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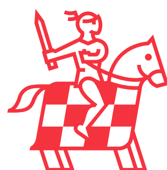

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The Classics' Corner

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Borders and marches. Political and geographical factors within international relations

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> To begin with and before all things: the first, original, and truly natural boundaries of states are beyond doubt their internal boundaries… From this internal boundary, which is drawn by the spiritual nature of man himself, the marking of the external boundary by dwelling-place results as a consequence; and in the natural view of things it is not because men dwell between certain mountains and rivers that they are a people, but, on the contrary, mend well together and, if their luck has so arranged it, are protected by rivers and mountains because they were a people already by a law of nature which is much higher.
>
> (Fichte, *Addresses to the German People*, Address 13)

BORDERS AS ZONES AND AS LINES

The first impression of national borders that we gain from our school desks is *linear*. On a political map of Europe, or the world, the limits of states within each continent are marked by lines that separate areas of different sizes, and these are marked in different colours so as to stand out better. This linear impression may even be reified when we come to an actual border if, for example, by passing through a tunnel or crossing a river we are transported from one country to another. In both the above cases the border represents a line of delimitation. Nevertheless, the experience of travelling across a border is more complex than the intuition of crossing a border we get from reading a map. This is because although the human and social context, as well as language, may gradually change from one side of the border to the other, it may also sometimes remain the same in its fundamental elements. That is, change is gradual, with substantial differences only seen in expressions of public authority, such as flags and military uniforms, or the imagery on coins and banknotes, which have diverse names and values. As for physical features, their homogeneity across borders is, in general, even more pronounced. The notion of a border as a clear and precise dividing line must therefore be reconceived as a broader concept, that of a *zone*. In this sense we can overlay a spatial or zonal concept of a border onto the classical linear notion, thereby introducing the complexity of borders as a phenomenon. We can thus say that although a border is linear from a political and legal perspective —the line which marks out the spatial limits of the scope of state authority— from a geographical and cultural point of view, it may be a zone of contact between politically differentiated societies or geo-historical settlements, which creates tensions or generates isolation. What therefore stands out from this is that borders are a human construction created by and for men, even where they appear to reflect natural boundaries.

The ideas of Pascal on the relativity of ethical judgements of men, not only in time, but also in space, are well known (though in reality these take inspiration from a phrase by Montaigne and should be taken *cum grano salis*): everything becomes different, fairly or unfairly, where climates are different. Moving three degrees away from the poles will bring down jurisprudence; a meridian will dictate the truth. "Plaisante justice qu'une rivière borne! Vérité au deçà es Pyrénées, erreur au delà."[1] There is also another quote from Pascal which is relevant here, taking the form of a brief yet dramatic dialogue: "Why do you kill me? What! do you not live on the other side of the water? If you lived on this side, my friend, I should be an assassin, and it would be unjust to slay you in this manner. But since you live on the other side, I am a hero, and it is just."[2] These strong words from the French thinker provide a perfect representation of borders, not only as a linear concept, but also as a key factor in all aspects of life.

However, the most interesting conclusions we can draw from Pascal's reflections may be, even taking into account the time in which they were recorded, that they intuitively foresaw what modern political borders would represent. Indeed, the linear understanding of a border, even from the political sphere, is a recent concept. Throughout history, and well into modern times, borders have referred to an empty or sparsely populated space. As J. A. van Houtte observes, "humanity has come a long way before arriving at a linear concept of borders, and in many places this development is still far from complete."[3] But even where the process of creating hard, linear borders has been completed, there is nothing to say that things will remain this way in the future. In fact, there would appear to be a move away from hard borders, at least in Western Europe. In this sense, Vicens Vives notes, "today we can see that the rigid border of the nineteenth century arose from a combination technical and spiritual factors present at that time, and it will shortly become outmoded due to the rapid development of modern media and distribution systems. In this sense, the most relevant factor is the inability of contemporary diplomats to establish a political map of Europe following the Second World War. Rather than borders, today's great powers require extensive protective buffers and deep security glacis that distance the geo-historical heartland and state's population from the threat of aerial incursions and rapid invasion of enemy tanks." Indeed, Vives adds, "from a geo-historical perspective, borders should be considered as a periphery of cultural tension —a tension which is almost always creative, and not necessarily belligerent and aggressive. In this sense, political borders are nothing more than phenomena determined by historical and geographical contexts over the course of human societies."[4]

A brief overview of the history of political borders indeed shows us that the concept of the linear border is a relatively recent phenomenon. The great, ancient cultures of the East resembled dense geo-historical islands which were separated from each other

---

[1] *Pensées,* ed. De L. Brunschvicg (Paris, "Classiques Garnier"), nº 294.

