL PARTICIPATION AS A MANDATORY RIGHT FOR STATES

The process of humanization that the international legal order underwent after the Second World War involved the repositioning of the human being at the centre of the system of norms of Public International Law. This process brought with it the approval of the key document for all subsequent development in the field of human rights, the Universal Declaration of Human Rights, in 1948, as well as numerous international treaties mandatory for States in the field of human rights protection[2], such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR), in 1966, and to which would later be added numerous binding international texts that proclaim and comprehensively protect the people human rights, creating and outlining what is known as international human rights law.

Among the rights proclaimed, in the scope of political rights, the right to political participation stands out, proclaimed by the ICCPR in its article 25, which contemplates the right of every citizen to participate politically in the public affairs of their country, as well as their right to active and passive suffrage, among others[3]. This is how it reads:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine and periodic elections which shall be by universal and equal suffrage

---

[1] R. Dahl, *A preface to democratic theory* (University of Chicago Press, 1956), at 71; and R. Dahl and Ch. Lindblom, *Politics, Economics and welfare* (Harper & Bros., New York, 1953), R. Dahl, *On democracy* (Yale University, 2012).

[2] M. Díez de Velasco, *Instituciones de Derecho Internacional Público* (Ed. Tecnos, Madrid, 2018), at 93.

[3] E. Bernales Ballesteros, 'El derecho humano a la participación política', *Derecho PUCP: Revista de la Facultad de Derecho* (nº 59, 2006), 9-32.

and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
(c) To have access, on general terms of equality, to public service in his country."

This article has since become a mandatory precept for a large part of the international community thanks to its majority ratification. The countries that have ratified and therefore have bound themselves to comply with the International Covenant on Civil and Political Rights are 173 to date, an overwhelming majority of the States that make up the international community[4]. We are also facing a mandatory right that is enforceable, from a subjective or individual point of view, before the United Nations Human Rights Committee by the citizens of the member States. Article 25 of the ICCPR proclaims the right to political participation as universal, and constitutes a norm of general acceptance, a norm with *erga omnes* effect, which in a way explains the widespread election calls that international society has been experiencing in the recent decades.

In its initial formulation, Article 25 ICCPR stated the obligation of the States to seek forms of participation of their citizens in the public affairs of the State, and prescribed how elections should be held to be "genuine"; however, it did not include any pro-democratic connotation nor any mention of the concept of "democracy" in its articles. Cassese acknowledges that the "democratic" model outlined in the Covenant is so generic that states can easily contend that they comply correctly with its parameters5, without being democratic. In fact, without a doubt, it was this certain initial neutrality that made possible the overwhelming number of ratifications that the ICCPR has achieved to date, making this right to political participation a mandatory right for most States in the international community.

But its initial neutrality wasn't real, because as we have seen in previous paragraph the same article 25 ICCPR prescribed how elections should be to be considered as genuine[6], so that we can affirm that this article 25 also included a "right to free and fair elections", without mentioning "democracy". However, this article needed to be driven by the action of international organisations, States and other international committees, that were going to channel this first right to political participation right down the path of democratization.

(C) THE TRANSITION FROM THE RIGHT TO POLITICAL PARTICIPATION TO A RIGHT TO POLITICAL PARTICIPATION IN DEMOCRATIC ELECTIONS THROUGH THE UN ACTION

As we will analyse in the following sections, we have observed that this right to political participation has moved towards its democratization mainly due to the action of various United Nations main organs and committees.

(1)United Nations Support of the idea of "Democracy"

The Charter of the United Nations does not contain any specific reference to the term *democracy*[7],

[4] As of May 2021, the countries that have signed but not ratified the Pact are (6) China, Comoros, Cuba, Nauru, Palau and Saint Lucia. The countries that to date have neither signed nor ratified the Covenant are the following (18): United Arab Emirates, Myanmar, South Sudan, Malaysia, Singapore, Solomon Islands, Tonga, Tuvalu, Bhutan, Oman, Saudi Arabia, Brunei, Saint Kitts and Nevis, Niue, Cook Islands, Kiribati, Micronesia and the Holy See (Source: https://indicators.ohchr.org/)

[5] A. Cassese, *Self-determination of peoples. A legal reappraisal* (Cambridge University Press, 1995), at 54.

[6] "To vote and to be elected at genuine and periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."

[7] J.C. Ricci et al., *La contribution des Nations Unies á la démocratisation de l'État,*, Dixièmes rencontres

which already gives us an idea of the difficulty of universalizing a concept with particular western world connotations. However, some authors have pointed out various implicit references to the concept of democracy in the Charter, mainly found within the internal dimension of self-determination and in the interaction between democracy and other areas, such as human rights, development, and international peace and security[8]. Gradually, the concept of "democracy" will appear more frequently among the different resolutions issued by the various main organs of the organization.

Thus, within the framework of the United Nations, it can be stated that the positive value of democracy is reflected for the first time in Resolution 2625 (1970); it contains the *Declaration on principles of international law*, which has been acknowledged to contain certain positive law value as general international law, and in which democracy is assimilated to the principle of the self-determination of peoples. In this sense, Mangas Martín maintains that the internal dimension of the principle of self-determination is identified with the very substance of the idea of democracy[9].

In practice, it was necessary to wait until the detente of the cold war to find the most significant initiatives that referred to democracy in general as a concept[10]. Since 1989, the United Nations Organization has experienced a profound democratic impulse, and has positioned itself in favour of democracy as a form of government. Since then, all the organs of the United Nations have been imbued with this democratizing drive.

The Secretary General stressed that the impetus for democracy also came from 1989, when a new era began regarding the activities related to the electoral processes of the States that had achieved independence[11]. During the 1990s, the Secretary-General took up in his periodic reports the Organization's main priorities in the so-called election observation missions, thus reflecting the new trend of the Organization that implied a greater operational deployment in the field.

Along these lines, the UN Secretary-General consistently and repeatedly positioned himself in favour of promoting democratization processes in his successive annual reports; among these, we can highlight the Report prepared by Butros-Ghali in 1996 under the title "An agenda for democratization"[12], or the Report of the Secretary-General in 2000, prior to the Millennium Summit[13], in which he declared:

> "We will spare no effort in promoting democracy and strengthening the internationally recognized rule of law and respect for all human rights and fundamental freedoms, including the right to development."

The same former Secretary-General of the United Nations (followed by successive Secretaries-General[14]) became an essential figure in the UN's drive to democratize international society, as

internationales d'Aix-en-Provence, colloque des 14 et 15 décembre 2011 (Ed. Pedone, Collection: Rencontres internationales d'Aix-en-Provence).

[8] L.A. Sicilianos, 'Les Nations Unies et la démocratisation de l'État: nouvelles tendances' in R. Mehdi (ed.), *La contribution des Nations Unies á la démocratisation de l'État* (Ed. A. Pedone, Paris, 2002), at 25 ff.

[9] A. Mangas Martín, *Humanización, Democracia y Estado de Derecho en el ordenamiento internacional*, Reception Speech by Ms Araceli Mangas Martín as a full-time academic at the Royal Academy of Moral and Political Sciences, 8 april 2014, Madrid, at 102.

[10] M. Mariño, C. Fernández Liesa et al., *El desarrollo y la cooperación internacional* (Universidad Carlos III de Madrid-Boletín Oficial del Estado, Madrid, 1997).

[11] Y. Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Nijhoff, Dordrecht, 1994), at 148 ff.

[12] UN Secretary General Report, *An agenda for democratisation*, Supplement to reports A/50/332 and A/51/572, 17th December 1996.

[13] UN Secretary General Report, *We the Peoples - The Role of the United Nations in the 21st Century*, A/54/2000.

[14] Kofi Annan, Ban Ki Moon and currently Antonio Guterres.

 DOI: 10.17103/sybil.25.2

evidenced by his following statements:

> "A fundamental concept of transformation was underway: the democratization of the international system."

(2)The UN General Assembly, the UN Organs and the Reinforcement of Democracy

The role of the UN General Assembly in this democratic reinforcement is crucial so that we have to highlight some of its main contributions. In 1996, the UN General Assembly approved - with 157 votes in favour, 0 against and 16 abstentions - one of its most forceful resolutions in support of democracy; we are referring to *Resolution 55/96 "Promoting and consolidating democracy", of February 28, 2001 (A/RES/55/96)*, in which the UN plenary body urged States unequivocally to promote and consolidate democracy, inter alia by:

> "(a) Promoting pluralism, the protection of all human rights and fundamental freedoms, maximizing the participation of individuals in decision-making and the development of effective public institutions, including an independent judiciary, accountable legislature and public service and an electoral system that ensures periodic, free and fair elections;
> (b) Promoting, protecting and respecting all human rights, including the right to development, and fundamental freedoms;
> (c) Strengthening the rule of law;
> (d) Developing, nurturing and maintaining an electoral system that provides for the free and fair expression of the people's will through genuine and periodic elections;
> (e) Creating and improving the legal framework and necessary mechanisms for enabling the wide participation of all members of civil society in the promotion and consolidation of democracy."

Subsequently, there have been numerous resolutions of the UN General Assembly, such as the one known as the Millennium Declaration[15], which have reaffirmed that a democratic and participatory government based on popular will constitutes the ideal political system in order to guarantee human rights. In line with this, successive resolutions of the highest UN plenary body have established "democracy" as a target value; among them the GA Resolution 62/7, 8 November 2007, and GA Res. 64/12, 9 November 2009, on "Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies", in which the General Assembly reaffirms that:

> "Human rights, the rule of law and democracy are interrelated, mutually reinforcing and counted among the fundamental, universal and indivisible values and principles of the United Nations."

Likewise, the UN General Assembly has spared no effort in passing numerous resolutions, of more political content, establishing the concept of "democracy" as the objective of the United Nations by supporting new or restored democracies[16] - without abstentions or votes against - or even directly appealing to the promotion of a democratic international order, of which we must highlight the most recent of 18 December 2013, on "Promotion of a democratic and equitable international order". However, the most important UN General Assembly contribution to the promotion of democratic elections will be given to the "Principle of free and fair elections", as we will analyse in section 5.

This progress towards the consolidation of democracy as the aim of the current international order

---

[15] GA Res. 55/2, 18 September 2000, adopted by the Head of States.

[16] See inter alia Resolution 49/30 of the UN General Assembly, '*Support of the United Nations system to the efforts of governments for the promotion and consolidation of new or restored democracies'*, 7 December 1994; GA Res. 50/133 "Support of the United Nations system to the efforts of governments for the promotion and consolidation of new or restored democracies", 12 December 1995; GA Res. 53/31, 23 November 1998; GA Res. 54/36, 29 November 1999; GA Res. 55/43, 27 November 2000; 58/13, 17 November 2003; 58/281, 9 February 2004; GA Res. 62/7, 8 November 2007; GA Res. 64/12, 'Support of the United Nations system to the efforts of governments for the promotion and consolidation of new or restored democracies', 9 November 2009 and 66/285, 3 July 2012, etc.

 DOI: 10.17103/sybil.25.2

also owes its development to the work of the United Nations Commission (today, Council) on Human Rights, whose activity has been decidedly focused in favour of democratization and human rights[17]. As Charlesworth[18] outlined, the Commission adopted a series of resolutions on democracy from 1997 onwards, endorsing the process of democratisation of states and presenting 'free and fair elections [as] an essential feature of democracy'[19]. In 1995, in one of its first resolutions on the promotion and consolidation of democracy, the Commission acknowledged that "democracy, development and respect for human rights and fundamental freedoms are mutually reinforcing interdependent concepts", and that, to the extent that democracy "is the best method to facilitate individual and collective expression of freedom of expression […], the widest possible participation in democratic dialogue of all sectors and actors of society should be promoted to in order to reach agreements on the appropriate way to solve the social, economic and cultural problems of a society."

Within this connection between democracy and human rights, the Human Rights Commission approved in 1999 the Resolution 1999/57 entitled "Promotion of the right of democracy", in which the right to democracy was now proclaimed directly, without euphemisms, as an essential requirement for the protection and promotion of human rights. This fundamental resolution of the then Human Rights Commission stated that:

> "1. Affirms that democracy fosters the full realization of all human rights, and vice versa;
> 2. Also affirms that the rights of democratic governance include, inter alia, the following:
> (a) The rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly;
> (b) The right to freedom to seek, receive and impart information and ideas through any media;
> (c) The rule of law, including legal protection of citizens' rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary;
> (d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections;
> (e) The right of political participation, including equal opportunity for all citizens to become candidates;
> transparent and accountable government institutions;
> (g) The right of citizens to choose their governmental system through constitutional or other democratic means;
> (h) The right to equal access to public service in one's own country […]".

In support of this approach, in 2000 the Human Rights Commission recommended a series of important legislative, institutional and practical measures to consolidate democracy (Resolution 2000/46); and in 2002, the HR Commission declared the following as essential elements of democracy[20]:

> "respect for human rights and fundamental freedoms, freedom of association, freedom of expression and opinion, access to power and its exercise in accordance with the rule of law, the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and organizations, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media."

Although we do not intend to exhaust the set of resolutions of the UN organs aimed at promoting democracy as the ideal political model for the protection and defense of human rights, it is essential to also emphasize the recent Resolution 40/9, approved by the Human Rights Council on March 21st, 2019 "Human rights, democracy and the rule of law" (A/HRC/RES/ 40/9), in which the UN human

[17] Previous resolutions of the Human Rights Council on promoting a democratic and equitable international order are: HRC Resolutions 8/5, 18 June 2008, 18/6, 29 September 2011, 21/9, 27 September 2012, 25/15, 27 March 2014, 27/9, 25 September 2014, 30/29, 2 October 2015, 33/3, 29 September 2016, 36/4, 28 September 2017 and 39/4, 27 September 2018.

[18] H. Charlesworth, *International Legal Encounters with Democracy* (Global Policy, volume 8. Suppl. 6, 2017).

[19] See e.g. UN Doc. E/CN.4/RES/1999/57, 27 April 1999; UN Doc. E/CN.4/RES/2001/41, 23 April 2001; etc.

[20] Human Rights Commission, resolution 2002/46.

 DOI: 10.17103/sybil.25.2

rights body recognizes that human rights, democracy and the rule of law create an environment in which countries can promote development, protect people against discrimination and guarantee equal access to justice for all, as it had also been doing in HR Council resolutions 19 / 36, 23 March 2012, 28/14, 26 March 2015 and 34/41 24 March 2017.

Finally, we must point out that the extensive task of the United Nations in promoting democracy has materialized in its support of national democratization processes, observation and verification of elections[21], promotion of democratic governance, support of democracies in transition, as well as, among others, in the orientation of national and regional efforts to consolidate democracy and maintain the rule of law[22]. In short, its role in promoting democracy and democratic elections has been transcendental, effective, and irreplaceable.

(3) The General Comment 25 of the UN Human Rights Committee and the Right to Political Participation in Democratic Elections.

The path to the "democratization" of international society had as its first precedent the right of peoples to self-determination proclaimed in the Charter of the United Nations and article 1 of the International Covenant on Civil and Political Rights. Various authors stress the customary nature of this right of self-determination; thus, for Pastor Ridruejo, the right of peoples to self-determination is:

> "An international custom formed at a rapid pace and in accordance with the demands of democratization and socialization of the international society of our time […], therefore, the existence of a customary norm of institutional origin that consecrates the right of peoples to their self-determination. Norm that undoubtedly has the character of 'ius cogens'."[23]

This collective right to people's self-determination laid the foundations for the development of a collective and individual right to political participation in the public affairs of the States, which was conventionally included in articles 21 of the UDHR and 25 of the ICCPR. For many scholars, article 25 ICCPR is also narrowly linked to the people's right to self-determination, as Gutiérrez Espada affirms categorically: "Article 25 of the ICCPR is the very core of the people's right to internal self-determination"[24]. Hence, the most common approach is to relate internal self-determination to the political rights enshrined in the ICCPR[25].

Although it is true that articles 21 of the UDHR and 25 of the ICCPR complement each other to establish that the will of the people is the basis of the authority of the public power, and that said will must be expressed through genuine and periodic elections; nevertheless, this nature mainly procedural of the right to political participation (and the absence of democratic connotations in its articles) encouraged the vast majority of States in the current international community to hold elections to elect their representatives, including countries with authoritarian or semi-authoritarian regimes, even when these could not be described as democratic elections.

Consequently, this conventional right to political participation, of a more neutral and impartial

---

[21] Outstanding examples in this area are the UN electoral observation missions in Namibia (1989), Nicaragua (1990), Haiti (1990) or South Africa (1994).

[22] A. Badía Martí, *La participación de la ONU en procesos electorales* (Ed. Mac Graw-Hill, Madrid, 1998).

[23] J.A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales* (Tecnos, Madrid, 2020).

[24] Gutiérrez Espada, C., ¨El derecho a la libre determinación de los pueblos' in F.J, Ansuátegui Roig et alia (eds.), *Historia de los derechos fundamentales* (vol. 4, 3, Dykinson, Madrid, 1998).

[25] For a detailed study about the relationship between internal self-determination and democracy, see P. Andrés Sáenz de Santa María, 'A right of all peoples: the internal dimension of self-determination and its relationship with democracy', 22, *Spanish Yearbook of International Law* (2018), at 172.

 DOI: 10.17103/sybil.25.2

nature (with nuances), could have been reduced to citizens having channels of participation in public affairs, without much delving into the conditions and requirements of how those elections should be held, which could have even been partially fulfilled within non-democratic systems. However, this article 25 would be enhanced and promoted by different UN organs, as well as those analysed in the previous section, by the Human Rights Committee, in whose General Comment 25, of 1996, the Committee would endow the right to political participation with various elements and characteristics, which were going to make it evolve towards the right to political participation in democratic elections. The Human Rights Committee added to this article the "General Comment number 25: The right to participate in public affairs, the right to vote and the right of equal access to public service"[26](1996), which provides more extensive regulatory and clarifying elements for the implementation of Article 25 of the ICCPR by the States to hold "authentic elections". The most relevant arguments of General Comment number 25 can be summarized around the following points[27]:

a) In order for the elections to be "authentic", they must be regulated by laws that ensure the non-discrimination conditions established in article 25.

b) Regarding multipartyism, even though the Covenant does not impose specific obligations regarding the design of electoral systems, the Committee declares the freedom of individuals to stand as candidates and their connection with other Covenant rights such as freedom of expression and association.

In this General Comment 25, the Human Rights Committee outlines how an election should be carried out according to article 25 of the ICCPR:

> "21. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely."

Therefore, General Comment 25 represents a considerable reinforcement for the idea of the right to democratic elections. Free and fair elections require freedom of expression, assembly and association (paragraph 12); non-discrimination against citizens in their right to vote (paragraph 3); the rejection of undue restrictions for the exercise of active and passive suffrage based on political affiliation (paragraph 25); it requires free voters to support or oppose the government without undue influence or coercion (paragraph 19); and it also binds the States to explain how the representativeness of the elective bodies is guaranteed (paragraph 22). In other words, GC25 provides the appropriate legal basis to compel States to hold genuine (authentic) and periodic elections[28]. We can affirm, therefore, that the interpretative development of article 25 of the ICCPR included in this General Comment 25 acquires great relevance since it establishes the legal basis of the "international standards for the holding of elections" and it also positions this right of political participation on the path towards a right of political participation in democratic elections.

Furthermore, the previous right to political participation will turn into a right to political

[26] General Comment Nº 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev.1/Add.7, 57ª session, 1996.

[27] A. Jarillo Aldenueva, *Pueblos y democracia en Derecho Internacional* (UNED, Madrid, 2010), at 400.

[28] S. Varayudej, 'A right to Democracy in International Law: Its implications for Asia', 12 *Annual Survey of International & Comparative Law* (2010).

participation in democratic elections also thanks to the so-called "jurisprudence" of the different UN Committees.

(4)The Development of the Right to Political Participation in Democratic Elections through the "Jurisprudence" of the UN Committee of Human Rights and other UN Committees

The UN Human Rights Committee has also played an essential role in developing relevant "jurisprudence" in relation to the right to political participation, as a result of its competence to hear individual communications. Among the resolutions of this Committee, the following have singular significance, for the purposes of our research:

- *Case Oleksii Katashynskyi vs Ukraine* (2018). The Committee declares that the circumstances of the election, where the electoral commission decided not to take the voting results of one polling station into account since the records had been lost, and the failure of the State party to remedy the ensuing violation of his rights, constituted a violation of article 25 of the Covenant[29].
- *Case Vicencio Scarano Spisso vs Bolivarian Republic of Venezuela* (2017). The Committee concluded that the author's detention based on his conviction for contempt in respect of the interim protection measures was arbitrary and that the proceedings against him violated the due process guarantees provided for in article 14 of the Covenant; therefore, the Committee found that his removal from office as mayor and his de facto inability to exercise his right to vote and be elected constituted a violation of article 25 (b) of the Covenant.
- *Case Mr. Valery Lukyanchik vs Belarus* (2009). The Committee concluded that the refusal to register the author as a candidate for the 2004 elections to the House of Representatives was not based on objective and reasonable criteria and was, therefore, incompatible with the State party's obligations under article 25.
- *Case Ms. Antonio Ignatane vs Latvia* (2001). The Committee concluded that Mrs. Ignatane had suffered specific injury in being prevented from standing for the local elections in the city of Riga in 1997, because of having been struck off the list of candidates on the basis of insufficient proficiency in the official language[30].
- *Case Peter Chiiko Bwalya vs Zambia* (1993). The Committee observed that restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the carrying out of public affairs.

Furthermore, the protection of political rights is also included in many resolutions from other UN Committees[31], such as the Committee on the Rights of Persons with Disabilities; among other resolutions, it should be noted Communication no. 4/2011 *Zsolt Bujdosó, Jánosné Ildikó Márkus and others vs. Hungary* (9 September 2013), Communication 019/2014 *Fiona Given vs. Australia* (16 February 2018), and Communication 11/2013 *Gemma Beasley vs Australia* (1 April 2016); in these resolutions, the Committee is of the view that the State party has failed to fulfil its obligations under

[29] "The Committee recalls that an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws that are compatible with the Covenant. The security of ballot boxes must be guaranteed. There should be independent scrutiny of the voting and counting processes and access provided to judicial review or another equivalent process so that electors have confidence in the security of the ballot and the counting of votes".

[30] The Committee notes that Art. 25 secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned in article 2, including language.

[31] See more information here.

 DOI: 10.17103/sybil.25.2

article 29 of the Convention on the Rights of Persons with Disabilities and it recalled that "article 29 of the Convention requires States parties to ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including by guaranteeing their right to vote". Moreover, some resolutions of the UN Committee on the Elimination of Racial Discrimination deal with the right to political participation; for instance, the Communication 30/2003, *The Jewish community of Oslo et al. vs Norway* and Communication 6/1995, *Z.U.B.S vs Australia*.

As we can see, in all of these resolutions, the right to political participation has gained a wider reach and interpretation; it is not only a procedural or neutral right. According to this "jurisprudence", it is not difficult to verify that the right to political participation is moving towards a new right, more completed and more focused on the development of democratic elections.

Apart from that, the most important momentum for the development of the right to political participation in democratic elections will come from the UN General Assembly and, specifically, from the rise and evolution of a new principle that was going to promote the transformation of the previous right into a right to political participation in democratic elections, the "principle of free and fair elections".

(5)The "Principle of Free and Fair Elections" in UN General Assembly Resolutions

Having examined the role of the United Nations in promoting democracy and the right to political participation, we must analyse specifically and separately, to highlight its transcendence, the importance given by the organization's General Assembly to the "principle of free and fair elections". Equally, this principle finds its legal basis in the articles 21 of the Universal Declaration of Human Rights and 25 of the Covenant on Civil and Political Rights, in which it is stated that the authority to rule is based on the will of the peoples, expressed in periodic and genuine elections. We can confirm that this principle is established in the way in which elections are carried out ("periodic and genuine elections"); but the necessary guarantees that must be present in all electoral processes are also emphasized:

> "It declares that determining the will of the people requires an electoral process that offers clear options and that this process must provide all citizens with equal opportunities to stand as candidates and present political options, individually and in collaboration with others."[32]

The definition of what we should understand by free, fair or genuine elections has required a considerable effort on the part of the doctrine; thus, we can understand that *free elections* are those elections that take place in a climate free from intimidation and respect for human rights and freedoms (freedom of opinion, expression and information, assembly, association, independence of the judiciary, non-discrimination, secret ballot), removing obstacles to the full participation of citizens in the electoral process. *Fair elections* are those that respect the guarantees of equal, universal and non-discriminatory suffrage, non-discrimination in electoral matters (both in active and passive suffrage), as well as legal and technical guarantees against fraud and manipulation[33]. Easier is the concept of *periodic elections*, which would be those in which the period between calls is guaranteed to be adequate to continue reflecting the will of the people. Finally, "genuine elections" would be those that fulfill and unite all the previous elements:

– Free will of citizens;

[32] GA Resolution 43/157, 8 December 1988.
[33] For a deep analysis, see G. Goodwin-Gill, '*Free and fair elections'* (Inter-Parliamentary Union, 2006).

 DOI: 10.17103/sybil.25.2

– Political pluralism;
– Equal access to public service; and
– Information and civic education for voters to exercise their right to vote[34].

According to Fox, the right to free and fair elections comprises four main elements: 1) Universal and equal suffrage; 2) The absence of discrimination between voters, candidates or parties; 3) Secret vote; and 4) Holding periodic elections[35].

In electoral practice, the term "free and fair elections" is often used when the requirements of international standards are met, such as article 25 of the International Covenant on Civil and Political Rights, which are intended to guarantee freedom and equality in the political participation of citizens[36]. Later, this concept evolved towards the term of "genuine elections", in accordance with the tendency in favour of political pluralism within the States[37].

The evolution of the UN towards the acceptance of democratic principles as universally recognized values and their active promotion was linked to the slow development of the United Nations human rights promotion program, which finally led - thanks to pressure from non-governmental organizations and the work of pro-democratic States - to the resolutions of the UN General Assembly with the title "Enhancing the effectiveness of the principle of periodic and genuine elections", aimed at assisting the States that request it in the technical and legal aspects of the democratic elections, and that they were finally going to endorse the organization and observation of democratic elections in sovereign countries[38]. In numerous resolutions, the UN General Assembly showed its strong support for the holding of democratic elections. In these resolutions, the General Assembly increasingly emphasized the importance of elections to protect the rights of citizens, in particular human rights, while proclaiming the relevance of the "principle of holding genuine elections", to determine the true will of the people.

The issue of "Enhancing the effectiveness of the principle of periodic and genuine elections" was the subject of discussion, for the first time, at the 43rd session of the General Assembly, in 1988. The Assembly expressed it as follows:

> "… Its general objective is of a practical nature; namely, to allow the international community to cooperate in the search for adequate means and means to make the principle of holding genuine and periodic elections more effective."[39]

The scope and relevance of this first Resolution 43/157, of 8 December 1988, should be framed within the process of disintegration of the USSR and the fall of the Berlin Wall, which facilitated the detente between the two blocks, thus allowing the reaching of a consensual resolution that advocated the principle of holding genuine and periodic elections[40], again avoiding any reference to the controversial term of "democracy", which was not yet positively received by many countries of the former Soviet axis.

This first resolution of the General Assembly has been followed until date by many other resolutions approved under the same name ("Enhancing the effectiveness of the principle of periodic

[34] A. Badía Martí, *supra*, n. 22, at *40.*
[35] G.H. Fox, 'The right to political participation in International Law', in G.H. Fox and B. R. Roth, *Democratic Governance and International Law* (Cambridge University, 2000), at 69.
[36] G. Goodwin-Gill, *supra*, n. 33.
[37] G.H. Fox, *supra*, n. 35, at 65.
[38] Y. Beigbeder, *supra*, n. 11, at 91-92.
[39] UN Doc. A/C.3/43/SR.55, paras. 66 and 69, at 16.
[40] See A. Jarillo Aldenueva, *supra*, n. 27, at 230.

 DOI: 10.17103/sybil.25.2

and genuine elections")[41], annually at first since 1989, and biannually since 1993. We list just some of them below:

- United Nations General Assembly Resolution 44/146, "Enhancing the effectiveness of the principle of periodic and genuine elections"[42].
- United Nations General Assembly Resolution 49/190, "Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization"[43].
- United Nations General Assembly Resolution 64/155, "Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization"[44].
- United Nations General Assembly Resolution 74/158, "Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization"[45].

These resolutions were approved by the UN General Assembly, in some cases without proceeding to vote[46], and in other cases, with overwhelming majorities in their favour[47], and have undergone a process of evolution that started from a principle of periodic and genuine elections with a more neutral formulation in the first resolutions that was derived towards a principle inextricably linked to the promotion of electoral democracy or the holding of democratic elections.

In this regard, we must highlight some of the pronouncements contained in the first resolutions, which emphasized (1) the essential nature of this principle in the efforts to protect the rights of the governed, as well as the fact that (2) to determine the will of the people, an electoral process that offers clear options and equal opportunities is necessary; also routinely collected in these resolutions was (3) the commendable value of United Nations electoral assistance, (4) insisting on the advisability of increasing the United Nations Trust Fund to finance election observation missions and meet the growing demand of electoral assistance of the States.

In the same line, these first resolutions already included provisions regarding the methodology and requirements demanded for the deployment on the ground of a UN election observation Mission, requiring (5) the Organization to try to ensure that there is sufficient time to organize and carry out an effective mission and (6) that there should be preconditions that make it possible to hold free and guaranteed elections, as well as (7) that adequate and complete reports can be presented on the results of the Mission, and (8) that UN electoral assistance work must be extended to all phases of the electoral cycle.

Likewise, all these resolutions that proclaim the "principle of genuine and periodic elections" recommend (9) that the observation activities are to be carried out in coordination with the other governmental and non-governmental organizations that are present and monitor the same electoral

[41] From Res. 49/190, 9 March 1995, to present, UNGA resolutions in this field adopted the name of "Strengthening the role of the United Nations in increasing the effectiveness of the principle of celebration of authentic and periodic elections and the promotion of democratization".

[42] GA Res. 44/146, 15 December 1989.

[43] GA Res. 49/190, 9 March 1995.

[44] GA Res. 64/155, 18 December 2009.

[45] GA Res. 74/158, 18 December 2019.

[46] G. Goodwin- Gill, *supra*, n. 33.

[47] 162 votes in favor, 0 abstentions and 8 votes against, at the fifty-sixth session; 169 votes in favour, 0 abstentions and 8 votes against, at the 58th session; as well as 175 votes to none and 13 abstentions in 2017 (at the 72nd session).

process.

However, this great development of the base of international electoral observation was always constrained by three pronouncements that would be repeated in all of them, specifically the following: (10) Electoral assistance and support for democratization are only provided to the express request of the Member State concerned; (11) the freedom of all States to choose and organize their electoral institutions is emphasized and (12) the sovereign right of States to choose and develop their political, economic, social and cultural systems is proclaimed and reiterated.

Gradually, these UN General Assembly resolutions were improved, as they were added, along with the "principle of genuine and periodic elections", specific mentions of the terms "democracy" and "democratization", which since then would remain a constant and even emphasized in the most recent resolutions. In this sense, since Resolution 58/180 of 2003, the need to strengthen democratic processes, electoral institutions and the ability to administer fair elections has already been acknowledged (13), with the addition of (14) the advisability of cooperating with the governmental and non-governmental organizations and of sharing information and experiences to promote best practices in the provision of assistance and presentation of reports on the electoral processes.

Likewise, since this Resolution of 2003, the connection of support to the principle of periodic and genuine elections with the promotion of democratization would also become clearly incorporated (15), as deduced from the title of the resolution itself "Enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization", and of the very text of the resolution:

> "Having considered the report of the Secretary-General on the activities of the United Nations aimed at strengthening the effectiveness of the principle of holding regular and authentic elections and promoting democratization"

In subsequent resolutions, especially, since Resolution 64/155 18 December 2009, "Enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization", the commitment to democratic elections will be even more evident, as (16) it is added the responsibility of the States to ensure that the elections are free and transparent, and that the work of the international observation of elections in relation to the promotion of free and fair elections, and its contribution to improving the integrity of electoral processes and electoral participation, will be emphasized.

Finally, as a consequence, if we analyse the last of the resolutions approved, in 2019 —which was not submitted to vote— we can continue to appreciate that this principle has undergone a notable democratic reinforcement, as it is overwhelmingly considered mandatory by the States that make up the international community; specifically, in its 7th and 8th statements:

> "7. Reaffirms the obligation of all States to take all appropriate measures to ensure that every citizen has the effective right and opportunity to participate in elections on an equal basis;
> 8. Strongly condemns any manipulation of election processes, coercion and tampering with vote counts, particularly when done by States, as well as by other actors, and calls upon all Member States to respect the rule of law and the human rights and fundamental freedoms of all persons, including the right to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors, thereby fostering conditions in which all citizens, regardless of how they voted, whom they supported or whether their candidates prevailed, have the motivation and incentive, as well as the right and opportunity, to continue to participate directly or through elected representatives in the conduct of public affairs and their Government;[…]"

Because of the above, it is evident that the General Assembly has endowed the right to political participation with a clear democratic connotation, and has established a direct connection between

 DOI: 10.17103/sybil.25.2

the principle of free and fair elections and the development of the democratic system. After these resolutions, in our view, it is clear that when the UN General Assembly is mentioning "free and fair elections", the UN main organ is meaning "democratic elections", so that the right of political participation is going to be clearly linked to the development of democratic elections.

(6)The Right to Political Participation in Democratic Elections in the Human Rights Council.

Finally, in this process, we must also point out that support for the validity and development of the "Principle of genuine and periodic elections" has also been formulated by the then Human Rights Commission (today, Human Rights Council), with resolutions as clear as Resolution 2003/36, of April 23[48], that proclaims the "universal validity" of the principle of holding genuine and periodic elections by universal suffrage and by secret ballot[49].

Notwithstanding, the evolution of this principle has been reduced within the successor organ to the former Human Rights Commission, the Human Rights Council. Since the inception in 2006 of the Human Rights Council, its new structure has reduced the influence of Western states [50]. Momentum has changed. Instead of promoting more in depth the Principle of genuine and periodic elections or even a right to democracy, the Human Rights Council has moved to emphasize a different goal in several resolutions: the promotion of a democratic and equitable international order[51]. All of these resolutions on a democratic and equitable international order are invariably supported by a coalition of African, Asian, Islamic and Latin American states along with China and Russia and are opposed by all Western members of the Council[52], and all of them are more focused in the promotion of democracy beyond States borders (and much less in the promotion of democracy within the States). To support this goal, through Resolution 18/6, the HR Council established the mandate of the Independent Expert on the promotion of a democratic and equitable international order[53] for an initial period of three years. Since then, the mandate has been extended three times.

On the other hand, in March 2015, the Human Rights Council adopted resolution 28/14, which

---

[48] UN Commission on Human Rights Resolution 2003/36: Interdependence between democracy and human rights, 23 April 2003, E/CN.4-RES/2003/36

[49] In 2005, the Human Rights Commission passed one of its most comprehensive resolutions on democracy and the rule of law. After recalling its position on the minimum "content" of democracy, the Commission reiterated in Resolution 2005/32 of the Human Rights Commission, "Democracy and the rule of law" of 19 April 2005 (46- 0-7): "the right of every citizen to vote and be elected in authentic periodic elections without any discrimination based on race, color, sex, language, religion, political or other opinions, national or social origin, economic position , birth or other social condition, ... and that the people empowered to vote must have the freedom to choose any candidate and to support or oppose the government, without influences or undue coercion of any kind that may distort or inhibit the free expression of the will of the electors, and that the results of the authentic elections must be respected and respected…"

[50] M. Spohr, 'The United Nations Human Rights Council' 14 *Max Planck, Yearbook of United Nations Law*, (2010), 169–218.

[51] Among others, we can mention Resolution 18/6 on the "Promotion of a democratic and equitable international order" (29 September 2011) (A/HRC/18/L.13) and Resolution 39/4 "Promotion of a democratic and equitable international order" (27 September 2018) (A/HRC/39/L.5).

[52] H. Charlesworth, *supra*, n. 18.

[53] The purpose of his mandate is to promote and encourage respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, the rule of law, pluralism, development, better standards of living and solidarity. A democratic and equitable international order means all peoples have the rights to peace, international solidarity, development and self-determination; exercise effective sovereignty over their natural wealth and resources; freely pursue their economic, social and cultural development; have equal opportunity to participate meaningfully in regional and international decision-making; and have a shared responsibility to address threats to international peace and security. A democratic and equitable international order fosters the full realization of all human rights for all, and everyone is entitled to it.

established a forum on human rights, democracy and the rule of law, providing a platform for the promotion of dialogue and cooperation on issues pertaining to these areas.

In spite of this diminished boost to the principle of periodic and genuine elections, the Human Rights Council has adopted a number of resolutions highlighting the interdependent and mutually reinforcing relationship between democracy and human rights. Recent examples include Human Rights Council resolution 18/15 of 29 September 2011 or HRC Resolution 19/36 on "Human rights, democracy and the rule of law" (19 April 2012), adopted by a recorded vote (43 to 0, with 2 only abstentions: China and Cuba)[54].

Furthermore, in the field of political rights, the Human Right Council has also adopted some resolutions to promote "Equal participation in political and public affairs", such as Resolution 33/22 (A/HRC/RES/33/22), on 30 September 2016, or Resolution 39/11 (A/HRC/39/L.14/Rev.1), on 28 September 2018, in which the HR Council reaffirms:

> "that every citizen shall have the right and the opportunity, without any of the distinctions stipulated in the International Covenant on Civil and Political Rights and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives, and to have access, on general terms of equality, to public service in his or her country, and to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and held by secret ballot, guaranteeing the free expression of the will of the electors, and reaffirming also that the will of the people shall be the basis of the authority of government"

And imposes "the obligation of States to take all appropriate measures to ensure that every citizen has an effective right and opportunity to equal participation in public affairs [..]".

In conclusion, we can affirm that the current Human Rights Council does not play a central role in promoting democracy at the international level; contrary to this, the HR Council is in many cases under the influence and control of countries with little democratic tradition and attachment: hence, at the present time, it is not a reference body either for the development of the principle of periodic and genuine elections. However, despite this, the HRC continues to proclaim the right to political participation in periodic and genuine elections and it continues to show in some resolutions, such as Resolution 19/36 (2012), the necessary interrelation and interdependence between human rights, democracy and the rule of law, which undoubtedly shows a future path of potential development of the right to political participation in democratic elections.

(7)The End of the way in the Transition Process from a Right to Political Participation into a Right to Political Participation in Democratic Elections.

Consequently, after our analysis, it becomes clear that the "Principle of genuine and periodic elections"

[54] See paragraphs 1 and 2: "1. Stresses that democracy includes respect for all human rights and fundamental freedoms, inter alia, freedom of association and of peaceful assembly, freedom of expression and opinion, freedom of thought, conscience, religion or belief, the right to be recognized everywhere as a person before the law and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote in a pluralistic system of political parties and organizations and to be elected at genuine, periodic, free and fair elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration and decision-making and free, independent and pluralistic media; 2. Reaffirms the right of every citizen to vote and be elected at genuine periodic elections without discrimination of any kind, such as race, color, sex, language, religion or belief, political or other opinion, national or social origin, property, birth or other status, and stresses that persons entitled to vote must be free to vote for any candidate of party for election and free to support or to oppose government, without undue influence or coercion of any kind that may distort or inhibit the free expression of the elector's will, and that the results of genuine, periodic, free and fair elections representing the choice of the people for their representatives should be respected by the international community, as well as by all parties and stakeholders […]"

 DOI: 10.17103/sybil.25.2

has become a basic principle of Public international law for the promotion of the democratization of political systems; for instance, for the UN General Assembly, genuine and periodic elections and democracy were to become inextricably linked. Therefore, according to the UN General Assembly resolutions, it is clear that "periodic and genuine elections" is equivalent to "democratic elections".

The principle of "genuine and periodic elections" or "democratic elections" implies that the elections are a legitimizing criterion of the public power[55], that the elections must be qualified as free, fair, periodic and genuine, and that the national legislation of the countries must fit these criteria.

The significance of this principle of "genuine and periodic elections" has been such that a large part of the doctrine has defended the obligation of the principle of free and fair elections within the international legal order. In 1992, Thomas Franck —in his article "The emerging right to democratic governance"— already concluded that:

> "The international system is moving towards a clearly defined democratic right, in which national governments are being legitimized by compliance with international standards and systematic monitoring of compliance."[56]

As a result of the foregoing, and despite the initial greater neutrality of the principle, the new political stage that began in 1989 and the content of these resolutions in favour of the right to "genuine elections" ensured that the majority of countries in the international community gradually positioned themselves in favour of democracy as a form of government and that the United Nations reviewed and clarified its neutrality with respect to the political freedom of States[57], as can be deduced from the numerous resolutions approved by the General Assembly.

In fact, as it has been exposed, we can affirm that the original right to political participation of article 25 ICCPR has been transformed into a "right to political participation in democratic elections" thanks to –among others- the development and promotion of the "principle of free and fair elections" led by the United Nations. A right that is also being consolidated both by the continued support of the UN organs, and by the repeated and constant practice of many States, as well as by an existing *opinio iuris* regarding its mandatory nature[58], which could set the foundations for potential mandatory rules of customary origin for States in this field.

However, to conclude, we must be aware that this right to political participation in democratic elections is a right that presents different levels of development depending on the continent or regional area that we study. Thus, we will have regions with a perfectly consolidated *right to political participation in democratic elections*, both conventionally and by the repeated practice of the States (Western Europe and America); others, with an incipient right or in the formation phase, as well as others in which the existence of this right will be denied, because the right of political participation conventionally contained in article 25 of the ICCPR is not even properly fulfilled.

Furthermore, this process of "democratization" of the right to political participation, thanks to the "principle of free and genuine elections", was going to be also supported by an international mechanism that would carry out continuous monitoring and assistance to the States to ensure that they adapt their electoral practice to the norms and standards for democratic elections. This context was conducive to the expansion of international electoral observation.

---

55 See A. Badía Martí, *supra*, n. 22, *at 34.*

56 T. Franck, *'*The emerging right to democratic governance*'*, 86 *The American Journal of International Law* (nº 1, 1992), 46-91.

57 L.A. Sicilianos, *supra*, n. 8, at 121 ff.

58 A. Jarillo Aldenueva, *supra*, n. 27, at 445.

 DOI: 10.17103/sybil.25.2

(D) THE CONTRIBUTION OF INTERNATIONAL ELECTION OBSERVATION IN PROMOTING THE RIGHT TO POLITICAL PARTICIPATION IN DEMOCRATIC ELECTIONS

Since 1962, the Organization of American States (OAS) has deployed more than 240 Electoral Observation Missions in 27 countries of the hemisphere[59]; since 2000, over 120 European Union (EU) Election Observation Missions have been deployed to all continents[60]; the Organization for Security and Cooperation in Europe (OSCE) has observed more than 400 electoral processes in Europe, North America and Central Asia[61].

The relevant role played by international election observation was already adequately highlighted by Crawford[62], who noted that International Law is progressing in a pro-democracy direction, thanks to (1) the electoral observation developed by international organizations, such as the UN or the OAS, as well as non-governmental organizations; (2) the processes of institutionalization of these election observation practices, as well as (3) the existence of various courts and committees for the protection of human rights at political level.

In this section, we will proceed to examine the contribution that international election observation is making in the field of the promotion of democracy and the principle of democratic elections; more precisely, first, we will analyse its role as a control mechanism for international electoral norms and standards; secondly, its fundamental role in promoting electoral democracy and democratic practices in the electoral field around the world as well as in creating new electoral standards; and, lastly, the singular role it plays in setting the ground for the activation of institutional reaction measures in case of non-compliance or violation of the electoral standards.

(1)The Control of the Election Observation Missions (EOMs) on Compliance of the Right to Political Participation by the States

The control responds to the interest of international society to guarantee that its legal system is respected and to prevent any breaches with the aim of achieving common objectives[63]. After the Second World War, international control experienced a boost with the approval of various international treaties that incorporated a control mechanism in their articles; in this sense, international control is developed explicitly in a wide range of normative sectors: among them, the control that emerged in the field of protection of human rights[64].

International election observation missions constitute control mechanisms for the international norms and standards, within the field of protection of human rights, particularly political rights. The control carried out by the EOMs is of a hybrid nature; that is, although the technical nature of their activity prevails, since the parameters in use are binding norms and electoral standards; nevertheless, the political action that all electoral observation activity entails is evident. The role of control of these Election Observation Missions consists of evaluating the compliance of the international electoral

[59] See more information here.
[60] See more information here.
[61] See more information here.
[62] J. Crawford, 'Democracy and the body of international law', in G.H. Fox and B. Roth (eds.), *Democratic governance and International Law* (Cambridge University Press, Cambridge, 2000), 103-113.
[63] According to Kant, the violation or non-compliance with international treaties necessarily affects each and every one of the States of the international community, since any of this non-compliance endangers and threatens the freedom and harmony that must govern relations between states. See I. Kant, *The Philosophy of Law* (Edimburg, 1887), at 223.
[64] S. Borrás Pentinat, 'Los mecanismos de control de la aplicación y del cumplimiento de los tratados internacionales multilaterales de protección del medio ambiente' (thesis on file at the University Rovira i Virgili, 2007), at 23.

norms and standards by the States, and culminates in the publication of various reports at different stages of the electoral process (preliminary reports and final report) presenting a series of *conclusions* —in which the EOM determines whether or not the observed electoral process has adhered to the international norms and standards of electoral observation— and *recommendations*, which the Mission addresses to the country's authorities, suggesting their implementation to improve the quality of the electoral process and comply more fittingly to international norms and standards. As examples of positive assessments by these EOMs, we can mention the European Union EOM in Senegal Presidential Elections (24 February 2019[65]), Paraguay (22 April 2018[66]), Timor Leste (2017[67]), among many other elections observed by the EU, the OAS[68] and the OSCE[69].

The EOMs evaluate the electoral processes according to the electoral norms and standards set forth in mandatory international treaties, domestic laws and in international electoral non-binding or "soft law" norms. That is, obligatory electoral norms that we find in binding universal treaties such as the International Covenant on Civil and Political Rights (art. 25), or of regional scope, such as the European Convention on Human Rights (art. 3 additional protocol No. 1), the American Convention on Human Rights (art. 23), etc., which include legally binding norms for the States regarding the holding of elections.

(2)The Development of "Soft Law" Electoral Standards by International Election Observation Organizations

Along with the international electoral standards contained in the mandatory international treaties, we find a proliferation of international standards for elections in the electoral sphere that are not, in principle, sources of international law[70]; these are agreements, declarations, recommendations, protocols that, in principle, would not be mandatory for the signatory States and which come to form the so-called "soft law" within the electoral domain[71]. This type of "soft" norms is quite frequent in

[65] "Le scrutin s'est déroulé dans le calme et de manière globalement transparente. Il s'est caractérisé par une forte participation des électeurs. Le vote a été évalué positivement par les observateurs. Les procédures ont été généralement respectées dans les bureaux de votes observés, et la compilation des résultats a été effectuée de manière efficace […]." (Senegal Presidential Elections -24 February 2019- EU Final Report).