[2] Ibid., nº 293, ""Pourquoi me tuez-vous?

Eh quoi! Ne demeurez-vous pas de l'autre côté de l'eau? Mon ami, si vous demeuriez de ce côté, je serais un assassin et cela serait injuste de vous tuer de la sorte; mais puisque vous demeurez de l'autre côté, je suis un brave, et cela est juste."

[3] *Géopolitique. Introduction aux factors géographiques de l'Histoire et de la Politique*, Brussels, 1946, p. 107

[4] *Tratado general de la geopolítica*, 2ª ed., Barcelona, 1956, p. 158.

not only by deserts, but also by stretches of land which were either sparsely populated or which had little geo-historical meaning. This notwithstanding, we must also note that within this context we observe the first historical record of a strict territorial delimitation. The demands of agricultural cultivation required an exact delimitation of the land belonging to each village or town. In Egypt we see the rise of a system of demarcations whose basic unit we know as *nomos*, from Greek, but which in Egypt was called *spat*. As Vicens Vives observes, *spat* derives from the root *sp*, which means 'to divide'.[5] We thus see that the Greek term shares its meaning with the original Egyptian word. In this line Carl Schmitt notes that although the primary meaning of *nemein* in Greek is 'to take', its secondary meaning is 'to divide' or 'to separat'" (according to Schmitt, these are original accepted uses prior to the transfer of the term to political and social contexts, in which it refers to 'us'", 'custom' or 'law').[6]

In ancient Egypt the geometric and linear delimitation of the *spat* or *nomos* thus arises as an internal demarcation — what we would call today a jurisdictional or administrative boundary — within an organised polity which lacks precise external limits. In Mesopotamia the issue of dividing the fertile lands irrigated by the Tigris and Euphrates was more complex, as it came about later and also, due to contextual circumstances, involved the political unification of both river basins. Hence, delimitations could be at the same time international and internal in legal terms (applying these current concepts to a time when they were used less rigorously). In fact, the oldest document of international law that we know of is a treaty setting out the limits of the realms of King of Lagash and the King of Umma, with a neighbouring prince designated as arbiter, in the IV millennium BC.[7] Of equal relevance, however, is the fact that between great constellations of power in the ancient world there were zones of isolation in the style of 'no man's lands' or zones of friction within areas of influence or security. These territories were often under an indirect regime of dependency as protected or tributary states, wherein a change of leadership (frequently with tragic consequences for 'protected' and client populations) reflected the swings and sways of great politics of the epoch. We thus see an incipient version of the modern buffer state, a concept which despite being the pride of classical European diplomacy, was actually devised much earlier. On the one hand this explains why the finely detailed and still-conserved Egypt-Hittite Peace Treaty of 1279 BC between Ramesses II and Hattušiliš III makes no mention of boundaries; on the other hand, it sheds light on the role of Palestine as a zone of tension between the empires which surrounded it.

We thus see that the phenomenon of borders in preclassical antiquity is fundamentally a human concept which arises in line with the human pressures that come from political differentiation and from the general geo-historical context of each age or historical-cultural cycle. That is, the need for borders comes from the security needs of differentiated human groups.

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5 Ibid., p. 159.

6 From the article "Apropiación, partición, apacentamiento. Un ensayo para fijar las cuestiones fundamentales de todo orden social y económico a partir de nomos", translated by ourselves for the *Boletín Informativo del Seminario de Derecho Político de la Universidad de Salamanca*, nº 2 (January-February 1955), pp. 3 ff.

7 Cf. A. Wegner, *Geschichte des Völkerrechts*, Stuttgart, 1936. p. 2.

The trend towards clear cultural and political boundaries manifests itself when, as Vicens Vives notes, "the original geo-historical cores develop a superior culture which must be defended against peripheral groups of *barbarians*."[8] Such is the case of China and the Mongols, or the Roman Empire and the Germanic tribes. In both cases an artificial barrier was established, using geographical features where possible. However, neither the Great Wall of China, which was begun in in 215 BC, nor the Roman limes were rigid borders in the modern sense. During the first century AD, the Roman limes were offensive in nature, conceived as strategic support for northward penetration. It was only later, when expansionist urges had been abandoned, that the limes took on the nature of a wall (although, unlike the Great Wall of China, not in the sense of being able to protect the hinterland in itself).

Following the fall of the Roman Empire, during the Middle Ages in the West borders continued to be regarded in the traditional sense as a zone of transition, unoccupied or sparsely populated, between geo-historical cores. The internal consolidation, and external expansion of these cores would, however, lead to the modern, linear border. The Carolingian Empire created marches which, after the empire's downfall, would continue to exist within the confines of the Christian world with increased autonomy. The border, in this sense, is a zone of incursions, with a legal-international status that is inherently unresolved, leading to disputes and a constant oscillation between war and peace, above all where infidels are on the other side, with whom peaceful coexistence is not a possibility (consider the relations between Christianity and Islam, and the ideas of *impius foedus* and the holy war). From this we see a unique period of lightning raids, which evoke the "romantic ballad of the border of Ben Zulema", below, which colourfully depicts one of many border incursions:

> *"De Granada partió el moro*
> *que se llama Ben Zulema;*
> *allá se fuera a hacer el salto*
> *entre Osuna y Estepa.*
> *Derribado ha los molinos*
> *y los molineros lleva,*
> *y del ganado vacuno*
> *hecho había grande presa,*
> *y de mancebos del campo*
> *lleva las trahillas llenas"*

It is highly interesting to look at the development of the Iberian Peninsula, where shifts in borders followed two perpendicular axes, which were not only geographic but also religious, cultural and political. The southward advances of the Reconquista created delimitations, from west to east, of the spheres of control of the Christian kingdoms. The unique role of marches in medieval Spain has been illustrated by José Antonio Maravall as "a process of warmaking in a situation of perpetual but not permanent war. As such it was used by the Moors, as well as Christians, and not just Frankish Christians but also

8 Vicens Vives, op. cit., p. 160.

those from the western reaches of the Iberian Peninsula."[9] According to Maravall, the imprecision of territorial limits was more pronounced in the Iberian Peninsula than in other countries, becoming important constitutive factors in the development of the kingdom. In this sense the Spanish kingdoms were never 'bodies' but rather 'lands' in different phases of political incorporation.[10] Certain analogies can be drawn here with in what today is Central and Eastern Europe, with the penetration of the Teutonic Order into regions with Slavic populations.

To round off this brief overview of medieval notions of borders, we will cast a look at their long-term impact on terminology. The English term *frontier* designates a border in in the traditional sense of a liminal zone with a sparse population. This is nuanced by the historical experience of the colonisation of North America, which, unlike Mexico and Peru, did not have developed political and cultural centres. The frontier is thus characterised by its sparse population density, an economy of self-sufficiency, and the tough living conditions and unique ways of life that are found in less complex cultures. As Rupert B. Vance observes, this form of social demography has been present in modern times not only in the United States but also in the west of Australia, Latin America (especially Argentina), the north-west of Canada, Siberia and Rhodesia.[11] In contrast, the border in its legal and political sense, as the limit of the scope of state authority, is that of a *boundary*, which its etymology denotes as a delimitation and obstacle. In Germany, the current term *grenze* does not appear until the thirteenth century and, significantly, it is of Slavic origin (*granica* in Polish and Russian; *hranice* in Czech).[12] For this reason the term entered Late High German via the territories of the Teutonic Order. Like many other words, the term entered into common language through the works of Luther. The term which was traditionally used to indicate the confines of a country was *mark*, (from the Gothic and old German word *marka*, whose root was widely used in Indo-Germanic languages). This word, according to to J. Corominas in his *Diccionario crítico etimológico de la lengua castellana,*[13] quickly passed into Gallo-Romanesque via Frankish and spread into Spain from Occitan or Gaulian Latin, becoming most consolidated in Galician-Portuguese (where it possibly came from Gothic or the Suebic Germanic tribes); it signified simply a region or county, later coming to designate peripheral regions or counties. From this we see the term *Markgraf,* meaning count, or the chief of a border region. As land began to be redistributed in the East there was a need for a more precise system of delimitations, and a new term to designate them. In this line, as Otto Maull contends, the substitution of one term for another reflected the gradual transformation of borders from a frontier strip to a border line.[14]