[66] "Voting took place in an organised and calm atmosphere with polling stations following procedures that ensured the integrity and transparency of the process. EU observers were present constantly during the aggregation at all electoral tribunals. The integrity of results forms was assessed as good or very good in 98 per cent of cases and with high levels of transparency […]." (Paraguay general Elections -22 April 2018- Final Report).

[67] "Both election days took place in a peaceful and orderly manner. EU observers visited in the course of both presidential and legislative elections over 120 polling stations throughout the country and in most cases evaluated positively the opening, polling and closing procedures. Nonetheless, EU observers concluded that voters cast their ballot in secrecy, free of influence. The tabulation processes were evaluated in most cases as orderly, well organised and transparent […]." (Timor Leste Presidential Elections –20 March 2017- Final Report).

[68] As an example, Mexico General Elections (1st July 2012) OAS Final Report: "Los ajustes legales y reglamentarios realizados para mejorar la calidad de la jornada electoral han demostrado su pertinencia y utilidad, mientras que el conjunto de reformas constitucionales de 2007 ha contribuido al desarrollo de campañas más equitativas e incluyentes. Ciertamente, se constataron algunas fragilidades y temas en los cuales se requerirán modificaciones adicionales, pero no empañan el balance general de las elecciones y constituyen más bien una guía para el perfeccionamiento del sistema electoral mexicano […]." (Final Report).

[69] As an example, Georgia Parliamentary Elections (31 october 2020) OSCE Final Report. The Statement of Preliminary Findings and Conclusions issued by the EOM on 1st November concluded that "the elections were competitive and, overall, fundamental freedoms were respected".

[70] See European Union, *Compendium of International Standards for Elections* (2016).

[71] As examples, the 1990 OSCE Copenhagen Document or the Inter-American Democratic Charter 2001, both of great political importance.

 DOI: 10.17103/sybil.25.2

the electoral field as they are perfectly suited to the reservations of the States to assume binding obligations in such a delicate area as that of the political rights or the political participation of their citizens.

Moreover, the international organizations promoting these standards —aware of said reluctance— will themselves promote these standards among their members or to third parties to make the States advance progressively and without interference towards compliance with these soft rules that, in the end, may lead to the adoption of the mandates contained in the binding regulations.

Even though the norms and standards contained in this type of norms are not strictly binding in principle, it is evident that at present there are numerous States that comply with and adapt the development of their electoral processes to these non-legal standards or parameters of international election observation, and have been developing a repeated and continued practice of adjusting to the principles contained in these texts. International election observation has developed numerous non-binding electoral standards to promote the holding of free and genuine elections among its member States, whose compliance is also monitored by these EOMs. Consequently, the generation by the organizations of electoral observation of these non-binding rules, which include parameters pertaining to the celebration of "genuine" or "democratic" elections, is also contributing to the democratization of electoral processes in many countries and to the improved compliance with the "principle of democratic elections".

(3)International Election Observation as a Means of Promoting Democratic Electoral Practices

The international election observation carried out by "comprehensive" and long-term missions, in particular the OSCE, the EU, the OAS and even the African Union (AU) and the Southern African Development Community (SADC) provides an invaluable and irreplaceable empirical base on the electoral practice of the States in their many electoral processes. The preliminary and final reports of these Election Observation Missions delve into the analysis of all the elements that play part on the right to political participation, as well as those other parameters that shape the concept of "democracy". Consequently, these reports constitute means of proof of compliance of the mandatory right of political participation; but, at the same time, election observation missions promote genuine and fair elections worldwide, mainly by the permanent and constant promotion of electoral democratic practices and norms among the observed States, and more specifically through different ways: (1) the verification of compliance with standards and parameters; (2) its follow-up work; (3) its involvement in the countries and their interest; and (4) its electoral assistance work so that the development of the electoral processes comply with said standards. All these elements contribute to boost the "observed" States to adapt their electoral practice to these democratic parameters and therefore, they can support the creation of reiterated practices by the States in accordance to the holding of "democratic elections"[72]. For it, we say that the international election observation may foster the material element of a potential custom in the field of democratic elections, I mean, a right to political participation in democratic elections through a customary way.

Therefore, in this sense, international election observation may play an essential and irreplaceable

[72] For instance, the European Union has observed three elections in Ghana in the last years (2008, 2016, 2020). In the three elections, the Election observation mission assessments were positive, however, some shortcomings were identified. More information here.

 DOI: 10.17103/sybil.25.2

role to transform the *right to political participation* into a new *right to political participation in democratic elections*, through the promotion of constant and repeated democratic electoral practices among the States observed. Election observation missions are spreading democratic standards and norms throughout the world and are fostering these democratic practices among the States. If these practices become repeated, constant and uniform among the States, together with the *opinio iuris sive necessitatis*, the right to political participation in democratic elections might become a customary norm too.

In similar terms, this customary character has also been highlighted by Ezetah, for whom the right to democracy as an internal aspect of the right to the self-determination of peoples can also be classified as a predominantly customary norm in international law[73].

(4)The Reaction of International Election Observation Organizations to Non-compliance with International Electoral Norms and Standards

The sanction in response to the violation of a norm of International Law is yet another proof that the violated norm is a norm of Public International Law. In the electoral field, there are increasing cases of imposition of institutional and collective sanctions by international organizations that carry out election observation activities (EU, OAS, UA, OSCE, mainly) or, individually, by the States themselves (as in the recent cases of Myanmar 2021, Belarus 2020, Honduras 2017 or Venezuela 2018), to those countries that flagrantly stray or do not comply with international standards for democratic elections. In fact, international election observation constitutes the basis on which sanctions are imposed to some of the countries that do not carry out their electoral processes according to international standards.

Consequently, we can confirm that the international organizations that carry out election observation activities (mainly, the aforementioned EU, OSCE, OAS and AU) use the reports of their missions on the ground to adopt institutional reaction measures aimed at enforcing the application of international electoral norms and standards for democratic elections. For example, the European Union has become highly relevant in terms of institutional reaction by activating specific mechanisms, such as the "human rights and democracy" clause[74], which is included in a large part of its bilateral external relations with third countries.

Within the OSCE, the irregularities detected in the successive electoral processes in Belarus led to the adoption of retaliatory measures by some States and institutional sanctions by the Organization itself or its members. With regard to this country, based on the reports of the OSCE electoral observation missions, the European Union has been applying various legal sanctions to the Lukashenko regime for its systematic violation of human rights, the rule of law and for the lack of democratic advances[75]. On the other hand, in Ukraine, the second round of the presidential elections of November 2004 was repeated after the report released by the OSCE-ODIHR Election Observation Mission[76].

---

[73] R. Ezetah, 'The right to democracy: a qualitative inquiry', 495 *Brooklyn Journal of International Law* (1997).

[74] See A. Úbeda De Torres, 'La evolución de la condicionalidad política en el seno de la Unión Europea', 32 *Revista de Derecho Comunitario Europeo* (January/April, 2009).

[75] See more information here.

[76] "The second round of the Ukrainian presidential election did not meet a considerable number of OSCE commitments and Council of Europe and other European standards for democratic elections" (Text available electronically here, accessed 15 May 2021).

 DOI: 10.17103/sybil.25.2

In short, the election observation work carried out by the main specialized international organizations (primarily by the OSCE, OAS, EU and also the AU) has contributed, thanks to its functions of control, the creation of standards, its promotion of democratic electoral practices worldwide and serving as a basis for institutional reaction in case of non-compliance, to the consolidation of a *right to political participation in democratic elections* in almost all of today's international society.

(E) THE CONFIGURATION OF THE RIGHT TO POLITICAL PARTICIPATION IN DEMOCRATIC ELECTIONS IN PUBLIC INTERNATIONAL LAW

After having established that in the international legal order there is a right to political participation that has been transformed into a "right to political participation in democratic elections", thanks to the action of the UN, the general tendency among states to hold elections to elect their political representatives and the irreplaceable work carried out by international election observation missions; in this last section we will address if at present this right to democratic elections is an individual, enforceable and subjective right in Public International Law.

(1) Firstly, to determine if it is feasible to speak of the right to political participation in democratic elections as a subjective and enforceable right of the individual, it is essential to analyse its origin in the first place, particularly, if this right is included in any binding normative instrument or if it has been established by customary way. As we have seen, the right to political participation in democratic elections is proclaimed in international treaties and it is developed and reinforced through the role of the General Comment 25, the resolutions of the UN Human Rights Committee, the UN action and the States behaviour and practice.

(2) Secondly, we must also examine whether this right has any *control mechanism* in International Law; the conventional right to political participation in democratic elections has several conventional control mechanisms, such us the UN Human Rights Committee, as well as the control carried out by election observation missions.

(3) The third parameter to examine is whether the violation of this right implies any type of *reaction* by the international community, if the State that violates this right may be subject to the imposition of sanctions, be they social sanctions or coercive measures. We have verified that the international community has reacted to various violations of the right to political participation in democratic elections. These are "sui generis" responses, but they do force the offender to comply with this right: they are reactions regarding the validity of elections or the illegitimacy of a government, which may lead to the non-recognition of that new government, or to the imposition of institutional and collective or unilateral sanctions. There are also reaction mechanisms against illicit breakdown of democratic systems, coups d'état or erosion of the values and principles of democratic systems[77]. These reaction measures will be decentralized and each State or international organization will be responsible for establishing them, so that the degree of coercibility will vary according to each case and region.

(4) Finally, the existence of a right usually requires that that right be enforceable before jurisdictional courts; that is, *judicial control* is generally an attribute of any subjective or collective right. The right to political participation in democratic elections has received a wide support from –

[77] We can mention the recent cases of Belarus 2020 or Myanmar 2021.

in Europe- the brilliant jurisprudential activity of the European Court of Human Rights, and in the American continent, in which the Inter-American Court of Human Rights intervenes.

Consequently, we can state that the right to political participation in democratic elections is a binding right in the whole international community; the States that do not respect this right are breaching International Law and may face the reaction of the rest of the international community. This right of democratic elections is mandatory worldwide, it has a universal reach, it is in a clear process of expansion and it has a very high degree of recognition; therefore, there is a clear trend to protect this right within the international legal framework[78].

However, the recent democratic practice of States is also experiencing setbacks and it is not always respectful of the right to political participation in democratic elections[79]. Roldán indicates that democratic principles and systems have been suffering a visible setback during the last decade[80]. Not only there are countries that persist in their breach of the right to political participation ex Article 25 ICCPR (Cuba, China, North Korea, Turkmenistan, Saudi Arabia, United Arab Emirates, Yemen, Iran, Cameroon, Azerbaijan, Algeria, etc.). Furthermore, there are countries whose compliance with this right is deteriorating compared to previous electoral processes (Russia, Venezuela, Turkey, Uganda, Rwanda, Nicaragua, Myanmar, Jordan, Ethiopia, Democratic Republic of the Congo, etc.)[81].

Some scholars do not consider this right as an *erga omnes* norm, for instance, as Fernández Liesa affirms: "It is true that in international law the right to free elections is being concretized, but there are still reluctance and opposition to make possible to develop the norm to the degree that it constitutes the basis of a general obligation"[82]; nevertheless, we think —with Jarillo— that it is a right that is close to achieve that general obligation[83].

In short, it is therefore a legal obligation internationally assumed by the States that are parties to the ICCPR, "whose compliance is subject to the law of treaties and the general rules of responsibility of international law"[84] (own translation). However, we understand that, for its definition and development as a right, it cannot be required a generalized and unanimous compliance in the international community, but that said right is understood to exist due to the support of most of the States and the existence and ratification of legally binding international instruments by most of them. As in other areas of Public International Law, non-compliance with the rules is often one more proof of their obligatory nature and of their legally binding nature (see the case of International Humanitarian Law). Hence, we understand that this right to political participation in democratic elections exists as such in the current scope of the international legal system; although there are States that repeatedly fail to comply with this obligation internationally assumed. Despite it, even the defaulting States very often try to give the image that they do adequately fulfil this right to political participation in democratic elections[85]; which only confirms its legally binding nature and its potential

[78] A. Mangas Martín, *supra*, n. 9, at 101.

[79] A. Jarillo Aldenueva, *supra, n.* 27, at. 171.

[80] J. Roldán Barberó, 'Internal democracy and International law', *Spanish Yearbook of International Law* (2018), at 200.

[81] Source: Freedom House (https://freedomhouse.org/explore-the-map?type=fiw&year=2021), and Election observation mission reports.

[82] C. Fernández Liesa, *Democracia y desarrollo en el ordenamiento internacional,* in F. Mariño and C. Fernández Liesa, *El desarrollo y la cooperación internacional* (Univ. Carlos III, Madrid, 1997), at 195.

[83] A. Jarillo Aldenueva, *supra*, n. 27, at 177.

[84] *Ibid.*, at 169.

[85] An example is the statement made by Nicolás Maduro after the 2020 parliamentary elections: "5 years ago I went out to acknowledge defeat and now, thanks to the people, we are now celebrating a victory."

 DOI: 10.17103/sybil.25.2

erga omnes effect.

Consequently, we can conclude that the generally accepted right to political participation (*ex* art. 25 ICCPR) has moved to a right to political participation in democratic elections, which is on the way to become an *erga omnes* norm, due to the UN action in the promotion of the principle of periodic and genuine elections, and thanks to the role developed by the election observation missions worldwide. In line with Wouters, Meester and Ryngaert, "one can assume that, if democracy is understood restrictively as a form of governance in which the people elect their administrators, it is definitely a principle of international law"[86].

(F) DOES IT EXIST A RIGHT TO DEMOCRACY IN INTERNATIONAL LAW?

After this, the final step in the process would be the transition towards a right to democracy. At this point, we understand that this right to political participation in democratic elections, its universality and normative force, is acting as a stimulus for the promotion of a right to democracy as an ideal model of a political regime. But this final change will be more complex in the current stage of the International Law.

The right to democracy is not present as such in any binding legal instrument of universal scope. Even though it seems complex to defend that an individual citizen could judicially claim their right to democracy, it is necessary to state that, in some regional areas, the development of the right to political participation in democratic elections and its derivation, the right to democracy, can be demanded —with variations— before regional or domestic courts of justice.

For the analysis of a potential right to democracy, we share with Dupuy the need to adopt a regional approach[87]. The convenience of this regional analysis is motivated by the differences that exist regarding the degree of mandatory and compliance both with the right to political participation (*ex* art. 25 ICCPR), as with the right to political participation in democratic elections, as well as the hypothetical right to democracy. As an explanatory note, we must state that the general regional trends that we expose must be qualified because this does not prevent individual cases from departing from the majority trend.

(1)Europe

We can state that there are: 1) Binding norms (among others, ICCPR and European Convention on Human Rights) regarding political participation in democratic elections and the right to democracy. According to Roldán, "The legitimacy of power relies on the expression of the popular will, through free and periodic elections"[88]; 2) Non-binding international regulations that acquire a certain mandatory quality by the practice of the States as a majority (see the OSCE Copenhagen Document); 3) The validity and effectiveness of the principle of free and genuine elections has transformed the right to political participation into a right to political participation in democratic elections; 4) There is an effective jurisdictional court (the European Court of Human Rights) to which citizens can resort in case of infringement of the elements that make up the right to political participation in democratic

[86] J. Wouters, B. De Meester and C. Ryngaert, 'Democracy and International Law', 34 *Netherlands Yearbook of International Law* (2003), at 156.

[87] R-J., Dupuy, 'Les droits de l'homme, valeur européenne ou valeur universelle', in AAVV., *Pensamiento jurídico y Sociedad internacional. Libro homenaje al profesor D. Antonio Truyol Serra* (CEPC, vol. I., Madrid, 1986), 415-429.

[88] J. Roldán Barbero, *Democracia y Derecho internacional* (Ed. Civitas, Madrid, 1994), at 97.

elections and even a right to democracy[89]; and 5) Existence of regional international organizations that require the "democratic" requirement to become member (European Union and Council of Europe); 6) The democratic conviction and practice of the European States is almost complete, unanimous if we refer to the member countries of the European Union[90].

Therefore, we can conclude that, among the member countries of the European Union, and to a large extent, among the countries that make up the Council of Europe, there is –in general terms- a high compliance with the conventional right to political participation in democratic elections, which has been absorbed by the binding force of a right to democracy guaranteed for citizens and fully enforceable. In other words, in Western Europe there has been a move from the initial obligatory right to political participation to a right to political participation in democratic elections that has become an indisputable right to democracy[91]. According to Dupuy, "The situation is different in the regional spaces of the European Union and the Council of Europe, where democracy has been recognized as a true legal principle and as part of the common constitutional heritage of the States".

Consequently, following this author, we could state that *in Europe there is a right to democracy with binding normative force*. In the European space, the States are linked by the plurality of regional commitments acquired in recent years that have shaped the common European heritage, and democracy has acquired full significance as a legal principle that informs all the activities of the State.

(2)Latin America

In Latin America, we also can speak of the right to political participation in democratic elections and the right to democracy, since the existence of: 1) Binding norms (among others, ICCPR, American Convention on Human Rights and the American Declaration of Rights and Duties of Man) regarding political participation in democratic elections and the right to democracy[92]; 2) Non-binding international regulations that become binding by State practice, like the Inter-American Democratic Charter[93]; 3) The validity and effectiveness of the principle of free and genuine elections has

[89] See Council of Europe/European Court of Human Rights, "Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights. Right to free elections", 31 dec 2020. This particular Guide analyses and sums up the case-law on Art. 3 of Protocol No. 1 to the European Convention on Human Rights: "Right to free elections". This Guide emphasizes the importance of many ECHR judgments with regard to, among others, the right to vote (*Hirst v. the United Kingdom (no. 2)* [GC], 2005, § 62), the loss of civic rights (Albanese v. Italy, 2006); prisoners (*Frodl v. Austria*, 2010), Right of citizens residing abroad to vote (*Hilbe v. Liechtenstein* (dec.), 1999), the right to stand for election (*Podkolzina v. Latvia*, 2002, § 35), the organization of elections (*Russian Conservative Party of Entrepreneurs and Others v. Russia*, 2007), the election campaign (*Abdalov and Others v. Azerbaijan*, 2019), the exercise of office (Sadak and Others v. Turkey (no. 2), 2002), electoral disputes (*Kovach v. Ukraine*, 2008, 55 et seq); (*Riza and Others v. Bulgaria*, 2015), effective remedies (*Grosaru v. Romania*, 2010), etc. The extensive jurisprudence of the court covers numerous aspects related to the right to political participation in democratic elections, as well as even extends to the right to democracy that we maintain exists at the European level.

[90] The cases of Poland and Hungary require to call into question this respect for democratic principles; notwithstanding, the right to democratic elections in these countries is not at risk at this moment (See inter alia, A. AGH, '*Decline of democracy in the ECE and the core-periphery divide: Rule of Law conflicts of Poland and Hungary with the EU'* (Journal of comparative politics, Vol. 11, number 2, July 2018).

[91] A. Ruiz Robledo, 'El derecho a participar en elecciones libres según la jurisprudencia del Tribunal Europeo de Derechos Humanos', 30 *Corts: Anuario de derecho parlamentario* (2018), 275-305.

[92] "La democracia representativa es determinante en todo el sistema del que la Convención forma parte" (OC6/86 Corte IDH 1986a, 9, párr. 34) y por ello "constituye un 'principio' reafirmado por los Estados Americanos en la Carta de la OEA, instrumento fundamental del Sistema Interamericano" (Castañeda, Corte IDH 2008b, 42, 141; OC 6/86, Corte IDH 1986a, 9, 34 y Yatama, Corte IDH 2005b, 88, 192).

[93] Article 1 of the Inter-American Democratic Charter: "The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it".

 DOI: 10.17103/sybil.25.2

transformed the right to political participation into a right to political participation in democratic elections and even into a right to democracy; 4) There are two effective jurisdictional bodies (the Inter-American Commission and the Interamerican Court of Human Rights) to which citizens can resort in case of infringement of the elements that make up the right to democratic elections and a right to democracy [94]; 5) Existence of regional international organizations that demand the "democratic" requirement to become member (Organization of American States, among others); 6) The democratic conviction and practice of the American States, as well as the commitment to democracy and the appropriate development of electoral processes is very high.

Compliance with election observation standards is highly effective in the Americas, but it is undoubtedly the democratic commitment of the OAS and its action to stop the breakdowns of the constitutional order in these countries, which leads us to conclude that the American continent is experiencing a phase of widespread acceptance of representative democracy and other democratic variants. However, democratic development is more fragile in Latin America (see, among others, the example of Honduras in 2009 or the Venezuelan crisis of 2014-2015), which forces the OAS to maintain a coherent policy in defence of democratic principles[95].

(3)Rest of the World

In the rest of the world, the majority of States have ratified the International Covenant on Civil and Political Rights, in which the right to political participation is enshrined. As a consequence of that, we can conclude that the right to political participation in democratic elections is mandatory and enforceable in all of these States parties.

However, in Eastern Europe and former Soviet republics, there are many examples of countries that circumvent the effective fulfilment of the right to political participation and the principle of democratic elections. Therefore, although a casuistic analysis should be carried out, in this region, the general trend is not favourable even to the effectivity of the right to democratic elections in its individual aspect. The right exists and it is enshrined and accepted by this States, but the level of fulfilment is low (see, the cases of Uzbekistan, Azerbaijan, or even the case of Russia)[96].

On the other hand, Africa itself is trying to walk, with setbacks and obstacles, on the path of the development of a right to democratic elections; but it is not possible to generalise, because the situation differs greatly among countries in the continent. The right of political participation in democratic elections exists and it is enshrined and accepted by these States, but the level of accomplishment is not very high. Countries like Ghana, Tunisia, South Africa or Senegal provide

[94] According to A. R. Dalla Via, 'Los derechos políticos en el Sistema Interamericano de Derechos Humanos' 15 *Tribunal Electoral del Poder Judicial de la Federación* (2011), "los derechos políticos, consagrados en diversos instrumentos internacionales, propician el fortalecimiento de la democracia y el pluralismo político." This has been upheld by the Inter-American Court of Human Rights in its main judgments on political rights, cases *Castañeda Gutman vs. Estados Unidos Mexicanos* (Corte IDH 2008b, 42, 141), *Yatama vs. Nicaragua* (Corte IDH, 2005b, 88, 192), *López Mendoza vs Venezuela* (Corte IDH 2011c, 233, 109), etc.

[95] Inter alia, see D. Acevedo and C. Grossman, 'The Organization of American States and the Protection of Democracy' in T. Farer, (ed.) *Beyond Sovereignty. Collectively Defending Democracy in the Americas* (Baltimore and London: The Johns Hopkins University Press, 1996), 132-149; S. Mesa Salazar, 'La democracia y el Sistema Interamericano: de la Carta de la OEA a la Carta Democrática lnteramericana', 16 *Agenda Internacional* (2002), 97-122; H. Olmedo Gonzáles, 'Diez años de la Carta Democrática Interamericana: Un Régimen Internacional para la Defensa de la Democracia', *Revista Electrónica de Estudios Internacionales* (2011), etc.

[96] For a more detailed study of this question, see J.-Y. Morin, 'L'Etat de droit: émergence d´un principe du droit international', 254 *RCADI* (1995), 9-462.

positive and inspiring models for the rest of the States of the continent; and elections are being developed in many other African countries in positive way (as declared by the international election observation missions deployed in these countries to observe the electoral processes)[97].

In Asia, it is not feasible today to even adduce that a right to political participation in democratic elections is in force in an emerging phase. The Asian continent remains highly fragmented and the States that comprise it are in very diverse stages of institutional development; from advanced countries in a phase of democratic and institutional consolidation, such as South Korea or Japan, to attested authoritarian systems, such as China or North Korea (in which even the right to political participation is not respected). This heterogeneity and variety prevent the emergence of supranational international organizations that extend democratic values and principles, in such a way that support for democratic phenomena materializes on rare occasions and its success depends on the will of the country's authorities and their true democratic commitment.

Finally, in Oceania, except in the cases of Australia and New Zealand, which are impregnated with Anglo-Saxon democratic values and principles, and some other isolated cases, we can only speak of respect for the right to political participation among those States that have ratified the ICCPR, but it is not possible to find the right to political participation in democratic elections generally in force.

According to this analysis, we can only share the majority opinion of the doctrine that states that in the current scope of the international legal order we cannot speak of a right to democracy (as a political system), given that the principles of sovereign equality of States, non-intervention in internal affairs, and self-determination of the peoples[98], grant freedom to the States to adopt the political, economic and social model they prefer, and currently there is no obligation to adopt a democratic model of government. However, at the same time we can say that the world is experiencing in different regions a clear democratizing trend.

Our analysis reveals a majority tendency of the States towards a greater recognition of democracy as a desirable form of government for the States. Although we started from the premise that the existing normative basis that sets a legal obligation for States to establish democracy as a form of government is not sufficient, given that at a universal level there has not yet been a process of codification from which democracy is configured within a conventional framework of positive law that generates obligations for the States parties[99]; it is undeniable that there exists a majority tendency towards a greater recognition of democracy as an ideal political model. The political changes produced in Western, Central and Eastern Europe in the 90s, with the new democratic wave, resulted in a reinforcement of the concept of "democracy" as a value, even a dominant value, at the national and international level[100]. As International IDEA report "The Global State of Democracy 2019" shows:

> "The number of democracies continues to rise, despite a slowdown of the global democratic expansion since

[97] See the examples of the 2016 Presidential and Parliamentary Elections in Ghana (text available electronically here); the 2019 Senegal Presidential Elections (text available electronically here); or the 2018 Tunisia Municipal Elections (available electronically here).

[98] See H. Charlesworth, *supra*, n. 18, at 37-38, for a detailed analysis about the division of international lawyers regarding the existence or non-existence of this right.

[99] H. Thierr, 'L'état et l'organisation de la societé international', in AA. VV: *L'état soverain à l'aube du XXI siècle* (Colloque de Nancy, Eds. A. Pedoné, 1994).

[100] See inter alia D. Held, *Models of democracy* (Cambridge, Mass., Polity Press, 1987); G. Duncan, *Democracy and the capitalist state* (Cambridge University Press, 1989), etc.

the mid-1990s. In fact, between 2008 and 2018 the number of democracies continued to rise, from 90 to 97"[101].

The concept of "democracy" has become a key element for most international organizations at the regional level. Increasingly in numbers, regional organizations are demanding respect for democratic principles and institutions to incorporate new members (EU, Council of Europe, OAS, OSCE, African Union, among others), which is a clear example of the commitment of these supranational entities in spreading democratic ideals and institutions. Undoubtedly, these demands are contributing to the increase in the democratization process of the international society and to the emergence of a right to democracy in some regional areas.

Wheatley observes that, although there is no uniform practice of democracy, nevertheless, the international community shows a strong normative commitment towards democratic government in a large part of the national political systems[102]. This has led an important part of the doctrine to uphold the universality of the values that underlie democracy as a form of political organization. And —as Charlesworth affirms— these views were not simply the result of the Western enthusiasm103. She set the example of Amartya Sen's praise for democracy: *"*Sen, the Indian Nobel prize-winning economist, has spoken of democracy as "a universal value that people anywhere may have reason to see as valuable"[104]. In this sense, Garzón and Cardona consider democracy as one of the "modulating values of the principles of the United Nations"[105], that is, they conceptualize "democracy" as a value, but, at the same time, they highlight the importance of democracy by conventional means in some regional spaces.

As discussed, the UN itself began to make frequent use of the term "democracy" in resolutions approved by the General Assembly, the Security Council, its Secretary-General, and the rest of its specialized agencies. Since then, the actions of the UN have been imbued with a democratic spirit and a democratizing drive; today it is undeniable that the UN has as a desideratum of its actions, among others, the promotion of democracy at the international level.

Furthermore, another element that shows that "democracy" constitutes a guiding principle of the contemporary international community can be found in the numerous electoral processes that take place in the different countries that make up the international society. The holding of elections is a constant and repeated event in most States. And although elections are not synonymous with democracy, nevertheless, the holding of democratic elections does constitute a fundamental requirement for us to speak of a democratic system. The normative force of "democracy" in today's international society is such that the leaders themselves often advocate the democratic nature of their elections, even if they subsequently are not democratic and if they present multiple deficiencies. In addition, we have met and continue to meet at the international level, a multitude of demands by individuals, organizations, associations and States in favour of the establishment of the democratic system in their respective countries —as it has taken place in recent years in the North of Africa, with the so-called "Arab Spring"[106]— or further strengthening of democracy in systems previously

[101] Available electronically here, accessed 15 May 2021.

[102] S. Wheatley, 'The democratic legitimacy of International Law*', Studies in International Law* (Hart Publishing, Oxford, 2010).

[103] H. Charlesworth, 'Democracy and International Law', 371 *Recueil des Cours. Collected Courses of the Hague Academy of International Law* (Brill, 2014), at 64.

[104] A. Sen, 'Democracy as a Universal Value' 10 *Journal of Democracy* (nº 3, 1999), at 3.

[105] G. Garzón Clariana and J. Cardona Llorens, 'Los propósitos y los principios de las Naciones Unidas', in M. Díez de Velasco, *Las organizaciones internacionales* (Ed. Tecnos, 16ª, 2010), at 186.

[106] Tunisia, Egypt or Libya are example of this despite recent setbacks.

 DOI: 10.17103/sybil.25.2

considered democratic[107].

In fact, in recent years, the consensus has been growing among States and there has been a growing convergence of national legal systems towards the democratic standards contained in international legal instruments[108]. In 1993, the great impulse that definitively linked human rights to democracy took place thanks to the holding of the 1993 World Conference on Human Rights. The Final Declaration and the Vienna Program of Action [109] confirmed, first of all, the right of self-determination of peoples, the interdependence of human rights and, therefore, the document declared the link between "democracy, development and respect for human rights and fundamental freedoms".

Years later, at the 2005 World Summit, all the governments of the world reaffirmed that democracy was a universal value, recognized their interdependence with the respect for human rights, and renewed their commitment to support democracy by strengthening the countries' capability to apply democratic principles and practices[110]. Similarly, as previously analysed, the overwhelming majorities within the United Nations General Assembly in favour of the approval of the resolutions related to *"strengthening the principle of genuine and periodic elections"* corroborate this extensive support for the democratic ideal.

According to Professor Mangas Martín in her Reception Speech as a full-time academic at the Royal Academy of Moral and Political Sciences[111],

> "International law in the last quarter century proclaims democracy and the rule of law as the breeding ground in which it is possible to realize human rights and, finally, peace"

As a consequence, it is feasible that we can currently speak of "democracy" as a guiding principle of the Public International Law, as well as "democracy" as a universal value. In this vision of democracy as a universal value of today's international society, it is essential to bring up the work of Ali Khan in which the author highlights that, in recent years, democracy has emerged as a universal value by virtue of which the peoples of the world aspire to make their governments responsible and replaceable[112].

On the contrary, other scholars —like prof. Crawford— emphasized the relatively thin enthusiasm for democracy in International Law and the fact that there was no legal obligation for States to be democratically elected. Moreover, the principles of territorial sovereignty and non-interference in the internal affairs of States have been and are readily invoked by non-democratic States to screen undemocratic governmental action from scrutiny. Crawford described his position as a "modified scepticism" about the role of the democratic principle in International Law [113]. Furthermore, paraphrasing Pastor Ridruejo, "the democratization value also encounters resistance and significant limits in certain states. In short, democratization finds only one possibility of incomplete and unsatisfactory realization in contemporary international law."[114] (Own translation). It is not difficult to find cases of countries that are not favourable to respect for democracy, which effusively defend the principle of sovereignty and non-intervention in order to perpetuate their undemocratic political

[107] As examples, 15-M Movement in Spain or Yosoy132 in México.
[108] A. Jarillo Aldenueva, *supra*, n. 27, at 742 ff.
[109] Approved in World Conference of Human Rights, on 25 June 1993.
[110] World Summit Final Document 2005, cit. A/RES/60/1, at 135-136.
[111] A. Mangas Martín, *supra*, n. 9, at 32.
[112] L. Ali Kahn, *A theory of Universal Democracy. Beyond the end of history*, (Martinus Nijhoff Publishers, 2003).
[113] J. Crawford, *supra*, n. 62, at 107.
[114] J. A. Pastor Ridruejo, 'Le Droit international à la veille du vingt et unième siècle: normes, faits et valeurs', 274 *RCADI* (1998), at 305.

 DOI: 10.17103/sybil.25.2

regimes or even systems whose democratic quality is in full decline.

However, to close the above exposition, we share with Mangas Martín the difficulty of denying the "ecumenism of the democratic model as rule of law and as an international obligation of the States"[115] in the current international society. As she continues:[116]

> "Although the substantial democratic system is variable, and there is no single definition or unique model, on the contrary, the standards of freedom, equality, human rights, political and union pluralism, free elections and submission to the law and the judiciary, these constitute its universal 'DNA'".

Consequently, we conceive "democracy" as a general trend, a universal value, a goal and a political commitment of the majority of the States and it rises as a guiding principle of the present international society. However, in the first decades of XXI century, democracy doesn't constitute a legally enforceable human right in most of the world, except in the cases of Western Europe and America; in the rest of the world, the principle of State sovereignty and the freedom to choose its own political, economic and social model prevail; at present, there is not a legal obligation to adopt a democratic system in International Law. Nevertheless, for its part, the right to political participation in democratic elections, despite it is not respected in some countries in the world, it is a legally enforceable human right for individuals and clearly binding for all the States that ratified the ICCPR, that are accepting the UN resolutions promoting the principle of fair and free elections and that are holding elections to elect its representatives. Finally, as a result of our study, despite the differences between the right to political participation in democratic elections and the right to democracy in legal terms, we can affirm that the right to political participation in democratic elections is contributing at different speed to the emergence of a right to democracy in various regions of the world. However, the emergence of a universal right to democracy does not seem very feasible in the next decades. The universalization of the right to democracy will continue to require a solid and constant commitment of most of States and international organizations (such as the UN and the organizations that carry out international electoral observation activities) in the promotion of democracy and electoral democracy at the national and international level.

(G) CONCLUSIONS

1. Article 25 of the ICCPR proclaims the right to political participation as universal, and constitutes a norm of general acceptance, a norm with *erga omnes* effect. The right to political participation in public affairs by the citizens is a mandatory right for States, and it is enforceable, from a subjective or individual point of view, before United Nations committees. However, in the beginning, there was no mention nor link of this right with the idea of democracy.

2. The principle of genuine and periodic elections proclaimed repeatedly by the UN General Assembly in many of its resolutions has become a basic principle of Public International Law for the promotion of the democratization of electoral processes and political systems; therefore, for the General Assembly, genuine and periodic elections and democracy were to become inextricably linked.

3. The original right to political participation of article 25 ICCPR has been transformed thanks to the work of the United Nations (and by the practice of many States) to develop and promote the "principle of free and fair elections" into a *"right to political participation in democratic elections"*.

[115] A. Mangas Martín, *supra*, n. 9, at 109
[116] *Ibid.*, at 110.

4. The transition process from the right to political participation to a right to political participation in democratic elections is also supported and developed by the international election observation activities. The most "comprehensive" and independent electoral observation missions (OSCE, EU and OAS) are essential in this transition process: they work as control mechanisms on the compliance of the right to political participation in democratic elections; they are developing "soft law" electoral standards; they are fostering democratic electoral practices worldwide; they are also promoting norms and standards for the holding of democratic elections; and finally, their reports are used as the basis for the adoption of reaction measures in case of non-compliance with international electoral rules.

5. In the current scope of International Law, we conclude that it exists a universal right to political participation in democratic elections as a legally enforceable human right for individuals and clearly binding for all the States that ratified the ICCPR, that accept the UN resolutions promoting the principle of fair and free elections and that are holding elections periodically to elect its representatives.

6. This right to political participation in democratic elections is acting as a stimulus for the emergence of a right to democracy in various regions of the world (mainly, in Western Europe and America).

7. Although the universal international instruments do not include "democracy" as a right of either peoples or citizens, democracy is becoming a guiding principle at the international level. The successive democratizing waves, the proliferation of electoral processes observed by international organisations, the United Nations resolutions in support of the democratization of international society and the Organization's own daily actions irreversibly lead to the proclamation of "democracy" as one of the aims and objectives of the United Nations and, therefore, of the states of the current international community.

8. As a consequence of this evolution, today democracy has emerged as a superior value of the international legal order and a guiding principle for States, individuals and international organisations in the current international community.

 DOI: 10.17103/sybil.25.2

the SPANISH YEARBOOK of INTERNATIONAL LAW

Transitional justice: some reflections around a misunderstood notion

Joana LOYO CABEZUDO*

Abstract: Transitional justice is a concept that, frequently, generates a huge rejection. The reason has to do with its consideration as a form of "extraordinary" justice in which, it is believed, the demands of the democracy or peace are the ones that should prevail. Consequently, it is thought that International Law does not have a role in these complex situations of transitions. However, as in the present work we are going to demonstrate, this conception of "transitional justice" is anchored in the past. In effect, nowadays, transitional justice is an integral form of justice -that applies in ambiguous "transitional" periods- and whose objective is to eradicate impunity and guarantee the rights of victims. What is more, the relation of transitional justice with International Criminal Justice is based on complementarity, due to the fact that criminal justice continues having a central role in transitional periods. In conclusion, the main objective of this work is to prove that it is erroneous to consider that transitional justice does not have a juridical basis and, as a consequence, that it only offers alternative mechanisms to deal with violations of human rights.

Keywords: transitional justice – international crimes – international justice – international criminal law – victims' rights

(A) INTRODUCTION: WHAT IS TRANSITIONAL JUSTICE?

Transitional justice is a notion that generates scepticism only by mentioning it.[1] But the truth is that are a lot of errors around what this justice really is.[2] What is more, this term is interpreted contradictorily.[3] For example: for some authors, transitional justice requires necessarily criminal measures;[4] whereas, for others, criminal justice is just the opposite from transitional justice.[5] Another intense debate has to do with the consideration of transitional justice as a "light" form of justice.[6] Even if this comparison has been critiqued by the Special Rapporteur on the promotion of truth,

Article received on 30 July 2021, accepted on 11 November 2021 and published on 31 December 2021

* Doctor in Public International Law, University of the Basque Country. Email: joana.loyo@ehu.eus

1 X. Philippe, "Les solutions alternatives et complémentaires à la justice pénale internationale : la justice transitionnelle exercée à travers les commissions vérité et réconciliation" in Institut de Sciences Pénales et Criminologie (ISPEC) et Centre de Recherche en Matière Pénal Fernand Boulan (CRMP), *L'actualité de la justice pénale internationale*, Colloque organisé par le Centre de recherche en matiere penale F. Boulan (CRMP) - Faculté de droit (Aix-en-Provence, 12 mai 2007). Sous la direction de Monsieur le Professeur Xavier Philippe et de Madame le Professeur Dominique Viriot-Barrial (Presses Universitaires d'Aix-Marseille, 2008), at 131.

2 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif, A/HRC/21/46, 9 august 2012, point 19.

3 A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009), at 538 [doi: 10.1093/law/9780199238323.001.0001]

4 W.A. Schabas, "Truth Commissions and memory" in F. Gómez Isa and K. de Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges* (Publicaciones de la Universidad de Deusto, Bilbao, 2006), at 657.

5 X. Philippe, "La justice transitionnelle : une nouvelle forme de justice *?", 14 L'Observateur des Nations Unies* (2003), at 123.

6 J.E Méndez, "Justicia de transición" in R. Escudero Alday and C. Pérez González (eds.), *Desapariciones forzadas, represión política y crímenes del franquismo* (Editorial Trotta, Madrid, 2013), at 13 - 14.

 DOI: 10.17103/sybil.25.3

justice, reparation and guarantees of non-recurrence (hereinafter, *Special Rapporteur*)[7] and the International Center for Transitional Justice,[8] it continues being one of the most extended error the field has to deal with. Due to these contradictions some specialists believe that the concept of transitional justice should be reconceptualized.[9] And this is the reason why the doctrine is facing an enormous debate around what transitional justice is or should be.

Taking into consideration that the field of transitional justice has been studied by experts from different disciplines,[10] that has evolved considerably[11] and that even the United Nations created the mandate of the *Special Rapporteur*[12] to promote its study, it is quite surprising that, currently, we continue without a minimally accepted definition of this term.[13] It is true that there are some great studies that have tried to delimit transitional justice. For example, it must be mentioned the Report published, in 2004, by the United Nations Secretary-General in which transitional justice is defined as:

> "(…) the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof."[14]

If we analyse this definition, we can reach to some interesting conclusions: transitional justice seems to be a "range of processes and mechanisms" (that can be judicial and non-judicial) and whose objective is to "come to terms with a legacy of large-scale past abuses". However, and if we focus on the mechanisms mentioned, we can appreciate that it only enumerates those measures, but it does not specificize what kind of justice it is.[15] What is more, from a legal perspective we should asked what is the role of International Human Rights Law or International Criminal Justice in these "range of processes".

Taking into consideration that the effectiveness of transitional justice requires common interpretations of its most fundamental concepts,[16] in our opinion, the field of transitional justice should clarify, at least, its basic notions.[17] That is: it should try to reach a consensus around the

---

[7] Report of the Special Rapporteur, *supra* n. 2, point 19.

[8] International Center for Transitional Justice, "What is transitional justice?", 2009, the online text can be consulted here.

[9] In this sense, it is interesting to read the volume 6, num. 3 of the *International Journal of Transitional Justice*, where the authors analyse the possibility of reconceptualizing "transitional justice". An explanation of this view is explained in: P. Riaño Alcalá, and E. Baines, "Editorial Note", 6:3 *International Journal of Transitional Justice* (2012) at 387 – 388 [doi: 10.1093/ijtj/ijs027]

[10] A great summary of this multidisciplinary works can be found at: L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice* (Cambridge University Press, Cambridge, 2013).

[11] To understand how the evolution of transitional justice has affected its conception we highly recommend the following work: P. McAuliffe, "Transitional Justice's Expanding Empire: Reasserting the Value of the Paradigmatic Transitions", 2:2 *Journal of Conflictology* (2011), at 32 – 44 [doiI: http://dx.doi.org/10.7238/joc.v2i2.1297]

[12] HRC, Res. 18/7, 29 September 2011. All the information around the mandate can be found here.

[13] The intense debates around this notion can be appreciated at: P. Arthur, "How `Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice", 31:2 *Human Rights Quarterly* (2009) at 359 [doi: 10.1353/hrq.0.0069]; P. De Greiff "Theorizing Transitional Justice" in M.S. Williams, R. Nagy and J. Elster (Eds.), *Transitional Justice* (New York University Press, New York and London, 2012), at 32.

[14] The rule of law and transitional justice in conflict and post-conflict societies Report of the Secretary-General, S/2004/616, 23 August 2004, point 8.

[15] A similar opinion is expressed by the followings authors: J. Bonet Pérez and R.A. Alija Fernández, *Impunidad, derechos humanos y justicia transicional* (Publicaciones de la Universidad de Deusto, Bilbao, 2009), at 98.

[16] Report of the Secretary-General, *supra* n.14, point 5.

[17] Even more, it should be differentiated from similar concepts such as "post-conflict justice" or "jus post bellum".

definition; the limits of each mechanism; the role of International Law; the relation with other international institutions such as the International Criminal Court; etc. Otherwise, transitional justice will continue being a misunderstood notion and, as consequence, the rights of victims that theoretically it guarantees will face multiple obstacles to have a total protection.

This is the reason why in the present work we have decided to focus on what we consider transitional justice should be taking into account the norms of International Law. We know that, sometimes, it is quite controversial to affirm that transitional justice must respect the Law; but, precisely because of it, it is worth saying just from the beginning that, effectively, transitional justice must respect the obligations of International Law.

In order to defend our point of view and achieve the objective previously mentioned, we will start the article by mentioning the evolution experienced by the field (due to the fact that some of the errors come from a conception of transitional justice that does not have a correspondence with the present moment); then, we will analyse what we mean by "transition" and by "justice"; and, finally, we will explore what is the role of International Law in the transitional process (analysing the rights of victims, the different mechanisms that we identify with transitional justice, its juridical basic and, at the end, the connection with International Criminal Justice). Only this way we will be capable to conclude if we are in front of a justice that promotes impunity or not and, consequently, we will be able to dismantle the errors that are around this conflictive notion.

(B) A NOTION ANCHORED IN THE PAST: THE CREATION OF THE FIELD

Even if it is difficult to identify the origins of transitional justice[18], it seems that, when the field was created, it only applied to the transitions from dictatorial societies to more democratic ones.[19] For this reason, transitional justice was sometimes defined as a field that dealt with violations of human rights committed by an undemocratic regime.[20] As such, the key question that authors set out in that epoch was the following one: "In these times of massive political movement from illiberal rule, one burning question recurs. How should societies deal with their evil pasts?".[21]

Curiously, there were two opposite answers to this question:[22] first, there was one group of specialists who believe that judgements were mandatory;[23] but, in other experts' opinion, judgments were not possible because they firmly believe that in transitional periods was necessary to forget the

---

To analyse the differences between them it is interesting to compare and contrast the following materials: J. Iverson, "Transitional Justice, Jus Post Bellum and International Criminal Law: Differentiating the Usages, History and Dynamics", 7:3 *The International Journal of Transitional Justice* (2013) at 413 – 433 [https://doi.org/10.1093/ijtj/ijt019]; L. May and E. Edenberg (Eds.), *Jus Post Bellum and Transitional Justice* (Cambridge University Press, Cambridge, 2013); M. Freeman and D. Djukic, "Jus Post Bellum and Transitional Justice" in C. Stahn and J. K. Kleffner (Eds.), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (Asser Press, The Hague, 2008), at 226 – 227.

[18] C. Bell, "Transitional Justice, Interdisciplinarity and the State of the `Field' or `non-Field'", 3:1 *International Journal of Transitional Justice* (2009) at 15 [https://doi.org/10.1093/ijtj/ijn044]; R. G. Teitel, "Genealogía de la Justicia Transicional", 16 *Harvard Human Rights Journal*, (2003), at 69 – 94 [http://dx.doi.org/10.14482/dere.44.7167]

[19] N. J. Kritz (Ed.), *Transitional justice. How emerging democracies reckon with former regimes* (United States Institute of Peace Press, Washington D.C., 1995); P. Arthur, Paige, *supra* n. 13, at 325 – 326.

[20] A. Boraine, "Transitional Justice" in C. Villa – Vicencio and E. Doxtader (Eds.), *Pieces of the Puzzle. Keywords on Reconciliation and Transitional Justice* (Institute for Justice and Reconciliation, South - Africa, 2004), at 67.

[21] R. G. Teitel, *Transitional Justice* (Oxford, Oxford University Press, 2000), at 3.

[22] J. Chinchón Álvarez, Javier, *Derecho internacional y transiciones a la democracia y la paz: Hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana*, (Parthenon, Madrid, 2007), at 280.

[23] J.E. Méndez, "In Defense of Transitional Justice" in A. J. McAdams, (Ed.), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame and London, University of Notre Dame Press, 1997), at 1.

past.[24] The tension between these two opposite views (sometimes represented as the justice *vs* democracy debate) characterize exactly the intense debate that impregnate the field and that, as time goes by, become one of its distinctive signals.[25]

If we analyze this debate from a legal perspective, in our opinion, the doctrinal disputes were quite surprising. In effect, the practice corroborated that the opinion that prevail was that justice had to give up in order not to put in danger the "transition" or the "democracy" and, as such, it seemed that the "restorative model" pursuit by truth commissions were the only option to deal with the systematic violations of human rights.[26] So it seems that, at least at the beginning of the field, it existed a huge discretion in order to decide which mechanism apply and, normally, the political considerations were the reasons that prevail when making that choice.[27]

However, taking into account that International Law imposed some obligations to states when human rights violations have been committed[28], the question should have been the following one: Did International Law admit this option? From a legal point of view, the answer, in our opinion, was no: it did not. But, as the practice of transitional justice demonstrates, in the first years of development of the field, the debate did not take International Law into consideration but, contrary, as we have said, the political considerations were the arguments that only prevail.[29]

If we take the Latin-American transitions as an example, we can appreciate that, generally, amnesties were widely approved and, consequently, justice processes were substituted for truth commissions[30] (this was classically represented as the truth *vs*. justice debate)[31]. The reason that prevailed to justify this option was that this decision was necessary to guarantee the "reconciliation" of the society.

Nevertheless, as it has been correctly argued, the use of words such as reconciliation can have

---

[24] I. Rangelov and R. Teitel, "Transitional Justice", in M. Kaldor and I. Rangelov (Eds.), *The Handbook of Global Security Policy* (United Kingdom, Wiley Blackwell, 2014), at 342 - 345.

[25] C. Turner, "Deconstructing Transitional Justice", 24:2 *Law and Critique*, (2013), at 194 [https://doi.org/10.1007/s10978-013-9119-z]

[26] R. G. Teitel, *supra* n. 21, at 11.

[27] R. Mani, "La reparación como un componente de la justicia transicional: la búsqueda de la `justicia reparadora' en el posconflicto" in M. Minow et al, *Justicia transicional* (Siglo del Hombre, Universidad de los Andes, Pontificia Universidad Javeriana - Instituto Pensar, Bogotá, 2011), at 161. However, as it has been said, it is true that existed some kind of similarities if we compare the different transitions of this period (Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif: A/HRC/36/50/Add.1 Report to the Human Rights Council on his global study on transitional justice, 7 August 2017, points. 5 – 23).

[28] This debate is going to be analyzed in the point D) of the present work. More, we are going to explain that even if this is the point that we support, in the doctrine exists great discrepancies about what the role of International Law should be in transitional justice processes. A great summary of the debate facing in the discipline could be found at: I. Forcada Barona, *Derecho Internacional y Justicia Transicional: Cuando el Derecho se convierte en religión*, (Civitas - Aranzadi, Navarra, 2011).

[29] R. Mani, Rama, *supra* n. 27, at 159. An excellent study of the status of International Law in this period is analyse by Roht-Arriaza in the following book: N. Roht – Arriaza (Ed.), *Impunity and Human Rights in International Law and Practice* (New York - Oxford, Oxford University Press, 1995).

[30] To acquire more knowledge around this kind of transitions: J. Chinchón Álvarez, *supra* n. 22.

[31] E. Muñoz Nogal and F. Gómez Isa, "Derechos económicos y sociales en procesos de justicia transicional: Debates teóricos a la luz de una práctica emergente", 30 *Revista Electrónica de Estudios Internacionales* (2015), at 8 [doi: 10.17103/reei.30.01]. However, it is important to highlight that, as the years go by, both amnesties and truth commissions as the unique mechanisms in a transitional justice process have been condemned by the Interamerican Commission and Court of Human Rights. An excellent study to read about the contribution of the Court and the Commission to the development of transitional justice can be found at: E. Mesquita Cela, "The contribution of the Inter-American Court of Human Rights to the development of transitional justice", 14 *The Law and Practice of International Courts and Tribunals* (2015), at 457 – 475 [https://doi.org/10.1163/15718034-12341302].

contradictory meanings.[32] For example: the resolution of the Security Council that created the International Criminal Tribunal for Rwanda believed that "the prosecution of persons responsible for serious violations of international humanitarian law […] would contribute to the process of national reconciliation and to the restoration and maintenance of peace".[33] But if we look at another key case of transitional justice, the South Africa case, we reach just the opposite conclusion due to the fact that, in this process, it was the establishment of the famous Truth and Reconciliation Commission the mechanism whose objective was to reconcile the society.[34] So the question is: does justice or truth contribute to the reconciliation of the society? In the end, what these opposite cases demonstrate is that ambiguous words such as reconciliation or peace can be easily tergiversated to achieve different objectives.

To sum up, in the first years of development of the field the rights of victims of human rights were massively and systematically vulnerated[35] and, in the end, impunity prevailed.[36] So, consequently, we can draw the first conclusion of our analysis: transitional justice seemed to guarantee a situation of impunity. What is more, in this period, the role of International Law or, better said, its capacity to have an influence in the design of transitional justice was purely insignificant.[37]

The problem with this affirmation is that, in our opinion, there still is a sector that firmly believe that transitional justice continues defending an impunity situation. In another words: that this conception of justice that we have just present continues nowadays. But the truth is that the field has developed and, as such, no longer characterizes it. In order to better explain this qualitative leap, we are going to focus in the section that follows what do we understand for "transitional" and, then, what "justice", in our opinion, is or should be.

(C) BREAKING DOWN THE CONCEPT

(1)The "transition" of the field

As we have said below, in the first years of development of transitional justice, the field only seemed to apply to transitions to democracy. However, as the years go by, this model of justice started to expand to other situations. Indeed, it reclaimed its application in situations in which an armed conflict took place,[38] into what was called "historical injustices"[39] and, also, to some other contexts in which systematic violations of human rights had simply occurred[40] (these last ones sometimes are called

[32] A great comparation of the different answers given can be read at : P. Truche, "Deux réponses africaines à des crimes contre l'humanité" in J.P. Marguénaud, M. Massé et N. Poulet-Gibot Leclerc (Eds.), *Apprendre à douter: Questions de droit, Questions sur le droit* (Limoges, Presses Universitaire Limoges, 2004), p. 775.

[33] SC, Res. 955, 8 November 1994, Preamble.

[34] Article 3 of the Promotion of National Unity and Reconciliation Act, No. 34 of 1995. Online here.

[35] W. Schabas, "Transitional Justice and the Norms of International Law", for presentation to the Annual meeting of the Japanese Society of International Law, Kwansei Gakuin University, 8 October 2011.

[36] C. Collins, *Post - transitional justice: Human rights trials in Chile and El Salvador*, (The Pennsylvania State University, USA, 2010), at 19.

[37] J. Chinchón Álvarez, *supra* n. 22.

[38] A complete study around the expansion of the field can be found at: T.O. Hansen, "The vertical and horizontal expansion of transitional justice: Explanations and implications for a contested field" in S. Buckley – Zistel et al. (Eds.), *Transitional Justice Theories* (Abingdon and New York, Routledge, 2014), at 105 - 124.

[39] F. Gómez Isa, "Historical Injustices" in L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice*, Vol. 1, (New York, Cambridge University Press, 2013), at 285.

[40] These situations normally involved the problems face by those states that suffer the consequences of terrorism as the following authors maintain: J. Bonet Pérez and R.A. Alija Fernández, *supra* n. 15, at 115; A. Álvarez Berastegi,

"conflicted democracies"[41]). Despite, the application of transitional justice to the classical situations of transitions to democracy continued having quite predominance[42]. More, the usage of the field also experienced some success in those states that made their transition to democracy in the past but, in those years, did not deal with the consequences of the violations of human rights committed during the dictatorship (a phenome that some authors attribute to what is called the "justice cascade"[43]).

As the *Special Rapporteur* has revealed, the contexts mentioned are very different from the original transitions to democracy.[44] What is more, it must also be taken into consideration that, when the expansion took place, the field was still developing.[45] This is the reason why the growth of the field made the concept of "transitional justice" even more ambiguous that it was before[46]. More, as it has been said, nowadays, the "transitional" concept does not make sense any longer.[47] Nevertheless, it is this word, precisely, what makes "transitional justice" so controversial.[48] In effect, there is a huge sector that believes that the justice that transitional justice offers is a "transitory" one. In another words: instead of attributing the "transition" word to the contexts, sometimes it is erroneously attributed to the justice one. Because of this, and before analysing what justice means, we consider it might be necessary to study with more detail one of the ambits of application just cited: concretely, the context of armed conflict[49], due to the fact that we are going to return to this ambit latter on.

It can be easily deduced that, in the middle of an armed conflict, a "transition" or a "political transitions" does not take place.[50] However, after the publication of a widely accepted *Inform* of the United Nations Secretary General the application of transitional justice to this kind of contexts has been widely consolidated.[51] Even more, the United Nations have promoted intensely the application

---

"Justicia transicional en estados democráticos: Uso y abuso de los límites conceptuales" in R. Jimeno Aranguren (Ed.), *Justicia transicional: historia y actualidad* (Aranzadi, Navarra, 2017), at 69 – 86. However, there also are other situations that can be agglutinated in this group.

[41] F. Ní Aoláin and C. Campbell, "The Paradox of Transition in Conflicted Democracies", 27:1 *Human Rights Quarterly* (2005), at 172 – 213 [https://doi.org/10.1353/hrq.2005.0001]

[42] What is more, for some authors these ambits continue being the "orthodox case studies": T.O. Hansen, "Transitional Justice: toward a Differentiated Theory", 13:1 *Oregon Review of International Law* (2011), at 3 [https://doi.org/10.1080/13642987.2019.1624538]. An example of those ones could be the transitions occurred in some Arabic states. For more information about them: K. J. Fisher, and R. Stewart (Eds.), *Transitional Justice and the Arab Spring* (London and New York, Routledge, 2014).

[43] K. Sikkink, *La cascada de la justicia. Cómo los juicios de lesa humanidad están cambiando el mundo de la política*, (Barcelona, Gedisa, 2016).

[44] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif: A/HRC/36/50 (Advance unedited version) Report to the Human Rights Council on transitional justice in weakly institutionalized post-conflict settings, 21 August 2017. If we compare the different contexts, we can appreciate that the only common element is that all the situations mentioned deal with massive, systematic and grave human rights violations.

[45] *Ibid*. That is: the notion of transitional justice, its mechanisms, the limits of International Law, etc., were not sufficiently fixed when this expansion occurred.

[46] *Ibid*.

[47] J.R. Quinn, "Whither the `transition' of transitional justice", 8:1 *Interdisciplinary Journal of Human Rights Law*, (2014-2015), at 63 – 80 [https://doi.org/10.1080/01419870.2019.1615629].

[48] L. Bickford, "Transitional Justice", in D.L. Shelton, (Ed.), *The Encyclopedia of Genocide and Crimes Against Humanity Vol. 3*, (USA, Macmillan, 2004), at 1045.

[49] The reason why we are going to choose the armed conflict one is just because, in the last years, this ambit has become the most important one. What is more, it is the context that, precisely, links transitional justice with International Criminal Justice (as we will explain at the end of the work).

[50] H. Van der Merwe and J. Brankovic, "Transitional Justice and Human Rights", in A. Mihr and M. Gibney, (Eds.), *The SAGE Handbook of Human Rights, Vol. 2*, (Thousand Oaks, CA, SAGE Publications, 2014), at 896.

[51] Report of the Secretary-General, *supra* n.14.

of the mechanisms of transitional justice to the situations of armed conflict,[52] irrespective of the completion or not of it. What is more, the recent transitional justice process created in Colombia (that took place in the middle of the armed conflict) made the application of this kind of justice to these ambits indisputable.[53]

Once it has been accepted that transitional justice also applies to situations of armed conflict, it is important to put special attention to the particularities of this kind of contexts. The reason is quite simple: it is relevant to take into consideration that, if we apply transitional justice while the armed conflict continues, it will be particularly difficult to demand, for example, the application of "justice" measures.[54] These difficulties can arise, among others, in the middle of peace negotiations. In effect, in these negotiations, the parties will be highly distrusted to accord the obligation to judge those ones who have committed crimes during the armed conflict; and this, precisely, is the reason why, in some experts' opinion, "at first glance, ongoing conflict and transitional justice seems conflictive concepts".[55]

In conclusion, the problem with transitional justice in the last years is that "accountability for past wrongs is being demanded in situations where there is no clear or consolidated political transition".[56] However, in our opinion, due to the relevance of the notion and the popularity that it has achieved we should continue using this concept in order to guarantee the rights of the victims of international crimes. Furthermore, it is important to highlight that the United Nations and other international organizations also use this word constantly.[57] So the problem should not be what a "transition" is but, instead, what we mean by "justice". A question that we are going to try to respond in the next section.

(2)The complex challenge of "justice" in transitional situations

As we have said at the beginning of the present work one of the most frequent errors in the field of transitional justice is to consider it like a "light" form of justice.[58] It is undeniable that transitional justice is a type of "justice" that applies in "transitional" periods. But, what kind of "justice" it is? Does it include criminal justice or it is just an alternative type of justice?

First of all, it must be said that the type of justice that transitional justice offers has created an intense doctrinal debate and, nowadays, there is impossible to find a consensus around what "justice" is or should be in the ambiguous periods of transition.[59] However, if we take into consideration that

[52] For example, from 2006 on, the United Nations published the "Rule of law tools for post-conflict states", that can be consulted here.

[53] However, at the beginning -that it is, when the concept of "transitional justice" started to apply to the Colombian case-, some experts mistrusted its used. For wider information of this case and the debates that generated its application: R. Uprimny y M.P. Saffon, "Usos y abusos de la justicia transicional en Colombia", 4 *Anuario de Derechos Humanos*, (2008), at 176 – 183 [doi:10.5354/0718-2279.2011.13511].

[54] J.E. Méndez and C. Cone, "Transitional justice", in S. Sheeran and S.N. Rodley (Ed.), *Routledge Handbook of International Human Rights Law* (London and New York, Routledge, 2013), at 771.

[55] K. Ambos, "Conflict (Ongoing) and Transitional Justice" in L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice, Vol. 1* (New York, Cambridge University Press, 2013), at 151 - 152.

[56] R.G. Teitel, *Globalizing transitional justice. Contemporary essays* (New York, Oxford University Press, 2014), at xiv.

[57] For example, it is interesting to analyzed the context in which the following resolutions apply: HCR, Res. 21/15, 27 September 2012, point 13. The same context can be appreciated in the following resolution: HRC, Res. 12/11, 1 October 2009.

[58] J.E. Méndez, *supra* n. 6, at 13 - 14.

[59] S. Vandeginste and C.L. Sriram, "Power Sharing and Transitional Justice: A Clash of Paradigms?", 17:4 *Global Governance*, (2011), at 490 [https://doi.org/10.1163/19426720-01704006]. In our opinion, one of the most recent study around the notion of transitional justice and one of the best one is: D.N. Sharp, *Rethinking Transitional Justice for the*

"different cultures have different understandings of what justice is, as well as different understandings of the relativity of justice modalities in post conflict situations"[60], the difficulties that this work entails are quite comprehensive.[61]

If we make a comparative study of what has been written about this topic, we can deduce one main conclusion: it is not only that the authors differ in the defense of what justice should be, but also that the positions that they maintain are completely contradictory and, as consequence, this has had an effect on the effective implementation of the transitional justice process.[62] For example: there is a clear doctrinal division between those who believe that transitional justice is an ordinary justice[63] and those who affirm without doubt that it is an extraordinary justice.[64] In our opinion, the debate around the ordinary or extraordinary nature of transitional justice is not relevant for the field. Instead, what can have some kind of significance is to elucidate if the justice that we can obtain from the mechanisms of transitional justice is retributive or restorative.[65] Only this way we will be able to concluded if transitional justice does vulnerate or not the obligations that derivates from International Law.

It is worth saying that, in the doctrine[66], it has surged with special intensity a clear claim: transitional justice should focus less in criminal matters and, instead, it should pay attention to local[67],

---

Twenty-First Century: Beyond the end of history (Cambridge University Press, Cambridge, 2018).

[60] M.C. Bassiouni, "Editorial", 8:3 *International Journal of Transitional Justice* (2014), at 336 [https://doi.org/10.1093/ijtj/iju020]. In similar terms: G. Dancy, "Impact Assessment, Not Evaluation: Defining a Limited Role for Positivism in the Study of Transitional Justice", 4:3 *International Journal of Transitional Justice*, (2010), at 355 [doi:10.1093/IJTJ/IJQ016].

[61] *Ibid*., at 367.

[62] The different points of view around the debate can be consulted at: P. De Greiff, *supra* n. 13, at 58 – 65; M. Phillips, "Justice - Seeking in Settler States: A Model for Thinking about `Justice' in Transitional Societies" in C. Corradetti, et al. (Eds.), *Theorizing Transitional Justice* (England, Ashgate, 2015), at 81 – 92; J. Webber, "Forms of Transitional Justice" in M.S. Williams, et al. (Eds.), *Transitional Justice* (New York and London, New York University Press, 2012), at 98 – 128.

[63] E.A. Posner and A. Vermeule, "Transitional Justice as Ordinary Justice", 40 *University of Chicago Public Law and Legal theory Working Paper* (2003), at 4. Online at: http://www.law.uchicago.edu/files/files/40.eap-av.transitional.both_.pdf

[64] M. Kamto, "Réflexions sur la notion de justice transitionnelle" in C. Mottet and C. Pout (Ed.), *La justice transitionnelle : une voie vers la réconciliation et la construction d'une paix durable*, Conference Paper 1/2011, Dealing with the Past - Series, at 33. Online here.

[65] Along with restorative justice, there are some other kinds of justice that have been created last years. Such as reparatory justice (R. Ursachi, "Reparatory Justice" in L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice, Vol. 1* (New York, Cambridge University Press, 2013), at 288), structural justice (K.K. Thomason, "Transitional Justice as Structural Justice" in C. Corradetti et al. (Eds.), *Theorizing Transitional Justice* (England, Ashgate, 2015), at 71 – 80), distributive justice (M. Bergsmo et al. (Eds.), *Justicia distributiva en sociedades en transición* (Oslo, Torkel Opsahl Academic EPublisher, 2012) or transformative justice (R. Mani, *supra* n. 27, at 201 – 202).

[66] The United Nations have also recognized that it is necessary to take into account the contexts and the local forms of justice. However, as it has been added, they must be compatible with the norms of International Law. For more information about it: Report of the Secretary-General, *supra* n.14, point 36; GA, Res. 40/34, 29 November 1985, point A.7; Office of the United Nations High Commissioner for Human Rights, Rule of Law tools for post-conflict states: Mapping the Justice Sector, New York and Geneva, United Nations, 2006 (HR/PUB/06/2), at 18. The relevant International Center for Transitional Justice does also apply the same point of view: International Center for Transitional Justice, *supra* n. 8.

[67] R. Shaw and L. Waldorf, (Ed.), *Localizing transitional justice: interventions and priorities after mass violence*, Stanford (Stanford University Press, 2010); K. McEvoy and L. McGregor (Eds.), *Transitional Justice from Below. Grassroots Activism and the Struggle for Change* (Oxford and Portland, Hart Publishing, 2008); D.N. Sharp, "Transitional justice and `local' justice" in C. Lawther et al. (Eds.), *Research Handbook on Transitional Justice*, (Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, 2017), at 142 – 158; N. Roth – Arriaza et al. "Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty", *19 Whittier Law Review*, 325 (1997), at 343 – 344 [doi: https://doi.org/10.1017/CBO9781139026406.002].

traditional[68] or alternative[69] strategies to deal with massive human rights violations. This "alternative" strategies are being assimilated to the justice given by Truth and Reconciliation Commissions and to the "traditional justice" of some communities.[70] In the end, what these positions reclaim is that justice should be adapted to the needs of each society[71] because, it is added, only this way can transitional justice have some legitimacy.[72] The truth is that this doctrinal revindication has had such a huge acceptation that has even been considered the "fourth generation of transitional justice".[73]

The consequences that derivates from the acceptance of this "fourth generation of transitional justice" or simply from the acceptance of alternative restorative methods to deal with human rights violations is that criminal justice can be put on hold. This is an option that seems quite probable due to the fact that, in some experts' opinion, "criminal justice is not, of course, the only form of accountability for atrocity".[74]

In "ordinary" criminal matters "restorative justice"[75] is having quite a great welcome. But if we translate the debate to the field of transitional justice the situation changes a bit. The main reason is that in transitional justice contexts the crimes that, normally, are committed are international crimes, that it is: genocide, crimes against humanity and war crimes. So, first, obviously, the crimes and their magnitude are different; and, second, the context in which the justice has to apply differs considerably

---

[68] R. Nagy, "Centralizing legal pluralism? Traditional justice in transitional contexts" in C. Sriram et al. (Eds.), *Transitional justice and peacebuilding on the ground: Victims and ex-combatants* (Routledge, London and New York, 2013), at 81 – 99; P. Manirakiza, "Customary African Approaches to the Development of International Criminal Law" in J.I. Levitt (Ed.), *Africa: Mapping New Boundaries in International Law* (Hart Publishing, Oxford and Portland, 2008), at 44 - 48; C. Brems and Schotsmans (Eds.), *International actors and traditional justice in Sub-Saharan Africa: Policies and Interventions in Transitional Justice and Justice Sector Aid* (Intersentia, Cambridge-Antwerp-Portland, 2015); B. Bennett et al. (Eds.), *African perspectives on tradition and justice* (Intersentia, Cambridge-Antwerp-Portland, 2012); M.O. Hinz and C. Mapaure (Eds.), *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa*, (Namibia Scientific Society, Windhoek, 2010); L. Huyse and M. Salter (Eds.), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (International IDEA, Sweden, 2008).

[69] S. Kemp, "Alternative Justice Mechanisms, Compliance and Fragmentation of International Law" in L. Van den Herik and C. Stahn (Eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden-Boston, Martinus Nijhoff Publishers, 2012), at 261 – 263.

[70] A. Tiemessen, "Judicial versus Nonjudicial Methods", in L. Stan and N. Nedelsky (Ed.), *Encyclopedia of Transitional Justice, Vol. 1* (Cambridge University Press, Cambridge, 2013), at 206.

[71] A.A. An-Na'im, "Editorial Note: From the Neocolonial `Transitional' to Indigenous Formations of Justice", 7:2 *International Journal of Transitional Justice* (2013), at 199 [https://doi.org/10.1093/ijtj/ijt012].

[72] P. Lundy and M. McGovern, "Whose justice? Rethinking Transitional Justice from the Bottom Up", 35:2 *Journal of Law and Society* (2008), at 291 – 292 [doi:10.1093/ijtj/ijm029]. A similar opinion is expressed by: C. Duggan, "`Show me your impact': Evaluating transitional justice in contested spaces",35:1 *Evaluation and Program Planning*, (2012), at 205 [https://doi.org/10.1016/j.evalprogplan.2010.11.001].

[73] D.N. Sharp, "Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice", 26:1 *Harvard Human Rights Journal*, (2013), at 152 [doi:10.1163/2210-7975_hrd-9944-3005].

[74] W.A. Schabas, and R. Thakur, "Concluding remarks: The question that still remain" in E. Hughes, et al. (Eds.), *Atrocities and international accountability: beyond transitional justice* (Tokio-New York- Paris, United Nations University Press, 2007), at 281. Even if it is true that justice is not just criminal justice, it is undeniable that criminal justice continues having a central role in transitional justice (P. Seils, "La restauración de la confianza cívica mediante la justicia transicional", in J. Almqvist and C. Espósito (Coords.), *Justicia transicional en Iberoamérica* (Centro de Estudios Políticos y Constitucionales, Madrid, 2009), at 21; M. Freeman, *Truth Commissions and Procedural Fairness*, (Cambridge University Press, Cambridge, 2006), at 10).

[75] But what is restorative justice? Even if, as it has been said, there is not a unique definition of restorative justice (C. Hoyle, "Can International Justice Be Restorative Justice? The Role of Reparations" in N. Palmer et al. (Eds.), *Critical Perspectives in Transitional Justice* (Cambridge - Antwerp - Portland, Intersentia, 2012), at 193; J. Phoenix, "Restorative Justice" in N.J. Young (Ed.), *The Oxford International Encyclopaedia of Peace, Vol. II* (Oxford University Press, Oxford, 2012), at 636) we can take as an example the definition given at the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (ECOSO, Res. 2002/12, Annex: Principios básicos para la aplicación de programas de justicia restitutiva en materia penal) that can be consulted here.

too. Just to put an example: maybe, after a war, the country has not had a well stablished judicial system able to manage all the juridical demands.

Noteworthily, the specialists that have studied the application of "restorative justice" to transitional scenarios seems to assume that the difficulties that these societies faces are exactly the same (but, as we know, they are not[76]). Nevertheless, there are only a few studies that focuses on the vicissitudes that cause the application of restorative measures to this kind of situations.[77] The rest of them, as previously said, only studies the mechanisms that we can identify with restorative justice.[78] Not to say that there are those who automatically put on the same level both modalities of justice; in other words: there is a tendency to assume that transitional justice and restorative justice are just synonyms.[79]

Even if the origins of transitional justice and restorative justice are not the same [80] and, consequently, it is not right to take both concepts as synonyms, the truth is that there is a wide doctrinal consensus when it comes to affirm that, in these contexts, justice has to pay attention to the reparation of victims and society.[81] What this positions mean is, consequently, that the punishment of the perpetrators is not so important and what really matters is to discover the true and to achieve reconciliation.[82] However, this is not only a doctrinal debate. In effect, like the recent case of Colombia demonstrates, the "restorative model" has started to have its place in transitional justice initiatives.

Actually, when the Peace Accord was signed, the parties to it accorded that the Especial Jurisdiction of Peace should apply restorative justice.[83] It is well known that, during the conflict of Colombia, international crimes were committed[84]. So, the question is the following one: it is possible to exclude criminal justice when international crimes have been committed? Does International Law allow that exclusion? We are going to answer to this question in the following point. But, first of all,

---

[76] K. Clamp and J. Doak, "More than Words: Restorative Justice Concepts in Transitional Justice Settings", 12 *International Criminal Law Review* (2012), at 340 [doi: 10.1163/157181212X648824].

[77] The following studies could be particularly interesting to acquired more knowledge around this topic: JJ. Llewellyn and D. Philpott (Eds.), *Restorative Justice, Reconciliation, and Peacebuilding* (Oxford University Press, Oxford, 2014); K. Clamp , *Restorative Justice in Transition* (London-New York, Routledge, 2014); S. Parmentier et al., "Dealing with the legacy of mass violence: changing lenses to restorative justice" in A. Smeulers and R. Haveman (Eds.), *Supranational criminology: towards a criminology of international crimes* (Intersentia, Antwerp-Oxford-Portland, 2008), at 335 – 356; C. Villa-Vicencio, "Transitional justice, restoration and prosecution" in D. Sullivan and L. Tifft (Eds.), *Handbook of Restorative Justice: A Global Perspective* (Routledge, London and New York, 2006), at 387 – 400.

[78] A critique of this comparison can be read at: G. Musila, *Rethinking International Criminal law: Restorative Justice and the Rights of Victims in the International Criminal Court* (LAP Lambert Academic Publishing, Germany, 2010), at 19.

[79] J. Sarkin, "Enhancing the legitimacy, status, and role of the International Criminal Court globally by using transitional justice and restorative justice strategies", 6:1 *Interdisciplinary Journal of Human Rights Law*, (2011 – 2012), at 88 [doi: 10.1163/22131035-00901001].

[80] R. Uprimny y M.P. Saffon, "Justicia transicional y justicia restaurativa: tensiones y complementariedades" in A. Rettberg (Comp.), *Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional* (Bogotá, Ediciones Uniandes, 2005), at 217.

[81] A. Buti, "Restorative justice", in M.C. Bassiouni, (Ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization and Post - Conflict Justice, Vol. 1* (Intersentia, Antwerp-Oxford-Portland, 2010), at 701.

[82] S.C. Carey et al., "Rebuilding society in the aftermath of repression", S.C. in Carey et al. *The Politics of Human Rights: The Quest for Dignity* (Cambridge University Press, Cambridge, 2010), at 213.

[83] Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera, signed 24 of November 2016, at 144. It is interesting to read also the articles 3 and 13 of the Ley No. 1957, de 6 de junio de 2019, "Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz".

[84] The preliminary examinations of the International Criminal Court have repeated it incessantly. All of them can be consulted here.

it would be interesting to study what does the International Criminal Court think about restorative justice (due to the fact that, as we will explain latter below, there is an undeniable link between transitional justice and International Criminal Court when international crimes have been committed).

It is true that International Criminal Court gives more attention to victims[85] that previous international criminal tribunals. In this way, it guarantees in some parts of the process (even with some limits)[86] their right[87] to participate in the proceeding[88], as well as their protection[89] and reparation.[90] What is more, the Court stablishes some organs whose function is to attend the demands of the victims.[91]

Taking into consideration the position of the victims in the Rome Statute, it has been affirmed that the recognition of victims' rights is central to the Rome Statute.[92] What is more, it has been considered a recognition of restorative justice in the work of the Court.[93] But, as some experts have correctly said, the justice that the International Criminal Court offers is predominately a retributive one (even

[85] The definition of victims can be found at the Norm 85 of the Norms of proceedings and proof of the International Criminal Court. To deepen the knowledge around the concept to victim and their position at the International Criminal Court we highly recommend the following works: E. Orihuela Calatayud, "¿Justicia restaurativa para las víctimas? El papel de la Corte Penal Internacional", in J. Soroeta Liceras, (Ed.), *Conflictos, Nuevos Colonialismos y Derechos Humanos en una Sociedad Internacional en crisis*, (Anuario de los Cursos de Derechos Humanos de Donostia- San Sebastián, Aranzadi, Navarra, 2013), at 42 – 58; H. Olásolo and A. Kiss, "El Estatuto de Roma y la jurisprudencia de la Corte Penal Internacional en materia de participación de víctimas", 12-13 *Revista Electrónica de Ciencia Penal y Criminología*, (2010), at 5 – 13.

[86] E. Orihuela Calatayud, *supra* n. 85, at 23 - 81.

[87] We must insist that the participation of victims, as it has been said, is a right recognized in the Rome Statute, and not a privilege (Report of the Court on the strategy in relation to victims of the Assembly of States Parties of the ICC, ICC-ASP/8/45, point 45). The Rome Statute was approved in Rome, 17 July 1998; and enter into force 1 July 2002, in accordance with article 126 [United Nations, Treaty Series, vol. 2187, p. 3; depositary notifications C.N.577.1998]. Actually, 137 states have firmed the Treaty and 123 are parties to it. All the information can be consulted here.

[88] Article 68 of the Rome Statute, Norms 89 - 93 Rules of procedure and evidence, Rules 86 and 87 of the Regulation of the Court; Report of the Court on the strategy in relation to victims, *supra* n. 87; ICC-OTP, Policy Paper on Victims' Participation, April 2010; RC/Res.2: The impact of the Rome Statute system on victims and affected communities (Adopted at the 9th plenary meeting, on 8 June 2010, by consensus). The result that the Court has reached has been described at: "Court's Revised Strategy in Relation to Victims", ICC-ASP/11/38, 5 November 2012; Report of the Court on the Revised strategy in relation to victims: Past, present and future, Assembly of State Parties, Eleventh session The Hague, 14-22 November 2012, ICC-ASP/11/40. What is more, an illustrative recompilation of the participation of the victims at the process is been realized at: Situation in the Central African Republic in the Case of The Prosecutor v. Jean-Pierre Bemba Gombo. Judgment pursuant to Article 74 of the Statute. ICC-01/05-01/08-3343, 21 March 2016, at 16 – 21; Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo. Judgment pursuant to Article 74 of the Statute. ICC-01/04-01/06-2842, 14 March 2012, at 15 - 22.

[89] Article 68 of the Rome Statute, rules 87 y 88 of the Rules of procedure and evidence, Regulation 41 y 42 of the Regulations of the Court.

[90] Article 75 of the Rome Statute; Rules 94 - 97 of the Rules of procedure and evidence, Regulation 88 of the Regulations of the Court.

[91] The organs are the following ones: Trust found for victims (art. 79 of the Rome Statute; ASP/1/RES.6: Establishment of a fund for the Benefit of victims of crimes within the jurisdiction of the Court); Victims Participation and Reparations Section (art. 43 of the Rome Statute); and the Office of Public Counsel for Victims (Rule 16.1b) c) of the Rules of procedure and evidence; Regulation 81 of the Regulation of the Court; Regulations 114-117 of the Regulation of the Registry).

[92] ICC-ASP/15/Res.5, 26 November 2016: Strengthening the International Criminal Court and the Assembly of States Parties, at 38.

[93] We highly recommend the declarations of Mr. Ban Ki-Moon, United Nations Secretary-General around this topic: "Una era de rendición de cuentas". Discurso ante la Conferencia de Revisión del Estatuto de Roma de la Corte Penal Internacional, Kampala, 31 May 2010. If interested, it is also interesting to read the following study: S. Kendall, "Restorative justice at the International Criminal Court", 70/2 *Revista Española de Derecho Internacional*, (2018), at 217 – 221 [http://dx.doi.org/10.17103/redi.70.2.2018.2a.02].

if we can find some components of restorative justice).[94]

Nevertheless, this is not the vision that the Court has of itself, due to the fact that it has made some affirmations where puts in valour its restorative function. Just as an example we should mention that it has been declared that "ICC is about much more than just punishing the perpetrators. The Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes".[95] Fernández de Gurmendi has also said that the Court offers a hybrid system[96] or even Von Habel has affirmed that it guarantees restorative justice to thousands of victims.[97] More, in some of the Decisions and Judgements of the Court it has been recognized its restorative function.[98] In conclusion, there seems that restorative and retributive justice have an important role to play in the work of International Criminal Court[99] and, in consequence, "under the Rome Statute, victims are actors of international justice rather than its passive subjects".[100] But, obviously, and as those declarations confirm, this does not mean that criminal justice can be excluded from the work of the Court.

So, if we take into account that even the International Criminal Court can offer a slight combination between retributive and restorative justice, the point is: Can we reach the same conclusion in the controversial field of transitional justice? To answer this question -and, consequently, to dilucidated the type of justice that transitional justice is-, we are going to analyze in the section that follows what is the role of International Law in the field. By completing this research, we are going to be able to conclude if retributive justice must always be part of a complete transitional justice strategy or not.

(D) THE RELEVANCE OF INTERNATIONAL LAW IN TRANSITIONAL JUSTICE

(1) The multiple rights of victims and the correspondence with transitional justice mechanisms

[94] E. Orihuela Calatayud, *supra* n. 85.

[95] ICC-OPT, ICC President tells World Parliamentary Conference "ICC brings retributive and restorative justice together with the prevention of future crimes", Press Release: 11 December 2012, ICC-CPI-20121211-PR860. Online at: https://www.icc-cpi.int/Pages/item.aspx?name=pr860. In a similar sense it is interesting to read the words said by Fernández de Gurmendi: "Justice for atrocity crimes, both retributive and restorative – taking into account the interests of the victims and affected communities – is an important factor for long-term stability in post-conflict societies" (ICC-OPT, International Criminal Court: 'Justice is key to durable peace', Press Release: 21 September 2015, ICC-CPI-20150921-PR1152. Online here).

[96] ICC - OTP, Judge Silvia Fernández de Gurmendi, President of the International Criminal Court, "International Criminal Court Today: Challenges and Opportunities", Keynote speech at Seminar "International Criminal Court – the Past, the Present and the Future", 9 June 2016, Helsinki, Finland. Online here.

[97] ICC - OPT, Herman von Hebel, Registrar, Remarks to the 15th session of the Assembly of States Parties, The Hague, 21 November 2016, at 11. Online here.

[98] Just to put an example, we can mention the following one: ICC - OTP, Dissenting Opinion of Judge Eboe-Osuji, ICC-01/09-02/11-863-Anx-Corr 27, November 2013.

[99] C. Van den Wyngaert Hon, "Victims before International Criminal Courts: Some views and concerns of an ICC trial judge", 44:1 *Case Westerns Reserve Journal of International Law* (2011), at 475 – 496; ICC - OTP, Assembly of State Parties, Report of the Court on the implementation in 2013 of the revised strategy in relation to victims, Twelfth session, The Hague, 20-28 November 2013, ICC-ASP/12/41; ICC Newsletter, Victims before the ICC, October 2004, at 7. Online here; Report of the Court on the strategy in relation to victims, *supra* n. 87.

[100] OTP, Strategic Plan 2019-2021, 17 July 2019, at 23.

One of the most distinctive features of transitional justice is that it offers a justice for victims.[101] For this reason, the mandate that created the figure of the *Special Rapporteur* also adopted a perspective that centre its work on the victims[102] (a line that has also been followed by some of the organs of the United Nations[103]).

So, it is without doubt that the current stage of transitional justice situates the victims at the centre of the process and guarantees its participation and protection.[104] The reason why the victims are just in the middle of the process of transitional justice is because of the rights they own.[105] Effectively, as the Special Rapporteur has affirmed:

> "What is indispensable, and what transitional justice measures seek to accomplish, is to recognize that the victim is the holder of rights. This entails not only the right to seek for avenues of redress that can assuage suffering but also to restore the victim's rights that were so brutally violated and affirm her or his standing as someone who is entitled to make claims, on the basis of rights, and not simply as a matter of empathy, or any other type of consideration".[106]

It has been recognized unanimously that victims have the right to justice, to know truth, to obtain reparation and guarantees of non-repetition.[107] If we analysed these multiple rights, we can reach to a simple conclusion that is shared by the majority of experts that work in the field: one action hardly will be sufficient to guarantee all of them. In another words: if the state, for example, investigates, judges and sanctions the responsible of the commission of the crimes, that action will not be sufficient because the victims own other rights that must be satisfied too.[108]

This is the main reason why it is said that, in transitional justice processes, the strategy must be "integral" or complete in order to satisfy all the rights previously mentioned.[109] That means that it is necessary to adopt a wider notion of "justice" that takes into consideration criminal justice but, also, does not exclude the restorative justice one.[110] Because of this, transitional justice should try to

[101] J. E. Méndez, "Victims as Protagonist in Transitional Justice", 10:1 *International Journal of Transitional Justice* (2016), at 1 – 5 [https://doi.org/10.1093/ijtj/ijv037].

[102] The Resolution that creates the mandate of the *Special Rapporteur* mentions this question and it has also been revendicated by this special procedure as can be seen at: Report of the Special Rapporteur, *supra* n. 2, points 54 – 57.

[103] The following documents, among others, justify the centrality of victims in transitional justice: Report of the Secretary-General, *supra* n.14, point 18; Guidance Note of the Secretary - General: United Nations Approach to Transitional Justice, point 6.

[104] To know more about the participation of victims in the process of transitional justice the following works can be consulted: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/34/62, 27 December 2016. And, in the doctrine, we highly recommended the following study: T. Bundschuh, "Enabling transitional justice, restoring capabilities: the imperative of participation and normative integrity", 9 *International Journal of Transitional Justice*, (2015), at 10 – 32 [https://doi.org/10.1093/ijtj/iju030].

[105] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif, A/67/368, 13 September 2012, point 61; it is interesting to read also the following studies of the Special Rapporteur: A/68/345, 23 august 2013, points 37 – 38 y 65 – 67; Report of the Special Rapporteur, *supra* n. 2, points 29 – 31.

[106] Report of the Special Rapporteur, *supra* n. 2, point 29.

[107] One of the strategics of the Special Rapporteur has been to make a deep study around each of the mechanisms of transitional justice and, specially, its juridical basis. The great results achieved by the Special Rapporteur can be consulted here.

[108] Report of the Special Rapporteur, *supra* n. 2, point III.D.22 – 23.

[109] *Ibid*.

[110] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greif, A/HRC/39/53, 25 July 2018, point 31.

achieve a holist justice[111], an integral justice[112] or, in the end, a wide notion of justice.[113] The main reason lies in that "the holistic approach to transitional justice affords a genuine opportunity for at least some accountability, some truth, some reconciliation and healing, some transformation and some reparations for victims".[114]

Nevertheless, it is important to highlight that even if we adopt a wider notion of justice the criminal justice must be included[115] (otherwise, and as we are going to see later, the state could violate International Law). In effect, as Odio Benito has affirmed, the restorative justice mechanisms are welcome, but it does not mean that the impunity of perpetrators ought to be guaranteed.[116] Therefore, transitional justice must try to reach to a combination of restorative and retributive justice all together.

In our opinion, this is precisely one of the most positive aspects of transitional justice and the main reason why we support its application: because the justice that transitional justice offers includes retributive and restorative justice and, in the end, it can guarantee a better response when human rights violations have been committed. Because of this, we agree with the definition given by Pablo de Greiff when he considers transitional justice as:

> "a strategy for the achievement of a familiar conception of justice to which countries in the area have adhered as manifested by their ratification of international instruments that ground and express rights to truth, justice, reparation, and guarantees of non – recurrence".[117]

As we have said at the beginning of the work, transitional justice incorporates different measures (judicial and extrajudicial[118]) in order to guarantee all the rights mentioned before. Even if the enumeration of mechanisms can differ considerable,[119] in our opinion, after the creation of the *Special Rapporteur* is correct to cite mainly four: justice measures, truth and reconciliation commissions, reparation programs and multiple measures whose objective is to guarantee the non-repetition of the violation of victims' human rights.[120]

All these measures should be applied complementarily. Put in other words: a transitional justice process should interrelate all the measures cited.[121] The reason resides in that each of the mechanisms

---

[111] A.L. Boraine, "Transitional Justice: a holistic interpretation", 60:1 *Journal of International Affairs* (2006), at 17 – 27; Y. L. Sooka, "The Politics of Transitional Justice" in C. L. Sriram and S. Pillay (Eds.), *Peace versus justice? The dilemma of transitional justice in Africa* (James Currey, UK-US, 2010), at 38.

[112] R. Mani, "Balancing Peace with Justice in the the Aftermath of Violent Conflict", 48:3 *Development* (2005), at 27.

[113] A. Boraine, *supra* n. 20, at 67.

[114] A. L. Boraine, *supra* n. 111, at 28.

[115] R. Uprimny and M.P. Saffon, *supra* n. 80, at 228.

[116] E. Odio Benito, "Posibles aportaciones del Estatuto de Roma a los procesos judiciales en las sociedades en transición", in J. Almqvist y C. Espósito (Coords.), *Justicia transicional en Iberoamérica* (Centro de Estudios Políticos y Constitucionales, Madrid, 2009), at 252.

[117] P. De Greiff, "Some Thoughts on Transitional Justice", 4 Middle *&* *East – North Africa e-bulletin* (2013), published by the Association for the Prevention of Torture (APT), at 4.

[118] Report of the Secretary-General, *supra* n.14, point III.8.

[119] However, the enumeration of measures of transitional justice is not always the same. For example, if we analyse the informs published by different organs of United Nations, we can achieve one unique conclusion: there are innumerable different measures to guarantee victims' rights. As an example, we can mention the following ones: Report of the Secretary-General, *supra* n.14, point III.8; HRC, *supra* n. 57, point 1; SC, Res. 1894 (2009) 11 November 2009.

[120] It must be highlighted that the name of the Special Rapporteurs makes reference to the four mechanisms of transitional justice. What is more, the expert has explained the basis of its mandate and the strategy that he will follow to apply it. The report in which this information is given is the following one: Report of the Special Rapporteur, *supra* n. 2.

[121] L. Moreno Ocampo, "Building a Future on Peace and Justice: The International Criminal Court" in K. Ambos et al. (Eds.), *Building a Future on Peace and Justice. Studies on Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin, Springer - Verlag, 2009), at 12; N.J. Kritz, "Progress and Humility: The Ongoing Search for Post - Conflict Justice" in M.C. Bassiouni (Ed.), *Post - Conflict Justice* (New York, Transnational

have its own limits and, consequently, complementarity is the key.[122] So, as it has been said, "each mechanism need not be taken as a whole. Rather, a portion of one or more may be used and combined with others".[123]

Even if it is some consensus around the necessity to achieve complementarity between the different measures the question, as it has been said, is how.[124] Nevertheless, there seems to be an acceptance around the impossibility to found a formula that applies to all the different scenarios in which transitional justice is demanded[125], due to the fact that the particularities of each state are unique.[126]

However, in our opinion, there are some common aspects that every state should respect. Effectively, as we are going to study in the following section, the juridical fundament of the mechanisms is founded in the obligations that comes from International Law[127] and, as consequence, the particularities of each state could not be taken as an argument to limit the application of International Law.

(2)The juridical basis of transitional justice

As we have said at the beginning of the present work, in the origins of the field, International Law did not play a significant role in transitional justice processes. However, the evolution of the field changed the attitude of promotors of transitional justice towards their legal obligations. And, nowadays, in our opinion, it is indisputable that there are a number of legal norms that must be respected and guaranteed in transitional justice.

There have been a lot of aspects that changed considerably the role of International Law in the application of transitional justice measures. However, and taking into consideration that it is not possible to analysed all of them, we would like to highlight just three relevant aspects: the creation of the International Criminal Court[128], the labour that United Nations did in the field,[129] and the relevant work made by the Inter-American System of Human Rights.[130] All of these organs have said

Publishers, 2002), at 59 - 60; C. Stahn, "La geometría de la justicia transicional: opciones de diseño institucional" in A. Rettberg (Comp.), *Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional* (Bogotá, Ediciones Uniandes, 2005), at 81 – 142; P.B. Hayner, *Verdades silenciadas: la Justicia transicional y el reto de las Comisiones de la Verdad* (Barcelona, Bellaterra, 2014), at 42. However, a contrary position can be read at: R. Friedman and A. Jillions, "The Pitfalls and Politics of Holistic Justice", 6:2 *Global Policy*, (2015), at 141 – 150 [https://doi.org/10.1111/1758-5899].

[122] P. De Greiff, "Algunas reflexiones acerca del desarrollo de la Justicia Transicional", *Anuario de Derechos Humanos* (2011), at 24 – 25 [doi: 10.5354/0718-2279.2011.16994].

[123] M.C. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, (Martinus Nijhoff Piblishers, Leiden - Boston, 2013), at 954.

[124] Report of the Special Rapporteur, *supra* n. 105, point 58, at 21.

[125] Report of the Special Rapporteur, *supra* n. 2, point IV.A. 49; HRC, *supra* n. 57, point 14; The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, S/2011/634, 12 October 2011, point 16; Guidance Note of the Secretary – General, *supra* n. 103, point 3.

[126] C.L. Sriram, *Confronting Past Human Rights Violations. Justice vs Peace in Times of Transition* (London and New York, Frank Cass, 2004), at 220; Office of the United Nations High Commissioner for Human Rights, Rule of Law tools for post-conflict states: Reparations Programmes, New York and Geneva, United Nations, 2008, at 2 (HR/PUB/08/1).

[127] J. Bonet Pérez and R.A. Alija Fernández, *supra* n. 15, at 13 – 30; I. Forcada Barona, *supra* n. 28, at 25 – 29; A. Bisset, *Truth Commissions and Criminal Courts* (Cambridge, Cambridge University Press, 2012), at 12.