Similar developments took place in France, leading to the substitution of the word *marche* for *frontière*. This new term begins to appear at the beginning of the fourteenth century, being used to designate those most threatened outer limits of the kingdom

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9 *El concepto de España en la Edad Media*, Madrid, 1954, p. 150.

10 Ibid., p. 348.

11 Art. "Frontier: Geographical and Social Aspects", in *Encyclopaedia of the Social Sciences*, E. R. A. Seligman, VI, p. 503.

12 F. Kluge, *Etymologisches Wörterbuch der deutschen Sprache*, 10th edition, Berlin and Leipzig, 1924; cited by O. Maull, *Politische Grenzen*, Berlin, 1928, p. 5.

13 Madrid, n.d., III, 259.

14 *Polit. Grenzen*, op. cit., pp. 5-6.

until the end of the seventeenth century.[15] Here the prevailing concept in the idea of the border is that of *the front*, so rather than a linear notion, we begin to see borders represented by the idea of military tension and danger.

The process of border consolidation, at least in European terms, was accelerated by French statism in the seventeenth and eighteenth centuries. This reflects the political rationalism that can be seen in the idea of the modern state, as was embodied by the centralist French monarchy of the time. And this was accentuated by the principal of territoriality, which followed from the dogma of sovereignty. It should also be noted that strategic and economic considerations gained importance, especially economic integration, as this required a tight line of customs controls, which in turn implied the need for a continuous, linear demarcation.[16] This notwithstanding, even the borders developed by Vauban were mouldable, as in the case of the French border with the Spanish Netherlands until the Peace of Utrecht, and thereafter with the Austrian Netherlands until the French Revolution. As Charles Rousseau observes, from a poll carried out by Armand Brette, on the eve of the French Revolution it was impossible to settle on where the French borders actually lay with any precision in terms of how we understand the modern sense of the word.[17] At the end of the cycle of bloody wars of the French Revolution and the Napoleonic Empire, Europe's borders were finally drawn with their current precision and rigidity and states now directly came up against each other all over the place. In the words of Professor Terán, we had finally reached a stage of states rubbing up against each other *face-to-face*.

Nevertheless, the linear delimitation of the border failed to supplant certain regional connections, giving rise to special border regulation regimes, of which have persisted over time.

SO-CALLED NATURAL BORDERS

The existence of borders clashes with the fact that on the ground nature does not recognise these boundaries, which explains the aforementioned references to borders as a human construction. This notwithstanding, as borders have the basic function of protecting the group, men have always attempted to use the natural and civilisational resources at hand to create limits that achieve this function. In this sense, we see the rise of the theory of natural borders.

Whilst the theory of natural borders is not exclusively French, it is strongly rooted within France. In this line, it would certainly be interesting to delve into this theory (with its focus on 'borders' in the plural) and seek out contrasts between the Cartesian spirit and the soil of the territorial state, which Promethean German thinkers (think of Ratzel's *raumsim*) have seen spatially as a single whole (*raum, lebensraum, grossraum*). Whilst German historians tend to stress the relevance of this theory, for obvious reasons their French counterparts tend to play it down. Whereas this theory was once the basis of the monarchy's foreign policy, as carried out by Richelieu (the idea of *pré carré*),

[15] Cf. C. Rousseau, "Les frontières de la France", *Rev. Gén. De Dr. Int. Publ.*, 58 (1954), pp. 28-29

[16] Cf. J. Brunhes and C. Vallaux. *La géographie de l'histoire*. Paris, 1921, p. 340.