[128] This point is going to be analyzed with great detail latter on in the part 3 of the present work.

[129] Report of the Secretary-General, *supra* n. 125, point 19, at 7. In a short work like this it is not possible to analyzed in great detail the relevant work made by the United Nations in the field. However, we would like to mention the great job made by the *Special Rapporteur*, due to the fact that he has systematized the work of the Organization. To learn more, we highly recommend to visit the official website of the Special Procedure here.

[130] International Center for Transitional Justice, *supra* n. 8. In a similar sense: M. Freeman, *supra* n. 74, at 9; Special

it simple: impunity must finish when human rights violations have been committed. But what is impunity?

The truth is that, sometimes, impunity goes in hand with the absence of criminal justice. But, actually, impunity does not arise uniquely if there is not criminal justice, due to the fact that impunity has a wider application.[131] In effect, we must take into consideration the definition provided in the "Updated Set of principles for the protection and promotion of human rights through action to combat impunity"[132]:

> "Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations".[133]

So, along with the bringing the perpetrators to justice, it is necessary to ensure the right to know the truth, to provide reparations to victims and to guarantee the non-repetition of the human rights violations. What is more, all the obligations are "mandatory, interrelated, non-hierarchical".[134]

Moreover, as the studies that have been made around the *Updated Set of principles* stress, transitional justice process should also follow the same objective.[135] Then, we can say that one of the most important conclusions that arises from this definition of impunity is that there is a plane coincidence between it and the measures that transitional justice offers.[136] In another words: as it has been concluded, the juridical basis of transitional justices lies in the different international conventions that continue being in force in transitional scenarios.[137] This is the reason why it is

---

Rapporteur, A/HRC/24/42, 28 august 2013, point 19.

[131] Principle 1. General obligations of States to take effective action to combat impunity.

[132] Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 february 2005. An excellent study around these principles can be found at: T. Van Boven, "Preamble" en F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018).

[133] Principle 1. General obligations of States to take effective action to combat impunity.

[134] N. Roht-Arriaza, "Principle 1: General obligations of States to take effective action to combat impunity" in F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018), at 47.

[135] Definition C): "Restoration of or transition to democracy and/or peace". A deep study around the different definitions that offer the Set of Principles can be read at: S. Krähenmann, "Definitions" in F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018), at 40 - 41.

[136] F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018).

[137] Cassese, *supra* n. 3, at 538 – 540. If we focus on the international obligation that imposes to States the duty to investigate, prosecute and punish human rights violations it should be noted that it can be deduced from various sources. On the one hand, there are several international treaties of universal scope that contain it. Thus, we can mention the Convention on the prevention and punishment of the crime of genocide (arts. 1, 5 and 6), the Convention against torture and other cruel, inhuman or degrading treatment or punishment (art. 2, 6.2, 12 and 7.1), the International Convention for the protection of all persons from enforced disappearance (art. 3, 10.2 and 11) or, in the field of International Humanitarian Law, the Additional Protocol I to the Geneva Conventions (art. 85.1). On the other hand, if we turn to International Human Rights Law, it is true that the conventions that make up this sector do not expressly refer to the obligation to investigate and prosecute the human rights violations that they regulate. However, this obligation derives from victims' rights to have an effective remedy that is provided, among others, in the Universal Declaration on Human Rights (arts. 8 and 10), the International Covenant on Civil and Political Rights (art. 2), the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 13), the American Convention on Human Rights (art. 25) or the African Charter on Human and Peoples Rights (arts. 1, 7 and 26). To sum up, the instruments cited contain, either directly or indirectly, an obligation that imposes on the States the duty to carry out investigations when human right violations have been committed. Nevertheless, as we would see latter on, this interpretation of international regulations is not unanimously

important to highlight that International Law is always applicable in transitional justice processes.[138] As a result, we firmly consider that transitional justice (when apply taking into consideration the standards of International Law) can be an excellent instrument to combat impunity.[139]

But, to reach that ambitious objective, it is essential that transitional justice combines the mechanisms cited and that each of them respects the standards stablished by International Law. Accordingly, the state must investigate, judge and sanction the persons responsible for the commission of human rights violations; must give reparations to victims; and, finally, must adopted guarantees of non-repetition.[140] However, the fundamental question is how to guarantee all of them.[141]

Before anything else would be recommendable to add that, even if this is the opinion that we partage, there are some experts that believe that there do not exist those obligations or that there must be some kind of flexibilization when they are applied to transitional justice scenarios[142] (sometimes arguing that what really matter is the achievement of peace[143]). In this way, it is also added that in transitional justice contexts "criminal justice often has to give way to broader peace interests."[144] Even if the debate between peace or justice should have ended a long time ago,[145] the truth is that, as these

defended.

[138] Office of the United Nations High Commissioner for Human Rights, Transitional justice and economic, social and cultural rights, New York and Geneva, United Nations, 2014 (HR/PUB/13/5), at 5. Consult also the international documents mentioned at note 147.

[139] This position has had a great acceptance in the United Nations, as these documents demonstrates: S/PRST/2004/34, 6 October 2004; SC, Res. 1674 (2006) 28 April 2006, at 3; Office of the United Nations High Commissioner for Human Rights, *supra* n. 138, at 7; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/68/362, 4 September 2013, point 93. We also highly recommended the work of: J. Bonet Pérez and R.A. Alija Fernández, *supra* n. 15, at 15 – 92.

[140] All those obligations cited are excellently analyzed in the reports published annually by the *Special Rapporteur*. In effect, the Special Rapporteur has made an incredible work in order to dilucidated the juridical basis of a transitional justice process. Due to the fact that it is not possible to analyze in a short work like this the reach of each international obligations, we must refer to the extend reports mentions that could be consulted at the Official website of the *Special Rapporteur* previously mentioned (*supra* n.129). Also, we would like to add that, in the doctrine, two of the more complete works in which the international obligations are analyzed are: J.E. Méndez, *supra* n. 6, at 13 – 30; J. Bonet Pérez and R.A. Alija Fernández, *supra* n. 15.

[141] Report of the Special Rapporteur, *supra* n. 105, point 58, at 21.

[142] One of the most incredible aspect in the literature of transitional justice is the position maintained by some authors in which this "flexibility" is defended. For example, the following works can be compare and contrast: K. Ambos, "El marco jurídico de la justicia de transición", in K. Ambos et al. (Eds.), *Justicia de transición: Informes de América Latina, Alemania, Italia y España* (Berlín, Konrad Adenauer Stiftung, 2009), at 23 - 129; C. Bell, "The `New Law` of Transitional Justice" in K. Ambos et al. (Eds.), *Building a Future on Peace and Justice. Studies on Transitional Justice, Peace and Development. The Nuremberg Declaration on Peace and Justice* (Berlin, Springer - Verlag, 2009), at 105 - 126; N. Dimitrijevic, "Normative Change and Transitional Justice" in L. Stan and N. Nedelsky (Eds.), *Encyclopedia of Transitional Justice, Vol. 1* (New York, Cambridge University Press, 2013), at 224 - 230; N. Turgis, *La justice transitionnelle en droit international* (Bruxelles, Bruylant, 2014), at 365.

[143] R. Uprimny Yepes et al., *Justicia para la paz. Crímenes atroces, derecho a la justicia y paz negociada* (Bogotá, Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2014), at 81; K. Ambos, "Principle 19. Duties of States with Regard to the Administration of Justice" in F. Haldemann and T. Unger, *The United Nations Principles to Combat Impunity: A Commentary* (Oxford Commentaries on International Law Series, Oxford, 2018), at 209 – 210; W.A. Schabas, (Chair), 'Truth Commissions, Accountability and the International Criminal Court, Commentary by William A. Schabas', in W. van Genugten et al., *Criminal Jurisdiction 100 Years After the 1907 Hague Peace Conference : proceedings of the eighth Hague Joint Conference held in The Hague, the Netherlands, 28-30 June 2007* (The Hague, TMC Asser, 2009), at 132.

[144] K. Ambos, Kai, *supra* n. 143, at 205 – 206.

[145] However, the United Nations have recognized that the debate is already over: Office of the United Nations High Commissioner for Human Rights, Rule of Law tools for post-conflict states: Amnesty, New York and Geneva, United Nations, 2009, (HR/PUB/09/1), at V. In the same line: Report of the Secretary-General, *supra* n.14, point II.2.

affirmations show, justice still has to face a lot of obstacles to find its place in transitional justice processes.

However, and as we have said above, the most recent studies and practice[146] make it clear that international obligations exists and, as multiple international instruments have stressed, they are also applicable in transitional justice scenarios.[147] What is more, these obligations are the same and must be applied equally in transitional processes.[148] Nevertheless, the question, as we have said before, is how,[149] due to the fact that the field has to deal with massive, systematic and grave human rights violations.[150] In effect, even if we admit that International Law must be respected in transitional justice processes, we are aware of the difficulties that surge and that, in some way, limits its absolute application.[151] For this reason, it is important to maintain a creative mind in order to offer the best juridical solutions that the complex transitional justice scenarios demand[152].

For all the reasons mentioned in this section, we believe that is fundamental to insist on two points: first, the main idea that we will like to highlight is that transitional justice does not go against International Law; contrary, it respects it and guarantees its application. And, secondly, transitional justice is based in a combination of mechanisms (whose juridical basis, as we have said, resides in International Law) in order to guarantee a broader response to combat impunity.[153] Consequently, states cannot decide which mechanism apply, due to the fact that compensation between mechanisms is not allowed.[154] To sum up, the relevance of transitional justice consists on the interrelated combination of the measures that it offers and that, in the end, make possible that states guarantee the observance of International Law. What is more, as we are going to explain in the last point that

[146] In this sense, it is important to highlight the Colombian case that it is going to be mentioned latter on. The importance of this case is that it is considered the most relevant transitional processes at the moment. What is more, it is fixing the legal basis that a transitional justice processes should respect. To learn more about this case the following study can be consulted: J. Loyo Cabezudo, "La justicia transicional en Colombia: ¿Un instrumento creado para erradicar la impunidad?", *Anuario Iberoamericano de Derecho Internacional Penal*, Vol 5, 2017 [doi: https://doi.org/10.12804/revistas.urosario.edu.co/anidip/a.5669].

[147] Report of the Special Rapporteur, *supra* n. 44, point 97; Report of the Special Rapporteur, *supra* n. 2, point 61; Report of the Secretary-General, *supra* n.14, points 9 - 10, p. 6; Office of the United Nations High Commissioner for Human Rights, *supra* n. 138, at 5.

[148] The following studies demonstrated that the international obligations continue being the same (even if the state is involved in a transitional justice process or not): J.E. Méndez, *supra* n. 6, at 14; T. Rincón, *Verdad, justicia y reparación, La justicia de la justicia transicional*, (Editorial Universidad del Rosario, Bogotá, 2010), at 25; J. Chinchón Álvarez, "Derecho internacional y `transformaciones del Estado': Del desuso, uso y abuso del ordenamiento jurídico internacional cuando de ciertas transformaciones que afectan a la forma de gobierno se trata" in J. Soroeta Liceras, (Ed.), *La eficacia del Derecho Internacional de los Derechos Humanos*. C*ursos de Derechos Humanos de Donostia-San Sebastián. Volumen XI* (Bilbao, Servicio Editorial de la Universidad del País Vasco/Euskal Herriko Unibertsitatea, 2011), at 86; N. Turgis, *supra* n. 142, at 547.

[149] Report of the Special Rapporteur, *supra* n. 105, point 58, at 21.

[150] Report of the Special Rapporteur, *supra* n. 44, points 56 – 58; Guidance Note of the Secretary – General, *supra* n. 103; ICTJ briefing, "Transitional Justice in the United Nations Human Rights Council", at 2.

[151] Some of those limits are mentioned in: "Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119" E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, point 48.

[152] To read more about the possible juridical solutions or alternatives that multiple transitional justice processes demand: J. Loyo Cabezudo, *Estudio de la Justicia Transicional desde el prisma del Estatuto de la Corte Penal Internacional: Especial referencia a las cuestiones de admisibilidad*, (Navarra, Aranzadi, 2020).

[153] Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity, by professor Diane Orentlicher (E/CN.4/2004/88) 27 February 2004, at 2.

[154] Report of the Special Rapporteur, *supra* n. 2, point III.D. 27. An idea that it is repeated in: Report of the Special Rapporteur, *supra* n. 105, points 60 y 81.

follows, even the International Criminal Court has accepted this wider vision to combat impunity[155] and, consequently, has finally adopted a favorable position towards transitional justice.

(3) International Criminal Justice and transitional justice

At first sight, it might sound quite rare to affirm that the relation between International Criminal Justice and transitional justice is a complementary one.[156] But the truth is that it is. The reason why these two ambits overlap is the following one: the contexts that "activated" the application of transitional justice are, normally, also the ones where international crimes have been committed[157]. Consequently, in theory, the International Criminal Court could exercise its jurisdiction[158] if the state concern does not investigate, judge and sanction the person responsible of committing them.[159] This is the reason why Schabas has argued that:

> "the Rome Statute of the International Criminal Court is today at the centre of the legal debate concerning transitional justice (…). The consequence is that it is now impossible for States to assess the transitional justice options that are best suited to their own needs, political context and historic development without taking into account the possibility that the Court will decide to involve itself based on a different evaluation of priorities and regardless of their concerns."[160]

It is not only that these two ambits overlap, but also that they need each other due to the limits that they both have. Effectively, the Court itself has recognized that its resources are limited and that is the reason why it has accepted that it is necessary a broader approach to combat impunity.[161] In the last years[162] it has also recognized that there exist complementary measures to criminal justice that can contribute to achieve this goal.[163] Concretely, the Court has made the following thought-provoking declarations:

> "As such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.
>
> "The Office notes the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap. The Office will seek to work with those engaged in the variety of justice mechanisms in any given situation, ensuring that all efforts are as complementary as possible in developing a

[155] International Criminal Court, Paper on some policy issues before the Office of the Prosecutor, September 2003 (ICC-OPT 2003), at 3.

[156] M.A. Drumbl, "The future of International Criminal Law and Transitional Justice" in W.A. Schabas et al., (Eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (England, Ashgate, 2013), at 531 – 545; S. Essomba, "Quelle complémentarité entre la justice transitionnelle et la justice pénales internationale?", 84 *Revue internationale de droit pénal*, (2013), at 181 – 204.

[157] As it is well known, the International Criminal Court is "a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions" (art. 1 Rome Statute).

[158] Read article 17 of the Rome Statute.

[159] This connection between the two has been revendicated by several organs of the International Criminal Court. Due to the fact that the concrete declarations are going to be cited latter on, we refer to the reader to the documents cited at notes 161 – 176 in order not to repeat them. In the doctrine it is also interesting to read the following works that sustain this position: J. Chinchón Álvarez, "El Derecho penal internacional en contextos transicionales" in A. Gil Gil and E. Maculan (Dirs.), *Derecho penal internacional*, (Dykinson, Madrid, 2016), at 465; H. Olásolo Alonso, *Derecho internacional penal, justicia transicional y delitos transnacionales: dilemas políticos y normativos*, (Tirant lo blanch, Valencia, 2017), at 303.

[160] W. Schabas, *supra* n. 35, at 11.

[161] ICC-OTP, *supra* n. 155, p. 3; Assembly of States Parties, tenth session, New York, 12-21 December 2011: Report of the Court on complementarity. ICC-ASP/10/23, 11 November 2011, at 8, point 35.

[162] The recognition of this combination of measures has followed the following years. For example, if interested it is relevant to consult: Resolution ICC-ASP/16/Res.6, 14 December 2017: Strengthening the International Criminal Court and the Assembly of States Parties.

[163] ICC-OTP, Policy Paper on the Interest of Justice, September 2007, at 7 – 8.

 DOI: 10.17103/sybil.25.3

comprehensive approach."[164]

It is interesting to verify that, when the Rome Statute Review Conference took place, complementary measures to criminal justice were also debated.[165] Concretely, it was considered that extrajudicial mechanisms (such as truth and reconciliation commissions or reparative measures) could be excellent complements to criminal justice.[166] But it is important to highlight that we are talking of "complements", not "alternatives" measures.[167] Nowadays, this concrete point of view has been confirmed by the recent practice of the International Criminal Court.[168]

In effect, the Court has made it clear that the Rome Statutes imposes an obligation to investigate, judge and sanction the persons responsible for committing international crimes and, as it has been added, during the transitional justice process this obligation has to be respected too.[169] So, actually, political arguments seem to have no place at the International Criminal Court, even if the state is implementing a transitional justice process.[170]

As it is well known, it has been the Colombian transitional justice process the initiative that has joined together the work of the International Criminal Court and the measures of transitional justice. Concretely, when the Colombian peace process was taking place, some organs of the Court made some of the most interesting declarations about this topic.[171] For example, it was said that transitional

---

[164] *Ibidem*.

[165] Review Conference of the Rome Statute of the International Criminal Court Kampala, 31 May – 11 June 2010, RC/9/11, at 5.

[166] Review Conference of the Rome Statute of the International Criminal Court Kampala, 31 May – 11 June 2010: RC/9/11, Annex V b): Stocktaking of international criminal justice Peace and justice, point 7.

[167] *Ibid*., point 33.

[168] First of all, it is relevant to say that, in the doctrine, a number of experts have studied the application of article 17 of the Rome Statute to alternative measures. However, due to the fact that it is impossible to study in detail all the juridical arguments that have been highlighted to support this point, we would like to refer to the following work where the debate is explained: J. Loyo Cabezudo, *supra* n. 152 (specially chapter 4). At this point, we just considered necessary to add that the Court has also analyzed this debate and has declared that if a State implements alternatives measures, the situation would be admissible: Pre-Trial Chamber II: Situation in the Islamic Republic of Afghanistan. Decision pursuant to Article 15 of the Rome Statute on the authorization of an investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019, point 79; Pre-Trial Chamber III: Situation in the Republic of Burundi. Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X–9-US-Exp, 25 October 2017. ICC-01/17-9-Red, 9 November 2017, point 181; Situation in the Republic of Côte d'Ivoire. Request for authorization of an investigation pursuant to article 15. ICC-02/11-3, 23 June 2011, point 51; Situation in the People's Republic of Bangladesh/Republic of The Union of Myanmar, Request for authorization of an investigation pursuant to article 15, ICC-01/19-7, 4 July 2019, point 233.

[169] Keynote speech by James Stewart, Deputy Prosecutor of the ICC: "La justicia transicional en Colombia y el papel de la Corte Penal Internacional". Conferencia organizada por: La Universidad del Rosario, El Tiempo, el Centro Cyrus R Vance para las Iniciativas de Justicia Internacional, la Fundación Hanns Seidel, las Naciones Unidas en Colombia, el Centro Internacional para la Justicia Transicional y la Coalición por la Corte Penal Internacional. Bogotá, Colombia, 13 de mayo de 2015; Mr. James Stewart, Fiscal Adjunto de la Corte Penal Internacional: "El rol de la CPI en el proceso de justicia transicional en Colombia", Conferencia organizada por el Instituto Max-Planck de Derecho Público Comparado y Derecho Internacional en Friburgo, la Universidad Externado en Bogotá y la Universidad EAFIT en Medellín. Bogotá y Medellín, Colombia, 30 - 31 de mayo de 2018.

[170] It is important to add that references to the "political" or "complex" situations that face the states are common in the doctrine. In another words: there are a high number of experts that interpreted that articles 16 and 53 of the Rome Statute could open the door to political considerations in the practice of the International Criminal Court. However, once more, the Court has simply declared that these arguments have no place in the Rome Statute, like the following documents corroborated: ICC-OTP, *supra* n. 163; ICC-OTP, Documento de política general sobre exámenes preliminares, 2013, pp. 18 – 19; Speech of Mrs Fatou Bensouda, Prosecutor of the International Criminal Court, Seminar Hosted by the Attorney General of the Federation and Minister of Justice of Nigeria: International Seminar on the Imperatives of the Observance of Human Rights and International Humanitarian Law Norms in International Security Operations. Abuja, Nigeria, 24 February 2014, p. 6.

[171] It worth saying that the Colombian process has been praised by some authorities of the Court. For example: James

justice must respect the Rome Statute,[172] due to the fact that the obligations that it imposes cannot be suspend or ignore because of opportunity reasons.[173]

However, the Court, obviously, is a criminal tribunal and, for this reason, it only focuses on the justice component of each transitional justice process.[174] Expressed differently: The Court only activates its jurisdiction if a state does not apply correctly the justice measures inside a wider process of transitional justice[175]. This does not mean that the rest of the mechanisms are not relevant, it just means that it is not the main focus of the Court.[176]

These declarations confirm what we have defend along this work: transitional justice does not go against International Law (or even International Criminal Law). What is more, criminal justice continues playing a central role in each and every transitional justice process. Otherwise, as we have seen, if international crimes have been committed, the International Criminal Court could activate its jurisdiction, even if the State applies effectively the rest of transitional justice mechanisms. In conclusion, International Law (and, specially, International Criminal Law) has a relevant role to play in transitional justice processes.

(E) FINAL REMARKS

As we have said at the beginning of the present article, transitional justice is a notion that, still, generates considerable misunderstandings among its objectives. Furthermore, the fact that we do not have a wide approved definition of it generates perhaps too much speculations about what really this ambiguous concept entails. Not only that, but it is important to take into consideration that the definitions around this kind of justice, more often than not, are even contradictory. This is the reason why, in our opinion, it is time to specify juridically what transitional justice really is.

As we have also highlighted, this uncertainty is hard to understand, due to the fact that transitional justice accumulates years of experience and, as we have seen, there also exist a special procedure in the core of the United Nations: the *Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*. So, the question we should ask ourself is why. In another words: why there are so many misunderstandings, indeterminacies and vagueness around what transitional justice is or should be? In our opinion, the answer may be quite simple: maybe there is not a political or practical intention to limit the contours of transitional justice.

Effectively, it is interesting to remember that, at the beginning of the field, states owned a huge discretion in order to decide which mechanism should be applied in transitional justice processes. More, International Law did not play such a big role in the election of the mechanisms and, for this reason, normally, criminal justice was simply avoided. Instead, truth and reconciliation commissions or even reparative measures took up its place. To sum it up all: the political considerations were the reasons that prevailed in the election of the form of transitional justice and, as such, it was correct to affirm that, in the end, transitional justice guaranteed a situation of impunity.

Stewart, *supra* n. 161, point 209.

[172] Keynote speech by James Stewart, *supra* n. 169, at 18 – 19.

[173] James Stewart, *supra* n. 169, point 68.

[174] *Ibid*., points 46 – 49.

[175] *Ibid*.

[176] *Ibid*.

 DOI: 10.17103/sybil.25.3

However, the evolution experienced in International Law does not permit this comparison any longer. And, as consequence, nowadays, transitional justice processes must respect the limits impose by International Law. Then, why the experts that work in the field of transitional justice seems so cautious to accept the actual juridical basis of transitional justice? Maybe the truth just is that states - and, in the end, the promotors of transitional justice- feel more "comfortable" if they do not have to deal with the limits impose by the Law. But, if we admit this situation, we are negating the rights of millions of victims that have suffered massive, systematic and grave human rights violations. What is more, we are tolerating perpetrators of this violations to simply enjoy an idle situation of impunity. Last but not least, we are implicitly recognizing a step back in the eradication of impunity; an objective that, in theory, was strongly welcomed in 1998 with the creation of the International Criminal Court.

For all the reasons mentioned, we have offered another angle to study the concept of transitional justice. One that, in our opinion, is based on International Law and, consequently, on the respect and guarantee of the rights of victims. From this perspective, we firmly believe that transitional justice cannot be a kind of "extraordinary" justice in which the Law has not a role to play and where the rights of victims must be "compensated" with the needs of the "transition" or even the "peace". This kind of "transitional justice", in our opinion, could go against the norms impose by International Law and, consequently, if adopted, the state concern could incur in international responsibility.

Therefore, we consider that transitional justice could by qualified as a "type" of justice whose objective is to eradicate impunity. The reason why we attribute this capacity to it is because it offers an integral combination of mechanisms (judicial and extrajudicial) that, if apply successfully and respecting International Law, can offer the most satisfactory answer when massive, grave and systematic human rights violations have been committed. Moreover, it is interesting to remember that the definition of impunity offered by the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* contemplates this comparison and, more, the studies that experts have made around them also support this position.

Effectively, as it has been highlighted, when we are in "transitional" periods, the violations that the judicial system has to dealt with are characterized for them gravity and systematicity. For this reason, it is easy to understand that the judicial system is not going to investigate all the violations. It is from this point of view that we defend that the juridical response must be completed in order to guarantee all the rights victims own (due to the fact that they are, basically, one of the pillars of transitional justice). But, of course, criminal justice must continue being one of the core mechanisms of an integral transitional justice process. Because of it, it is important to insist that retributive justice and restorative justice must go hand in hand in transitional justice processes. Therefore, it is important to put an end to those trends that consider that transitional justice and restorative justice are just synonyms.

Furthermore, as it has also been explained, all the mechanisms of transitional justice have its juridical basis in International Law. So, consequently, we can conclude that if we applied them respecting the norms impose by this sector of the legal system, transitional justice is not against the Law. What is more, maybe, in the future, it will contribute to reach the reconciliation of the society.

To sum up, transitional justice is not restorative justice, it is not an extraordinary justice and it is not an area that is against the Law (in general) and against International Law (in particular). Taking into consideration the ample sectors that firmly believe that International Law can be ignored or that it simply becomes more "flexible" in these contexts, it is important to emphasize that this is no longer

an option. Quite the contrary: transitional justice is a form of justice that combines multiple mechanisms (criminal justice, truth and reconciliation commissions, reparatory measures and guarantees of non-repetition) and whose legal basis is in International Law. If apply correctly, its objective could be the eradication of impunity, while it guarantees satisfactorily the rights of millions of victims that have suffered massive, systematic and grave human rights violations.

As we have just said, transitional justice has a firm commitment with the eradication of impunity and, for this reason, in recent years it has also had the approval of the International Criminal Court. This is one more reason that helps us to maintain, first, our bet in favor of the benefits that derives from an integral transitional justice process; and, second, helps us to defend that transitional justice does not oppose to International Criminal Justice. To put it simple: when international crimes have been committed, probably, the ambit of application of transitional justice and International Criminal Justice will overlap. So, sometimes, the situations the International Criminal Court is going to deal with could be define as transitional justice processes (as the Colombian cases probes). In these situations, the obligations imposed by the Rome Statute must be respected and, consequently, transitional justice could not guarantee a "legal haven".

However, we must recognize that, especially in transitional justice periods, criminal justice has its limits. So, it is time to open our minds and try to find more creative and effective ways to, in the end, guarantee the rights of victims. Only this way (and not by empty words) the International Community is going to prove that is committed with them and will recognized that, as the Preamble of the Rome Statute says, "have been victims of unimaginable atrocities that deeply shock the conscience of humanity". We know that transitional justice it is not going to be the panacea, but, maybe, it can offer a more satisfactory response when it comes to dealing with these complex situations.

 DOI: 10.17103/sybil.25.3

the SPANISH YEARBOOK of INTERNATIONAL LAW

The Paradox of Global Norms

Caterina GARCÍA, Pablo PAREJA & Ángel J. RODRIGO *

(I) INTRODUCTION

The need to create global rules to address global problems or challenges (climate change, international migration, biodiversity reduction, activities in cyberspace and even outer space), to protect global common resources and to provide global public goods is increasingly pressing. However, this demand contrasts with an international practice in which it is complicated and sometimes very difficult to adopt new global norms. This is a critical paradox as global norms are more necessary than ever but at the same time more difficult to adopt. Describing, understanding and explaining this paradox was the aim of the research project on *The creation of global norms: between soft cosmopolitanism and the revitalization of Westphalia* that was developed by a group of researchers at the *Universitat Pompeu Fabra* between 2017 and 2021. This group is characterized by two features. The first is its international composition, as its members come from six different nationalities. The second is its interdisciplinary approach, mostly combining International Law and International Relations. This interdisciplinary perspective is a feature that has characterized the group for many years and which, we believe, provides mutual benefits both to the members of the group and to the resulting work produced by each of them.

The purpose of this paper is twofold: on the one hand, it seeks to provide a synthesis of the preliminary work developed to facilitate the design and implementation of the research project[1]; on the other hand, it aims at introducing and contextualizing the different case studies included in this Forum.

Attempting to understand, describe and analyze the paradox resulting from the growing need for global norms and the reluctance or inability of international actors to adopt them requires three complementary components: first, to build a common understanding of global norms; second, to contextualize the process of creation and its difficulties in an international community in which two underlying trends —soft cosmopolitanism and a certain Westphalian resurgence in international relations— coincide and coexist; and, finally, to identify some of the hypotheses on which the project is based and which need to be confirmed, refuted or nuanced.

(II) A BROAD CONCEPTION OF GLOBAL NORM-SETTING

The project was based on a broad conception of the notion of global standard-setting. Such conception has the potential to be more effective because it allows for the plural, different approaches that the participant members may have. In essence, it is characterized by the following features (C. Brölman & Y. Radi, 2018, p. 2):

1. The notion of norms does not necessarily require a binary classification between law and non-law. In International Relations, the concept of Global Norms refers very broadly to "shared expectations or standards

* Professor and Associate Professors of Public International Law, University Pompeu Fabra.

1 C. García, P. Pareja & A.J. Rodrigo, *La creación de normas globales: entre el cosmopolitismo* soft *y el resurgir de Westfalia*, Orbis Working Papers, 2019/08.

 DOI: 10.17103/sybil.25.4

of appropriate conduct accepted by states, international governmental organizations and/or non-governmental actors of various kinds" (Khagram, Viker & Sikkink, 2002). In legal science, it is possible to understand legal normativity as a sliding scale (Ch. Chinkin, 1989, p. 850), in which a gradation of legal effects can be identified. This conception can help to examine more formalized rule-making processes (international treaties), but also others in which general rules of conduct are adopted (e.g. codes of conduct or draft conclusions).

2. The term norm-setting encompasses a variety of norm-setting procedures and processes. Four avenues of global norm-setting can be identified: a) legal norm-setting, b) multiple stakeholder initiatives, c) global policy networks, and d) transnational advocacy coalitions (Martinsson, 2011).

In the case of legal norm creation, these include: a) Formalized procedures of international legal norm creation such as international treaties or resolutions of international organizations; b) Other diffuse processes of interaction between legal actors such as standards, codes of conduct, etc.; and c) Social processes in which legal consequences can be induced from certain social practices (international custom).

3. The term global includes normative activity that transcends national legal borders. In addition, it is not limited to the classic inter-state framework. Finally, it helps to incorporate, even tacitly, the aspiration for universality of norms that seek to regulate and protect the global public interest and cosmopolitan values that have an undeniably global dimension.

4. The progressive blurring of the boundaries between diffusion and change of and in norms. Along with the above features, the notion of global norm setting is also characterized by the gradual interpenetration and reconstitution of the processes of diffusion and change of global norms. Diffusion refers to the process by which the observation and acceptance of particular norms spread beyond the group of actors proposing them and attain a universal or near-universal dimension. In contrast, change refers to the process through which norms undergo variations with respect to factors such as their level of precision or their scope, and which may result either in the transformation (or adaptation) of existing norms or in their replacement by different, new ones. Although these two processes are distinguishable from a theoretical point of view, in practice the two of them not only run simultaneously, but also maintain an intense relationship of reciprocal influence that informs their development.

(III) THE COEXISTENCE OF SOFT COSMOPOLITANISM AND WESTPHALIAN REVIVALISM

The analysis of the creation and transformation of global norms takes place in an international context characterized by the coexistence of two processes that, in part, can be seen as opposing signs: on the one hand, the advance of a soft cosmopolitanism that has not yet taken hold but has proved more resilient than some of its critics predicted at the beginning of the 1990s; and, on the other, the more recent resurgence of discourses and behaviors close to a partially weakened Westphalian model that seeks to regain space. This Westphalian model is accompanied by state behavior described as a "return to geopolitics" (Mead, 2014, Guzzini, 2013), which adopts foreign policy models typical of realist power politics and moves away from liberal models and conceptions of international order.

The tension between these two processes or phenomena has multiple and profound repercussions on international relations in the constitutional order built since the Second World War, and on international law as one of its fundamental institutions (García & Pareja, 2016). However, it is in the processes of normative construction where its effects are most evident in the short term, making them privileged scenarios for analyzing and understanding the potential impact of this tension in the medium and long term. Hence, the content of the project was delimited and informed by the two aforementioned trends: a) the advance of soft cosmopolitanism and the consequent articulation of global norms and a truly public international law; and b)

the revitalization of the Westphalian model, the re-emergence of the state and the defense of the classical version of state sovereignty and its translation into behaviors based on geopolitical conceptions.

(1) The advance of soft cosmopolitanism, the advance of other mechanisms of global governance and the consolidation of a public dimension in international law

(a) *The advance of soft cosmopolitanism*

Following decades of neglect, cosmopolitanism burst into the theoretical reflections of the social and legal sciences after the end of the Cold War. This was helped, on the one hand, by the realization of the global and transnational nature of some of the main challenges facing contemporary international society and, on the other, by an awareness of the need to create patterns of global governance in order to manage them effectively. The resulting "cosmopolitan turn" entailed the abandonment -politically and intellectually- of the limitations of the national imaginary, as well as the embrace of ideological, political and legal developments that question the supremacy of state sovereignty and claim the tension between human rights and states' rights (Beck, 2005). In their early days, many of these developments were strongly influenced by a liberal conception of the state and the liberal order in which global governance replaced the state (Krieger, 2017). Over the years, however, resistance to this shift has led to continuous back-and-forth, and rhetorical advances have often been followed by sharp reversals in the political-practical sphere. It is not surprising, then, that a kind of soft cosmopolitanism has gradually taken hold.

This cosmopolitanism is characterized by three main features. The first is its asymmetrical or variable level of rootedness in different regions of the world. Although it is more firmly established among Western countries and somewhat less so in most emerging powers, the differences within each of these groups are notable and it seems imprecise to speak of more or less cosmopolitan regions. The second is the existence of a gap between the rhetorical defense of cosmopolitan principles and their translation into specific, precise norms, a gap that partly reflects the conception of the cosmopolitan corpus more as an ideal or source of inspiration than as a programmatic guide. The third is its commitment to reconciling the preservation of the state and its interests as central elements of international society with the gradual articulation of mechanisms and instruments that respond to the cosmopolitan will to offer universal, general and individual-centered responses (Gallaroti, 2010).

(b) *The advance of global governance' mechanisms: the international liberal order*

From the ideas, principles and approaches associated with this soft cosmopolitanism sponsored by international actors and institutions emerge global governance projects that can be understood as part of a long-term process or a long-term trend. These global governance mechanisms are embedded in the international order built after the Second World War, an order that combines contractual elements with others of a hegemonic nature. The essence of this international order can be summarized in five convictions (Ikenberry, 2018: 11). First, a strong preference for openness: trade and exchanges are not only perceived as two defining features of today's global society, but also as two factors that promote economic development, peace and the advancement of democracy. Second, a strong commitment to a system of international relations based on the observance and enforcement of an evolving set of principles, norms and rules. Third, a widespread belief in the need to maintain a minimum level of security cooperation to ensure the survival of the actors and the system they comprise. Fourth, the conviction that the current international order is flexible and correctable, that is, capable of adapting to the changing circumstances and demands of the international system that underlies it. Finally, a deep hope that this order embodies an idea of progress that contributes to the advancement of liberal democracy across the globe.

The emergence and advancement of new mechanisms of global governance has been facilitated in recent years by the transformation of the international order, a transformation that has given rise to a "decentralized or center-less globalism" (Buzan and Lawson, 2015: 273-304). Barry Buzan and George Lawson suggest that we now live in an international society in which regions occupy a central position and in which there are no

 DOI: 10.17103/sybil.25.4

longer undisputed superpowers. They also believe that we are moving towards an international order characterized by five elements: firstly, the diversity and diffusion of power among a wide range of actors, both state and non-state; secondly, the overlapping and interpenetration of multiple forms of interaction that transcend classical inter-state international relations; third, the coexistence of a wide range of domestic governance models and organizational practices; fourth, the replacement of US/Western hegemony by a decentralized or polycentric system; and finally, fifth, the progressive weakening of the conception of liberal values as universal values.

(c) *The consolidation of a public dimension within International Law.*

This process of advancing soft cosmopolitanism has been accompanied by the creation of global governance mechanisms that have contributed to the evolution of the international legal order. In this regard, and in order to better organize and regulate the cosmopolitan interests and values shared in the world system, several fundamental legal norms have been adopted that limit the power of states, recognize the rights and freedoms of individuals, allow for accountability for violations of these that constitute crimes against humanity, and protect the general interests of international society. Their impact on global society and international law has been explained by different doctrinal currents through international constitutionalism (Peters, Klabbers and Ulfstein, 2009), global administrative law (Kingsbury, 2005), perspectives such as International Public Authority (Von Bogdangy et al. 2010) or through the International Rule of Law (Nolte and Krieger, 2016).

Together with other factors, the challenge of soft cosmopolitanism to classical public international law has contributed to its evolution towards a truly public international law (Casanovas, 2015, Rodrigo, 2019, and Casanovas and Rodrigo, 2021). This legal order now has a public dimension that is characterized by four elements. First, it is a public international law because one of its primary purposes is the protection and regulation of the general interests of the international community, of the global public interest (Bouza, García and Rodrigo, 2015). Secondly, it is a public international law that has seen its classic functions increased to also include that of regulating and protecting the general interests of the international community by means of new types of rules, public interest rules (Huesa, 2015; Delbrück, 1997; Rodrigo, 2019), and international obligations (obligations of integral structure and interdependent obligations) that have given rise to a community structure in the international legal order. Third, the international legal order has become an inclusive international legal system that allows for the participation of non-state actors at certain levels and in certain spaces (MacCorquodale, 2004). Fourthly, the global public interest is regulated and protected by public interest norms that operate within the framework of general international regimes (Casanovas and Rodrigo, 2021); it is therefore a genuinely public international law because it not only regulates relations between public entities (states), but also protects and regulates the public interest of the international community as a whole. Finally, public international law is characterized by the fact that it is a more complex and more mature legal system than its previous version, because it performs a greater number of functions and because, in addition to its traditional structure, it also has a community structure, which now has an increasingly complete community toolbox that allows it to maintain its formal and material unity.

In addition to the evolution of classical public international law towards a truly public one, soft cosmopolitanism drives the creation of global norms, understood as standards of conduct, which apply to transnational identity groups and which, although they do not always create legal rules and principles, help to establish norms and expectations of conduct. In other words, they introduce cosmopolitan elements into the liberal international order.

(2) The revival of the Westphalian model: the return of geopolitics, the re-emergence of the state and the defense of the classical version of state sovereignty

In contrast to the advance of transformative soft cosmopolitanism and the crystallization of a public dimension within International Law described in the previous paragraphs, the last decade has also witnessed a

revitalization of Westphalian conceptions of reality and the international legal order. Thus, the onset of the global economic crisis in 2007 and the subsequent political, economic, social and legal responses offer some signs of a possible change of trend or, at least, of the end of the belief in the existence of linear progress in international relations, international law and history (Peñas, 2012), from euphoria and confidence in progress to contestation (A. Wiener, 2014).

(a) *The revival of Westphalia and the return of geopolitics*

Andrew Hurrell has recently identified three possible signs of a possible 'change of cycle'. The first is the so-called 'return of geopolitics', evident in conflicts as diverse as Syria, Crimea, the South China Sea and eastern Ukraine. This return alludes to the growing weight of geostrategic considerations or realistic calculations in the international strategies of the great powers, the emphasis on the material sources of power and the return to conceptions of international reality that equate it with a system in constant competition. The second sign refers to the "shifting legitimacy problem arising from changes in the international distribution of power and the slowness with which these are reflected in the processes of international cooperation/negotiation", a problem whose effects are particularly reflected in the construction of norms in the international arena. Finally, the third sign concerns the 'power shift' in the world, a power that is shifting away from the core of the Western industrialized world (Hurrell, 2017), becoming increasingly fragmented and distributed among more actors and authorities of different natures (Acharya, 2014).

The factors that feed these signs or indicators of change are of a different nature: some consist of a change in economic conditions (rise of China, global financial crisis, evolution of the situation of the middle classes in developed and developing countries, etc.); others reflect changes in domestic political conditions (Trump's presidency in the United States, Brexit, populism in European countries, etc.); still others reflect changes in domestic political conditions (Trump's presidency in the United States, Brexit, populism in European countries, etc.); still others reflect changes in the political situation in Europe and the United States (Trump, Brexit, populism in the United States, etc.). These and other factors like the recent Covid-19 pandemic have favored the return of geopolitics, which has put territorial issues, power relations and threats of the use of force back at the center of the international agenda (Mead, 2014; Drezner, 2021). The revival of geopolitics has ultimately led to a re-securitization of the international relations agenda, which has been explained, rather than for deterministic reasons, by the identity crises of the main actors in international relations (Guzzini, 2013).

(b) *A shift in the redistribution of power: the re-emergence of the sovereign state*

The sum of these factors not only challenges the advance of soft cosmopolitanism, but also produces a redistribution of power in international law (Burke-White, 2015; Nolte and Kieger, 2016) that marks the end of the transatlantic moment and alters the processes and content of international law. These changes are structural and substantive. The new power structure can be synthesized in three essential features: power is diffuse, disaggregated and asymmetrically distributed. These characteristics result in a system that is not unipolar, bipolar or multipolar, but rather a complex multipolar system (García Segura 2014) or a multi-hub system (Burke-White 2015), which stimulates pluralism and drives some processes of international law.

From a substantive point of view, on the other hand, the growing influence of emerging powers has not translated into a rejection of the liberal international order, nor of public international law of which it is a fundamental element, nor into a clear break with the dominant transatlantic vision. The attitude of the so-called BRICs is illustrative in this respect: often accused of being subversive or even antagonistic (subversive leaders), their positions over the last decade vis-à-vis the evolution of the international legal order towards a genuine public international law make them pro-status quo states (García, 2017 & 2019). They have become active supporters of Westphalian norms, leaving behind their traditional role as passive supporters (Sun, 2013).

 DOI: 10.17103/sybil.25.4

(IV) PROJECT HYPOTHESIS

The hypotheses on which the project has been built and on which confirmation and/or refutation has been sought are five:

a) The advance of soft cosmopolitanism is an established reality that, despite the challenge posed by the resurgence of Westphalian conceptions, has permeated contemporary international society and is more resilient than its detractors seem to recognize. Moreover, there is growing support among different members of the international community to the idea that many problems and challenges have a global dimension and that responses to them, either for the management of global common resources or for the creation of global public goods, must also be global.

b) The resurgence of conceptions linked to the Westphalian model has once again placed the state at the center of global norm-building processes, but has not succeeded in restoring its control or exclusivity over them. These processes are now more plural and open, and it is not possible to reconstruct them without taking into account the influence and contributions of non-state actors and private authorities in all areas of international reality, including those which, due to their impact on the principle of sovereignty, might seem more protected from the influence of non-state actors. Case studies should bring to light the increasing difficulties states face in reaching legally binding multilateral agreements with robust substantive normative content.

c) Global norm-building processes are best understood as dynamic, multidirectional, non-cumulative and plural processes that not only influence each other, but often run in parallel and intermingle, to the extent that in practice it is impossible to distinguish the processes of defining and disseminating global norms from those of transforming and replacing them.

d) The redefinition of global norm-building processes shows the challenges that public international law has to face as a fundamental institution of the international order and, in turn, contributes to the adaptation of the latter, which is increasingly proving to be "sticky" (Ikenberry, 2011). From this perspective, the reconstitution and interpenetration of the processes of global norm creation and diffusion, on the one hand, and those of norm transformation and substitution, on the other hand, should be interpreted as a further step in the stabilization of an increasingly less state-centered but nonetheless robust international order. Again, case studies should show that global norm-building processes help the consolidation and resilience of the public dimension of the international order and of an international law and an international order with cosmopolitan elements.

(V) THE CREATION OF GLOBAL NORMS IN PRAXIS

Among the papers elaborated in the implementation of the research project and which were presented at the Seminar held throughout the 2020-2021 academic year, this volume includes a representative selection. In her work "Between Cosmopolitism and Westphalia: the case of terrorism", Laura Planas shows how, despite the fact that terrorism has become one of the serious threats to international peace and security, there are serious difficulties in adopting global norms (including the definition of terrorism itself).

Meijie Jiang's paper, "Evolving China in the Global Climate Norm-Making: Development Models, National Roles and International Contexts", explains the process of shaping China's positions, practice and choices in the processes of negotiating and adopting norms to address climate change. It is a good example of the tense coexistence between the needs arising from cosmopolitanism and the resurgence of state interests.

In "Submarine Cables as an Object of Legal Regulation under International Law", Daria Shvets argues that submarine cables are a global public interest that should be protected and regulated by global rules. However, given that there are significant difficulties in adopting such rules, the author explores different options.

Josep Ibañez's contribution, "The normative dimension of platform governance: big techs and digital platforms as normative actors", highlights the relevance of the normative dimension of cyberspace governance

 DOI: 10.17103/sybil.25.4

in which states appear as dysfunctional entities. In it, big tech and social platforms have become normative actors through codes, algorithms and economic models.

Finally, Esteban Muñoz's work shows the potential normative significance of the ICJ through notions of de facto authority and inherent powers theory.

REFERENCES (SELECTION)

Bouza, N., García, C. y Rodrigo, A.J. (dirs.) y Pareja, P. (coord.) (2015), *La gobernanza del interés público global*, Madrid, Tecnos.

Brölman, C. y Radi, Y (2016), "Introduction: International lawmaking in a global world", en C. Bröllman and Y. Radi (Eds.), *Research Handbook on the Theory and Practice of International Law-Making*, Cheltenham/Northhampton: Edward Elgar Publishing, pp. 1-9.

Buzan, Barry y Lawson, George (2015), *The Global Transformation. History, Modernity and the*

Casanovas, O. (2015), "La dimensión pública del Derecho internacional actual", en N. Bouza, C. García y A.J. Rodrigo (dirs.) y P. Pareja (coord.), *La gobernanza del interés público global*, Madrid, Tecnos, pp. 57-75.

Casanovas, O. y Rodrigo, A.J. (2021), *Compendio de Derecho internacional Público*, 10ªª edición, Madrid, Tecnos.

Chinkin, Ch., (1989) "The Challenge to Soft Law, Development and Change in International Law", 38 *International Comparative Law Quarterly* (1989), 850.

Gallaroti, G.M. (2010), *Cosmopolitan Power in International Relations. A Synthesis of Realism, Neoliberalism and Constructivism*, Cambridge, Cambridge University Press.

García, C. (2017), "*Westfalia, Worldfalia, Eastfalia.*El impacto de las transformaciones de la estructura de poder interestatal en el orden internacional", *Revista Española de Derecho Internacional*, vol. 69, núm. 2, pp. 45-70.

García, C. (2021), "La construcción de normas globales entre el avance del cosmopolitismo blando y el retorno a la geopolítica. La regulación global de la ciberseguridad", *Cursos de Derecho Internacional y Relaciones internacionales de Vitoria-Gasteiz*, Valencia, Tirant lo Blanch, pp. 266-330

García, C. y Pareja, P. (2016), "La inspiración cosmopolita de la Responsabilidad de Proteger: construcción normativa y disensos", en García Segura, C. (ed.), *La tensión cosmopolita: avances y límites en la institucionalización del cosmopolitismo*, Madrid, Tecnos, 2016, pp. 64-116.

Guzzini, S. (ed.) (2013), *The Return of Geopolitics in Europe? Social Mechanisms and Foreign Policy Identity Crises*, Cambridge, Cambridge University Press.

Ikenberry, G.J. (2018), "The end of liberal international order?"", *International Affairs* 94 (1), pp. 7-23.

Khagram, S.J., Riker, V., y Sikkink, K. (2002), *Restructuring World Politics: Transnational Social Movements, Networks, and Norms*, Minneapolis, University of Minnesota Press.

Rodrigo, A.J. (2019), "Más allá del Derecho internacional: el Derecho internacional *público*", en R. Méndez-Silva, *Derecho internacional*, México DF, UNAM/El Colegio Nacional, pp. 67-98.

 DOI: 10.17103/sybil.25.4

the SPANISH YEARBOOK of INTERNATIONAL LAW

Between Cosmopolitism and Westphalia: the case of terrorism

Laura PLANAS GIFRA*

Abstract: The construction of global norms has always been complex, but today this has become more evident than before. The willingness to create an international legal framework might be less seductive than before. What is more, in the field of security it becomes even harder to develop global norms, as security is intrinsically linked with the sovereignty of the state, which might lead to more unwillingness to be bound by international obligations. States share different approaches on how to solve international problems, which complicates the designing a common international strategy. Some share a perspective based on Cosmopolitism which involves international cooperation, while others base their security strategies on geopolitical concerns and national interests. The case of terrorism is of particular importance as in the past couple decades it has become one of the most serious threats to international peace and security. And while this should be reason enough to agree on finding a common solution, its sole definition has become a complex matter. This paper analyses the necessity of developing global norms on terrorism and the difficulties of their approval precisely because of the clash between models based on Cosmopolitism and those based on Westphalia.

Keywords: international norms, terrorism, Cosmopolitism, Westphalia

(A) INTRODUCTION

While the international order used to be structured around power balances and geopolitics, after the end of the Cold War it seemed as if the Westphalian system was beginning to weaken to make room to a new model based on Cosmopolitism, with liberal values emerging and spreading throughout. However, what recent events have shown us is that geopolitical conceptions have remained and still own an important place in the way in which some states base their national security strategies. These views are finding a more influential place and frontally clashing with Cosmopolitism.

The dominance of geopolitical powers has always been clearer in the field of security, where sovereignty has always been put at the forefront of what states wanted to preserve the most. However, when it comes to terrorism, an international phenomenon which is now affecting not just a few, but most nations in the world, there is a clear need to find common grounds to coordinate efforts and fight through a joint strategy. We have, from the one hand, the preservation of national security interests and powers, and from the other, the need to cooperate to solve a problem which cannot be solved only through unilateralism.

On top of that, while there was a period of international law-making and a certain preference towards adopting hard-law instruments, more recently we have seen an unwillingness by states to give up part of their sovereignty to be bound by certain international obligations. The result is that it is now more difficult to develop international instruments, such as the case for a Comprehensive Convention on International Terrorism, which would provide a definition of international terrorism for all. We see some states pushing for the negotiation of the text, and others being reluctant to adopting international norms compromising themselves in the field of security. This conflict between these two approaches and the difficulties on adopting an international norm on terrorism to combat

* Doctoral candidate in Law at Pompeu Fabra University. Email: laura.planas@upf.edu.

 DOI: 10.17103/sybil.25.5

such a dreadful phenomenon may be useful to show the existing clash between Cosmopolitism and Westphalia. This is what this paper will try to analyse.

(B) THE CONSTRUCTION OF GLOBAL NORMS IN TODAY'S INTERNATIONAL ORDER

In recent scholarly debates, some have referred to the change of powers in the current international order, or even to the emergence of a completely new one. The relationship between states and the way they interact with each other has changed during the past decades. This has partly been due to globalization, the emergence of new international actors, new emerging powers, and different economic relations. While international public law still governs these interconnections, because of this new organizational functioning, the way in which norms emerge has changed.

In the modern era, international order was built based on the Westphalian system, which meant the balancing of powers, geopolitical strategies, and the prevalence of territorial sovereignty. After the Second World War, new principles based on the promotion of social, economic, and cultural development began taking the stage, and along with the United Nations, a more global order based on Cosmopolitism values was established. [1] However, in recent years we have witnessed the rise of China, which along with Russia are challenging the liberal values established by the West. Instead, they want to reinstall sovereignty and territorial integrity as the basis for international relations. [2] Furthermore, during the Trump administration, the United States also returned to unilateralism. And more recently, we have also seen the intensification of conflicts like those affecting the South China Sea, the Arctic, and the increasing instability of those countries in the Middle East.

With all these power shifts and new power balances, along with the intensification of global problems such as those related to climate change, migration, nuclear energy, and so on, the world is facing some important challenges. In this context, some scholars have focused on the changes in the nature of international law to analyse whether international norms emerge in different forms today. [3] There is, in some way, a tendency to return to the Westphalian model. That is, states are more often less keen to bind themselves by international norms and to sign new international treaties which will then involve new obligations. And when it comes to security issues, states are even more unwilling to develop more international norms. Although this is not a "return" to the Westphalian model per se, the question is whether we ever left it at all. The impact of Cosmopolitism on security affairs might not have been so strong after all.

Furthermore, non-state actors such as civil society and private enterprises have a much relevant role today and participate in regulatory activities. Their part during negotiations and drafting norms is now more evident than ever. Globalization, privatization, and the fragmentation of states has

---

[1] B. Buzan and G. Lawson, *The Global Transformation: History, Modernity and the Making of International Relations* (Cambridge University Press, Cambridge, 2015).

[2] M. Mazarr, M. Priebe, A. Radin, and A. Stuth Cevallos, 'Understanding the Current International Order', *RAND Corporation* (2016), at 11.

[3] N. Deitelhoff and L. Zimmermann, 'Norms under challenge: Unpacking the Dynamics of Norm Robustness', 4(1) *Journal of Global Security Studies* (2019) 2-17, [doi: https://doi.org/10.1093/jogss/ogy041]; A. Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge University Press, New York, 2008), [doi: https://doi.org/10.1017/CBO9780511490408]; L. Zimmermann, 'More for Less: The Interactive Translation of Global Norms in Postconflict Guatemala', 61(4) *International Studies Review* (2017) 774-785, [doi: https://doi.org/10.1093/isq/sqx044].

introduced these new actors into the game field[4] which, along with technological advancements in relation to information, computing and communication services has facilitated their involvement and their level of influence. Inter-governmental organizations contribute to solving international conflicts operating by the consent of the states, but they also count with experts who work to analyse international disputes and give their expertise to solving them. Non-governmental organizations many times lobby to influence both international organizations and governments to defend human rights, while also monitoring and bringing to justice those who do not comply with the law. And even more interesting is the role of transnational or multinational corporations which have become more powerful over time and are also key in determining the outcome of those norms affecting their spheres of influence.

This growing role and impact of non-state actors is explained precisely by the changes in the global order. The international system is no longer made only of states, but it is instead a pluralistic society made of different types of actors who participate with more or less success in influencing the norm making process. Trade unions, corporate businesses, religious groups, academics, think-tanks, etc. They are all involved in legislative and decision-making operations. The role of the state is still crucial, but the state is no longer alone, and more hybrid governance frameworks where the interaction between state and non-state actors is seen more frequently than before.

It seems that we are moving towards an even more pluralistic system, one with new actors, new emerging powers, and new power shifts. The reality of the international order has changed, and the debate on whether we are witnessing a return to the Westphalian system that used to be in place during the 19th and 20th centuries is more evident today. Within this framework, one may wonder whether international norms to solve global problems should be emerging more easily today or whether they face too many difficulties. It seems that even though there is a greater number of actors participating in the norm creation process, the fact that common problems need of an international agreed response might lead to greater cooperation processes. While this is obvious in areas such as climate change and the protection of the environment, nuclearization or migration movements among others, in other sectors states may not be so willing to oblige themselves under certain international obligations. This is what this paper will seek to explain in the following lines and in relation to terrorism in particular.

(C) GLOBAL NORMS IN THE CONTEXT OF THE WAR ON TERROR

The last couple decades we have witnessed multiple terrorist attacks in different parts of the world by international terrorist groups. The terrorist threat is now one of the main concerns of many nations, and we have seen how national security strategies now include the fight against terrorism as one of their main priorities. On a larger scope, it has also been recognized that terrorism is a major threat to international peace and security.

This has meant that terrorist legislation has expanded both at the domestic and international levels. This "rush to law"[5] is explained by the need which some states have felt to respond to this security threat through the legislative. Terrorism-related norms are not a phenomenon of the 21st Century, as

[4] K. Creutz, T, Iso-Markku, K. Raik and T. Tiilikainen, 'The changing global order and its implications for the EU', 59 *Finnish Institute of International Affairs* (2019), at 37.

[5] J. C. Barker, 'The politics of international law-making: Constructing security in response to global terrorism', 3(1), *Journal of International Law and International Relations* (2007) 5-30, at 5.

 DOI: 10.17103/sybil.25.5

the first treaties in the field were the Convention on Offences and Certain Other Acts Committed on Board aircraft of 1963 (commonly known as the Tokyo Convention), the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1973 (commonly known as the Montreal Convention). Regionally, other treaties were approved from the 70s and well through the 90s. And before 9/11, terrorist attacks were already considered to be threats to international peace and security by the Security Council after the Kenya and Tanzania attacks of 1998. [6] However, September 11 was a crucial moment because it has been since then that most of the legal development in the field has advanced.

The international community has been able to establish some landmarks through the Security Council on the war against terrorism, and these came as a response after the September 11 attacks. Resolution 1373 of 2001[7] and Resolution 1566 of 2004[8] became an important normative basis for the Security Council, since these resolutions invoked Chapter VII of the United Nations Charter requiring states to take certain national legislative measures. Shortly after 9/11, the first of these resolutions was adopted, and it invoked all states to take active measures against the terrorist threat. States were demanded to categorise terrorism as a crime and to cooperate between nations to prevent such attacks from happening. It was the first time the Security Council compelled states to change their national laws to include anti-terrorist legislation and the first time it declared terrorism as a threat to international peace and security. Later, this position was reinforced through Resolution 1566, as it went even one step further and stated that "terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security." The Resolution also included certain terminology associated with terrorism that would later on guide state practice in the field. And even though there is a provisional definition of terrorism, because of its non-compulsory nature, it has not been enough to lead to a uniform legal definition of the crime.[9]

Shortly after, new measures were adopted to combat this phenomenon, such as the establishment of the Security Council Counter-Terrorism Committee in 2001, of the Counter-Terrorism Committee Executive Directorate, and the approval of a common plan to respond to the terrorist threat agreed through the adoption of the UN Global Counter-Terrorism Strategy in September 2006.[10] However, Resolution 1373 has remained as one of the core instruments on international terrorism because, even though there can be a discussion on whether the Security Council does have or not legislative powers by virtue of the Charter, the resolution was extensively supported. The consideration of terrorism as a common international threat and the interest on combatting it seems to be obvious, and even if to date there are 19 international United Nations treaties in the field of terrorism, a definition on the international crime of terrorism is still missing.

But such a definition is crucial for various reasons. First, the lack of a common international definition leaves the door open for states to develop their own definitions at the domestic level, which leads to great discrepancies from one another, but can also lead to the violation of certain human rights -accidentally or willingly. As stated in Article 15 of the International Covenant for Civil and

---

6 SC Res. 1269 (1999), 19 October 1999

7 SC Res. 1373 (2001), 28 September 2001

8 SC Res. 1566 (2004), 8 October 2004

9 B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24(3) *Leiden Journal of International Law* (2011) 677-700, at 685 [doi: https://doi.org/10.1017/S0922156511000203].

10 GA Res. 60/288 (LX), 20 September 2006

Political Rights in respect of the principle of legality, all dispositions should be clear and precise enough to respect the principle of legal certainty. It is also important to distinguish terrorism from other forms of armed conflict which certain states may infringe under their domestic legislation as to supress the rights of activists and civil society organizations in their countries. Thus the lack of a formal definition of the crime of terrorism weakens the main goal of establishing such a definition, which is to regulate and combat the terrorist threat by protecting the security of all.

When it comes to the establishment of global norms it is usually much harder to find agreement since there is a multiplicity of interests involved, an obstacle that becomes even more evident in the field of defence. Each nation has its own interests and goals, but they also have different approaches regarding how to solve international problems. Some may have a more "cosmopolitist" view through which international cooperation and agreement are the basis of their international relations, while others may prioritize geopolitical perspectives. Moreover, security is intrinsically linked to sovereignty, which makes this area more even more complex for finding common agreement.

In the fifty-ninth session of the General Assembly, the Secretary General stated that "Today, more than ever before, threats are interrelated and a threat to one is a threat to all. The mutual vulnerability of weak and strong has never been clearer. Global economic integration means that a major terrorist attack anywhere in the developed world would have devastating consequences for the well-being of millions of people in the developing world."[11] However, while different measures have been approved by the United Nations and states altogether to protect from the terrorist threat, states are less enthusiastic to continue approving international norms and prefer following their own strategies according to their national security interests.

(D) TERRORIST LAWS AT THE REGIONAL LEVEL

Up until 11 September 2001, most of the efforts by the international community to combat terrorism were directed towards coordinating measures to supress international terrorist organizations. Nevertheless, after the 11 September attacks, most governments started increasing their measures to combat this phenomenon through laws and policies which would prioritize their own national security, even though these measures would sometimes harm the rights of their citizens. The security of the state was above all, which at times even led to human rights violations.

At the regional level we see different tendencies in these regards. While some regions are more directed towards cooperation and harmonization, others believe in the greater efficacy of unilateral actions. In the Inter-American region, the Inter-American Convention Against Terrorism of 2002, states declared that "strengthening hemispheric cooperation to prevent, combat, and eliminate terrorism" was one of the main goals to bear in mind to respond to terrorist attacks which are "one of the factors that underscore the need for cooperation and the urgency of efforts to eradicate [it]." The Organization of African Unity (OAU) also proclaimed in the 2004 Protocol to the Convention on the Prevention and Combating of Terrorism of 1999 "the need to coordinate and harmonize continental efforts in the prevention and combating of terrorism in all its aspects." These are just a few examples of how different regions have recognized the need to work together to fight against the terrorist threat

[11] SC Report A/59/565 (2004), 2 December 2004

 DOI: 10.17103/sybil.25.5

and have acknowledged the importance of adopting international instruments to cooperate between them to this end.

But the European Union has been the organization which has been more active responding to the terrorist threat. It has developed various instruments such as the EU Counter-Terrorism Strategy of 2005 or the Council Framework Decision of 13 June 2002 on Combating Terrorism (2002/475/JHA). The first, for instance, is a non-binding document, while the latter includes a series of obligations which compel states to adopt national measures to make sure that all states within the European Union had a definition of terrorism and typified all related acts.

However, the ASEAN has adopted a completely different approach. While it has also developed norms in the field such as the Declaration on Joint Action to Counter Terrorism of 2005, which called all states to improve regional cooperation in response to the 9/11 attacks, it has also passed other instruments such as the 2007 ASEAN Convention on Counter Terrorism. The document contains wide and general provisions on the fight against terrorism, but it is precise in emphasizing the importance of national laws in terrorist-related matters. This organization has shown a preference to resolve those problems connected to terrorism at the national level as they consider all security matters an essentially domestic problem. National sovereignty in security affairs, whether they affect the international community or not, is still clearly separated from the adoption of measures in the international arena. This obviously hinders regional cooperation since all states rely on different national provisions in relation to terrorism and thus follow very different interpretations and strategies. Some take more militaristic approaches, while others rely on criminal law and criminal courts. Their approximation is much more aimed at keeping security affairs through a geopolitical vision.

As the Secretary General stated once "Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community".[12] The fact that different regions deal with security issues such as terrorism in very different ways, gets on the way of establishing any potential harmonization process and complicates finding common solutions to global problems, since some actors keep on relying to their own mechanisms and prioritizing their national security interests over multilateral cooperation. And when it comes to responding to global issues and global threats such as is that of terrorism, this hinders the potential to find an appropriate and effective solution.

(E) BETWEEN COSMOPOLITISM AND WESTPHALIA

Although after the end of the Cold War many theorists thought the biggest geopolitical problems had been resolved, and that major security threats were already overcome, recent history has shown us that reality have not turned out to be exactly this way. The intensification of the South China Sea conflict, the disputes claiming territory on the Arctic, the return to unilateralism during the Trump administration… And on top of that, terrorism. And not just the type of terrorist attacks that used to affect only specific states or regions in the world, but terrorism as a global phenomenon that has

[12] *Ibid.*

 DOI: 10.17103/sybil.25.5

surpassed all frontiers, clearly altering international peace and security. Terrorism has grown at an exponential and uncontrollable rate, damaging both national and human security.

The complexities on the adoption of a global norm on terrorism can serve as an example to explain the tensions between Cosmopolitism and Westphalia. It is not exactly as if Cosmopolitism had been spread throughout the globe without any interferences, but the management of power based on geopolitics has remained. One may wonder whether we are returning to a Westphalian system or whether we ever left it behind. Whatever the case, the truth is that we are facing a tension between the two models, and we are left wondering which will turn out to be the predominant one.

However, in the case of security it may be easier to answer. Although terrorism has been recognized as one of the main threats to international peace and security, and although many international actors have thought it necessary to cooperate and to even work on the development of an international norm which defines terrorism as an international crime, the fact is that many keep on following their own national approaches, and we are still quite far from achieving agreement on such a norm. Many support the idea that terrorism can only be responded through cooperation, but in the field of security, states still prefer to address these issues according to their national interests and through their own national security strategies. Sovereignty remains over anything else.

What is more, because of this growing security threats, states are no longer the only relevant actors providing security. Private companies have gained a much stronger position in the market in the past decades, and it is more and more common for states to rely on enterprises to provide security in their name. Globalization has contributed to their expansion as many security threats have an international impact, and this is the case of terrorism too. The privatization of terrorism is an example of these manifestations of globalization.[13] And an important aspect of the incorporation of their services and their growing reliance by states is that they also want to have a say when norms are being debated. Any laws and policies related to the protection of the territory and of the citizens concern them too, so they lobby to be an important part of the law-making negotiation process. This may also be another reason why it is becoming so hard to agree to an international norm on terrorism.

Some states are still persisting in their effort to construct an instrument of hard law in the form of a treaty to establish the crime of terrorism. Others have started defending that there may be already certain practice that may lead to a customary norm, although they acknowledge that this has not crystallized yet. And some do not want to hear about either way at all.

The creation of a customary norm is long and complex. To culminate it, it must be proven that a particular behaviour is largely accepted as a custom by the international community, which is usually done through repetitive practice over time. When it becomes widely accepted and obeyed, it is because time and practice have made it obvious that it is a custom to observe it. Nevertheless, in the case of terrorism, most of the practice has taken place in response to 9/11, which is not enough time to show that there is this needed generalization. Some may say we are in the process of creating it, as states have developed laws and policies at the national level to respond to the terrorist threat and international cooperation has been strengthened, but we are still far from talking about a customary norm. What seems to be clear though is that all states share the need to protect from terrorism and to

[13] S. Adejumobi, 'A view from Africa', in A. Bailes and I, Frommelt (eds), *Busines and Security. Public-private sector relationships in a new security environment* (Stockholm International Peace Research Institute Yearbook, Stockholm, 2004), at 242.

 DOI: 10.17103/sybil.25.5

condemn this phenomenon in their national legal frameworks, but a conscious of obligatory nature has not flourished yet.

Nevertheless, some have persisted in the need to create an international treaty, precisely because they recognise that the creation of a customary norm is too slow, and we are still far from reaching the peak. Furthermore, terrorism is sufficiently grave as to react to it immediately, something that could not be done with a customary norm because of its slow and complex process of creation. That is why they believe that a Comprehensive Convention on International Terrorism could be the response to such security threats, as it can have immediate effects.

This hypothetical Convention is still a project which has not culminated in a definitive text. The initiative started with Resolution 54/110 of December 9, 1999, in which the General Assembly started considering the adoption of a norm defining the crime of terrorism. But it was not until the representation of the Indian government distributed an informal draft to the Special Committee on Terrorism that states started negotiating a normative text. The goal of this Convention would be to complement the already existing normative framework on terrorism with the typification of the crimes of terrorism; the suppression of laws establishing exceptions related to political, philosophical, ideological, racial, ethnic, religious or other similar grounds; the adoption of preventive measures to refrain potential attacks from states; and call for greater international cooperation so that all police and judicial forces can effectively combat terrorism. This would then become the general framework in relation to terrorism, which other laws and regulations would complement with more specific and limited content.

Even though we are still far today from establishing an international treaty containing the definition of terrorism, a decisive will by some to create it remains strong. Its final adoption could be seen as the superposition of the Cosmopolitist model over the Westphalian one, but if such a norm never exists it could be seen as evidence that the Westphalian way of dealing with power politics is still the only predominant model when dealing with the security sector.

However, the fact that we are still discussing whether one is more predominant over the other shows that Cosmopolitism is still a strong force to consider in today's international order, even in the area of security. Australia, Brazil, India, Indonesia, Mexico, South Korea, and Turkey are emerging democracies which play an important role in the international system and, as John Ikenberr says, they pressure towards multilateral cooperation and, along with the countries in the European Union and the United States, they are the ones to defend democracy and push towards a more liberal order[14]. In fact, India has been one of the most pressing states to defend the need for a Comprehensive Convention on International Terrorism, repeatedly calling states to sit at the table and negotiate during different conferences and summits. Its Prime Minister Narendra Modi has described terrorism as the "biggest problem facing the world today."[15] The BRICS have actually even established their own

[14] J. G. Ikenberr 'The illusion of geopolitics: The enduring power of the liberal order', 93(3) *Foreign Affairs* (2014) 80-91, at 81.

[15] The Wire, 'For the First Time, BRICS Releases Policy Document on Counter-Terrorism' (2020) November 18, 2020. Available here, accessed on July 15, 2021.

 DOI: 10.17103/sybil.25.5

Counter-Terrorism Working Group (CTWG), which started meeting in 2016. The work to achieve an agreement on this norm is nonetheless an uphill effort.

(F) CONCLUSION

What the persistent push for establishing a Comprehensive Convention on International Terrorism and the lack of agreement on it shows us is this continuous conflict between the Cosmopolitism and the Westphalian-model. We have seen the UN Security Council declare terrorism as one of the biggest threats to international peace and security and compelling states to criminalize terrorism as a crime under their national laws. We have seen states designing other laws and policies to address this security threat, and we have witness greater levels of cooperation between international actors to protect from the terrorist attacks. But states are still unwilling to bind themselves by certain international obligations, including the acceptance of a definition of terrorism and the approval of the Comprehensive Convention on International Terrorism. We see the need to combat a common grave security threat, yet we are unable to agree on its basis, which is its definition. Maybe the most significant conclusion of this process is precisely the lack of a specific outcome. The incapacity to create an international norm on terrorism is an absence which speaks by itself.

Thence the inclination for creating a norm on terrorism is not sufficient for achieving one, since the universality that is needed to generate an international norm is not met. The combination of national interests and what each state wants to include and exclude from a global definition of the crime makes it impossible to reach a common ground on what an act of terrorism can or cannot be. And by not committing themselves to a definition, they continue keeping a much greater degree of discretion and wider sovereignty on the way they manage all those issues related to terrorism and thus to national security. We may have been unable to create a norm defining international terrorism and we may still not see it in the short time, but we had never been so close to culminating the process.

We may even affirm that depending on the region of the world that we are looking at there is a most Cosmopolitist or Westphalian system. While it seemed that during the past decades, we had advanced towards the consolidation of Cosmopolitism and the maintenance of liberal order, we have seen some actors being more resistant, and how in some sectors such as those affecting security and national sovereignty the implementation of such a model has not been so successful. In some regions, and in some states, we see a tendency towards dealing with defence through the classical version of state sovereignty. These are the ones who are interested in keeping a conservative vision of power and sovereignty. With a phenomenon like terrorism, many states have taken advantage of the importance of such a threat to reinforce their national defence mechanisms and prioritize their domestic interests, something which can be seen as a return to those behaviours based on geopolitical conceptions. For them, international cooperation has been pushed into the background.

The lack of agreement on a global definition of terrorism and the incessant tenacity by some to create it is useful to show the existing tensions between Cosmopolitism and Westphalia. The advancement of the first so that the international legal framework is reinforced and further developed to share common interests and protect from common values is curbed by the latter, which imposes clear limits to the adoption of norms which undermine the national interests and their own specific goals. The development of an international norm on terrorism, strongly linked to defence and thus

 DOI: 10.17103/sybil.25.5

the sovereignty of the state, is the perfect case to show this clash between the two models and exemplifies the complex process of adopting international norms today.

Even if it may be usually hard to find common agreement on a global norm because of the multiplicity of interests, in the field of security this is even more complex. From the one hand, because of the national interests, goals, and values of each state. From the other, because security is intrinsically linked to national sovereignty, a sphere in which it is extremely strenuous to get states to give up part of their power. And on top of that, defence strategies may be completely opposite from one state to another and may show significant differences between those relying on geopolitical strategies and those who do not. The consequence is that even though there is a clear need to protect from such a dreadful threat, this seems not to be enough to agree on a definition of the crime. And it is precisely this lack of agreement and the absence of the norm which can help further understand this conflict between the dynamics of Cosmopolitism and Westphalia today.

 DOI: 10.17103/sybil.25.5

the SPANISH YEARBOOK of INTERNATIONAL LAW

Evolving China in the Global Climate Norm-Making: Development Models, National Roles and International Contexts

Meijie JIANG *

Abstract: As the world's second largest economy and largest emitter of greenhouse gases, China's participation in global climate governance has gained worldwide attention and has been under closer international scrutiny. This paper aims to understand China's motivations and underlying forces that have driven its positions, practices and choices in this regard, particularly when negotiating and complying with the UNFCCC, Kyoto Protocol and Paris Agreement. For this end, the article focuses on the changes and continuities of China in the evolving international climate norm-making. I argue that China's roles and engagement in the processes have been fundamentally shaped by development patterns, perception of national roles, and international contexts. The paper concludes that based on social, political and economic conditions, a mutual understanding and learning between China and other countries can reveal insights on global governance in the future.

Keywords: China – global climate governance – norm-making – UNFCCC – Kyoto Protocol – Paris Agreement – development – national role – international politics

(A) INTRODUCTION

In the aftermath of World War II, non-traditional security threats have increased substantially. International norms and global governance have emerged and have become more salient in the wake of globalization as a result of interdependence. These areas cannot be solved by any single government and are often regulated involving international treaties and conventions with the support of states, international organizations, and private sectors when necessary.[1] Within global commons, climate and environment concern is a matter of special urgency. Dramatic atmosphere changes and accompanying extreme weather conditions, which bring about hurricanes, floods and droughts, are now affecting agricultural and livestock development in all countries and directly threatening food security and human's survival.[2] Furthermore, global warming and environment problems have evolved from a country-specific matter to a global issue that affects various fields such as politics, economy, energy, ecology, and health, becoming one of the most pressing issues worldwide.

Global efforts to address climate issues are normalized from the United Nations Conference on Human Environment in 1972. Then, several rounds of international negotiations established a series of environmental decisions. In 1992, leaders of over 170 countries attended the United Nations Conference on Environment and Development to discuss global sustainable development.[3] The

* PhD candidate at Pompeu Fabra University. Email: meijie.jiang@upf.edu.

1 M. Burnay & J. Chaisse, 'Global Commons as an Emerging Arena of Contestation of Global Governance Structures and Norms', 22 *International Community Law Review* (2020) 533–558, at 535 [doi: 10.1163/18719732-12341446].

2 A. Savaresi, 'The Paris Agreement: A New Beginning?', 34 *Journal of Energy & Natural Resources Law* (2016) 16–26, [doi: 10.1080/02646811.2016.1133983].

3 J. Guo, 'On China's Energy Saving and Emission Reduction and International Law Analysis about Global Climate Change', 5 *Energy Procedia* (2011) 2568-2575, [doi: 10.1016/j.egypro.2011.03.441].

 DOI: 10.17103/sybil.25.6

Conference issued one of the first and most important environment-related documents, United Nations Framework Convention on Climate Change (UNFCCC), which laid down the foundation of the international legal regime for mitigating climate change.

In order to achieve the UNFCCC objectives, the Kyoto Protocol, which includes legally binding targets for developed countries to reduce greenhouse gas (GHG) emissions, was introduced at the third Conference of the Parties (COP) of the UNFCCC in Kyoto.[4] However, global climate governance stagnated, even though it established a "top-down" governance model. Since the Kyoto Protocol imposes binding emissions reduction commitments on developed countries, it has raised concerns about fair and equal allocation of mitigation burden and quantitative tasks as well as the potential adverse effects of such measures on their economies.[5] How to understand the principle of "common but differentiated responsibility" remains deeply contested. The international community began to actively explore institutional models that are more suitable for the unique attributes of climate governance. From the beginning of the Bali Roadmap to the initial formation of the Copenhagen Conference and the formal establishment of the Paris Agreement, a bottom-up autonomous contribution model replaced the Kyoto mechanism as the dominant governance model.[6] This model allows governments to set their own goals or ambitions in mitigation efforts, and to avoid distributional conflicts in subsequent negotiations, which are the major obstacles to cooperation.[7] The agreement adopted a system of nationally determined contributions (NDCs), which need to be communicated every five years and must include mitigation measures and represent a progress over the country's previous NDCs. It also encourages developing countries to establish increasingly ambitious mitigation targets by supporting their adaptation efforts via technology transfer and finance aid.[8]

Traditionally, normative development on climate change has been largely viewed as the domain of the West, with Europe and the United States (U.S.) as agenda setters over decades. However, Trump announced withdrawal from the Paris Agreement shortly after taking office. Clearly, the withdrawal undermines the universality of the Paris Agreement, which is primarily distinguished from the Kyoto Protocol by the joint participation of both industrialized and developing countries.[9] Moreover, the British decision to leave the European Union (EU) on the 29th of March of 2019 caused an internal rift within the EU, which has traditionally been at the forefront of global climate governance. This, combined with the EU's slow economic growth in recent years and the impact of the refugee crisis, has significantly reduced the EU's leadership in global climate governance.[10] Thus, the United States' withdrawal from the climate agreement and the relative decline of the EU's influence have created a leadership deficit in global climate governance.

---

[4] H. Jiang, 'Environmental Reviews and Case Studies: The Laws of Climate Change in China', 16 *Environmental Practice* (2014) 205–229, [doi: 10.1017/S1466046614000155].

[5] J. Brunnée & Ch. Streck, 'The UNFCCC as a Negotiation Forum: Towards Common but More Differentiated Responsibilities', 13 *Climate Policy* (2013) 589–607, at 601 [doi: 10.1080/14693062.2013.822661].

[6] Savaresi, *supra* n. 2; H. Zhang *et al*., 'U.S. Withdrawal from the Paris Agreement: Reasons, Impacts, and China's Response', 8 *Advances in Climate Change Research* (2017) 220–225, [doi: 10.1016/J.ACCRE.2017.09.002].

[7] R.S. Dimitrov, 'The Paris Agreement on Climate Change: Behind Closed Doors', 16 *Global Environmental Politics* (2016) 1–11, [doi: 10.1162/GLEP_a_00361].

[8] M. Luomi, 'Is the Paris Agreement a Success and What Does It Mean for the Energy Sector?' *Oxford Energy Forum* (2016).

[9] Zhang *et al*., *supra* n. 6.

[10] *Ibid*., at 224.

After becoming the world's second largest economy and largest emitter of greenhouse gases, China's participation in global climate governance has gained worldwide attention and been under closer international scrutiny. China's positions, practices, and choices in this regard have evolved over time as a result of the country's varying development stages and global circumstances.[11] Therefore, it is particularly necessary to understand China's motivations and underlying forces that have driven changes and continuities in global climate norms. Since the UNFCCC, Kyoto Protocol and Paris Agreement have cemented the legal and normative foundation of global climate governance, this paper tries to shed more light on the roles that China plays when negotiating and ratifying different agreements and how China has evolved in shaping global environmental norms.

(B) ANALYTICAL FRAMEWORK

As we explore the motivation and strategic considerations of China's engagement with climate issues at different times, I adopt an analytical framework of three dimensions: economic development models, national roles, and international politics. With a framework that combines legal and political perspectives, domestic and international factors, constructivism and realism, it is useful to gain a better understanding of China's behaviors in international norm-setting processes.

The three dimensions are not exclusive of each other but overlap in many respects, and their relative levels of importance in China's global climate governance have changed over time. First of all, many authors agree that a state's socioeconomic transitions shape a country's objectives, behaviors and consequences in addressing environmental concerns. S. G. Breslin stated in the last century that the environmental agenda was highly linked with non-environmental issues and the former would remain subordinate to other concerns until some fundamental issues were resolved.[12] Stephen Tsang and Ans Kolk echoed this observation, finding that in spite of recognizing environmental impact on people's lives, rapid economic development seems to attach more importance than environmental protection measures.[13] Fabiana Barbi *et al*. found that in an early stage when GDP growth commanded and mitigation might undermine urbanization, Chinese officials consistently refused to accept any reduction targets before industrialized countries took action first.[14] As climate change has transcended environmental issues and become more associated with other social and economic benefits, mitigation can be integrated within development interests. Teng Fei and Wang Pu focus on the state's quest for performance legitimacy. They point out economic growth alone is not sufficient to respond to governing pressures and the government must pursue a broader range of socially beneficial public goods.[15]

Second, states' cognition on national roles and identity determines their participation in global governance. Similar perceptions of identity bring actors closer together, and they are more able to reach consensus and form alliances in the process of negotiations. On the contrary, different identities

[11] F. Teng & P. Wang, 'The Evolution of Climate Governance in China: Drivers, Features, and Effectiveness', *Environmental Politics* (2021) 1–21, [doi: 10.1080/09644016.2021.1985221].

[12] S.G. Breslin, 'Sustainable Development in China', 4 *Sustainable Development* (1996) 103–108, at 107 [doi: 10.1002/(SICI)1099-1719(199608)4:2%3C103::AID-SD38%3E3.0.CO;2-K].

[13] S. Tsang & A. Kolk, 'The Evolution of Chinese Policies and Governance Structures on Environment, Energy and Climate', 20 *Environmental Policy and Governance* (2010) 180–196, [doi: 10.1002/EET.540].

[14] F. Barbi *et al*., 'Climate Change Challenges and China's Response: Mitigation and Governance', 1 *Journal of Chinese Governance* (2016) 324–339, [doi: 10.1080/23812346.2016.1181598].

[15] F. Teng & P. Wang, *supra* n. 11.

may result in more divisions or even conflicts, which will ultimately result in global governance failure. Under the coalition of Group 77 (G77) plus China, the global South managed to leverage their collective influence to embed the principle of common but differentiated responsibility in the conceptual framework of international environmental law.[16] However, it is not an easy task to maintain a meaningful negotiating position that captures the interests of all developing countries in view of a wide range of socio-economic and political factors that define the national circumstances of each country. Small island states are especially vulnerable to climate change and call for fair allocation of mitigation burden and provisions of financial and technical assistance to countries with capacity limitation.

Third, as part of global governance, the international system sets standards and norms for participation. It provides, in different periods, various platforms through which actors can participate. Global governance unfolds in a way that actors adjust levels of participation and engagement, clarifying their positions. This in turn makes it easier for actors to redefine their roles. As China's stature grows in the world, so does its ambitions with respect to global governance. The largest emerging power expands international reach and global activism and becomes one of the major players in most international domains.[17] Chinese President Xi Jinping initiated and reiterates in various occasions the concept of "community with a shared future of mankind" which implies that states should consider the legitimacy concerns of others and pursue shared development of all countries, a new philosophy for China's international relation policies.[18]

(C) CHINA'S EVOLVING ENGAGEMENT AND ROLES IN DIFFERENT STAGES

(1)China's Early Responses

When the Reform and Opening-up was announced, Chinese decision-makers incorporated the concern about the environment into the Chinese Constitution in 1978, which accelerated the development of nation-wide environmental protection efforts.[19] One year later, the first Environmental Protection Law started trial implementation. In 1996, China released the first independent plan for environmental protection specifying quantitative objectives.

However, China before 2000 was still an underdeveloped agrarian country lacking capital and technology. A dramatic contrast between prosperous Japan, four "Asian Dragons", and China's backwardness played a crucial role in the perception of national interest of fast-paced economic growth. The government had to mobilize limited resources to develop the economy and eradicate poverty. This has been the overriding priority in political agenda for decades. As the President Hu Jintao stated at the United Nations climate change summit in 2009, "climate change is an environmental issue, but also, and more importantly, a development issue. […] Without common development, particularly the development of developing countries, there cannot be a broad and solid basis in the long run for tackling climate change."[20] The statement implies that economic

[16] J. Brunnée & Ch. Streck, *supra* n. 5.
[17] M. Burnay & J. Chaisse, *supra* n. 1.
[18] F. Teng & P. Wang, *supra* n. 11.
[19] Constitution of the People's Republic of China was adopted on March 5, 1978, the first session of the 5th National People's Congress.
[20] J. Hu, 'Chinese President Hu Jintao's Speech at the UN Climate Change Summit', *Xinhua*, September 22, 2009.

 DOI: 10.17103/sybil.25.6

consequences of climate commitments have been crucial considerations for Chinese policymaking.[21] Furthermore, the low oil prices in the early stage of Reform and Opening-up allowed the country to take full advantage of energy to feed its development. As long as the Chinese and world economy depends heavily on fossil fuels, GHG reduction, which has the potential to hinder economic development, is bound to give way to GDP growth.

Additionally, the administration and institutional structure before 2000 suggests Chinese society viewed climate change primarily in scientific and environmental terms, rather than economic terms. The coordination of China's climate policy began in 1990 with the establishment of the National Leading Group for Climate Change Coordination, which was initially led by the National Meteorological Administration (NMA). The NMA played a key role in conducting early-stage research, participating in international scientific programs, and implementing commitments under the Framework Convention after its ratification in 1992. As climate change became an important issue on international political agenda, China set up an interdepartmental committee to define the governmental positions in future negotiations.

At the same time, China needed to improve the international environment and actively integrate itself into the international community. Since the 1980s, China has moved away from the revolutionary overtones of the past, fully considering national interests and global trends, opting for peaceful development and opening-up to the outside world, with the ultimate goal of achieving national development. In this light, participation in climate negotiations and global climate governance is undoubtedly an effective way to promote China's exchanges with other countries and enhance China's positive image. The United Nations Conference on Human Environment held in Stockholm in 1972 was the first multilateral conference that China attended after returning to the United Nations, marking an important moment for Chinese diplomacy.[22] Subsequently, China joined a series of agreements on environmental protection.[23] Certainly, this helps China to integrate into the new international system and also to deepen awareness of global environmental concerns. However, China had little influence in the roadmaps for negotiations and norm-making processes.[24] The early engagement falls more within the framework of reform, opening-up and economic development.

(2) Transitional Stage During China's Rise

From the UNFCCC to the entry into force of the Kyoto Protocol, global climate governance shifted from a stage of consultation to one of responsibility sharing. Legally binding international agreements, marked by the formulation and adoption of the Kyoto Protocol, began to enter the global climate governance mechanism.[25] In parallel, China's socio-economic conditions have evolved as well. The development in the late 1990s basically freed China from material shortage, and China began to pay more attention to the quality of economic development in addition to growth rate. Since the Kyoto Protocol established the basic principles and provided an effective framework and rules for international cooperation to address climate change, China's ratification in 2002 demonstrated a

[21] S. Tsang & A. Kolk, *supra* n. 13, at 191.
[22] *Ibid.*, at 185.
[23] B. Li, 'A Study of China's Role in Global Climate Governance', Doctoral thesis at Shangdong University (2020) 1-253, at 112.
[24] *Ibid.*, at 84.
[25] J. Kuyper *et al.*, 'Annual Review of Environment and Resources: The Evolution of the UNFCCC', (2018) [doi: 10.1146/annurev-environ].

 DOI: 10.17103/sybil.25.6

positive stance regarding international climate cooperation along with its commitment to sustainable development.[26] In this context, Chinese domestic institutional structure has gone through significant changes. The State Council approved the set-up in 2003 of the National Coordination Committee on Climate Change, including 13 vice ministers from various departments concerned.[27] It finally became part of National Development and Reform Commission (NDRC), a comprehensive department at the State Council in charge of releasing economic and social policies, making five-year planning, regulating energy prices and other activities. The institutional reform demonstrates that climate change in China is no longer merely a scientific and meteorological issue, but also a political and economic concern connected with state comprehensive development.

After joining the World Trade Organization (WTO), China has become a world factory for manufacturing goods, which brought about large GHG emissions. Numerous quantitative analyses have found carbon emissions embodied in foreign exports account for a significant portion of China's domestic emissions.[28] That is to say, the rest of the world has avoided significant emissions as a consequence of importing from China, rather than producing domestically. This partly explains the Chinese early stance of rejecting caps on emissions. What accompanies the high-speed economic growth is the hunger for energy, which cannot be met from its own domestic power generation.[29] After becoming a net importer of oil since 1993, China's dependency on and vulnerability to foreign oil has increased as the international oil market remains uncertain and the political turmoil in oil-producing countries is widespread. In the wake of China's accession to the WTO, the domestic energy market has also come under increasing pressure from international competition, due to outdated oil production equipment and poor management and policies.

Undoubtedly, double-digit growth greatly enhanced living standards in China and transformed China from a poor agricultural country to a semi-industrialized one. Nevertheless, growth based on export and heavy use of fossil fuels caused serious environmental consequences, such as pollution, extreme weather, floods, drought, etc. The government had to shift "from an economic focus to a broader range of socially beneficial public goods"[30] to respond to people's demand for life with quality after meeting their basic needs. The president Hu Jintao developed concepts of "Scientific Outlook of Development" and "Harmonious Society", which are featured by environmentally sustainable and socially inclusive development.

As a result of globalization and interdependence, China has become more engaged with the world. The economic growth and increasing national power have driven China to consider further expanding international influence, which continues to reinforce China's perception of being a responsible emerging country. As the largest developing country, the most populous state, and a permanent member of the United Nations, the international community has demanded China to assume greater responsibilities. The U.S., as the world largest greenhouse gas emitter at that moment, withdrew from the Kyoto Protocol at the beginning of George W. Bush's administration. The American performance left room for China to take a more active part in climate governance. Within the framework of UNFCCC and Kyoto Protocol, China helped African and small island countries improve their capacity to address climate change through bilateral and multilateral channels, compensating for the

[26] B. Li, *supra* n. 23, at 117.
[27] S. Tsang & A. Kolk, *supra* n. 13, at 190.
[28] *Ibid*., at 191.
[29] *Ibid*., at 187.
[30] F. Teng & P. Wang, *supra* n. 11, at 10.

 DOI: 10.17103/sybil.25.6

lost leadership by the United States.[31] On the other side of the Atlantic, the EU has been a model for global climate governance and has emphasized the importance of regional and international cooperation. Although the withdrawal of the US and Canada caused tremendous concern to the future of the Kyoto Protocol, the EU actively communicated with other states to dismiss doubts and uncertainties to this treaty, encouraging other countries to join or not to leave.[32] Especially, collaboration with developing countries can provide instrumental support for the EU to maintain green leadership. At the 20th anniversary of the establishment of diplomatic relations between EU and China, the two sides reached a partnership on jointly tackling climate change in 2005. The year 2010 witnessed the official set-up of the China-EU ministerial dialogue mechanism on climate change. The intergovernmental cooperation reflects the strong will from both sides to strengthen communication and facilitate extensive view-exchanging.

(3)Proactive Engagement under Xi's Presidency

Starting from the second decade of the 21st century, China began to slow down economic growth. During this period, China has found emissions mitigation to be aligned with national interests in economic rebalancing and environmental improvement.[33] Viewed as both international responsibility and inherent national interest, climate governance will allow China to optimize and upgrade its economic structure. The 12th and 13th five-year plans included climate change targets as legally binding targets. A series of emission trading systems and low-carbon city pilots were initiated. And sustainability became important criteria for evaluating the performances of local officials.[34] In the 19th Parties' Congress in 2017, the concept of "Ecological Civilization" has been formally acknowledged as foundations of China's long-term development philosophy. Additionally, Chinese president Xi Jinping emphasized that China should take a "driving seat in international cooperation to respond to climate change" and become "an important participant, contributor, and torchbearer in the global endeavor for ecological civilization".[35]

Regarding global climate norm-making, the Paris Agreement paves the way for a new era in international climate governance, as the successor to the Convention and the Protocol. Compared to previous legal agreements, the Paris Agreement has long-term goals, flexible principles, and operational measures to reduce emissions. The bottom-up approach reduces conflicts between developed and developing countries, encouraging them to comply with emissions reduction targets as a result of the voluntary principle. China has played a significant role in Paris negotiations and the conclusion of the deal. In 2014 and 2015, China and the United States released two joint announcements in this regard, generating substantial impetus to the Paris Conference.[36] The French climate negotiator Laurence Tubiana applauded the announcement as "very positive", "very important" and "simply remarkable" as the two largest emitters committing to cut off their

[31] B. Li, *supra* n. 23, at 138.

[32] M. Zhang & J. Gong, 'The Evolvement of China-EU Cooperation on Climate Change and Its New Opportunities under the European Green Deal', *Política de La Competencia y Regulación* (2020) 1-34, at 13.

[33] F. Teng & P. Wang, *supra* n. 11, at 10.

[34] *Ibid*., p. 11.

[35] J. Xi, "Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era", 2017, at 4.

[36] X. Gao, 'The Paris Agreement and Global Climate Governance: China's Role and Contribution',2 *China Quarterly of International Strategic Studies* (2016) 365–381, at 378 [doi: 10.1142/S2377740016500226].

emissions.[37] To move the post-2020 climate negotiation forward, China no longer contended over differentiated responsibility, but placed more emphasis on common commitments, calling on each party to take action in the future climate regime. Chinese deep engagement and leading role in climate conferences has helped create opportunities for consensus building between the global North and the global South.[38]

Undoubtedly, the Paris era is not a period without difficulties. In 2016, the United Kingdom held a referendum to leave the EU, and finally confirmed its withdrawal two years later. Consequently, the EU, originally in a joint position of global climate governance leader, found it difficult to make further progress mired in "Brexit", economic recession, refugee concern, populism, etc.[39] Meanwhile, Trump announced the withdrawal from the Paris agreement on the grounds that it would destroy the US economy and "put the US at a permanent disadvantage", which cast a shadow over post-Paris governance. The unprecedented Covid-19 pandemic hampered the collective progress of the international community to address climate issues. It is in this context that Xi Jinping announced an ambitious target in September 2020 to reach carbon peak before 2030 and achieve carbon neutrality by 2060. As outlined in the 14th five-year plan (2021-2025), China will set up a double control system of total energy consumption and intensity of fossil energy consumption. As well, the plan promised to promote "clean, low-carbon, safe and efficient use of energy", "transformation of industries, construction, transportation, and other sectors towards low-carbon development".[40] Without doubt, the ambitious endeavor will encounter difficulties and challenges. China still remains reliant on high-carbon fossil energy, with low energy utilization efficiency. The transition period from carbon peak to carbon neutrality allowed for the country is shorter than that of developed countries.[41]

(D) CONCLUSION

Climate change has been probably by far the most widely discussed issue, garnering the most attention and resources globally. Throughout the world, it has gradually influenced the political, economic, cultural, scientific, and technological fields in all countries. It is a collective effort of mankind that countries around the globe find countermeasures to reduce emissions, yet their interests are divided due to different economic development, scientific and technological advantages, and greenhouse gas emissions.