[17] Op. cit., p. 29

recent French historiography has revised this interpretation.[18] What Richelieu and the French diplomacy of the *Ancien Régime* sought, according to this reinterpretation, was to consolidate the country's borders in the north east around Metz and Strasbourg (the gateway to Germany). In reality, the theory of natural borders seems to have been more relevant during France's revolutionary period. In fact, despite only being invoked *a posteriori* to justify acquisitions already attained, or for specific aims, the theory was repeatedly brandished, often in conjunction with other theories. The most well-known cases were the allegations of Abbot Gregoire to justify the annexation of Savoy, and Dantón's declaration of January 31 1791 to justify that of Belgium: "The boundaries of France were set out by nature. We will reach them in four points: the ocean, the Rhine, the Alps and the Pyrenees."

Aside from the theory of natural borders being used to justify expansionism (the supposed natural border is generally beyond rather than before the existing border), for both statesmen and lawyers the theory is worth looking at in terms of boundary making. That is, to what extent do natural factors influence the creation and maintenance of a border?

The sea would certainly seem to be the most natural and best of all borders, as authors such as Henning and van Houtte have contended. However, in reality this is far from the case. The sea only separates men from each other when we are talking about vast oceans that cannot be traversed through technology. In other cases, the sea has always been a means of linking peoples. Although it marks a clear limit, it does not, in and of itself, provide security. Coastlines only create a secure military border where they are backed by sufficient naval power. By way of example we can refer to the defencelessness of the Spanish coast following the disaster of the Spanish Armada. In World War II, the existence of sturdy coastal fortifications along the Atlantic couldn't prevent the landing of naval forces that controlled the sea, as well as the air. This vulnerability is even greater for island nations, which are not safe from invasion, as shown by the Norman invasion of England. Furthermore, being an island does not guarantee in any way an ability to dominate the surrounding seas, as seen in the case of Ireland. Isolation is something that is either developed or otherwise by man, not a pre-established reality. In fact, because the seas are zones of contact rather than separation, island powers do not tend to think of their coasts as their borders. As Selden, the renowned author of *Mare Clausum*, contends, "It is true, beyond doubt [...] that the shores and ports of the most important neighbours on the other side of the sea are the southern and eastern bounds of the maritime territory of the British Empire; however, to the north and the west, across vast oceans, the bounds of the British Empire are located in the furthest reaches of the these vast seas belonging to the English, Scottish and Irish."[19] As two distinguished French treatise writers highlighted, maritime borders, just like land borders, are *une oeuvre d'Etat*, that is, a creation of the state. And the development and complexity of these maritime borders follow the development and complexity of the state itself.[20]

Whilst sea powers tend to project their borders to foreign coastlines, riparian powers project their domain as far as the immediate coastline, which becomes their territorial

[18] See, for exemple, G. Zeiler, *La France et l'Allemagne depuis dix siècles*. Paris, 1932.

[19] Cf. E. Wolgast, *Grundriss des Völkerrechts, I: Allgemeine Grundlagen*, Hannover, 1950, p. 36.

[20] Brunhes and Vallanx, op. cit., p. 340.

sea. The delimitation of territorial seas has given rise to, and continues to provoke, countless interpretations and controversies, especially where the claims of one state clash with those of another, as in the case of bays and straits. This is illustrated by the case of the Gulf of Aqaba, in the north of the Red Sea, where three borders come together. Where should the 'natural' border lie here? In these cases and others, such as that of the contiguous sea or the continental shelf, only a human decision, which takes into account the conflicting interests put forward and is conscious of the common good, can resolve the issue.