Parallel with the evolution of global climate norm-making, China's role and participation in the processes have also changed significantly. During the 1980s and 1990s, China viewed itself as an underdeveloped country, aiming at industrialization, modernization and bringing an end to poverty. Chinese interests in the global climate were confined to scientific research and integration to the international community. Since the beginning of the 21st century, China has gradually incorporated climate issues into its national economic development strategy, shifting from growth with quantity to growth with quality. As the largest developing country, China has developed its identity as a

[37] A. Robert, 'Laurence Tubiana: EU-China Climate Agreement Is Conceivable', *EURACTIV*, January 28, 2015.
[38] X. Gao, *supra* n. 36, at 379.
[39] H. Yu, 'Rebalancing Global Climate Governance and China's Endeavor', 5 *China Quarterly of International Strategic Studies* (2019) 417-435, at 419 [doi: 10.1142/S2377740019500246].
[40] Outline of the 14th Five-Year Plan (2021-2025) for National Economic and Social Development and Vision 2035 of the People's Republic of China, 2021.
[41] X. Zhao *et al*., 'Challenges toward Carbon Neutrality in China: Strategies and Countermeasures' 176 *Resources, Conservation and Recycling* (2022) [doi: 10.1016/j.resconrec.2021.105959].

"responsible power" and has begun to enhance environmental management, improve ecological conditions, and scientifically assess the impact of China's environmental problems. The withdrawal of the United States from the Kyoto Protocol and the loss of leading role have left more room for China to fill the void. During Xi's presidency, China has proposed the "Community of Human Destiny" as the "Chinese way" to offer a solution to global climate governance. Meanwhile, China steers gradually away from its reliance on large-scale resource consumption, increasing investment in science, technology and new energy sources. Furthermore, it promised in 2020 to reach carbon peak by 2030 and carbon neutrality by 2060.

This paper provides a testing ground for observing China's engagement in international norm-making processes, traditionally dominated by the West. Whether being a norm-taker, norm-challenger, or norm-shaper, China's participation is fundamentally shaped by development patterns, perceptions of national roles, as well as international contexts. The "Chinese model", "Chinese way" or "Chinese approach" might be difficult to follow for other countries, which generally do not have a centralized governmental system covering such a huge population and land area. Even so, mutual understanding and learning can shed more light on global governance in future, grounded in national social, political and economic contexts.[42]

[42] F. Teng & P. Wang, *supra* n. 11, at 18.

 DOI: 10.17103/sybil.25.6

the SPANISH YEARBOOK of INTERNATIONAL LAW

Submarine Cables as an Object of Legal Regulation under International Law

Daria Shvets*

Abstract: Submarine cables laid on the bottom of the ocean, connecting continents and nations worldwide, have specific and extraordinary legal nature. The current legal regime of submarine cables mostly formed by the law of the sea and domestic law of states depends on several key characteristics influencing the formation and development of such regime. First, submarine cables represent the plurality of interests of numerous stakeholders: public, private and those of a mixed nature. They combine a variety of legal relations concerning submarine cables taking place in different maritime zones in accordance with the law of the sea. Second, they form critical infrastructure being the backbone for modern Internet and telecommunications. Currently most of all international data traffic goes through submarine fibre optic cables. Third, submarine cables can be considered as an object of a global public interest serving needs of the whole international community. By providing the analysis of key distinguishing characteristics of submarine cables this article hopes to bring better clarity on the nature of submarine cables as an object of legal regulation under international law and attract legal scholars' attention to this important but sometimes underestimated topic of international law.

Keywords: Submarine cables–public international law –global public interest–stakeholders – law of the sea – telecommunications.

(A) INTERESTS OF DIFFERENT STAKEHOLDERS IN SUBMARINE CABLES

Submarine cables appear to be an infrastructure accumulating interests of various stakeholders. It might be characterized as multi-faceted and diverse collection of various goals set by such stakeholders that become possible to be achieved due to submarine cables network. Submarine cables not only demonstrate the plurality of public relations taking place around them but also that the nature of this object of regulation is diversified.

Principal stakeholders interested in submarine cables usage are states; business sector represented by content providers, telecommunications companies and IT giants; and individuals as final consumers. The value that submarine cables bring is addressed to all of them but each stakeholder finds its own benefit in using cables as it will be addressed further.

(1)Interests of States

Two different groups of states' interests in submarine cables can be distinguished: interests when laying a submarine cable (primary interests); and interests resulting from having a submarine cable in a maritime zone of such state (subsequent interests).

Regarding the primary interests, all states members of the United Nations Convention on the Law of the Sea[1] (hereinafter UNCLOS), the main international agreement addressing submarine cables, are granted the right to lay cables in different maritime zones.[2] The same applies to non-parties of the UNCLOS by virtue of customary international law. The UNCLOS does not divide states by

* Adjunct Professor, Universitat Pompeu Fabra. Email: daria.shvets@upf.edu.

1 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 397.

2 *Ibid*, Article 58, paragraph 1; Article 79, paragraph 1; Article 87, paragraph 1 (c); Article 112, paragraph 1.

 DOI: 10.17103/sybil.25.7

consideration of coastal or land-locked state or by any other criteria making all states equal in this right. Thus, states are entitled to lay submarine cables in other states' maritime zones according to international law.

As for subsequent interests, states perform on the other side being parties welcoming cables in their maritime zones. In particular, states are interested in regulating cable related activities given that the project is implemented in maritime zones under a state's jurisdiction. Therefore, coastal states regulate cable installation in their domestic legal orders[3]wishing their interests to be respected. From this perspective, states perform controlling functions and ensure a competition between providers that is especially relevant for developing states.[4]When laid in states' maritime zones they ensure their economic, environmental and security interests.[5]

Submarine cables connect states with the external world contributing into their economic development. Even remote territories or islands may stay connected to take part in world policy by electronic means that appeared to be even more relevant in the course of covid-19 pandemic. Australia and New Zealand, for instance, significantly rely on submarine cables transmitting over 99% of all their international communications.[6]The Australian navy, for instance, announced "three-ocean" strategy protecting submarine cables from terrorist attacks[7], understanding the crucial impact from cables for geographically remote Australia highlighting that cables should be free from all kinds of threats.

Another dimension from which states and the international community might be interested in submarine cables is environmental dimension. It becomes relevant not only for remote territories but for the common wealth of the whole world. Video conferences, video calls and other means of telecommunications may contribute to the protection of the environment eliminating the necessity to transport people and resources to a certain destination and as a result reduce CO2 emissions. For instance, a 2-day video conference between New York and Stockholm would produce 5,7 kg of CO2 due to the operation of submarine cables while CO2 emissions from aircraft used for bringing only 2 participants of the conference would count to 1,920 kilograms.[8] That might be especially relevant for states in building their agenda on mitigation of climate change and obligations taken before international community in relation to it.

One more factor for states to seriously consider submarine cables is that they rely on cables for security interests. Some cables are laid for military purposes and ensure national security. Historically submarine cables were used by governments for various military operations such as bilateral

[3]As an example, see analysis of detailed legal regime established by the Russian Federation on submarine cables in D. Shvets, 'The Experience of the Russian Federation in the Legal Regulation of Submarine Cables', *Central and Eastern European Legal Studies*, 1, 2017, 163-199.

[4] International Telecommunications Union, *Access to Submarine Cables: Guidelines, Harmonization of ICT Policies in Sub-Saharan Africa HIPSSA*, Geneva, 2013, at 1, accessed 18October 2021.

[5] For instance, Spain concerns national maritime security as the action of the state aimed at protecting national interests related to, inter alia, submarine cables. See B. Navarro, 'A Comprehensive New Approach: The National Maritime Security Strategy', Spain and the Law of the Sea: 20 years under LOSC, *Spanish Yearbook of International Law*(2017), 21, 225-238,at 231[doi: 10.17103/sybil.21.13].

[6] Department of Broadband, Communications and the Digital economy,*Submarine Cable Information Sharing Project: Legislative Practices and Points of Contact*, Australia, 2012, at3, accessed 18October 2021.

[7] P. Khanna, *Connectography: mapping the future of global civilization* (Random House,New York, 2016), at 126.

[8] D. Burnett, 'Impacts on international submarine cables by coastline state encroachment based in natural resources and environment', in L. Martin, C. Salondis, C. Hioureas, *Natural Resources and The Law of the Sea, Exploration, Allocation, Exploitation of Natural Resources in Areas Under National Jurisdiction and Beyond* (Juris, New York, 2017), 147-184, at 162.

communications, acoustic monitoring, and telecommunications.[9] However, some cables continue performing their initial functions, such as facilitating financial transactions, supporting surveillance systems, collecting intelligence, listening through hydrophones, et cetera.[10]

(2)Interests of Business Sector

Not only states but large business players such as banks, stock exchanges, airlines, and maritime industry also depend on submarine cables forasmuch as they ensure daily communications, transactions, and communications of business. Multinational corporations, telecom carriers, mobile operators, and content providers depend on submarine cables for the prosperity of their business. In particular, the Society for Worldwide Interbank Financial Telecommunications (SWIFT) daily transmits 15 million messages to more than 8300 banking organizations, securities institutions, and corporate customers in more than 200 countries or entities.[11] The global significance for domestic economies and communications is reported as increasing every year.[12]By way of example, the company Amazon uses submarine telecommunications cables for improving the speed and quality of its web services, as well as Japanese Softbank relies on submarine cables for "building and optimizing its network infrastructure to support rapidly increasing traffic demand and its customers".[13] Well-known content providers Netflix and Spotify also rely on submarine cables to transfer their data to customers.[14]Apart from major players of the market, middle class and small business in every state also depend on submarine cables. Travel agencies, supermarkets, restaurants, or local stores might serve as examples.

One more dimension of submarine cables' impact for business is shipping costs reduction. In combination with the development of 3D printing technologies, it might not be necessary to transport goods by sea or carry parcels by air from one part of the world to another. Submarine cables by transferring necessary information, may contribute into in-demand printing of objects at a place without the need of transportation. The cable industry is nowadays looking for faster and better development of 3D printing technologies for faster growth of this potential sector of cooperation.[15]

(3)Interests of Individuals

Submarine cables are laid and further operated in the framework of private law contracts between two legal entities basically acting as seller and purchaser of a cable system and are parts of business projects. At the same time, submarine cables also serve for needs of final costumers such as individuals providing people with Internet, the possibility to make calls, send messages, and have access to data transmitted by cables.

Although legally cables are laid in favor of a contracting party under a contract, this fact does not change submarine cables' nature. In a legal sense, submarine cables are considered as a property of

---

[9] D. Burnett, T. Davenport, R. Beckman, *Submarine cables: The Handbook of Law and Policy* (Martinus Nijhoff, Leiden, 2014), at 339.

[10] B. Clark, 'Undersea Cables and the Future of Submarine Competition´, *Bulletin of the Atomic Scientists*, 72, Issue 4, 2016, 234-237, at 234[doi: 10.1080/00963402.2016.1195636].

[11] Supra n. 8, at1.

[12] Submarine Telecoms Forum, Submarine cable almanac, issue 24, 2017, at 2, accessed 18October 2021.

[13] See website of Softbank, accessed18October 2021.

[14] B. Morris,'Submarine cables: a deep dive into underwater connectivity', *Tata Communications New World Blog*, 2015, 1-4, at. 1, accessed 18October 2021.

[15] Supra n. 7, at 162.

the owner who is free to act with cables upon its will. However, the last consumer of cables as a product is general audience and individuals. Eventually they are placed for public purposes.

Submarine cables make connections global and allow transmitting data from one part of the world to another. Today anyone could have business with anyone by working remotely on the Internet. Mailboxes and professional social networks require daily access to the global network of submarine cables. Such cooperation between users around the world eliminates state borders, customs formalities, and distances to make people connected.

One more perspective from which individuals are interested in submarine cables is the right to online education. There are numerous online resources and programs available with Internet access nowadays that becomes especially relevant for remote and northern territories whose only way to external world is Internet.[16] The same applies to health care and telemedicine available online.[17]

(B) SUBMARINE CABLES AS TELECOMMUNICATIONS INFRASTRUCTURE

Infrastructure is primarily a tool helping a particular activity to be performed and developed further. In the present case submarine cables could be considered as a critical infrastructure for transmitting telecommunications as it is discussed below.

(1)Definition of Submarine Cables as an Infrastructure

Taking into consideration interests of different stakeholders in submarine cables operation and consequently, cables' public-private nature, they may be considered as infrastructure. The infrastructure can be defined as "the basic physical and organizational structure needed for the operation of a society or enterprise or the supporting structure/base/foundation for a system or organization."[18]In the case of submarine cables, it is not local and not always regional infrastructure but the infrastructure that often serves for an international community. Therefore, the definition of "global information infrastructure" may also be considered as applicable to submarine cables: "proposed telecommunications and information technology networks as a governmental and nongovernmental, worldwide infrastructure. Its objective is dissemination of information and remote collaboration spurring faster and greater economic growth".[19]Thus, submarine cables as a global information infrastructure have several important elements to examine.

(2)Elements of Submarine Cables as an Infrastructure

The development of succesful infrastructure is becoming a prerequisite for successful country´s development, especially for small countries allowing them to join the international market either through promotion of tourism, advertising of favourable business environment, or providing

[16] D. Shvets, 'The Legal Regime Governing Submarine Telecommunications Cables in the Arctic: Present State and Challenges', in M.Salminen, G.Zojer, K.Hossain, *Digitalisation and Human Security* (Palgrave Macmillan, Switzerland, 2020), 175-203[doi: 10.1007/978-3-030-48070-7_7].

[17] S. von Schorlemer,'Telecommunications, International Regulation', *MPEPIL*, 2009, 16, at 1, accessed 18 October 2021.

[18] C. Turner and D. Johnson, *Global infrastructure networks* (Edward Elgar Publishing Limited, Northampton, 2017), at 1.

[19] B. Garner (ed.), *Black's Law Dictionary*, 7th edition (West Publishing Co., St. Paul, Minn.,1979).

investment opportunities.[20]Submarine cable in service means physical elements to be installed on the seabed and onshore. Such physical elements include cables themselves, landing stations and repeaters among other things under the property of public entities, private companies, or companies of a mixed legal nature as it was discussed above. At the same time, cables are laid in various maritime zones attributed exclusively to states (except for the high seas and international seabed area, maritime zones not falling under any state's jurisdiction), and no private actor can claim a maritime zone to be owned by it. Thus, an analysis of submarine cables as an infrastructure contributes to understanding of cables as an object of legal regulation.

(i) *Property*

Successfully developed material infrastructure powers the existence of services enabled by it. The history even knows examples of exclusive use of the Internet powered by submarine cables when all other means of communications including regular mail or face to face communication were blocked for political reasons.[21] In the present time, governments are able to provide services online, respond to queries and better communicate with citizens due to well-working tangible submarine cables infrastructure. Thus, the ownership and proper maintenance of the infrastructure matter.

Submarine cables as an infrastructure may belong to different kind of stakeholders. A major part of all submarine cables constitutes a private property of legal entities or consortium of legal entities aimed at providing telecommunications services.[22]Sometimes cables are owned by a solo proprietor (for instance, cable Junior is owned by tech giant Google individually connecting two locations in Brazil with more and more investments being made by this company in other cables).[23] Sometimes the infrastructure may be leased. For instance, a time on a submarine cable is leased without the necessity to own it.[24]The same applies to cable stations facilities onshore. They can be leased from a coastal state, or a company headquartered in such state.[25] Another form of property is when a cable is in the public domain. Although this situation is not common in the cable industry some examples may be found in practice. One would be a cable Saba, Statia Cable System (SSCS) owned by the Government of Netherlands.[26]Forms of submarine cables possession may vary that one more time underlines their hybrid and complex legal regime.

(ii) *Location*

Despite different type of ownership in the area of submarine cables, rules andmaritime zones dividing the ocean established by the UNCLOSremain the same. Thus, submarine cables as an infrastructure are laid in maritime zones under the sovereignty of coastal states (territorial sea and archipelagic

[20] L. Main, 'The global information infrastructure: empowerment or imperialism?', *Third World Quarterly*, 22, No 1, 2001,83-97, at 95[doi: 10.1080/01436590020022592].

[21] During the 1995 conflict in the Balkans the external server helped people separated by the conflict to communicate. See supra n. 19, at 84.

[22] For instance, a submarine cable Circle North connecting Netherlands with England is owned by two companies: euNetworks headquartered in the United Kingdom (see more information at the company's website, accessed 18 October 2021) and VTLWaveNet, also a privately held company (see more information at the company's website, accessed 18 October 2021). Therefore, a cable constitutes a joint private property of these two companies.

[23] Telegeography, *Submarine Cable Map*, accessed 18 October 2021.

[24] R. Miller, 'Google's latest undersea cable project will connect Japan to Australia', *TechCrunch*, 2018, 1-2, at 1,accessed 18 October 2021.

[25] S. Esselaar, A. Gillwald, E. Sutherland,'The regulation of undersea cables and landing stations', *International Development Research Centre*, 1-16, at 3, accessed 18 October 2021.

[26] Supra n. 22.

waters), maritime spaces not under the sovereignty of coastal states but where they have rights to exercise certain jurisdiction (contiguous zone, exclusive economic zone, and continental shelf) and maritime areas not subject to the jurisdiction of coastal states (high seas and international seabed area).

Essential infrastructure providing society with public goods deserve well-developed legislation specifying their certain status. It becomes even more relevant when the infrastructure is global and serves for the needs of the international community. The infrastructure helps states and communities to prosper, maintain and develop economic wellbeing, and stay connected to the rest of the world. This is the reason why states aim to develop and maintain its modern infrastructure and specify it as one of top prioroties of national development strategy.[27]In other cases states at least intend to have a minimum level of regulation and enact domestic acts implementing their UNCLOS obligations. However, there are still cases of underdeveloped legal regime of submarine cables under international law. That means not all states put enough efforts to develop a comprehensive legal regime regulating submarine cables in maritime zones under their jurisdiction so that it causes practical implications and difficulties for cable projects in practice.

(C) SUBMARINE CABLES AS A MATTER OF GLOBAL PUBLIC INTEREST

Legal norms of public interest are norms addressed to regulate most important matters of an international community since they accumulate different interests of various groups. Together they are based on common values recognized by states, international organizations, civil society, and all other stakeholders on international arena admitting the necessity of existence of such interests.[28]In the light of this concept submarine cables can be considered as an issue comprising global public interest.

(1)Definition of Global Public Interest

The modern international law does not provide with the definition for the term of a "global public interest" but there is a shared vision that global public interest is expected to be for the benefit of all. There are, however, various definitions of a "public interest" in academic papers. In the legal doctrine, it is defined, for instance, as "an interest of society as a whole, i.e. an interest that goes beyond the interest of the individual or of mere factions.[29]Another definition of authoritative *Black's Law Dictionary* suggests that a public interest is: "(1) The general welfare of the public that warrants recognition and protection; and (2) Something in which the public as a whole has a stake; especially an interest that justifies government regulation".[30] Alternative definition to be found in *Barron's Dictionary* refers to public interest as "that which is best for society as a whole", but then adds it is "a subjective determination by an individual such as a judge or governor, or a group such as a [...]

[27] President of the Russian Federation,Decree of n. 645 'On the Strategy for the Development of the Arctic Zone of the Russian Federation and Ensuring National Security for the Period until 2035', accessed 18 October 2021.

[28] Supra N. 17, at 6.

[29] A. Bělohlávek, 'Public Policy and Public Interest in International Law and EU Law',in *Czech Yearbook of International Law*,A. Belohlavek, N. Rozehnalova (eds.) (JurisPublishing, Inc.,Huntington, New York,2012), 117-149, at 120.

[30] Supra n. 18.

 DOI: 10.17103/sybil.25.7

legislature of what is for the general good of all people".[31]In the abundance of definitions, there is, however, still no agreement between scholars what should be considered as a public interest.[32] The traditional concept arguing that "public" means pertaining to a state, the state-oriented, or equalling to the interest of a state, does not apply in the case of submarine cables. The public interest, especially when it is a global public interest does not mean the sum of individual interests of states but constitutes the interest of a different nature.[33] States within the international legal order are considered as sovereign and equal subjects constructing the horizontal and decentralized system.[34] However, as opposed to this traditional concept the new notion of a public interest has emerged stating that public interest does not mean an interest of a state but the interest of an international community as a new object of regulation by the international legal order.[35]That said, states do not have their own interests but rather have one common interest together with other actors. Since the complex system of current international law involves interests of many actors and constitutes more than particular individual interest, the global public interest should be considered as an interest of the international community.

(2)Global Public Interest as an Interest of the International Community

Global public interest contains the interest of an international community meaning that in the modern world states are not the only stakeholders. They coexist together in a manner of interdependence and cooperation with other international law actors. Such actors, for instance, international governmental organizations, international non-governmental organizations, and individuals should successfully integrate to the international community. Therefore, the current international law represents the variety of actors with complex relations between themselves. At the same time, it remains reluctant and conservative regarding the involvement of non-traditional institutions to the law-making process arguing that states "have not been challenged towards the protection of community interests".[36]

Despite the conservativeness of international law, the central element to be considered is the existence of collective interests, matters constituting a concern to all stakeholdersin international law. These interests are different from the interests of any of the stakeholder taken individually since such interests identify a shared value that all stakeholders recognize as the one that needs common protection, a collective action under international law. Global public interest consisting of collective interests that are not the sum of individual interests but concerns of the international community as a whole constitutes general interest. This general interest should be regulated by rules and institutions of international law and deserves legal protection reflecting social interests.[37]Judge Simma of the

---

[31] S. Gifis, *Law Dictionary*, 4th ed. (Barron's Educational Services,New York, 1996).

[32] R. Huesa, 'La protección del interés público global: una nueva dimensión para las normas y obligaciones internacionales', in N. Bouza, C. García, Á. J. Rodrígo, Coordinador: P. Pareja, *La gobernanza del interés público global*(XXV Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales, 2015), 253-286, at 255.; A.Rodrigo, 'Más allá del derecho internacional:el derecho internacional público', in R. Méndez-Silva, *Derecho internacional,* primera edición, *(*UNAM, Instituto de Investigaciones juridicas,México, 2019),67-98, at 77.

[33] O. Casanovas, A. Rodrigo, *Compendio de Derecho Internacional Público*, sexta edición (Tecnos,Madrid, 2017),at 355.

[34] P. Reuter, *Droit international public*, 7ª ed. (Presses Universitaires de France,Paris, 1993), at 22.

[35] E. Riedel, 'International Environmental Law. A Law to Serve the Public Interest? An Analysis of the Scope of the Binding Effect of Basic Principles (Public Interest Norms)', in J. Delbrück (ed.*), Proceedings of an International Symposium of the Kiel Walther-Schücking- Institute of International Law* (Duncker & Humblot, Berlin, 1997),at 97.

[36] S. Villalpando, 'The Legal Dimension of the International Community: How Community Interests are Protected in International Law', *European Journal of International Law*, 21, 2010, 387-419, at 410 [doi:10.1093/ejil/chq038].

[37] Supran. 31, at 155-156.

International Court of Justice once noted "[a] rising awareness of the common interest of the international community, a community that comprises not only states, but in the last instance all human beings, has begun to change the nature of international law profoundly."[38]

There are three elements to be covered by the notion of a public interest. First, objects of a public interest re in service to meet the needs of international community in general. Second, their origin is in interdependence. Third, they are characterized by their lack of reciprocity.[39] Thus, interests of international community should be protected by the international legal order and submarine cables deserve the status of the interest of an international community.

(3)Recognition of Submarine Cables as a Matter of Global Public Interest

There is no definitively established list of areas of international law to be considered as a global public interest and any area might be attributed such status should there be a reason for it. Activities rising around submarine cable might be examined as one of such areas constituting the global public interest. Not only they constitute an object of a public interest but appear to be a matter of global public interest in the meaning that many stakeholders on different territories equally recognize the value of services brought by submarine cables. There are two elements connected to the interest. First is *global,* meaning that submarine cables are not an object causing concern only in a particular territory or in a particular state. Submarine cables are laid worldwide and ensure stable telecommunications in various territories. Second is *public*, meaning that various groups of stakeholders are interested in submarine cables where each group has its own concern.

Public interest is most associated with being present in affairs traditionally belonging to state-oriented policy such as military affairs, international relations, state defence, et cetera. Legal scholars also find the public interest in problems of climate change; world cultural and natural heritage; high seas and its resources; the seabed of the oceans and their mineral resources; problems of biodiversity in areas beyond national jurisdiction; the Antarctic; protection of basic human rights; maintenance of international peace and security, et cetera.[40] Apart from matters traditionally associated with strong role of a state and its governance, other fields of international relations where public interest may present appear. Gradually telecommunications also become to be considered as an area of public interest being essential source of connectedness.[41] Therefore, it might be argued that the public interest is present in the legal regime of submarine cables given that submarine cables and their infrastructure serve for the interests of many stakeholders taken each separately and simultaneously for all them together.

The public interest is often associated with concerns of states as it follows from the traditional concept mentioned above. However, states and other international community's interests are not always equal, and what is considered by the state as a public interest does not always interpret by society equally. For instance, military affairs are widely considered as being a matter of a public matter. At the same time, state's population does not necessarily support acts of war or aggression covered by the concept of defense or protectionof national interests supported by the state. Public

[38] B. Simma, 'From Bilateralism to Community Interest in International Law', *Recueil des Cours de l'Academie de Droit International*, 250, 1994, 217-384, at 234 [doi: 10.1093/acprof:oso/9780199588817.003.0067].

[39] E. Kornicker Uhlmann, 'State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms', *Georgetown Environmental Law Review*, 101, 1998-1999, 101-135, at 107.

[40] Supra n. 31, at 156.

[41] Supra n. 6, at 25.

interest is the interest recognized by state and ensured by law, providing for interests of the whole community, the satisfaction of which serves as a condition and a guarantee of this community's existence and development.[42] A particular attention in this definition one should turn to the aspect that interests of society and the state are not equal, but the special role of the state in the expression and protection of both interests is emphasized.

In the case of submarine cables, it appears to be the opposite. Both a state and a civil society as well as business representatives and other stakeholders support maintenance of existing cables and laying of new ones. This model works because both parties have their benefit from cables and understand their significance for each of them. States find submarine cables helpful in providing and ensuring their economic, security and other interests while civil society along with business sector finds their benefits in submarine cables in the opportunity to be connected and have a chance to communicate with the rest of the world.

In the framework of submarine cables as a public interest there is a recognized universal value of submarine cables associated with interests of international community. In this case, it is an interest serving for everyone's wealth and might be considered as a global public interest.

(D) CONCLUSION

Submarine cables constitute an interesting and to a certain extent unique object of legal regulation that unfortunately, sometimes left out of scope of international agenda and academic discussions. Certain distinguishing characteristics inherent to submarine cables such as accumulation of interests of several stakeholders, serving as critical and irreplaceable infrastructure and constituting a global public interest formulate multifaceted and multi-levelled legal regime of submarine cables nowadays. The legal regulation of submarine cables is represented by international agreements with leading role of the UNCLOS in place; domestic law of states enacted in the framework of implementation of international law norms; and concluded by private international law norms governing a great part of relations between stakeholders in the course of submarine cables projects. The current legal regime of submarine cables would not be possible to form without these distinguishing characteristics analysed in the present article and constituting submarine cables as an object of regulation under international law.

[42] A. Chardantsev, *Theory of State and Law: textbook for high schools* (Yrait-M, Moscow, 2001), at 171.

 DOI: 10.17103/sybil.25.7

the SPANISH YEARBOOK of INTERNATIONAL LAW

The normative dimension of platform governance: big tech and digital platforms as normative actors

Josep IBÁÑEZ MUÑOZ *

Abstract: Big tech and digital platforms are not only market players or even political agents, but also normative actors and sources of authority for users, consumers and even governments. Virtual communities shape a global public domain and transcend the private nature of the services and spaces of interaction provided by private corporations. In the global public domain of cyberspace, States appear as dysfunctional and heterogeneous entities for the regulation of content, whereas global platforms have become normative actors effectively shaping the behavior of individuals and groups of all sorts through code, algorithms and business models. The relevance of this normative dimension of platform governance deserves a normative acknowledgement as well as a critical consideration.

Keywords: Virtual communities – big tech – digital platforms – normative actors – platform governance

(A) INTRODUCTION

Recent years have seen an increasing tension between States and non-state actors in relation to the establishment of norms for the use and functioning of internet around the globe. Since the first decades of the creation and expansion of cyberspace, its universal, transnational and decentralized nature favoured the development of cyberlibertarian conceptions stressing the democratic potential of networks; digital citizens, netizens, would enjoy freedom and creativity in spaces beyond the limitations of territories shaped by political geography and geopolitics. However, the reality of cyberspace in the 21st century has been partly shaped by States, and the so-called return to geopolitics[1] has entailed a remarkable wave of regulation with the aim of controlling internet users within state borders, even beyond them, as well as the projection of state power with cyberoperations, in what can be seen as the emergence of cybergeopolitics.[2]

Between these two coexisting trends, big tech companies and digital platforms have become central players for the articulation of communication on the internet. The notion of platform adopted here is a broad one, "a programmable architecture designed to organize interactions between users — not just end users but also corporate entities and public bodies" on the internet, as defined by Dijck, Poell and Waal.[3] Such digital constructs have created the virtual spaces where users, consumers and

* Associate Professor of International Relations, University Pompeu Fabra. Email: josep.ibanez@upf.edu.

1 S. Guzzini (ed), *The Return of Geopolitics in Europe?: Social Mechanisms and Foreign Policy Identity Crises* (Cambridge University Press, Cambridge, 2012), and W. R. Mead, 'The Return of Geopolitics', 93(3) *Foreign Affairs* (2014) 69-79.

2 R. J. Deibert, 'The geopolitics of internet control: Censorship, sovereignty, and cyberspace', in A. Chadwick, Ph. N. Howard (eds), *Routledge Handbook of Internet Politics* (Routledge, New York, 2009) 323-336; Ch. C. Demchak and P. Dombrowksi, 'Rise of a Cybered Westphalian Age', 5 *Strategic Studies Quarterly* (2011) 32-61; R. Nieto Gómez, 'Cybergéopolitique: de l'utilité des cybermenaces', 152-153(1-2) *Hérodote* (2014) 98-122; J. Sheldon, 'Geopolitics and Cyber Power: Why Geography Still Matters', 36(5) *American Foreign Policy Interests: The Journal of the National Committee on American Foreign Policy* (2014) 286-293; C. Cuihong, 'Geopolitics in the Cyberspace: A New Perspective on U.S.-China Relations', 39(1) *The Journal of International Studies* (2018) 9-37.

3 J. van Dijck, T. Poell and M. de Waal, *The Platform society. Public Values in a Connective World* (Oxford University Press, Oxford, 2018), at 4. In this volume the anatomy of platforms is depicted by stressing the relevance of some elements: "a platform is fueled by *data*, automated and organized through *algorithms* and *interfaces*, formalized

 DOI: 10.17103/sybil.25.8

citizens interact according to both the rules of digital platforms and the rules of states. The normative settings of these interactions online are more complex and diverse than the public norms that states adopt and enforce in their fragmented territorial spaces. On the internet, a diversity of public and private actors and authorities cooperate and compete in the management of the public interest with overlapping or conflicting norms, shaping so the behaviour of individuals, groups and organizations of all sorts.

The following pages overviews some of the features of digital platforms and the normative challenges they pose to States, characterized as dysfunctional polities to govern the global public domain of cyberspace. In light of the complexity of platform governance, a conceptual framework is suggested to depict normative processes in terms of normative flows or streams running along normative courses or channels, which are shaped according to the normative action by both public and private actors and authorities.

(B) GLOBAL PUBLIC SPACES, DYSFUNCTIONAL POLITIES AND NORMATIVE CODE

Interactions among users of platforms, applications and services on the internet are at the origin of virtual communities, defined by H. Rheingold back in 1993 as "social aggregations that emerge from the Net when enough people carry on those public discussions long enough, with sufficient human feeling, to form webs of personal relationships in cyberspace."[4] The nature of such Computer-mediated communities (CMC) or electronic communities has extensively been debated, and with the experience of recent decades we can assume by now not only that they are versions of real communities, but also that they affect 'real life' communities and, actually, they are themselves real communities, as suggested by B. Wellman and M. Gulia.[5] They may be conceived as 'communities of practice', 'virtual arenas', 'virtual networks' or 'networked virtual communities',[6] but in most cases these social interactions online take place in public spaces constituted by millions of users, and transcend territorial, social, functional boundaries. Such communities are transnational in their scope, heterogeneous in terms of participation, and very diverse in their functionality and interests.

Although private corporations articulate this social reality with their digital services, the sheer dimension and scale of virtual communities make them public spaces of interaction, well beyond the private nature of the platforms hosting, facilitating and reproducing them. Like in many areas of social and economic life, industry self-regulation effectively grants private companies a public role in terms of governance.[7] Thus, big tech companies and digital platforms have assumed and performed with their private means functions of global governance in the transnational public spaces where virtual communities exist.

Since they are shaped and organized according to patterns and rules designed and embedded in the

---

through *ownership* relations driven by *business models*, and governed through *user agreements*." *Ibid.*, at 9.

[4] H. Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (Addison-Wesley, Reading, MA, 1993), at 5.

[5] Wellman, B., & Gulia, M., 'Net surfers don't ride alone: Virtual communities as communities', in M. Smith & P. Kollock (eds), *Communities in cyberspace* (Routledge, London, 1999), at 167-194.

[6] A comprehensive discussion of these conceptions can be found in D. Ellis, R. Oldridge and A. Vasconcelos, 'Community and Virtual Community', in B. Cronin (ed), *Annual Review of Information Science and Technology*, (information Today, Medford, 2004), at 145-186, doi: 10.1002/aris.1440380104.

[7] V. Haufler, *Public Role for the Private Sector: Industry Self-Regulation in a Global Economy* (Carnegie Endowment for International Peace, Washington, DC, 2001).

software of apps and platforms hosting them, they are not spontaneous or unlimited spaces of interaction, but social arenas with some degree of institutionalization. They are, therefore, part of the global public domain, understood by J. G. Ruggie as "an increasingly institutionalized transnational arena of discourse, contestation, and action concerning the production of global public goods, involving private as well as public actors."[8] And there is, therefore, a global public interest, an interest with a communitarian dimension (qualitatively different from the aggregate interests of States), arising from rational deliberation and open participation, and the beneficiaries of which are not only States, but humankind (individuals and peoples of present and future generations).[9]

In cyberspace States have not always been able nor willing to assume and perform the provision of public goods such as regulation of interactions in virtual communities. These difficulties, or reluctance, to control the internet derive from a variety of factors, such as the pace of technological innovation, the lack of awareness about the depth of transformations brought about by the revolution of Information and Communication Technologies (ICTs), the plurality of governmental approaches and policies (from democratic to authoritarian), or the calculated strategies by some powerful States to enjoy their technological advantage in the digital world. But the essential issue at stake is the dysfunctionality of territorial entities to deal with trans-border functional realities, especially if from a liberal democratic perspective fundamental rights and freedoms of citizens are to be preserved. As in other areas of international life, connectivity in cyberspace severely disrupts political geography and modern territoriality.[10] States, and notably democratic governments, appear as dysfunctional political entities to manage the coexistence of spaces-of-flows with spaces-of-places and the challenges of unbundled territoriality.[11]

For States the regulation of cyberspace has been extremely difficult due to the architecture of the internet, but this un-regulation of the Net is a feature of the past, as noted by L. Lessig.[12] During the 21st century, both States and technological companies have 'tamed' the cyberspace, although through different means and for different purposes. For most governments, the internet has eventually been understood as a domain that can and must be controlled, just like other more familiar domains of modern territoriality. But for ICT companies, this possibility was clearly understood since the beginning of electronic markets. The policy of commercialization and privatization of the Net completed by the United States government by 1995 represented for ICT companies the opening of huge business opportunities, and these commercial activities entailed the design and implementation of software products and business models which effectively shaped the way users, consumers, and virtual communities at large would behave in the cyberspace.

The normative dimension of software was eloquently stressed by L. Lessig in 1999: "In real space we recognize how laws regulate -through constitutions, statutes, and other legal codes. In cyberspace we must understand how code regulates —how the software and hardware that make cyberspace what

---

[8] J. G. Ruggie, 'Reconstituting the Global Public Domain — Issues, Actors, and Practices', 10 *European Journal of International Relations* (2004) 499–531, at 504.

[9] O. Casanovas and J. Rodrigo, *Compendio de Derecho internacional público* (3rd ed., Tecnos, Madrid, 2014), at 341-342, and N. Bouza, C. García and A. J. Rodrigo, '¿Hacia *Worldfalia*? La gobernanza política y jurídica del interés público global', in N. Bouza, C. García and A. J. Rodrigo (eds), *La gobernanza del interés público global* (Tecnos, Madrid, 2015), at 43-44.

[10] P. Khanna, *Connectography. Mapping the future of global civilization* (Random House, Madrid, 2016).

[11] J. G. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', 47 *International Organization* (1993) 139-174.

[12] L. Lessig, *Code and other laws of cyberspace* (Basic Books, New York, 1999) and L. Lessig, *Code version 2.0* (Basic Books, New York, 2006).

 DOI: 10.17103/sybil.25.8

it is *regulate* cyberspace as it is… Code is law."[13] And it was through code that some companies explored and exploited the opportunities of using software and system design to make money on the internet. As early as the 1990s AOL adopted a 'walled garden' strategy embracing advertising campaigns with sponsored content and service for its captive audiences. And in the early 2000s Larry Page and Sergei Brin at Google took a strategically decisive path: in spite of their aversion for advertising, in order to solve the company's lack of revenue, they decided to resell the attention gained by its search engine. Basically, they enabled a brilliant algorithm to be used for commercial purposes. In the following years many other websites and platforms hosting blogs, videos and all sorts of information rushed into commercial activities enabled by code. The transparency of advertising tactics like the clickbait was absent and most users totally unaware of the advent of the model of the attention merchant, as named by Tim Wu.[14] This same reality has been depicted as 'platform capitalism' by Nick Srnicek, who explains how advertising platforms appropriate data as a raw material and their revenue results "from the extraction of data from users' activities online, from the analysis of those data, and from the auctioning of ad space to advertisers."[15] The argument is further pushed by Shoshana Zuboff in her explanation of the 'extraction architecture', according to which digitalization and datafication (the application of software that allows computers and algorithms to process and analyze raw data) have resulted in 'surveillance capitalism', in which "software programs and their algorithms that function automatically, continuously, ubiquitously, and pervasively to achieve economies of action."[16]

Such business models, sustained and enhanced by software code, effectively shaped the behaviour of internet users in a sophisticated and rapidly changing environment which was beyond the reach of legal norms and regulation. Code and algorithms of digital platforms started to operate as mechanisms of control by establishing the technical conditions of user's activities and interactions online: cookies, content filtering, user's identification, geo-localization, and many other automated technical 'solutions' enabling or disabling choices for users, just like regulation allows or bans behaviours for citizens.

(C) NORMATIVE FLOW, NORMATIVE CHANNELLING, AND PLATFORM GOVERNANCE

A proper understanding of the normative dimension of decisions adopted by software engineers and digital platforms requires a conceptual framework which is complementary or alternative to theories about norm creation, diffusion and transformation in international relations and international law.[17]

---

[13] L. Lessig, *Code and other laws of cyberspace… supra* n. 9, at 6. The 'code is law' argument was originally inspired by W. J. Mitchell, *City of Bits: Space, Place and the Infobahn* (MIT Press, Cambridge, MA, 1995), at 111. The idea that technological capabilities and system design act as rules for participants had already been formulated in L. Lessig, 'Reading the Constitution in Cyberspace', 45 *EMORY L.J.* (1996) 896-97, at 869; and it was also stressed soon after by J. R. Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules Through Technology' 76 *Texas Law Review* (1998) 553-593. In Reidenberg's words, "the set of rules for information flows imposed by technology and communication networks form a 'Lex Informatica' that policymakers must understand, consciously recognize, and encourage", *Ibid.*, at 555.

[14] T. Wu, *The attention merchants. The epic scramble to get inside our heads* (Alfred A. Knopf, New York, 2016).

[15] N. Srnicek, *Platform Capitalism* (Polity, Cambridge, 2017), at 30.

[16] S. Zuboff, *The Age of Surveillance Capitalism. The Fight for a Human Future at the New Frontier of Power* (Public Affairs, New York, 2019), at 305.

[17] On the notion of norm entrepreneur and the adoption of such role by companies and other private actors in the normative process, see C. R. Sunstein, 'Social Norms and Social Rules', 96 *Columbia Law Review* (1996) 903-929; H. H, Koh, 'Why Do Nations Obey International Law' (106) *The Yale Law Journal* (1997) 2599-2659; M. Finnemore and

The regulation of platforms illustrates processes which may be different to those conveyed through the notion of norm entrepreneurship, norm diffusion as 'cascades'[18] or 'cycles',[19] or the role of 'contestation' in global governance,[20]

As a complementary explanation, rather than as an alternative, we suggest here that normative processes take the form of *normative flows* or *streams*: dynamic and heterogeneous sets of norms evolving within *normative courses* or *channels* which effectively affect social and economic practices, policies and even technologies. These analogies of water flows, streams, courses and channels offer a convenient image for the kind of fluid interaction between public and private norms resulting from the intervention of public and private actors in domestic, international, transnational and global environments.

Following A. Wiener's typology of norms,[21] a plurality of fundamental norms, organizing principles, and standardized procedures and regulations coexist and interact dynamically within normative channels created by normative actors, as well as by the same norms. In contrast with the image of cycles, the metaphor of channels conveys an idea that normative flows can retake previously existing courses (as in a cycle) or can open new ones. Normative processes may be affected by new technological means, by the participation of new actors or by the evolving prevalence of some normative tools, and the resulting channels drive norms towards areas previously unknown. Such normative channelling will vary in different States, in different regions and in transnational and global contexts, and these contextual differences account for the diversity and asymmetry of normative flows, always subject to dynamic forces of change and adaptation.

Normative flows and normative channelling seem a suitable conceptual framework to understand platform governance, defined by R. Gorwa as "layers of governance relationships structuring interactions between key parties in today's platform society, including platform companies, users, advertisers, governments, and other political actors."[22] At least three variables seem particularly relevant to account for the variations in normative flows and normative channelling of platform governance: the type of normative actors, the public-private nature of norms, and the type of regulatory tools.

(1)Normative actors

The plurality of actors creating, implementing and enforcing norms in digital platforms can be organized along three basic relevant distinctions. The first one would stress how differently States and companies have approached the regulation of platforms. As suggested above, some prominent

K. Sikkink, 'International Norm Dynamics and Political Change', 52 *International Organization* (1998) 887-915; A. Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' 58 *International Organization* (2004) 239-275; W. Sandholtz, 'Dynamics of International Norm Change: Rules against Wartime Plunder', 14(1) *European Journal of International Relations* (2008) 101–131, doi: 10.1177/1354066107087766; S. E. Goddard, 'Brokering Change: Networks and Entrepreneurs in International Politics', 1 *International Theory* (2009) 249-281; M. Finnemore and D. Hollis, 'Constructing Norms for Global Cybersecurity', 110(3) *American Journal of International Law* (2016) 425-479, doi:10.1017/S0002930000016894.

[18] M. Finnemore and K. Sikkink, *supra* n. 12.

[19] W. Sandholtz, *supra* n. 12; A. Wiener, *A Theory of Contestation* (Springer, Berlin, 2014).

[20] *Ibid.*, and A. Wiener, 'A Theory of Contestation — A Concise Summary of Its Argument and Concepts', 49(1) *Polity* (2017) 109-125.

[21] A. Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters* (Cambridge University Press, Cambridge, U.K., 2008), at 66.

[22] R. Gorwa, 'What is platform governance?', 22(6) *Information, Communication & Society* (2019) 854-871, at 854 doi: 10.1080/1369118X.2019.1573914.

companies played a leading role in shaping the behaviour of users and consumers on the internet. The pace of technological and business innovation offered them a privileged position to decide through code, business practices and private regulation how individuals, groups and institutions would use their services, what information would be exchanged and how asymmetrically power would be allocated in the Net.

During the last two decades this 'platform ecosystem'[23] has become dominated by five high-tech companies with headquarters on the West Coast of the United States: Apple, Microsoft, Alphabet (Google), Amazon and Meta (Facebook). This 'Big Five' groups concentrate ownership and control of key platforms, apps and digital services from North America, and in some industries and activities they share the market with platform companies like Salesforce, Netflix, Paypal, Shopify, ServiceNow, Airbnb, Booking.com, Uber or Twitter. In Europe few and smaller software companies and platforms can compete with their American rivals, like SAP or Spotify do. In Asia, excluding China, only tech companies like Samsung or Sea (Garena) would rank among the top players. And the peculiar Chinese platform ecosystem is dominated by giants like Tencent, Alibaba, Meituan, Jingdong Mall, Pinduoduo, Baidu, East Money Information or Kuaishou Technology. Thus, worldwide a reduced group of corporations concentrate the economic activity and market value of the platform ecosystem.[24] Such oligopoly results from the new dominant surveillance capitalism's logic of accumulation,[25] and in the normative process gives big tech companies an upper hand to design, create, implement and enforce private regulation on users/consumers. In platform governance they are central actors, 'global governors' who effectively manage the public interest according to their private interests[26]; as noted by T. Gillespie, "while part of the question must be how platforms are governed, an equally important question is how platforms govern".[27]

The ecosystem is shared with some normative actors from outside the private sector, such as governments, NGOs and other actors of civil society. But only States and intergovernmental organizations have truly nourished the normative flow of platform governance with regulation, and they have done it rather recently and in very dissimilar ways. This is actually the second important

---

[23] J. van Dijck, T. Poell and M. de Waal, *supra* n. 1, at 12.

[24] Largest tech companies by market cap and Largest internet companies by market cap, 2022.

[25] S. Zuboff, *supra* n. 14.

[26] On the notion of 'global governors' to include private actors and authorities, D. D. Avant, M. Finnemore and S. K. Sell (eds), *Who governs the globe?* (Cambridge University Press, New York, 2010), at 1-2.

[27] T. Gillespie, 'Regulation of and by platforms', in J. Burgess, A. Marwick and T. Poell (eds), *The SAGE Handbook of Social Media* (SAGE, London, 2018) 254-278, at 262. This same argument is shared by a number of scholars when analyzing specific practices by platfoms in diverse issue areas: D. K. Citron, *Hate crimes in cyberspace* (Harvard University Press, Cambridge, MA, 2014); L. DeNardis and A. M. Hackl, A. M., 'Internet governance by social media platforms', 39(9) *Telecommunications Policy* (2015) 761–770; J. Grimmelmann, 'The virtues of moderation', 17(42) *Yale Journal of Law and Technology* (2015); S. Humphreys, 'Predicting, securing and shaping the future: Mechanisms of governance in online social environments', 9(3) *International Journal of Media & Cultural Politics* (2013) 247–258; R. MacKinnon, E. Hickok, A. Bar, H. Lim, *Fostering freedom online: The roles, challenges and obstacles of Internet intermediaries* (United Nations Educational, New York, 2014); J. A. Obar and S. Wildman, 'Social media definition and the governance challenge: An introduction to the special issue', 39(9) *Telecommunications Policy* (2015) 745–750; J. Reagle, *Reading the comments: Likers, haters, and manipulators at the bottom of the web* (MIT Press, Cambridge, MA, 2015); S. T. Roberts, 'Commercial Content Moderation: Digital Laborers' Dirty Work', 12 *Media Studies Publications* (2016); Y. Roth, 'No overly suggestive photos of any kind': Content management and the policing of self in gay digital communities' 8(3) *Communication, Culture & Critique* (2015) 414–432; L. Stein, 'Policy and participation on social media: The cases of YouTube, Facebook, and Wikipedia', 6(3) *Communication, Culture & Critique* (2013) 353–371; B. Wagner, 'Governing Internet expression: How public and private regulation shape expression governance' 10(4) *Journal of Information Technology & Politics* (2013) 389–403; J. van Dijck, *The culture of connectivity: A critical history of social media* (Oxford University Press, Oxford, 2013).

 DOI: 10.17103/sybil.25.8

distinction announced above: democratic States and authoritarian States have adopted very different approaches to platform governance. In an international legal system where human rights have been interpreted and implemented in very disparate ways, domestic political systems retain a high degree of discretion in deciding how digital platforms will be regulated, with more or less constraints for big tech companies, with more or less freedom for users. Although this is an obvious observation, the 'global' scope or regulatory mechanisms both by public and private actors and authorities is in reality 'regional' (North American, European or Western) or 'domestic' (China, Russia and many other non-democratic countries).

Likewise, and this is a third distinction, the lack of uniform platform governance is also the result of huge disparities between powerful and weak States. Some great powers and regions can regulate the transnational operations of big tech companies because of their leverage in front of these giant private entities, but the public authorities of lesser States can hardly cope with the complex platform ecosystem and cede larger room of manoeuvre to foreign corporations with the means and expertise to exploit opportunities in peripheral markets. It is easy to understand that public regulation in OECD countries, Russia, China, India and some other great and middle powers has been adopted (or could have been adopted) with less difficulties than in many African, South American or Asian countries. The result, again, is a highly asymmetric and dysfunctional platform governance from an international or global perspective.

(2)Public-private nature of norms

The public-private distinction in platform governance is crucial to understand the nature of normative flows. But such attempt is somehow blurred by some empirical paradoxes: public authorities are not the sole regulators of public spaces and issues of public interest online; private actors and authorities often regulate interactions in the public domain of virtual communities; in many occasions, public norms fail to properly serve the public interest; and self-regulation by private companies organize the public sphere where the interests of platform users lie.

Who determines the public interest in digital platforms? Actually, what is the public interest of virtual communities on the internet? Our initial assumptions about the existence of a global public domain in cyberspace and the need to protect the global public interest of internet users are confronted to the reality of normative flows inconsistently nourished by both domestic public actors (States) and transnational/global private actors (digital platforms). The dysfunctionality of States to properly regulate the global public interest lies to a large extent on the basic distinctions considered in the previous section about normative actors. Differing domestic approaches to regulation are now obvious in the light of three ideal types. First, the more liberal stance of United States public authorities and Silicon Valley's companies, reluctant to State intervention, which was crucial for the emergence and expanse of big tech companies and digital platforms. Second, the more conservative approach of European countries and the EU, where public authorities tend to rely on regulation to ensure the protection of public interests; the democratic pillars of these States tend to limit the intrusion of public policies to areas of data protection, privacy, user's rights, etc. Thirdly, there is the radical interventionist stance of authoritarian governments, where the notion of public interest is discretionary defined and both internet users and digital platforms obey public authorities in a more

 DOI: 10.17103/sybil.25.8

controlled and restricted version of the internet.[28]

These three models offer some insights about the diverse normative courses taken by platform governance in different regions of the world. But beyond these differences, recent trends are unequivocal in pointing at growing state intervention and regulation. Freedom House's annual reports illustrate a continuous decline in global internet freedom and increased governmental restraints on free expression, being China the most radical case of abusive State intervention to curtail human rights and freedom on the Net. However, these observations coexist with other relevant remarks in relation to the spread of misinformation favoured (or at least tolerated) by digital platforms, as well as systematic abuses of users' and consumers' rights by corporate and market practices.[29] Wherever they can, big tech companies adopt and implement normative tools aimed at expand their profits through data harvesting at the expense of data protection, privacy, consumer rights, non-discrimination, truthfulness of information, etc. Private normative courses make their way in transnational and global environments whenever States fail to protect the public interest. Thus, hybrid normative flows shape the behaviour of users, sometimes with prevailing public regulation, and often with prevailing self-regulation mechanisms and private regulation of virtual communities.

There is a growing awareness about the dark side of the internet -the 'Net delusion', as Mozorov calls it,[30] and concerns about the authoritarian drift in cyberspace seem well founded. Their origin is not only the expanding cyber capabilities of authoritarian non-Western powers like China and Russia —digital authoritarianism, as some call it—,[31] but the vulnerability of democratic systems vis-à-vis misinformation campaigns eroding basic political institutions and consensus.[32] Such harmful use of information and digital platforms is exacerbated, promoted, facilitated or allowed by software code, algorithms, artificial intelligence and machine learning algorithms embedded in digital platforms; they can all be used according to, and depending on, the norms created and implemented by these companies, which effectively shape the behaviour of their users.[33] The Capitol attack in January 2021 illustrate how far some dangers can go when the use and abuse of ICTs is unrestrained by public authorities.[34]

This is one of the reasons why both the European Union and the United States under the Joe Biden Administration are exploring their own paths to curtail some privileges and practices of big tech

---

[28] These three models are partially inspired by K. O'Hara and W. Hall, 'Four Internets. The Geopolitics of Digital Governance', 206 *CIGI Papers* (2018), although O'Hara and Hall distinguish up to five models: Silicon Valley's Open Internet, Brussels' Bourgeois Internet, Beijing's Authoritarian Internet, DC's Commercial Internet, and Moscow's Spoiler Model. A similar argument about the fragmentation of cyberspace is defended with the concept of 'Splinternet' in S. Malcomson, *Splinternet: How Geopolitics and Commerce are Fragmenting the World Wide Web* (OR Books, New York/London, 2016). And the 'Balcanization' of the internet is a similar idea suggested by C. Sunstein, *#Republic: Divided democracy in the age of social media* (Princeton University Press, Princeton, NJ, 2017).

[29] *Freedom on the Net 2021. The Global Drive to Control Big Tech* (Freedom House, Washington, DC, 2021).

[30] E. Mozorov, *The Net Delusion. The Dark Side of Internet Freedom* (Public Affairs, New York, 2011).

[31] J. Sherman, 'Digital Authoritarianism and Implications for US National Security', 6(1) *The Cyber Defense Review* (2021) 107–118.

[32] B. R. Allenby, 'The Age of Weaponized Narrative, or, Where Have Your Gone, Walter Cronkite?', 33(4) *Issues in Science and Technology* (2017). Allenby defines 'weaponized narrative' as "the use of information and communication technologies, services, and tools to create and spread stories intended to subvert and undermine an adversary's institutions, identity, and civilization, and it operates by sowing and exacerbating complexity, confusion, and political and social schisms".

[33] A critical view on the harmful role played by tech companies in society and politics in the United States is deployed unambiguously in J. P. Steyer (ed), *Which side of history? How technology is reshaping democracy and our lives* (Common Sense Media, San Francisco, 2020).

[34] K. Hao, 'How Facebook got addicted to spreading misinformation', MIT Technological Review (2021).

 DOI: 10.17103/sybil.25.8

companies and digital platforms. In the case of the European Union, after the General Data Protection Regulation (DGPR) of 1996, new legislative efforts are under way to regulate big tech practices through the Digital Markets Act, and to create a safer digital space through the Digital Services Act, two pieces of legislation expected to change the digital landscape.[35] In the case of the United States, the turn in public policy seems clear: in March 2021 Tim Wu, a champion of antitrust policies in the digital economy, was appointed as special assistant to the President for technology and competition policy in March 2021; the President's chief science advisor, Eric Lander, started to work in an 'AI bill of rights' by November 2021; and the reform of Section 230 of the Communications Decency Act is in sight of the Administration -this law protects online platforms ('interactive computed services') from liability for information and content posted by their users, and allows them to moderate users' content without being treated as publishers.[36]

(3)Regulatory tools in normative channelling

As previously suggested, normative courses are shaped by both public and private actors and authorities in platform governance. A relevant issue when considering the diversity of normative tools is their legal or non-legal nature, since such distinction will trigger (or not) the legal consequences arising from their enforcement. As Pauwelyn, Wessel and Wouters have stressed, there is a universe of norms larger than the universe of law, and in such universe of normativity is where international and domestic normative flows are nourished and mixed.[37]

On the one hand, following policy strategies for the digital environment, States issue legislation, regulation, rules, and also join international legal initiatives in the form of international treaties, customary law, general principles of law, resolutions of international organizations, judgements by international courts, etc. This is the kind of traditional approach that public authorities used to guide the behaviour of citizens, companies, organizations of all sorts, as well as public administration itself. In recent years, the number of such public regulatory mechanisms seems to have significantly increased to govern the internet. Most of these instruments are *legal* norms, and a plethora of soft law mechanism without binding character, although States have also resorted to other norms in the form of standards, guidelines, declarations, codes of conduct, etc.

On the other hand, following profit maximization strategies, big tech companies and digital platforms guide their users' and consumers' behaviour through all sorts of contracts, conditions of use, terms of service, declarations of compliance, privacy policies, data policies and all kinds of standards and guidelines, community rules, codes of conduct, codes of practice, etc. All these regulatory mechanisms and self-regulation have no legal effects themselves, but in the absence of public legal norms, private regulation may attain equivalent effects in terms of actual shaping of users' behaviour.

These two normative flows coexist and mix in both cooperative and conflicting ways in numerous countries where digital platforms conduct their activities. They share the grey area or normativity

[35] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final, and Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

[36] Section 230 of the Communications Decency Act (1996).

[37] J. Pauwelyn, R. A. Wessel, and J. Wouters (eds), Informal International Lawmaking (Oxford University Press, Oxford, 2012), at 6.

 DOI: 10.17103/sybil.25.8

between the channels of legal and non-legal norms for two reasons. First, because the turn to informality in international law-making has entailed the proliferation of soft-law and informal (legal) norms adopted by states as convenient tools with a view to effective compliance without the burden of other binding and formal instruments.[38] Second, because hybrid and multistakeholder initiatives have gathered public and private actors around shared normative efforts, such as the Safer Social Networking Principles (2009), the Dynamic Coalition on Platform Responsibility (2014), the EU Code of Conduct on Terror and Hate Content (2017), the EU Code of Practice on Disinformation (2018) or the Christchurch Call (2019); these are examples of what R. Gorwa calls 'co-governance' in the 'platform governance triangle'.[39]

But the normative flows also share the little-known area of normative enforcement, where public efforts coexist with platforms compliance operations. Some remarkable research efforts illuminate the relative weight of public and private authorities in specific enforcement and compliance activities like platform content removal and takedowns in the European context. But public understanding of these operations remains limited, and more easily accessible information is needed to properly assess them.[40]

(D) CONCLUDING REMARKS

The restrictions imposed by Facebook on Donald Trump's accounts on 6 January 2021, when he still was President of the United States, represent a powerful illustration of the normative weight and power of digital platforms. To put it clear: A private corporation denied the exercise of freedom of expression to the highest public authority of the most powerful country of the world. We must have missed something when such a decision affecting the public interest of societies is left in the hands of private individuals and organizations. Mark Zuckerberg admitted in September 2019: "We are responsible for enforcing our policies every day and we make millions of content decisions every week. But ultimately I don't believe private companies like ours should be making so many important decisions about speech on our own."[41]

Digital platforms should act consistently with the beliefs of their CEO, but before that, they should cease to disturb and distort the global public domain and leave the defense of the global public interest to more legitimate actors and authorities. Civil society organizations continue to be the weak stakeholders in platform governance, and together with (democratic) governments and other public actors and authorities, they could substantially enhance the legitimacy of policies and norms in cyberspace. Big techs continue to be key normative players, but many have demonstrated their inability and failure to properly serve the public interest. Their normative role may be substantially reduced in the near future, at least in the United States and the European Union.

---

[38] J. Pauwelyn, R. A. Wessel and J. Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', 25(3) *European Journal of International Law* (2014) 733-763.

[39] R. Gorwa, 'The platform governance triangle: conceptualising the informal regulation of online content', 8(2) *Internet Policy Review* (2019), doi: 10.14763/2019.2.1407.

[40] D. Keller and P. Leerssen, 'Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation', in N. Persily and J. A. Tucker (eds), *Social Media and Democracy. The State of the Field and Prospects for Reform* (Cambridge University Press, Cambridge, 2020) 220-251.

[41] 'Facebook unveils charter for its 'Supreme Court,' where users can go to contest the company's decisions', *Washington Post* (17/09/2019).

the SPANISH YEARBOOK of INTERNATIONAL LAW

The ICJ's *de facto* authority and the exercise of inherent powers in the recent case of Iran v. the United States

Esteban MUÑOZ GALEANO*

Abstract: This paper offers an analysis of the potential authority of the ICJ from an institutional perspective by examining two different cases in which Iran brought the U.S. before the ICJ due to sanctions imposed by the U.S. government during the Trump's administration. Firstly, it approaches to the ICJ's jurisdiction from a global governance context under the premises of the *de facto* authority and the theory of inherent powers. In the second part, it deals with the recent cases of Iran v the U.S. before the ICJ jurisdiction in order to examine if the decisions issued by the ICJ have been accepted and embraced by the two mentioned states and their respective compliance partners. Finally, it provides a conclusion about the exercise of 'intermediated' authority by the ICJ through the use of inherent powers when it issued certain relevant decisions while deciding about certain procedural incidents in the case at hand.

Keywords: International Court of Justice – authority - inherent powers - international adjudication – Iran - United States of America

(A) INTRODUCTION

Nowadays, there is an important challenge in the fields of contemporary global governance and public international law that has to do with the creation of alternative mechanisms that contribute to overcome the informality that prevails in the context of decision-making and the design of public policies. In this regard, some authors have highlighted the importance of studying the *authority* of certain international institutions to identify their role in the creation of international norms.[1]

Occasionally, international agents see international institutions as a risk to the development of their interests, a threat to their individual rights or to their collective self-determination.[2] This situation has made the legitimacy of some international institutions to be questioned due to the concentration of power by certain international actors. Hence, to identify the exercise of international authority and the influence by certain institutions seems to be a key factor to analyze the creation or implementation of public policies and new normative mechanisms.

This paper offers an approach to this issue from the perspective of the International Court of Justice (ICJ). Indeed, the legitimacy and reception of the decisions issued by ICJ sometimes is challenged, even though it plays a relevant role for the peaceful resolution of disputes between States and the development of public international law.[3] Certainly, the ICJ's role in the creation and interpretation of public international law through its jurisprudence enjoys of general acceptance by scholars and

* Temporary professor of International Relations and Public International Law, University Pompeu Fabra, Barcelona. Email: esteban.munoz@upf.edu. This article is part of the research project *The creation of global norms: Between soft cosmopolitanism and the resurgence of Westphalia* of the Research Group in Public International Law and International Relations of the University Pompeu Fabra.

1 von Bogdandy A., Dann P. & Goldmann M., 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2010), at. 1375-1400.

2 Ba, A. and Hoffmann M. *Contending Perspectives on Global Governance. Coherence, Contestation and World Order*. (Routledge, London, 2005) at 262.

3 Rosenne, S. *Law and Practice of the international Court* (Fifth Edition by Malcolm N. Shaw, Leyden, 1965).

 DOI: 10.17103/sybil.25.9

legal operators,[4] in despite of some international actors put the significance of its decisions into question due to the apparent lack of receptivity.[5] Having on mind this scenario, studying the authority of the ICJ's judgments and other relevant decisions from an institutional perspective may help to understand the contribution of this international tribunal to solve international conflicts and to the development of international norms.

The methodology used was the case study under the least likely method.[6] The case that was chosen is Iran and the United States before the ICJ. It has been selected two lawsuits for the analysis: 'Certain Iranian Assets' (2016) and 'Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights' (2018).

The reason for choosing these cases has to do with the small probability of verifying the facto authority of the ICJ, since both States are tremendously unequal in terms of power exercise and influence in the international context. Not to mention the reserved position that the United States has with respect to the ICJ since it was found responsible in the 1986 case 'Military and paramilitary activities in and against Nicaragua.' However, the result of the analysis points out the ICJ effectively holds 'intermediate' de facto authority, through the exercise of inherent powers when it issued certain relevant decisions in the context of solving procedural incidents in the cases at hand.

(B) CONCEPT OF *DE FACTO* AUTHORITY AND INHERENT POWERS

In order to analyze the potential authority of the ICJ from an institutional perspective, this paper explores the role of this tribunal against a global governance context under the premises of the *de facto* authority[7] and the theory of inherent powers.[8] This dual-approach contributes to offer an approximation to study the influence of this international tribunal from a multilevel perspective, notwithstanding the sociological criterion of legitimacy. The proposal is to demonstrate whether the ICJ holds *de facto* authority with respect to other international agents in a case that is difficult to verify, which could shed light on the implementation of its decisions by the parties directly involved in a conflict, and by their compliance partners.

(1)About the *de facto* authority

The concept of de facto authority according to Alter, Helfer and Madsen implies the study of the institutional and political evolution of international courts while analyzing the impact of their decisions beyond legal mandate.9 It encompasses the analysis of the reception of a decision that has

[4] Esposito C. *The advisory jurisdiction of the International Court of Justice its value in the determination of international law and in the peaceful solution of controversies* (Autonomous University of Madrid, Faculty of Law, Department of Public Law, Madrid, 1995)

[5] Llamzon A., 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice', 18(5) *The European Journal of International Law* (2008), at. 815-852

[6] Bannet A. & Elman C. 'Case Study Methods in the International Relations', 40(2) *Comparative Politics Studies* (2007), at. 170-195.

[7] Alter K. et al. 'How Context Shapes the Authority of International Courts', 79 *Law and Contemporary Problems* (2016), at. 1-36.

[8] Brown C. *A Common Law of International Adjudication* (Oxford University Press, Oxford, 2007).

[9] Brandeis Institute for International Judges, *The Authority of International Courts and Tribunals: Challenges and Prospects* (The International Center for Ethics, Justice and Public Life of Brandeis University in partnership with iCourts, the Danish National Research Foundation's Center of Excellence for International Courts, University of Copenhagen, Faculty of Law, 2016).

 DOI: 10.17103/sybil.25.9

been made during relevant hearings in a contentious process. This concept is based on the idea that international courts lack the possibility of enforcing their decisions through the exercise of force; therefore, its role is to issue decisions that identify violations of international legal norms and from there, create effectively legally-binding obligations for the parties in a dispute. These obligations depend to a great extent on the interaction of the States in dispute during the public hearings.[10] International courts may have legal competence to settle certain disputes, but this is not necessarily translated into other international or domestic dimensions, which would eventually affect the effectiveness of the judicial decision. Hence, the parties in dispute or other international actors link the de facto authority to the effectiveness and embracement of judicial decisions. According to the mentioned authors the de facto authority can be exercised in three different levels: limited, intermediated and extended. There is limited de facto authority when the decision is embraced just by the parties to the conflict. The de facto authority is intermediated when there is a will of complying by the parties in dispute, but also by future litigants and compliance partners. There is extended authority, when a diverse and greater group of people in e.g. the civil society, lawyers associations, and scholars embraces the decision.

Additionally, there are two factors for an international court to exercise de facto authority: (i) recognition of the existence of an obligation to comply with the institution's decisions, and (ii) promotion of significant actions to give full effect to these decisions.[11] For determining both requirements, it is necessary to examine the practices of the relevant actors during the key hearings in a first place, and then to track the actions that are deployed once the decisions are issued by the international court. During these hearings, the ICJ has the fundamental role of deciding over procedural matters, and for this purpose, it may apply its inherent powers. Against this context, the inherent powers theory complements the de facto authority concept.

In despite of the issue of fragmentation of international law —and adjudication systems—, most scholars agree that the ICJ has the most integrated and efficient procedure in its field. Indeed, this court has remained as an 'authorized' interpreter of international law.[12] The impact of the ICJ as a jurisdictional authority has to do mainly with its ability to influence different regions through its decisions, and due to its status of main judicial organ of the United Nations.

According to Onuma, the importance of the ICJ judgments has been steadily increased since the second half of the 20th century, including advisory opinions.[13] Furthermore, most international lawyers and scholars rely on the ICJ's judicial decisions and advisory opinions when seeking to establish an authoritative perspective on the interpretation of international law.[14] However, the resolution of disputes before this court has some limitations. Some examples are the definition of competence and jurisdiction, the assessment of the amount of reparation and compensation, or the decisions over preliminary measures. To overcome these procedural impasses, it has been established that the ICJ may exercise some inherent powers in order to carry out efficiently its jurisdictional function.

---

[10] Marmor A., *An Institutional Conception of Authority* (Oxford University Press, Oxford UK, 2011)

[11] *Supra* n. 6.

[12] Onuma Y., 'Is the International Court of Justice an Emperor Without Clothes?', 8(1) *International Legal Theory* (2002), at. 1-28.

[13] *Ibidem*.

[14] Biehler G., *Procedures in international Law* (Springer-Verlag, Berlin Heidelberg, 2008).

 DOI: 10.17103/sybil.25.9

(2) Inherent powers and the ICJ

International tribunals apply their respective constitutive instruments and institutional rules to exercise their jurisdiction. However, there are other sources for effectively render a decision to the dispute at hand. Besides treaties, courts also apply customary rules, rules of judicial practice, general principles of law, and inherent powers.[15] The sources of international law are well known according to article 38 of the ICJ Statute, but inherent powers deserve special attention.

Inherent powers come from the capacity to decide over relevant procedural matters to move along a contentious case. There are some examples on the exercise of such faculties, as article 6 (6) of the ICJ's statute, which stands for "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." Another important example is the one brought in the UNCLOS, Article 288, which sets forth that "[i]n the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal". Similarly, the ICSID Convention also provides a clause in which "[t]he Tribunal shall be the judge of its own competence" (article 41 (1)).

Furthermore, other common clauses that provide the capacity of exercising procedural powers are the ones concerning to grant provisional measures (Art. 41 of the ICJ Statute) and the intervention of third parties (Art. 62 (2) of the ICJ Statute). Other similar procedural prerogatives are the power to give an interpretation of judgments and decisions, and the power to revise their judgments and awards (art. 60 ICJ Statute; article 33(3) of the ITLOS Statute; ICSID Convention, article 50; Inter- American Convention, art 67).

Despite the diversity of procedures hold by international tribunals, it is noticeable that there are some common principles of international jurisdiction. Most of these principles are embodied into the constitutive treaty of each international court and they deal with competence issues and incidental procedures concerns.

Concerning rules of procedure of international courts, and regardless of the procedures contained in the constitutive instruments of the international tribunals, there is a lack of detailed provisions on the suitable procedures or remedies to apply. Against this context, normally the institutional rules embodied in the constitutive treaties provide the opportunity for the tribunals to deal with general procedural rules. This prerogative was firstly set forth for the Permanent Court of International Justice, which was allowed by the Advisory Committee of Jurists in its draft statute to be free to formulate its own rules according to its needs.[16]

The notion of inherent powers is usually related to some institutional capacity, which by nature belongs to a subject with the power to exercise it. This attribute forms an essential characteristic of the person who holds an office, and in the case of a court.[17] In the case of international courts, the idea of exercising inherent jurisdictional powers is widely used within the tradition of common law systems. Indeed, English courts have invoked their inherent jurisdiction to exercise procedural powers for some time, whereas such an idea is merely anecdotal for countries with a continental-European tradition.[18] However, the application of any kind of inherent power in this context is linked to incidental procedural decisions and the grant of reparations. The exercise of these powers is then

[15] *Supra* n. 8.

[16] Hudson M., *The Permanent Court of International Justice, 1920–1942; A Treatise* (The Macmillan Company, New York, 2013).

[17] Jacob H. 'The Inherent Jurisdiction of the Court', *CLP* (1970), at. 23-24.

[18] *Supra* n. 8.

 DOI: 10.17103/sybil.25.9

necessary for any court to guarantee a substantive decision based on due process, as this sometimes entails the need to resolve any circumstance that may occur during the procedure. In this sense, granting the ability to exercise powers over procedural matters is vital for any judicial body to successfully administrate justice.

In this regard, a court lacking the power to decide for example, on the granting of provisional measures or allowing the intervention of a third party; is a tied-up judge with not sufficient tools to exercise jurisdiction.[19] Moreover, the ICJ may apply its inherent powers to advance in the procedure itself by creating its own procedural rules and orders, 20 and by declaring its *compétence de la compétence*. The exercise of inherent powers is an important resource to correct gaps in procedural norms, and have the vocation to serve as a source of judicial exercise.[21]

Beyond the application of constitutive instruments and institutional rules, the exercise of international jurisdiction may face some procedural situations, which do not find any solution within their statutes. From a domestic perspective, these issues usually are solved by the legal system of sources and hierarchical decisions within the judicial structure. However, the international legal system dynamics go through a predominant anarchical order, so finding sources to overcome procedural situations is complex.

In this regard, procedural provisions and procedural powers of international courts sometimes may get into gaps and ambiguities, like any other legal system. Facing lacunae is one of the main challenges for international courts when it comes to procedural matters due to the difficulty to find solutions in a case-by-case context. A typical case of lacunae occurs when the intent of the parties to the instrument is not known, thus it may include ambiguities.[22]

To approach this type of situation, international courts have to explore solutions brought on other instruments beyond their institutional activity. In this scenario, other sources are relevant for the jurisdictional labor. Customary rules, rules of judicial practice, the general principles of law, and the exercise of inherent powers rise as the main ways to surpass any procedural situation.[23]

Gaps and *lacunaes* are present in any judicial system due to the impossibility of the legislative or regulatory powers to foretell any particular situation to happen before the court. In the same vein, the international adjudication systems display a similar situation. Indeed, negotiators and drafters of the constitutive instruments are not able to envisage all the circumstances that might arise in future occasions, especially within the dynamics of the international system.[24]

According to the ICJ, its inherent powers -or by any other international tribunal-, have to do with functional reasons. Without procedural decisions, the most basic jurisdictional purposes would be put at risk, thus any decision on the merits would be just unviable. In this order of ideas, any jurisdictional instruction needs inherent powers to successfully render a decision.

Article 36 (6) of the ICJ Statute is set forth the inherent power of the Court to decide over its competence, specifically when stipulates that ‘in the event of a dispute as to whether the Court has

---

[19] Jennings R. and Watts A., *Oppenheim’s International Law* (Longman, Harlow, 1992)

[20] *Ibidem*.

[21] Waibel-Mavrommat M., ‘Palestine Concessions (Greece V Great Britain) (1924 - 27)’ *Landmark Cases in Public International Law* (E. Bjorge and C. Miles, eds, Hart, 2017), at. 33-59.

[22] Trachtman J., ‘The Domain of WTO Dispute Resolution’, 40 *Harvard International Law Journal* (1999), at. 333-340.

[23] *Supra* n. 8.

[24] Gordon E., ‘The World Court and the Interpretation of Constitutive Treaties’, 59 *American Journal of International Law* (1965), at. 794-805.

jurisdiction, the matter shall be settled by the decision of the Court'. However, the inherent powers of the ICJ and other international tribunals have been developed through judicial practice as well. In the *Nottebohm case* the ICJ refers to the inherent jurisdiction principle as the very essence of the arbitral function and one of the inherent requirements for the exercise of this function. In the same judgment, it concluded that '[t]he judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the court is competent to adjudicate on its jurisdiction in the present case'.[25] This statement was of remarkable importance because it confirmed the jurisprudence brought in the Alabama Claims about inherent jurisdiction.[26] Hence, in the absence of any agreement to the contrary, an international tribunal has the right to decide over its jurisdiction and has the power to interpret for this purpose the instruments that govern that jurisdiction.

(C) THE ICJ'S *DE FACTO* AUTHORITY IN THE IRAN V. U.S. RECENT CASES

As mentioned above, this paper explores the *de facto* authority and inherent powers exercised by the ICJ in two relevant hearings against the context of two cases before the ICJ that involve Iran and the U.S.: The *Certain Iranian Assets* case,[27] and the *Alleged Violations* case.[28]

The *Certain Iranian Assets* case is about the petition filed by Iran in June of 2016 before the ICJ, in which it claimed that the United States must unblock certain Iranian assets in the U.S. territory that were affected by the Executive Order 13599 of 2012. Furthermore, they claimed the U.S. must pay the respective compensation. Additionally, Iran requested that the ICJ should emphasize that the domestic courts of the United States cannot bring Iran and its companies to trial due to the principle of State Immunity. Iran based its claims on the violation of the Treaty of Amity signed in 1955, and in force since 1957 between both nations.[29]

On the other hand, in 2018 Iran brought a claim against the U.S. once again in the *Alleged Violations* case. In this opportunity, Iran claims to the ICJ to order the U.S. to lift the economic sanctions imposed for allegedly, failing to comply with the obligations derived from the 'Joint and Complete Action Plan'- the Iranian Nuclear Agreement 5+ 1-. This request aggravated relations between both States, and in particular, since the execution of the foreign policy of the former president of the U.S., Donald Trump.

The ICJ rendered two crucial decisions in both processes in public hearings based on the exercise of its inherent powers. In the Certain Iranian Assets case, it resolved the preliminary objections brought by the U.S. In the Alleged Violations case, it resolved the request for provisional measures filed by Iran on 4 October 2018. Both procedural decisions allowed the normal course of the process, and they still do not constitute the final decision on the matter. Nevertheless, legal and political consequences emanate from the two decisions between the parties, and to other international actors.

In a public hearing on 3 October 2018, the ICJ addressed the Iranian request regarding ordering the United States not to re-impose the sanctions, as indicated by the United States Government on 8

[25] *Nottebohm Case* (*Liechtekstein v. Guatemala),* ICJ Reports (1953), at 120.

[26] *Alabama claims of the United States of America against Great Britain (United States of America v. Great Britain),* Reports of International Arbitral Awards (1871) 127, at 134.

[27] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America),* ICJ Reports (2019) 164, at 8.

[28] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America),* ICJ Reports (2018) 175, at 3.

[29] Amity, Economic Relations, and Consular Rights (adopted 15 August 1955, entered into force 16 June 1957) *4132* UNTS *284.*

 DOI: 10.17103/sybil.25.9

May of the same year. After deciding that it had the competence to decide on the matter, it determined that the United States would have to remove any impediment to free trade due to the potential of an imminent and irreparable damage that could put the life and health of the Iranian population at risk. The ICJ emphasizes on removing the impediments that are generated with respect to the free trade of three types of goods in particular: (i) medicines and medical devices, (ii) food products and agricultural products, as well as goods and services required for the security of civil aviation, and (iii) spare parts, equipment and associated services necessary for civil aircraft. Although Iran's request was much broader, the ICJ focused on these points in particular. The ICJ avoided any type of pronouncement regarding sanctions on other assets such as hydrocarbons, or financial services that were not directly linked to the already described.

This decision was welcomed by Iran, as the Minister of International Affairs, Mohammad Javad Zarif, stated that this ICJ measure was 'another failure for the US government addicted to sanctions and a victory for the rule of law'.[30] For his part, just hours after the reading of the decision in The Hague, Michael R. Pompeo, in his role as former Secretary of State of the United States, held a press conference in which he stressed that the ICJ decision was a defeat for Iran. He emphasized that the court had rejected the other Iranian requests, regarding the lifting of the broader sanctions. He also announced that they were working closely with the Treasury Secretariat so there were no inconveniences in the transaction of goods that could lead to potential humanitarian problems for the Iranian population.

However, in addition to the approach to the consequences derived from the ICJ decision on the foreign policy of the United States, this decision seems to have had an effect on the creation of the INSTEX (Instrument in Support of Trade Exchanges) of the European Union. In a statement of January 31, 2019, the ministers of France, the United Kingdom and Germany announced the creation of this instrument that will allow European companies to trade with Iran in relation to goods of humanitarian need. The intention is, they remarked, eventually to open this mechanism to other types of goods and services.[31]

On the other hand, while deciding about the preliminary objections in the Alleged Violations case in 2019, the ICJ determined its own jurisdiction to hear the case when it discarded the exceptions of Abusse of Process and Unclean Hands brought by the United States, but also it dismissed the Iran's argument on States' Immunity. Then, the White House Spokesman released a statement in which they saw as a triumph that the ICJ has accepted the objection regarding not accepting its jurisdiction to decide on the principle of state immunity, and again he emphasized on the Iran's 'sponsor of terrorism' status. Regardless of the political impressions around this decision, the relevance of this act revolves on the ICJ exercise of *de facto* authority.

In the first place, as the White House spokesman announced, the fact that the ICJ has accepted the objection of lack of jurisdiction to decide on the principle of state's immunity implies that there will be no eventual order to the US courts to stop bringing to trial Iran –or any other state- in its jurisdiction. It is a legal victory for the United States in bringing sovereign states to their domestic courts; despite the fact that this is an activity prohibited by public international law. However, in this particular case, the jurisdictional function of the ICJ was directly subject to the interpretation of the Treaty of Amity, in which there is no legal basis to extract any clause regarding the state's immunity principle. The

[30] Bourse & Bazaar, *UN Court Tells US to Ease Iran Sanctions in Blow for Trump* (2018).
[31] More information available here.

 DOI: 10.17103/sybil.25.9

ICJ in this scenario apparently refused to mention the principle of state's immunity as one of customary order. Nevertheless, the fact that the ICJ has not abrogated the competence to rule on this issue - since there was no legal basis within the treaty to do so– does not imply that the United States is not acting against public international law.

The second legal consequence that derives from this decision is about the admissibility and jurisdictional objections brought by the United States and Iran over highly political arguments. This implies that by dismissing the admissibility objections of Abuse of Process and Unclean Hands, the Court was forced to rule on the alleged role of Iran as a state sponsor of terrorism, or the apparent abuse of the United States to impose its national interest over public international law within its territory. This remains as a point of inflection in the already cracked political relations between both States for 40 years, and it represents a challenge to Joe Biden's administration in reaching a new deal with Iran regarding its nuclear program.

(D) CONCLUSION

The ICJ holds intermediate *de facto* authority in the case study under analysis. Moreover, the ICJ exercised its inherent powers in the public hearings in both contentious cases while it decided over its own competence to hear the cases and by ordering preventive measures. Indeed, there is an influence of the ICJ on the behavior of Iran, the U.S. and other compliance partners. It was evident the will to comply with the preventive measures ordered by the ICJ in 2018 when the United States, Germany, France, the United Kingdom and the European Union took relevant actions on the matter.

Regarding the decision over preliminary objections in 2019, the ICJ exercised *de facto* authority and inherent powers when it rendered its decision within the framework of political motivations brought by the parties when addressing the issue of the admissibility objections of Abuse of Process and Unclean Hands. In addition, the ICJ also discarded the Iranian argument of state immunity, while avoiding any mention to this principle from the customary international law perspective. This decision contributed to the development of public international law. Moreover, it places some important expectation on the judgment on the merits.

In despite of the verification in the deployment of intermediate *de facto* in the case under study, it was not possible to verify the extended authority of the ICJ, since the methodology used was a limit for this purpose. For a better acknowledgement of the ICJ as an international authority, it is necessary for future research to use a methodology that combines the case study with other variables that will permit to *objectify* the role of this institution in an international context. This could be done by complementing the criterion of *de facto* authority with Von Bogdandy's public international law concept and under the research design that they propose from the Max Planck Institute.

 DOI: 10.17103/sybil.25.9

the SPANISH YEARBOOK of INTERNATIONAL LAW

Morgades Gil, Silvia, *De refugiados a rechazados. El sistema de Dublín y el derecho a buscar asilo en la Unión Europea* (Tirant lo Blanch, Valencia, 2021), 496 pp. (Ebook available)

The book under review, *De refugiados a rechazados. El sistema de Dublín y el derecho a buscar asilo en la Unión Europea*, addresses the issue of European asylum law, and discusses the strengths and failures of the current asylum system. It examines the transformation of the right to asylum in Europe as a result of the establishment of the Common European Asylum System, in addition to the consolidation of the role of the European Court of Human Rights and of the European Court of Justice in the configuration of the refugee regime. In fact, the debate on whether, and in what manner, the right to seek asylum in the European Union should be conceptualised in legal terms is a long running one, and the author incorporates theoretical and jurisprudential perspectives in order to analyse the issue. *De refugiados a rechazados* seeks to contribute to the debate by examining how the right to request asylum has been treated by the legislative process and judicial bodies when it conflicts with other interests. The premise of the book is that refugees and other asylum seekers are stripped of the protection which States provide to their nationals. The thoughts contained in the book are the result of a rigorous and critical analysis endorsed by Silvia Morgades' research.

The focus of the book is not limited to the right to asylum in a narrow sense. This would have required the author to examine only the current legal framework. Instead, the book addresses the challenge of analysing the tensions which emerge when the protection seeker requests asylum within the framework of the Dublin system and the broader protection of their human rights may not necessarily be considered. Based on an evolutionary interpretation of the analysis, the author concentrates on finding the elements which articulate the access to some type of international protection within the European Union and, with this aim, Morgades studies: a) the *de facto* entry in EU territory or in spaces under the jurisdiction of a member State; and b) the *de iure* admission in one of these States with the aim of making a first examination of the admissibility of the petition. Silvia Morgades brilliantly explains the scope of the Dublin requirements, arguing that the preliminary examination should not exclusively consider the objective evidence relating to the State of entry, according to the Eurodac system.

The book contains three clearly differentiated chapters which follow a logical structure. Part I is entitled "The right to seek asylum in the European Union". She explains the origin and the milestones that have built the asylum institution in the EU. She takes as a starting point a broad concept of asylum, which is "the territorial protection given by a State in its territory to persons who are under its jurisdiction due to reasons related to the protection of human rights" (the quotation is the reviewer's own translation, p. 27). Then, she takes as the reference framework the Schengen Agreement and the Area of Freedom, Security and Justice. The power to admit foreign persons into the territory of States is an attribute of sovereignty. But the right to flee from one's own country is a recognized right in international human rights instruments. Therefore, any person may present themselves *de facto* at the frontiers of a foreign state and request to be admitted. Whereas entry is a matter of fact, admission is a legal act. In this context, special attention is given to the State practice of non-entrance or immediate return. Silvia Morgades contributes to the creation of a theory related to two types of return: a) collective and automatic returns from places not under the jurisdiction of the State (*Hirsi Jamaa v.*

 DOI: 10.17103/sybil.25.9

Italy), and b) collective and automatic returns from territory under the jurisdiction of one Member State to another Member State (*Safari v. Italy*, and *Ilias and Ahmed v. Hungary)*. The author demonstrates that the judgments of the European Court of Human Rights admit that under certain circumstances refugees and other persons who need protection have the right to remain in a Member State while a decision on their statute is being adopted.

Part II, "The Dublin system: its formal legitimacy and *de iure* admission in the territory of a State Member of the European Union", refers more specifically to the Dublin system. It broadly examines the objectives and evolution of the Dublin system, and the different criteria established to assign to Member States the responsibility to examine asylum petitions, including discretionary and humanitarian clauses. She goes beyond the system in force, presenting an overview of the system's functioning, and indicates the perspectives of the future Dublin IV. The author examines the nuances of the system's formal legitimacy and explains with clear arguments that CEAS is incomplete. The unresolved issues can be summarized as follows. Firstly, the configuration of legal and safe pathways for entry, given that the option of humanitarian visas has not been successfully explored. Secondly, the fact that CEAS is not being respected in a rigorous way by all Member States. Thirdly, according to art. 78 (2) (a) of the TFEU "a uniform status of asylum for nationals of third countries, valid though the Union" shall be adopted, but it has not yet been established.

Finally, Part III is entitled "The exceptions to the application of the Dublin system: substantive legitimacy, solidarity, and the principle of mutual trust". The Dublin system establishes a procedure according to which one sole State is responsible for examining each asylum petition, but the system does not guarantee that the destination State will respect human rights standards according to specific criteria. When the protection of the human rights of refugees and asylum seekers is not sufficiently guaranteed through the Dublin system, it loses all legitimacy from the substantive point of view. In addition, the system is based on the presumption that all Member States are safe States, "always and as regards to all international protection seekers" (p. 297). Consequently, asylum seekers do not enjoy the right to choose the country in which their petition could be examined (p. 337).

The member State that examines the petition does not guarantee that the petition will be examined as regards to the substantive dimension of the necessity of protection. At this point, the author reviews in depth the concept of a safe third country: its formal legitimacy, the principle of the admission in one sole responsible State, the conditions for the transfer of asylum between States and the risk of indirect refoulement resulting from the concept of safe third country.

Neither the regulatory harmonization on the safe third country regime, nor the fact that the European Union Member States are parties to the Geneva Convention on the Statute of Refugees of 1951 and to the main international human rights instruments ensures that every protection seeker will have at least an opportunity to have their application examined in one Member State according to human rights standards (p. 322). This is one of the demands made by the author.

The dichotomies with which the author plays are evocative: Schengen *vs.* Dublin, asylum policies *vs.* immigration policies, control *vs.* protection, the communitarian method *vs.* intergovernmental dynamics, human security *vs*. national security, internal security s*v*. human rights, the realm of human rights and European standards s*v.* a place of non-rights.

The conclusions are clear and suggestive. The author expresses her view of the conceptual boundaries from which the EU will have to move away. Closing borders as it is currently conceived is doomed to failure and the system should be replaced by a porous conception of borders. This would make for a reliable asylum policy. The porosity of borders implies the creation of legal and safe

 DOI: 10.17103/sybil.25.9

pathways of entry in the European Free Movement Area. Likewise, the author dismantles the rhetoric related to the "common" character of the asylum system, adducing that the system is neither common nor a system. The low regulatory density of the rules, with numerous exceptions and discretionary clauses, make it difficult to identify the real framework and the boundaries of the system. Furthermore, the lack of a European standard for the protection of human rights leaves the configuration of a model which guarantees the application of a common system in hands of external actors such as the European Court of Human Rights.

The ten conclusions of the book are characterized by the idea that the Dublin system should be revised. The author defends that instead of being a formal mechanism which identifies the Member State responsible for examining applications, it should become a system for the distribution of the inherent function of solidarity. Not only does she explain that the enforcement of the rules contained in the Common European System remains a decentralized process, she also shows that the system lacks the essence of solidarity inherent to asylum; and she proposes that the solidarity principle should be incorporated in the asylum concept.

To sum up, it is a pleasure to read a book in which the author engages in deep, stimulating and inspiring arguments which are the result of documented research and reflection. It is not a coincidence that this book, written by Professor Silvia Morgades, received an award from the Barcelona Bar Association to projects on Asylum Law (Ferrer Eguizábal Award 2016). The author demonstrates, once again, her accurate and comprehensive knowledge on international *ius migrandi* and her capacity to argue legally with rigor and a broad perspective.

Joanna ABRISKETA UGARTE
University of Deusto

 DOI: 10.17103/sybil.25.10

the SPANISH YEARBOOK of INTERNATIONAL LAW

AEPDIRI Journals' Review *

Revista Española de Derecho Internacional (REDI), Vol. 73/1 (2021)

Ricardo Arredondo, "Diplomacia, espionaje y orden mundial: el cierre de consulados de China y Estados Unidos", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: https://dx.doi.org/10.17103/redi.73.1.2021.1.01]

Diplomacy, espionage and world order: the closure of consular offices of China and the United States

This paper analyzes the political and legal context of the closure of the Chinese consulates in Houston and the American one in Chengdu in the framework of international law in general and, specifically, of the Vienna Convention on Consular Relations (1963) and the Chinese Consular Convention - United States (1980). In the first part, a brief description is made of the status of bilateral relations between China and the United States, and then it particularly considers aspects related to: a) the decision of both countries to close the aforementioned consular offices; b) the alleged conduct performed by Chinese officials, in particular, allegations of espionage and theft of intellectual property; c) the immunities of consular officials and the possibility of criminal prosecution, and d) issues related to the inviolability of consular premises. The paper concludes with some final thoughts.

María Campo Comba, "Derecho Internacional Privado Europeo y aplicación de las directivas Europeas protectoras de la parte contractual débil", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.02]

EU Private International Law and application of EU directives protecting weaker contracting parties

The Rome I Regulation on the law applicable to contractual obligations includes special conflict rules that determine the law applicable to consumer contracts and individual employment contracts. However, in some cases, these rules are not enough to ensure the application of the mandatory provisions contained in the EU directives protecting weaker contracting parties according to their intentions and objectives. This study analyses the existing inconsistencies regarding the coordination between the Rome I Regulation and those directives, focusing specially on consumer contracts and individual employment contracts. The possible mechanisms of the Rome I Regulation to ensure the protection emanating from the mentioned directives are examined. This study proposes a European private international law method that takes more into account the EU needs, particularly regarding the harmonised areas of EU law such as EU consumer law.

* This section has been prepared by Sofía Elorza Luján —graduate 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*.

José Luis De Castro Ruano, "Buscando un nuevo modelo más satisfactorio de inserción de las regiones constitucionales en la Unión Europea. La oportunidad de la conferencia sobre el futuro de Europa", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.03]

Seeking a new more satisfactory model for the insertion of constitutional regions in the EU. The opportunity of the conference on the future of Europe

The so-called Constitutional Regions, i. e. those Regions with legislative power recognized in their constitutional framework, have not found satisfactory channels of representation and effective participation in the European Union. The Conference on the Future of Europe, which will reflect on the model of the European Union for the near future, gives us an opportunity to take up this reflection again. The next EU reform should allow channeling the demands of these unique Regional. Federal progress and regional recognition are two parallel processes that must be developed simultaneously. In this article, we review the state of affairs in historical perspective in order to assess the current unsatisfactory situation. We also launch some ideas to find a new more satisfactory model for the insertion of Constitutional Regions in the EU. In any case, this new model must provide for differentiated representation in favor of Constitutional Regions.