Although rivers serve as or symbolise borders in many cases (as noted by Pascal), they are in fact the opposite of a 'natural' border. Whilst river borders have the advantage of setting out a clear line (whether as a shore or a *talweg*), this concept of a border fails to consider the natural tendency for settlements along river basins to connect with each other. All the human activities which rivers facilitate and support highlight the interdependence between peoples, not only on opposite shorelines but also between the upper and lower courses of a river. What's more, this interdependence, which was a factor in the political integration of the great river states of the Ancient Near East, has become particularly relevant over the last century and a half with the growing possibilities for river use that come with technological advances. We thus see more attention being paid to the unity of river basins, with the resulting need for standard regulations that go beyond political delimitations. The classic example of this is the way in which developments along the Tennessee River led to the creation of the Tennessee Valley Authority. Obviously, the borders that had to be overcome here were between states which belonged to a federal state, and it might seem premature to transpose this type of arrangement when we talk about the international sphere. But international legal regulation of river transport, as has been developed since the Congress of Vienna,[21] is evidence of the community of interests which are necessarily established around rivers, with the principle of good neighbourliness being an especially relevant field in this respect. It is also relevant that rivers have little strategic value, as is illustrated by the numerous historical cases in which armies have crossed them.

Sometimes the course of a river is interrupted by a lake. Van Houtte argues that lakes are ideal as a border, as crossing them requires the ability to use nautical resources inland, and they are more difficult to cross than a river.[22] We see numerous examples in this respect, such as Lake Ladoga, between Russia and Finland, the Great Lakes which were adopted as a border between Canada and the United States in 1793, the African Great Lakes around Congo, along with well-known lakes in Europe.

More important than lakes and rivers, mountains would seem to be an ideal natural border. Indeed, mountain ranges have always played a role in delimiting human societies. And the higher the mountains, the more difficult it becomes to communicate across them. Without going into the political fragmentation Greece would face if its numerous mountain ranges became borders, we can look at the Romans, who did not include Alta Italia (High Italy) within Italy; this region was named Cisalpine Gaul, as distinct

21 Cf. See the insightful observations of C. De Visscher, *Théories et réalités en droit International públic*, Paris, 1953, p. 352 ff.

22 Op. cit. P. 112.

from Transalpine Gaul. But this example merely represents the relative importance of mountains as an isolating element. Furthermore, where mountain ranges have passes which can be transited, they need not acts as dividing lines and states can in fact incorporate mountain ranges within their borders; indeed, the Helvetic Confederation of Switzerland, which was created through the union of three formerly separated cantons, is a paradigmatic example of this. It is only where the extreme altitude of mountains, together with other factors, such as vegetation, makes transiting them too difficult that we see mountains functioning as a geopolitical barrier, as in the case of the colossal peaks of Central Asia. But even in such cases, human activity can overcome geographical features. The Swiss canton of Tesino is located on the southern flank of the Alps, as an inexplicable addition to the Helvetic Confederation. Indeed, the logic would also seem to dictate the union of Portugal and Castille, which are not divided by significant mountain ranges such as the military crests of Aragon, of which Antonio Machado wrote, and which speak similar languages and have rivers which run across them rather than between them. Yet, as an English historian noted, union surprisingly came between Castille and the mountainous terrain of Aragon, where languages closer to Provençal, Occitan and Italian are spoken, rather than with Portugal.[23] And whilst the Pyrenees may seem to be a solid border for Spain, both Catalonia and the Basque Country exist across them due to political vicissitudes; similarly, the height of the Pyrenees did not stop Navarre establishing itself atop their peaks. Indeed, Jean Gottman has reflected on the Pyrenees as a natural border, arguing "The Pyrenees are, beyond any doubt, high, above all because the people living on either side of them have wished them to be so: the French during the era of Spanish dominance; the Spanish during the period of French dominance. We only have to look at the gauge of each country's railways to understand that geographical features are not the biggest obstacle to communication between France and Spain."[24]

There are two competing theories regarding the exact way in which mountains are established as borders. The *hydrographic theory* posits that borders are set along watersheds, whereas the *ridge theory* argues that borders are set along a line linking the highest peaks. Ridge theory was applied to set the border between Spain and France. Whilst hydrographic theory may seem preferable, it does bring problems with it on frequent occasions, with the resolution of these issues depending much more on good neighbourliness than 'natural' facts.

Whilst rivers and mountains are given plenty of attention in the interpretation of borders, the same cannot be said for *vegetation*, whose role as a factor which disperses, and thus separates peoples is often overlooked. Forests are in fact an excellent example of vegetation as a form of geohistorical defence,[25] as they wipe out the possibilities of deploying and supplying an invading army. This can be seen in the routing of Varo's Roman legions by Arminio in the Teutoburg Forest in the year 7 A.D. In temperate zones

[23] C. E. Nowell, *Histoire de Portugal* (French translation by H. E. Del Médico), Paris, 1953, p. 8. Nowell notes that it is appropriate to consider events that seem to have been largely accidental . He concludes that history and popular feeling are more powerful forces in the creation of a nation than geography and language.

[24] *La politique des Etats et leur géographie*, Paris, 1952, p. 129.

[25] Vicens Vives, op. cit., p. 170.

the densest forests tend to be found on mountainsides, thereby coupling the effect of vegetation with that of relief. A similar effect occurs where dense vegetation is found in swamp zones. This can be seen in the case of Poland between 1919 and 1939, where the border was predominantly based on vegetation, especially around the Pripet Marshes.

The sparse vegetation of steppes, or even desert, is less effective as a border, especially in modern times. Although, like forests, they lack resources, these zones do not present as many obstacles to movement. Borders produced by zones of sparse vegetation are, as Van Houtte notes, more permeable than others, and they are often inhabited by nomadic tribes who exercise constant pressure on surrounding populations, who occupy more favourable terrains.[26] Interestingly, steppes, whose dry inland seas are traversed by nomadic caravans, have always had an important geo-historical role as a link between great cultures. This has been seen in the circumnavigation of Africa and America by Europeans, and has been remarked on by Toynbee.[27] Not only has man always managed to cross deserts, but advances in technology have increasingly reduced their importance as a form of defence, as was seen in the ease with which both sides in the Second World War managed to move around the Libyan Desert.

The conclusion to be drawn from this analysis of the so-called natural borders is that their importance is relative and is generally highly dependent on human factors.

CONVENTIONAL OR MATHEMATICAL BORDERS

In contrast to borders which, with varying degrees of justification, follow geographical features of the earth's surface, we also have *conventional* borders (also known as *artificial* or *mathematical* borders) that cut across natural landscapes and regions in straight lines. The first, large-scale development of this type of border was the marine line established between Spanish and Portuguese possessions under Pope Alexander VI. And a classic example of this can be seen in the border between the United States and Canada, which runs along the 49th parallel for 1,250 miles, cutting through the Red River Valley, the Great Plains and the Rocky Mountains. Similarly, in Europe we see the straight border between Russia and Finland as it runs through Lapland. There are problems associated with this type of border, as they are difficult to control and police, and they contain sections which don't fit with local conditions. This type of border is often seen in new states, and they are prevalent as borders of former (and existing) colonies and mandated territories in Africa and the Middle East. In the cases of Korea and Vietnam, borders of this type have been established in an improvised fashion within the country for military reasons.

CULTURAL BORDERS

There is a third type of border to be considered, which fully considers the human factor, namely *cultural borders*. Karl Haushofer[28] was particularly interested in this form

[26] Op. cit., p. 110.

[27] Cf. *Civilization on Trial*, Oxford, 1946, 4th edition, 1953, p. 69 and ff.

[28] *Grenzen in ihrer geographischen und politischen Bedeutung*, Berlin-Grunewald, 1927; 2nd Edition, 1938

of border, as was van Houtte, who coined the term *natural human borders.*[29] These borders also present problems, as they can be difficult to fix and culture is fluid. Nevertheless, they may be the best form of border in certain cases. The key factors that make them up are language, religion, ethnicity, history and the local economy. The will of local people, who will be affected by this type of border, is highly important and is often expressed through a plebiscite, as in the case of Upper Silesia following World War I and Saarland following both world wars. The principle of nationality is significant in this respect, which puts forward the idea that state borders should group together peoples who share a cultural identity. But there are difficulties in achieving this.