Juan Manuel De Faramiñán Gilbert, "Nuevas propuestas para el desarrollo sostenible en el espacio ultraterrestre", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.04]

New proposals for sustainable development in the outer space

In the 21st century, the international community faces the challenge of managing activities in outer space for the benefit of humanity so that its use and natural resources can be a shared heritage. Currently in order to evaluate the application of the «Space2030» Agenda the question arises to be able to elaborate a long-term action and reporting the United Nations about the benefits of the space based on closer international cooperation and better governance of activities in outer space and the use of science and law at the service of sustainable development.

María López Belloso, "Nuevas tecnologías para la promoción y defensa de los Derechos Humanos", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.05]

New technologies for the promotion and defense of Human Rights

Since new technologies like Big Data, machine learning or artificial intelligence were introduced in the international agenda, they have been perceived as a threat for human rights, especially the right to privacy. This defensive stance in front of the use of such tools has prevented the International Law of Human Rights to employ them for its promotion and defence or for the protection of people defending it. This work intends to offer an alternative vision and to present concrete examples of the potential use of such tools in favour of human rights and their defendants.

Joana Loyo Cabezudo, "La llave del «interés de la justicia» en el Estatuto de Roma: su controvertido empleo en el caso de Afganistán", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.06]

The «interests of justice» as a key in the Rome statute: its controversial use in the case of Afghanistan

In the case of Afghanistan, the Pre-Trial Chamber II of the International Criminal Court rejected the authorization to initiate an investigation by concluding that the investigation would not be in the «interests of justice», employing arguments that could be inconsistent with the Rome Statute. Even if the Appeal Chamber amended the Decision and, consequently, authorized the opening of the investigation, it did not specify the significance that the clause should have. Taking into consideration the juridical insecurity that this concept provokes, the main objective of the article is to analyze the «interests of justice» notion by studying the practice of the Court and examining the main guidelines provided by the Rome Statute: the interests of victims and the gravity of the crime committed by the suspected offender.

José Antonio Moreno Rodríguez, "La nueva guía de la organización de Estados Americanos y el derecho aplicable a los contratos internacionales (Parte I)", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.07]

The new guide of the organization of American States and the law applicable to international commercial contracts (PART I)

This paper addresses the general issues of the Guide on the law applicable to international commercial contracts in the Americas approved by the Organization of American States (OAS) in February 2019. The paper analyses the background of this relevant text, the conventions on the matter previously approved in America starting with the Montevideo Treaties of 1889, the influence on the Guide of The Hague Principles on choice law in international commercial contracts of 2015, the gestation of the idea of making a Guide by the OAS and the process undertaken to prepare the Guide approved in 2019.

Luciano Pezzano, "Rescatando una norma del olvido: el art. VIII de la convención contra el genocidio y la responsabilidad de proteger", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.08]

Rescuing a norm from oblivion: art. VIII of the genocide convention and the responsibility to protect

The paper examines the origin and interpretation of art. VIII of the Convention on the Prevention and Punishment of the Crime of Genocide, as well as the problems for its invocation in practice, and it proposes a current reading of that Article, through the prism of the Responsibility to Protect. In particular, the paper argues that art. VIII can be regarded as a precursor to the Responsibility to Protect, having expressly recognized the competence of United Nations organs in the prevention and suppression of genocide at as early as 1948. Also, the paper stresses that art. VIII has provided an important legal basis for the existence of a responsibility of the international community to protect populations from such a heinous crime.

Sara Sánchez Fernández, "El convenio de la Haya de reconocimiento y ejecución de sentencias: arquitectura y algunos problemas seleccionados", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.09]

The Hague convention on the recognition and enforcement of foreign judgments: architecture and some selected issues

On 2 July 2019, the Hague Conference adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. It establishes a minimum standard for the recognition and

enforcement which is built on two main elements: a catalogue of jurisdictional filters and a number of grounds to refuse recognition and enforcement. This contribution presents the Convention key elements, comparing them with the current rules on this matter in Spain, i. e. Brussels I bis Regulation and Ley de Cooperación Jurídica Internacional. In addition, we analyze two issues that may arise in the application of the Convention: penalty orders imposed upon the breach of non-pecuniary obligations and limitation period for enforcement of a judgment.

Belén Sánchez Ramos, "Intercambio de patógenos, salud pública y protocolo de Nagoya: oportunidades y desafíos", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/253-276]

Pathogens sharing, public health and the Nagoya protocol: opportunities and challenges

This article aims to analyze the public health implications of the Convention on Biological Diversity and its Nagoya Protocol on Access to genetic resources and the fair an equitable sharing of benefits arising from their utilization. Both instruments establish a new model where pathogen may be accessed subject to the prior informed consent of the country providing the resources and once mutually agreed terms have been reached that include the fair and equitable sharing of benefits arising from the utilization of the concerned resources. This new model differs from the common practice. In fact, the global sharing of pathogens was primarily done informally. In many instances, pathogens were shared without formal permission from national authorities. This situation presents challenges for both access and sharing of non-influenza and influenza virus. In fact, some problems related to the links between the NP and the Global Influenza Surveillance and Response System and the Pandemic Influenza Preparedness Framework are still unsolved.

Ángela Trujillo del Arco, "El combate de facto contra la trata de personas en España y la responsabilidad internacional del Estado", 73 (1) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.1.2021.1.11]

The de facto fight against human trafficking in Spain and the international responsibility of the state

For two decades, there has been a strong agreement in the international legal system on what is meant by the crime of trafficking in persons and how its human rights perspective should be addressed. However, such standards are not fully taken on board by the Spanish anti-trafficking strategy. While the Spanish legal system outlaws trafficking in line with the international consensus, its de facto fight seems to be guided by an outdated conception of the crime that hardly satisfies the international obligations assumed by the State. The analysis of such a disparity is necessary since the failure to act with due diligence to prevent such a human rights violation is likely to generate international state responsibility.

Revista Española de Derecho Internacional (REDI), Vol. 73/2 (2021).

N. Arenas Hidalgo, "Migraciones y asilo: análisis y perspectivas: el principio de solidaridad y reparto equitativo de la responsabilidad entre estados en la política europea de asilo: la conformación de la reubicación en un contexto de crisis", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.01]

Migrations and asylum: analysis and perspectives: the principle of solidarity and fair sharing of responsibility between states in the European asylum policy: the configuration of relocation in a context of crisis

The principle of solidarity and fair sharing of responsibility between the Member States is the guiding principle of European Union Asylum Policy, yet recent migration flows have revealed a lack of solidarity and mutual trust among States. Refugee relocation within the EU, as an expression of that solidarity, has been hotly contested. This study demonstrates how relocation is put into practice, and explores the various proposals put forward for the creation of permanent mechanism to operate within the common European asylum system. The study concludes with a call for solidarity based on a human rights approach.

María del Carmen Chéliz Inglés, "Migraciones y asilo: análisis y perspectivas: el laberinto jurídico de la protección de los menores migrantes abandonados: una aproximación desde el Derecho Internacional Privado", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.02]

Migrations and asylum: analysis and perspectives: the legal maze of the protection of abandoned migrant minors: an approach from Private International Law

The protection of abandoned migrant minors is a subject in which the regulations on child protection and the immigration regulations converge. To this must be added an added difficulty, such as the problems derived from the different notions of the concept of minor itself, which are provided in said instruments. Both circumstances can cause confusion in practice and lead to a wrong application of the regulations in question, undermining the protection of the MENA.

Waldimeiry Correa da Silva, "Migraciones y asilo: análisis y perspectivas: movilidad internacional y el mercadeo de la migración segura a través de la teoría crítica de las relaciones internacionales", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.03]

Migrations and asylum: analysis and perspectives: international mobility and the market of safe migration through the critical theory of international relations

This article aims to analyze the regular migration that occurs through Golden Visa from the application of the critical theory of International Relations (IR). The preliminary hypothesis for the study assumes that Golden Visa represent the binomial of inclusion and exclusion observed by critical theory. This study carries out a thematic literature review that seeks to answer the following questions: What is the Golden Visa? How are Golden Visa perceived in the context of contemporary migrations? How are they explained by critical theory? The final part delves into the three key elements of critical theory: the contestation of the liberal international order, the transformation of intersubjective meanings and the dialectical confrontation caused by the Golden Visa system.

Eva Díez Peralta, "Migraciones y asilo: análisis y perspectivas: la política convencional de la UE sobre readmisión de inmigrantes irregulares: una cooperación opaca y con implicaciones graves para los Derechos Humanos", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.04]

Migrations and asylum: analysis and perspectives: the conventional policy of the EU concerning the readmission of irregular immigrants: an opaque policy with serious implications for Human Rights

This study examines the transparency and effectiveness of EU cooperation with third countries on return and readmission and reflects on how difficult it is to reconcile it with the rule of law and human rights culture. Thus, EU readmission agreements (EURA) formally concluded with third countries will be presented. The study then discusses the underlying issues arising from the increasing informality surrounding readmission policy, both at the EU and bilateral level. It finally concludes with a critical review of the conventional readmission policy with third countries from a human rights perspective.

Teresa Fajardo del Castillo, "Migraciones y asilo: análisis y perspectivas: el derecho humano a abandonar un país, incluido el propio: las excepciones a la regla", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.05]

Migrations and asylum: analysis and perspectives: the human right to leave a country, including one's own: exceptions to the rule

The right to leave a country, including one's own, is enshrined in Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights. It is also incorporated in Article 2 of Protocol 4 to the European Convention on Human Rights. This right is marked both by its nature as a human right necessary for the enjoyment of rights such as the right to seek asylum or refuge, and by the restrictions that states may impose on it for reasons of security, public order and migration control. However, the right to leave a country does not constitute a sufficient legal entitlement for the choice of the country of destination. Its broad conception when it was first formulated is now limited by the establishment of exceptions and restrictions that restrict its scope as a consequence of migration policies in which potential destination countries have collaborated with countries of origin and transit to contain or prevent the departure of persons without legal qualifications to migrate regularly. The number of restrictions is such that it is reasonable to wonder whether the exceptions to the rule have diminished its content and applicability.

Jorge García Burgos, "Migraciones y asilo: análisis y perspectivas: la cooperación migratoria en la configuración de las relaciones entre España y África Subsahariana", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.06]

Migrations and asylum: analysis and perspectives: migratory cooperation in the relationship between Spain and Sub-Saharan Africa

This paper reviews the different cooperation plans on migration that have been implemented by the different Spanish governments in African countries during the last 15 years. On a recurring basis, development aid (specially in the form of co-development) has been used as an instrument of migration containment and at the service of border externalization, understood to establish of extraterritorial actions that act as a stoppage for migrations mainly through agreements with the countries origin and migratory transit. The hypothesis used is that beyond the achieved results, these programs are not always in line with the commitments made by Spain in terms of cooperation for development and respect for human rights, which remain in the background compared to matters relating to national security.

Víctor Luis Gutiérrez Castillo, "Migraciones y asilo: análisis y perspectivas: los procesos probatorios de solicitudes de asilo por orientación sexual e identidad de género en Europa: análisis desde la perspectiva de los Derechos Humanos", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.07]

Migrations and asylum: analysis and perspectives: the evidentiary processes of asylum application based on sexual orientation and gender identity in Europe: analysis from a Human Rights perspective

This essay introduces a critical analysis the different legal aspects of the assessment of evidence in asylum applications on the basis of sexual orientation and gender identity in Europe. National authorities enjoy a wide margin of discretion in the acceptance and assessment of the evidence. However, this freedom is limited by respect for the protection of the dignity of the person enforceable by international and regional standards. This research is focused mainly on the European Union law and the case-law of the Court of Justice of the European Union on this matter.

Diana Marín Consarnau, "Migraciones y asilo: análisis y perspectivas: nuevos y heredados desafíos en el contexto del regreso al país de origen del ciudadano de la unión y su familia", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.08]

Migrations and asylum: analysis and perspectives: new and inherited challenges for the union's citizens and family members in the context of the return to the country of origin

The aim of this paper is to consider how emerging and legacy challenges contribute on the need to move towards an autonomous legal status for family reunion, at EU or internal level, especially by focusing on the Spanish case, when the sponsor is a EU citizen that returns to establish himself in his country of origin. In this context, the third-country national, as a family member, begins a migratory process. The construction of the derived rights of residence by the Court of Justice of the European Union (CJEU), together with the specific problems arising in a crisis scenario and the needs arising in the development and continuity of private international relationships, promotes an appropriate forum to consider a step forward. This should also be considered taking into account aspects of consistency in the scope of application between regulatory instruments.

Lucas J. Ruiz Díaz, "Migraciones y asilo: análisis y perspectivas: entre apoyo a la integración y prevención de la radicalización. Una mirada crítica al plan de acción de integración e inclusión de la Unión Europea", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.09]

Migrations and asylum: analysis and perspectives: between supporting integration and countering radicalization. A critical analysis of the European Union's action plan on integration and inclusion

Not being its purpose to establish a security-migration link, the aim of this Study is to analyse both European Union's action to prevent radicalization and the current starting point by means of an instrument specifically aimed at promoting social inclusion and integration of third-country nationals and Europeans with a migrant background: the Action plan on Integration and Inclusion 2021-2027. In this document, besides stressing EU's intervention thought the lens of human rights, the Commission approaches social inclusion and integration from a securitarian perspective; that is, for the first time in the European agenda, as an active element of its action to prevent radicalization processes leading to violent extremism and terrorism. This approach, however, might entail undesired consequences for the effective protection and promotion of the rights of this collective.

Ana Salinas de Frías, "Migraciones y asilo: análisis y perspectivas: La insuficiente protección jurídica internacional de los migrantes irregulares víctimas de trata", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.10]

Migrations and asylum: analysis and perspectives: The insufficient international legal protection of irregular migrants vulnerable to human trafficking

The lack of a common legal definition of the term «migrant» or the fact of international legal instruments which are sparse as for concepts or simply not interconnected being applied concurrently on irregular migrants drive, as a result, to a serious lack of protection that the ECtHR has started recently to approach under art. 4 ECHR in a new and still under construction interpretation. According to it, art. 4 ECHR would include not only servitude, slavery or forced labour but additionally trafficking in human beings.

Beatriz Vázquez Rodríguez, "Migraciones y asilo: análisis y perspectivas: las obligaciones de los estados en materia de prevención y protección contra la trata de mujeres con fines de explotación sexual en el contexto migratorio", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1a.11]

Migrations and asylum: analysis and perspectives: obligations of states in relation to prevention and protection against women trafficking for purposes of sexual exploitation in the migratory context

The increase in the levels of trafficking in women and girls for the purpose of sexual exploitation because of the current migratory phenomenon calls for effective responses from the States to prevent and combat this problem in a comprehensive manner. This study analyzes the universal and regional international framework, in which there are important limitations, both due to the absence of a human rights approach and the lack of a gender perspective. However, there are trends with respect to the conception of this phenomenon that could lead to a positive redefinition of the scope of State obligations.

Laura Aragonés Molina, "Miscelánea: la buena administración de justicia en la jurisdicción internacional penal: excepciones a la aplicación estricta de la normativa procesal en materia de recursos", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1b.01]

The good administration of justice in the international criminal jurisdiction: exceptions to the strict application of procedural rules on post- adjudication remedies. International courts and tribunals refer to the principle of good administration of justice to justify certain decisions that do not find a legal basis expressly provided neither in their statutes nor in their rules of procedure or when they interpret the procedural rules in a flexible manner. In those cases, they exercise inherent powers necessary to ensure the fulfilment of their judicial function. This principle, whose content is imprecise, has two main purposes: to safeguard the proper administration of proceedings and to guarantee the justice of the decision. In this paper we study several manifestations of this principle in the application and interpretation of the procedural provisions of revision and additional evidence in appeal. We focus on the judicial practice of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Residual Mechanism for Criminal Tribunals. These precedents can be extremely useful when litigating in the International Criminal Court as well as in other international courts.

Mónica Herranz Ballesteros, "Miscelánea: El Reglamento (UE) 2019/1111 relativo a la competencia, el reconocimiento y la ejecución de resoluciones en materia matrimonial y de responsabilidad parental y sobre la sustracción internacional de menores (versión refundida): principales novedades", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1b.02]

Miscellany: regulation (UE) 2019/1111 on jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast): principal innovations

The Council Regulation 2019/1111 will become fully applicable in August 2022. This text is perhaps the most important legal Regulation of the civil cooperation in the European Judicial Area in international family matters. Its importance in daily practice entails the need to know the improvements of a very long Regulation that in some moments is not easy to read. The European Union has endeavored to bring a document that tries to balance, on the one hand, the long-await mutual trust, that allows the necessary integration in the construction of the European judicial area, and on the other hand, the protection of the best interest of child as a principle that acts at different levels.

José Antonio Moreno Rodríguez, "Miscelánea: la nueva guía de la organización de estados americanos y el derecho aplicable a los contratos internacionales (PARTE II)", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1b.03]

Miscellany: the new organization of American States guide and the law applicable to international contracts (Part II)

This paper addresses the specific issues of the Guide on the law applicable to international commercial contracts in the Americas approved by the Organization of American States (OAS) in February 2019. The paper analyses the structure of this relevant text, its relations with uniform law, the role of parties autonomy trough express (including formal validity) and tacit choice, the *pactum de lege utenda*, the separability of the choice agreement in case of invalidity of the contract, the applicable law in the absence of choice, the *dépeçage*, the flexible interpretation, the scope of the applicable law, the *ordre* public, the existence of other conventions and the States with more than one legal system.

Laura Movilla Pateiro, "Miscelánea: ¿Hacia un cambio de paradigma en el derecho del espacio ultraterrestre?: Los acuerdos Artemisa", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1b.04]

Miscellany: Towards a paradigm shift in the law of the outer space?: The Artemis accords

The current state of development of outer space law faces significant challenges arising from new space exploration and exploitation activities. In this context, several States, under the auspices of the United States, signed in October 2020 the «Artemis Accords. Principles for cooperation in the civil exploration and use of the Moon, Mars, comets and asteroids for peaceful purposes». This paper examines the possible contribution of these Accords to the consolidation of a paradigm shift in the Law of Outer Space, especially in relation to two aspects. On the one hand, with respect to their own development, as they were adopted outside the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS), the forum in which space law has historically been configured. Second, in relation to the legal regime of space resources, by consolidating an interpretation of the principle of non-appropriation that legitimizes their exploitation.

Xavier Pons Rafols, "Miscelánea: biología sintética y derecho internacional: débiles consensos ante desafíos inmensos", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1b.05]

Miscellany: synthetic biology and international law: weak consensus facing huge challenges

The dizzying scientific advances in the field of biology and biotechnology, which we are collectively refer to as synthetic biology, have defined new frontiers of knowledge. The latest stage in this process has been the rapid mastery of genome editing techniques, mainly CRISPR/Cas9 tools and systems. This study, from the perspective of international law, deals, on the one hand, with the implications of synthetic biology on human health, thus covering the bioethics and human rights perspective in relation to gene research and gene therapy; and, on the other hand, with the responses of international law to the challenges that gene editing and the development of modified gene drives present for biodiversity. In both dimensions, the weak existing international consensus and the profound interactions in a wide range of sectors of international law, with the presence of diverse international institutional mechanisms, are apparent, which is evidence of a multiple and complex normative crossroads.

Esteban Vidal Pérez, "Miscelánea: la construcción de una potencia global: la influencia de la competición geopolítica internacional en la transformación de la esfera doméstica de Estados Unidos", 73 (2) *Revista Española de Derecho Internacional* (2021) [DOI: http://dx.doi.org/10.17103/redi.73.2.2021.1b.06]

Miscellany: the construction of a global power: the influence of international geopolitical competition on shaping the domestic sphere of the United States

Neoclassical realism and structural realism provide different explanations about the rise of the United States as a global power. However, these approaches overlook the influence of international geopolitical competition on the internal political structures of States and how they affect their foreign policy. In this paper, we analyze the role of external pressures in shaping the United States' domestic sphere to explain how it became a global power. To do so, we resort to geopolitics and discuss how the international environment poses challenges, and States confront them by reorganizing their space and institutions in order to increase their national capabilities. In this way, we study several decisive moments in US history to see how they shaped its domestic realm and contributed to make this country a global power.

*

Revista Electrónica de Estudios Internacionales (REEI), No. 41 (2021)

Antonio Francisco Rando Casermeiro, "Amistades peligrosas: las relaciones entre Serbia, China y la UE en el contexto de la futura ampliación a los WB6", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.02]

Dangerous liaisons: relations between Serbia, China and the EU in the context of the future enlargement of the European Union to the WB6

The aim of this study is to analyse the relations between Serbia, China and the EU. Such relations had to be seen in the double context: On the one hand Serbia's accession running process, with the interferences on it of China as global rising power. Beijing, with its ambitious New Silk Road project, erupt as an agent in Europe, especially in Western Balkans and quite particularly in Western Balkans 6 (next UE´s enlargement area). On the other hand, China's influence on Serbia could determine the future as a Member State of the EU as well as EU enlargement policy in the region.

José Ignacio Paredes Pérez, "Contratos de suministro de contenidos y servicios digitales B2C: problemas de calificación y tribunales competentes", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.03]

B2C contracts for the supply of digital content and digital services: problems of characterization and competent courts

The purpose of this study is to analyse the characterization problems posed, for the purposes of the application of the European rules on international jurisdiction, by the legal actions available to the consumer in the new European regulation on improving consumer access to digital goods and services, and the possible fragmentation of litigation relating to the same infringing conduct under Directive (EU) 2019/770 and Regulation (EU) 2016/679. In the context of the Brussels I bis Regulation, the autonomous characterization of the legal actions available under the new regulation, and the way in which this is done, is decisive, depending on whether or not the contract falls within the scope of articles 17 to 19.

Ignacio G. Perotti Pinciroli, "El control de convencionalidad en el Derecho español: ¿una importación defectuosa?", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.04]

The conventionality control under Spanish law: a deficient import?

The Conventionality Control doctrine was almost strange to Spanish Law. However, in STC 140/2018, of 20 December 2018, the Constitutional Court of Spain construed that this mechanism is within the powers of Ordinary Judges and constitutes a rule of selection of applicable law. The article analyzes the meaning of the Conventionality Control doctrine from a Comparative law perspective, as well as its scope within the Inter-American Court of Human Rights. It also highlights some concerns regarding the implementation of the mechanism vis à vis the enforcement of International Human Rights Law in the Spanish legal system.

Daniel Iglesias Márquez, "El derecho a un medio ambiente sano ante el extractivismo en las Américas: el alcance de los estándares interamericanos sobre empresas y derechos humanos", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.05]

The right to a healthy environment within the extractivism in the Americas: the scope of inter-american standards on business and human rights

The right to a healthy environment and its close relationship and interdependence with other human rights are widely recognized in the Americas. However, the extractivist logic of most of the American States' economies facilitates the development of business activities that generate serious negative impacts and affects the enjoyment of this right, as well as other human rights that depend on the appropriate environmental conditions for their enjoyment. In this sense, this article answers the research question on the extent to which the inter-American standards on business and human rights contribute and provide new elements for the respect and guarantee of the right to a healthy environment in the context of extractive activities.

Ángel Sánchez Legido, "El reconocimiento del derecho a solicitar protección internacional en las embajadas y consulados de España (a propósito de la STS 3445/2020)", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.06]

The recognition of the right to apply for international protection in Spanish embassies and consulates (comments on the Supreme Court judgment 3445/2020)

In a judgement based on the persistent violation of the required regulatory development of the 2009 Spanish Asylum Act, last October the Spanish Supreme Court has recognized the right to apply for international protection in Spanish Embassies and Consulates. In the context of the so-called Human Visa problem, this recognition implies the incorporation to Spanish Law of a right deliberately eluded in EU Law, questionably rejected by both the European Court of Justice in X and X v. Belgium and the European Court of Human Rights in M.N. v. Belgium, and progressively suppressed in European States national Laws. Under a growing migratory pression background, this study suggest that the challenge posed by this decision requires a response that balances a Law-abiding approach and the commitment to the right of asylum, on the one side, and the real capabilities of the Spanish Asylum system, on the other.

Javier A. González Vega, "El reconocimiento por EE.UU. de la anexión marroquí del Sahara Occidental en perspectiva: aspectos jurídicos y políticos", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.07]

The US recognition of the Moroccan annexation of Western Sahara in context: legal and political implications

The decision of US President D. Trump to proceed in December 2020 to recognize the annexation by Morocco of the territory of Western Sahara has led to a profound alteration in US policy in relation to the situation. The work examines both the form and the content of the American proclamation, the context in which it has been adopted and its political and legal implications - including its eventual revocability - both in domestic law and in international law. In this sense, special attention is paid to the obligation of non-recognition that international law establishes insofar as the decision of the United States constitutes a clear breach of an obligation derived from a peremptory norm of international law such as that relating to self-determination of the peoples. The analysis developed -supported by a careful examination of international practice, both general and related to the specific case- concludes by noting that despite the firmness of the principle of non-recognition in International Law, the intrinsic weakness of the rules related to its content in accordance with the art. 41 of the draft articles of the ILC (2001) on State responsibility for internationally wrongful acts, prevent to extract sound legal consequences in the event of its violation.

María del Carmen Chéliz Inglés, "La Convención de Singapur y los acuerdos de mediación comercial internacional", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.08]

The Singapore Convention and the international commercial mediation agreements

The Singapore Convention on International Settlement Agreements resulting from mediation represents a milestone in the determined promotion of this dispute resolution mechanism and puts an end to the absence of a harmonized legal framework to regulate this issue. The most significant advance is that it gives a new legal status to the agreements resulting from international commercial mediation, which become directly enforceable in all the States that ratify the Convention. In this context, the objective of this work is to analyze the key issues of the Singapore Convention, highlighting its lights and shadows, and assess what repercussions the adherence to said normative instrument would have on the Spanish legal system.

Javier Ruiz Arévalo, "La estrategia de Irán ante el proceso de paz de Afganistán. Factores condicionantes: seguridad y liderazgo regional", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.09]

Iran's strategy in the Afghan peace process. Conditioning factors: security and regional leadership

There is a general agreement on the idea that in the Afghan conflict, peace will only be possible after an agreement in which the main regional actors must concur. Iran is one of the most relevant. For many analysts, Tehran's position is difficult to predict because its objectives in its relationship with Afghanistan have varied over time, depending on factors that are difficult to identify. Throughout this article it will be shown that, quite to the contrary, Iran has historically demonstrated clear and stable strategic interests vis-à-vis its eastern neighbor, which are what will determine its position on the future of Afghanistan. Over and above conjunctural interests, or ethnic, religious or cultural affinities, Iran's position towards the peace process is determined by those strategic interests that have consistently guided its regional policy since the triumph of the Islamic Revolution. This strategy had to be adapted to the profound changes produced in its geopolitical environment, but it has been this environment and not its strategic interests that have changed during these decades.

José Ángel López Jiménez, "La OSCE y el espacio post-soviético: 30 años de prevención y resolución de conflictos. Una valoración crítica", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.10]

The OSCE and the post-soviet space: 30 years of conflict prevention and resolution. A critical assessment

Thirty years after the disappearance of the Soviet Union, the post-soviet space presents a complex scenario. The state building processes are facing important challenges in different scopes: economical, social, institutional, interethnic coexistence, territorial conflicts, secessionisms, transition and democratic consolidation, and also in terms of the insertion in the international community. A significant number of conflicts are developing in this broad area what is the neighborhood between European Union (UE) and Russia. Due to the geoestrategic and geopolitic importance it is considered by Russia as an essential objective in its foreign policy. The European Security and Cooperation Organization (CSCE) and since 1995 as OSCE has participated being the main international organization in the prevention and resolution of conflicts. Nevertheless a detailed analysis shows shadows around the achievement of the objectives set out in their mandates. This study aims to carry out a critical balance of three co-led processes by the OSCE: two related to conflicts started before the dissolution of the Soviet Union (Transdniestria and Nagorno-Karabakh) and the other since 2008, after the russian intervention in Georgia (South Ossetia and Abkhazia).

David Fernández-Rojo, "La supranacionalización de la asistencia operativa a los sistemas nacionales de asilo en la Unión Europea", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.11]

The supranationalization of the operational support to the national asylum systems in the European Union

The European Asylum Support Office (EASO) is a decentralized EU agency that shapes the institutional framework of the Area of Freedom, Security and Justice and provides special and emergency assistance to the national asylum systems. The so-called "refugee crisis" of 2015 stressed the need to safeguard the functioning of the Common European Asylum System (CEAS), to operationally assist the Member States most affected by the sudden and extraordinary arrival of mixed migratory flows and, to effectively and uniformly implement the EU asylum measures. This article studies the evolution of the operational tasks of the Agency, both de iure and de facto, from its establishment to its proposed transformation into an EU Asylum Agency (EUAA) with powers of intervention, supervision and examination of applications of international protection. Moreover, the article examines, in particular, the control exercised by the Member States and the civil society with the aim of balancing the reinforced operational mandate of the Agency, overseeing the potential impact of the Agency's activities on the fundamental rights of the asylum seekers and, limiting the Agency's discretion in

the examination of applications of international protection. Hence, two trends in the administration of asylum in the EU can be highlighted after the analysis conducted in this article. On the one hand, while the EUAA's new legal framework indicates that its operational mandate is limited, like EASO's, to providing the national authorities with the assistance they may require, the tasks that EASO conducts in practice on the ground and the activities envisaged for the EUAA are clearly operational. On the other, the Agency has an increasingly leading role in ensuring the effective and uniform implementation of the asylum measures adopted at the EU level, as well as ensuring that the Member States do not jeopardize the functioning of the CEAS.

Marta Iglesias Berlanga, "La trata de menores en los conflictos armados desde un enfoque basado en los derechos humanos", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.12]

Trafficking in children in armed conflict from a human rights-based approach

The new wars associated with the third level, that is, with weak States immersed in armed conflicts, constitute a unique breeding ground for human traffickers, terrorist and criminals verbigracy, whose simplest objective are minors. The need to combine the fight against impunity of the perpetrators of this abominable human mercantilism and the need to protect victims (particularly children) in sudden-onset emergency environments justifies considering trafficking in persons from a human rights-based approach, especially within the framework of the State obligation of prevention, the genesis which is rooted in the due diligence required of a State in its territory, as well as the unfinished responsibility to protect in the context of atrocity crimes that may result in certain violations of human rights committed in the context of trafficking.

Montserrat Abad Castelos, "Rendición de cuentas por los crímenes cometidos durante el califato del Daesh: las pruebas como clave", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.13]

Accountability for crimes committed during the ISIS caliphate: evidence as key

This article seeks to determine if evidence can be a way to overcome the existing difficulties in the field of justice to hold Daesh members accountable for the atrocity crimes committed in Syria and Iraq during the armed conflicts that took place there. To get this, recent innovations are examined both the actors that collect and preserve evidence and the nature, characteristics and challenges that evidences pose. It will be concluded that the developments that are taking place are crucial and, consequently, have the capacity to trigger a paradigm shift that might be reflected in the outcome of pending prosecutions, in order to ensure the responsibility of the perpetrators of the crimes. Nevertheless, at the same time, it also shows how evidence is not the only key to take into account, since the problems related to the exercise of jurisdiction in domestic orders, which go far beyond the legal plane, will also be transcendental.

Julio Jorge Urbina, "Seguridad marítima e interceptación de buques en la represión de actividades ilícitas en el Derecho del Mar", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.14]

Maritime security and interception of vessels in the suppression of illicit activities in the Law of the Sea

The expansion of transnational criminal organizations across the seas and oceans has become one of the main threats to maritime security. In this context, it is necessary to analyse the actions that States can carry out against these groups in maritime zones. In this regard, the UNCLOS, as a legal framework of reference in

matters of maritime security, attributes enforcement jurisdiction to States to intercept, within certain limits, vessels suspected of engaging in illicit activities. But this legal framework suffers from important shortcomings that reduce the effectiveness of the State's action at sea and encourage the activities of these criminal groups. These shortcomings are most clear when state agents must adopt coercive measures, including the use of force in the most extreme cases, when the ship resists seizure, as the UNCLOS does not offer any guidance in this regard. In this situation, which has been partially mitigated by other international treaties, it is important that States precisely regulate the exercise of these police powers at sea, as well as the measures they can adopt in each case, to avoid incurring abuses or arbitrariness.

Laura Aragonés Molina, "Unidad o fragmentación en el Derecho Internacional Procesal: la revisión de sentencias ante la Corte Internacional de Justicia y el Tribunal Europeo de Derechos Humanos", 41 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.41.15]

Unity or fragmentation in International Procedural Law: revision of judgments at the International Court of Justice and the European Court of Human Rights

The increasing specialization of Public International Law and the diversity of international courts and tribunals with specific competences ratione materiae and personae in the multiple international normative sectors are still generating challenges for coherence, consistency and predictability of international jurisprudence. Procedural rules and principles may have a cohesive effect on judicial practice and foster a judicial dialogue and cross-fertilization at a procedural level. It may contribute to the unity of the international legal order through the formation of common rules of procedure. In this paper we explore this cohesive effect exhaustively, studying the interaction between the International Court of Justice and the European Court of Human Rights when they interpret and apply the revision provision.

Revista Electrónica de Estudios Internacionales (REEI), No. 42 (2021)

Juan Pablo Soriano Gatica, 'Ciencia, tecnología y relaciones internacionales: historias de poder, de esperanza y de normas e identidades', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.02]

Science, technology, and international relations: tales of power, hope, and norms and identities

The COVID-19 pandemic paralyzed the world, claimed millions of victims and demonstrated the high levels of interdependence of our hyper-globalized world. It also brought to the center of the debate the need to deepen our analyses of the ways in which science, technology and international relations are intertwined. This study proposes to use some theories of International Relations (IR) to reflect on these issues, and for approaching 'multi-stakeholder governance' as a mechanism to manage the dynamics generated by the scientific and technological changes of the contemporary world. To illustrate this proposal, three tales are constructed based on the 'ideal types' of three IR theories: a 'tale of power', based on realism, a 'tale of hope', based on liberalism, and a 'tale of norms and identities', based on constructivism. Each of these histories allows us to focus on specific international processes and actors, but more 'tales' will be needed to capture the complexity of the processes analyzed, and a closer collaboration between IR and Science and Technology Studies is required.

Carmen Pérez González, '¿Citius, altius, fortius?: Derecho internacional de los derechos humanos y protección de deportistas transgénero e intersexuales', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.03]

Citius, altius, fortius?: International human rights law and protection of transgender and intersex athletes

The aim of this paper is to reflect on how two objectives of international law can be reconciled: the prohibition of discrimination on the grounds of gender identity, on the one hand, and the integrity of sporting competitions, on the other. The ideas of dignity and non-discrimination, two of the pillars on which International Human Rights Law (IHRL) is built, have guided the slow and belated progress in the protection of the people on whom the study focuses: transgender or sexually differentiated athletes. International law, on the other hand, seems to have already assumed that the necessary protection of the integrity of sporting competitions justifies the limitation of fundamental rights. In this context, it seems appropriate to analyse whether the participation of these athletes in sports competitions can be limited under IHRL and, if so, the extent of this limitation.

Belén Sánchez Ramos, 'El Protocolo de Nagoya sobre acceso a los recursos genéticos y la participación justa y equitativa en los beneficios que se deriven de su utilización: especial referencia a su implementación en España', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.04]

The Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization and its implementation in Spain

This article aims to analyze the Convention on Biological Diversity, the Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization and its implementation in Spain.

Esteban Vidal Pérez, 'Fragmentación geopolítica y equilibrio de poder en el auge de Occidente', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.05]

Geopolitical fragmentation and balance of power in the rise of the West

This paper addresses the debate of the rise of the West from a geopolitical standpoint. To do so, it sets forth the main contributions from different authors and their respective research programs. In this way, we present cultural, institutional, technological, Marxist, cultural exchange, geographical, and other interpretations. The absence of a geopolitical analysis leads us to put forward a new hypothesis in the framework of international relations theories. In this regard, this paper discusses why it resorts to the realist paradigm instead of neomarxism or complex interdependence theories to define the ground on which geopolitics is used to analyze the triumph of Western civilization. In addition to this, it explores the most notable contributions of neorealism and neoclassical realism and highlights their main limitations. Next, it presents the methodology by presenting how geopolitics is understood to test the hypothesis. Finally, it approaches geopolitical fragmentation and its relation with the balance of power and the rise of the West.

Aurelio Lopez-Tarruella Martinez, 'Hacia un nuevo escenario en la litigación transfronteriza de patentes en Europa: la jurisdicción internacional y la distribución de competencias en el Tribunal Unificado de Patentes', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.06]

Towards a new scenario of cross-border patent litigation in Europe: international jurisdiction and distribution of competence in the Unified Patent Court

The purpose of this work is to explain the rules in the Brussels I bis Regulation that will establish the international jurisdiction of the proposed Unified Patent Court, and the rules that distribute the competence among its different divisions. In relation with these latest rules, a comparative analysis with the grounds of jurisdiction in Brussels I Regulation bis is provided with the objective of assessing how cross-border patent litigation in Europe will change once the UPC Agreement enters into force. The conclusion is that the UPC Agreement will reduce the complexity of international litigation in this field, but it will not eradicate forum shopping or other problems of the existing regulation in relation to disputes connected with States where the Agreement is not applicable.

Yaelle Cacho Sánchez, 'La independencia de los jueces internacionales: análisis y valoración de las reformas adoptadas en el marco del Tribunal Europeo de Derechos Humanos', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.07]

The independence of international judges: analysis and assessment of the reforms adopted within the framework of the European Court of Human Rights

Now that the process of reforming the ECHR's guarantee mechanism has been formally concluded, it seems appropriate to analyse and assess the scope of the measures adopted in regards to the ECtHR to improve judicial independence, at a time of growing international interest in this matter. Bearing in mind the different questions raised by the applicability of this notion to international jurisdictions and the reform process as a whole, this article examines the extent to which these measures introduce effective safeguards to enhance judicial independence in the appointment process, in relation to the security of tenure and against external pressures. The improvement is undoubted, but some challenges remain, which should in any case be addressed before the end of the extension of the deadline for the final assessment of this particular aspect of the reform, agreed in 2020 when the Interlaken process was formally closed and which means delaying that assessment until 2024.

Aritz Obregón Fernández & Guillermo Lazcoz Moratinos, 'La supervisión humana de los sistemas de inteligencia artificial de alto riesgo. Aportaciones desde el Derecho Internacional Humanitario y el Derecho de la Unión Europea', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.08]

Human oversight over high-risk artificial intelligence systems. Contributions from International Humanitarian Law and European Union law

The automation of decision-making by artificial intelligence systems is a growing phenomenon affecting all areas of society. The European Commission, aware of the risks that the use of these technologies entails for fundamental rights and freedoms, proposes in its Artificial Intelligence Act to introduce human oversight as a mandatory requirement for the design and development of these technologies. However, human oversight is underdeveloped in the European regulatory environment. For this reason, we propose to resort to the concept of Meaningful Human Control developed in the framework of International Humanitarian Law. In this article we analyse the state contributions, doctrinal and policy proposals made by the Group of Governmental Experts on Lethal Autonomous Weapons Systems. All these contributions allow us to approach from a novel perspective the concept of human oversight proposed by the European Commission for high-risk artificial intelligence systems. We conclude the article looking for universally applicable elements in human oversight for the automation of decision-making, irrespective of the field in question.

Jaume Ferrer Lloret, 'Las medidas restrictivas de la Unión Europea contra las violaciones graves de los derechos humanos en el Mediterráneo: ¿una potencia normativa?', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.09]

The European Union restrictive measures against serious human rights violations in the Mediterranean: ¿a normative power?

Over the last decade, the European Union has been engaged in a practice of some relevance in the application of restrictive measures in response to serious human rights violations committed in a number of states, and more particularly in the countries of the southern Mediterranean; in this region, the cases of Libya and Syria in particular stand out. More recently, the EU has established a targeted mechanism of thematic or horizontal restrictive measures, specifically designed to address serious human rights violations, which has already been implement against some two dozen natural and legal persons and entities, including two individuals responsible for such violations in Libya. In both cases, it is a matter of resorting to measures of retorsion and decentralized countermeasures admitted by general international law, aimed at achieving the cessation and reparation –in the interest of the beneficiaries of the obligation breached- of serious human rights violations. In its external action, the European Union thus assumes the role of a normative power committed to promoting and respecting human rights, albeit with evident double standards or different standards when deciding to use such restrictive measures. On this point, the EU is request to develop in the coming years a more coherent and uniform external action in the application of restrictive measures in response to serious human rights violations. Both at a universal level and, more particularly, in its relations with the states in its southern neighborhood, whose political, economic and social stability is of fundamental importance to the EU.

Josep M. Fontanellas Morell, 'Las principales conexiones del Reglamento 650/2012 por vez primera ante el Tribunal de Justicia de la Unión Europea', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.10]

The main connecting factors of Regulation 650/2012 for the first time before the Court of Justice of the European Union

After six years of application, Regulation (EU) No 650/2012 has been confirmed as one of the great texts on European PIL. Its extensive and complex content requires, as it was to be expected, a continuous and delicate construction by the courts, in particular the Court of Justice of the European Union, because of the binding nature of its decisions, which, in this area and so far, amount to ten. From a temporal perspective, two periods can be distinguished in the case law of the CJEU on the Succession Regulation: an initial one, which runs from the end of 2017 to mid-2020 and a subsequent one, starting in the summer of 2021, in which we are currently immersed. The CJEU's Judgment of 16 July 2020 (Case C-80/19) is a key piece of this sequence, because, besides constituting the link between one stage and the other, it tackles some of the core issues of this Regulation.

Josep Gunnar Horrach Armo, 'Los acuerdos atributivos de jurisdicción en el ámbito de los smart contracts y la tecnología blockchain', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.11]

Jurisdiction agreements in the field of smart contracts and blockchain technology

In this paper, we analyze the formal and material requirements of the jurisdictional agreements made in the field of smart contracts and Blockchain technology. Specifically, the study focuses on the formal aspects of this type of agreement, detailing under what circumstances an express submission agreement between subjects that use smart contracts (to self-execute one or more contractual clauses) will be valid. The different formats

in which these types of agreements can appear are also explained, considering the new platforms and computer applications that have appeared in recent years. The theoretical constructions are accompanied by examples and graphics that are intended to illustrate, as far as possible, the practical aspect of smart contracts and jurisdictional agreements. Regarding the systematics of this paper, without prejudice to the introductory sections and the conclusion, it is divided into several sections according to the different types of smart contracts according to the form they take (or, rather, according to the form of the underlying contract that usually accompanies the smart contract), which has allowed a more rigorous study of the jurisdiction agreements carried out in this area. Finally, the study focuses especially on Regulation No. 1215/2015 due to its preeminent application in the Spanish Private International Law.

Briseida Sofía Jiménez Gómez, 'Régimen jurídico aplicable a los intereses de demora en el arbitraje comercial internacional: propuestas de armonización', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.12]

Legal system applicable to default interest in international commercial arbitration: harmonization proposals

The purpose of this study is to analyze the determination of the law applicable to late payment interest on the final amounts that the arbitrators award within the framework of an international commercial arbitration. An exhaustive study of the possibilities offered by the traditional conflict of laws method is carried out, as it is widely used, despite the greater flexibility that arbitrators have with respect to determining the applicable law in an arbitration compared to judges. International commercial arbitration and investment arbitration awards as well as national judicial decisions are reviewed to propose practical solutions to assist arbitrators in their determination regarding their jurisdiction to award interest, the accrual period, and the applicable interest rate.

Ana Sánchez Cobaleda, 'Revisitando el Tratado sobre la No Proliferación de Armas Nucleares ante la Décima Conferencia de Examen', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.13]

Revisiting the Treaty on the Non-Proliferation of Nuclear Weapons in the lead-up to the Tenth Review Conference

This paper analyses the current status of the Treaty on the Non-Proliferation of Nuclear Weapons on the eve of the Tenth Review Conference, scheduled for 2020 and postponed due to the Covid-19 pandemic. Analyzing its structure, content and enforcement mechanisms makes it possible to assess the state of the NPT and to conclude what are the main challenges it faces today, more than half a century after its adoption. While the nuclear regime's reference treaty continues to face several of the challenges that have marked the debates surrounding it in its first 50 years - the criticism of its undemocratic character, the lack of compliance with disarmament commitments by the nuclear-weapon states or the vagueness of certain treaty provisions- it must also face new and complex obstacles - mainly marked by the current and evolving international nuclear landscape. Although tensions have worsened since the previous Review Conference in 2015, the next one, scheduled for January 2022, could be a catalyst for bridging positions, highlighting what has been achieved, unify positions, and fully legitimizing, once again, the structure, objectives, and content of which is still considered the cornerstone of the international nuclear regime.

Daniel Martínez Cristóbal, 'The current perspective on sharp power: China and Russia in the era of (dis)information', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.14]

La perspectiva actual del poder afilado: China y Rusia en la era de la (des)información

Digital and technological development has led to the so-called 'era of information', which affects all fields and has increased international tension between countries like the People's Republic of China and its model based on 'socialism with Chinese characteristics', or the Russian Federation, which makes use of cyberspace media for political purposes, as opposed to liberal democracies, especially the United States and the European Union. With the aim of finding a way to adapt the theoretical framework of power to reality, in 2017 a new term and concept was developed within the hard and soft power spectrum: sharp power, understood as hard power that uses means typically associated to soft power, with apparently no intention to obtain power, in which a degree of discretion is a notable factor. To address this matter, I will begin with the analysis of the growing difficulty to distinguish between the means intended to be used as hard power tools and those that are not, starting with current approaches in this complex international scenario. If liberal democracies, especially the United States and the European Union, mistakenly come close to the sharp power of China and Russia, it could have negative consequences for the modern-day world.

Mª Dolores Bollo Arocena, 'Violación de derechos humanos y empresas transnacionales. Hacia un tratado sobre empresas y derechos humanos (¿responsabilidad de quién, de qué tipo y ante qué tribunales?)', 42 *Revista Electrónica de Estudios Internacionales* (2021) [DOI: 10.17103/reei.42.15]

Human rights violations and transnational business. Towards a treaty on business and human rights (liability of whom, of what kind and before which courts?)

The capacity of companies to generate wealth, employment and development wherever they carry out their activities is indisputable, but their great capacity to violate the human rights of the people who work for them and of the communities in which they are based is just as indisputable. Hence the urgent need to discipline their behavior in order to eradicate impunity, particularly in those countries that have lax human rights legislation. The purpose of this work is to study some aspects of the Draft Treaty on business and human rights that is being developed within the Human Rights Council. This paper defends an international treaty that is particularly applicable to transnational companies as well as local companies with transnational activity, a treaty that recognizes that the obligations of States in terms of human rights towards the business sector are not limited to their territory but their responsibility goes further; a treaty that recognizes the direct responsibility of the companies themselves for the violation of all human rights, and not only for the commission of serious violations of these, since otherwise it would give the impression of tolerance in other cases. A liability that must have a criminal nature only in the case of natural persons, and of a civil or administrative nature, as appropriate, in the case of legal persons. In short, a treaty that recognizes the competence of a flexible range of jurisdictions, trying to avoid the application of the rule of *forum non conveniens*.