Some recent examples of political borders being drawn in line with cultural borders include the following: the border between the Republic of Ireland and Northern Ireland, based on the distribution of religious groups (93% of the population are Catholic in the Republic, whereas 33% are in Northern Ireland); the border between India and Pakistan, also for reasons of religious faith (Hinduism and Islam); similarly, Ceylon, a Buddhist island state at India's southern tip is a separate state from India. But there remain minority religious and cultural groups within these states, especially where states have been formed from the fragmentation of larger state or imperial entities (such as in the Balkans), as these often involved population movements and contacts between diverse groups. In this line, we should also remember the case of the Kashmir, between India and Pakistan.

The broad typologies of border that we have analysed are not mutually exclusive. Given the way in which states and borders have grown through history, borders are usually of a mixed nature in terms of their type.

THE POLITICAL-HISTORICAL CONDITIONING OF BORDER STABILITY

From the foregoing analysis, it can be seen that the *stability* of borders does not depend on geographical features but rather on the historical relations between peoples. Borders "respond to the vitality of geo-historical settlements, which generates tension in the periphery."[30] In this line we can compare the zones of tension in Alsace-Lorraine between 1871 and 1939, and those in contemporary Eastern Europe, with the stable border zones in Western Europe. In Europe today these border tensions have tended to lose their former importance in the light of more pressing global problems, as we can see in the recent peaceful solution of border disputes in Trieste and Saarland.

However, borders should not only be understood as zones of tension, as they are also zones of transit. As Gottmann observes, "the border problem in terms of foreign affairs is not about a line which must be maintained, or stopping the spread of sovereignty over one line or another. The problem relates to what goes on beyond these lines, to the relations between phenomena which occur beyond the border and those within a territory [...]. In this regard the aspect of neighbourliness is highly relevant. Borders, whether on land or sea, are increasingly a space of contact with foreign actors."[31]

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29 Op. cit., p. 113.
30 Vicens Vives, op. cit,. P. 172.
31 Op. cit., pp. 132-3.

THE LOCATION OF CAPITAL CITIES

Another aspect to consider with relation to borders, and which is often overlooked in terms of international relations and geopolitics, is the proximity or distance of the border from the main political and economic centres of a state, especially the capital city. Aside from the importance a capital city may have in terms of economics and communications, it also plays a psychological role in unifying a population, as van Houtte observes. For this reason we see many capital cities — such as Madrid, Paris, Rome and Brussels — in a central location within their respective states. This is not only necessary for geographical reasons, or in order to effectively mediate between diverse groups which are spread around within a state, but also to ensure the capital is well protected during potential conflicts. In this vein, van Houtte notes that "the fall of a capital city during a conflict brings with it the loss of a source of national unity, which may have fatal psychological consequences over the regions which have not yet been occupied."[32]

A country's hubs of economic activity are often located near borders, such as in the case of the steelmaking industry in Lorraine in France and the coalfields of Saarland and Silesia for Germany and Poland respectively. The same may occur with the capital, in which case the state will tend to obtain a more favourable border through a protective glacis (the annexation of Lorraine by Prussia in 1871; the creation of Saarland by France in 1919 and its reconstitution, with a customs union, following World War II; the incorporation of Silesia into Poland, also following World War II; Yugoslavia's northerly shift of its northern border through World War I in order to decongest Belgrade). As proximity has a special effect on the capital city, we also witness cases in which the capital itself is changed. When Turkey lost its Balkan territories, Constantinople lost its central location, and was replaced by Ankara as the capital. Russia did the same after losing its western provinces in World War I, though here we need to consider other factors, as it wished to distance itself spiritually from the West. The French policy of protecting Paris is also a result of this, as seen in *poussée vers l'est*, as developed by Richelieu. Indeed, one of the most serious consequences of World War II for Germany, in addition to the loss of territory in the east (comparable in magnitude to Spain hypothetically losing Al-Andalus and it being occupied by a Muslim power, with the expulsion of its current inhabitants), is the proximity of Berlin to a traditionally hostile border.

The fact that numerous states in Europe and beyond (especially in the Americas) have their capitals in coastal regions (Sweden, Norway, Finland, Portugal, Venezuela, Brazil, Argentina etc.) is due to the importance of these cities as ports and entry points, where the first settlements were established, with the strategic geographical considerations mattering less (which is also true more generally in the age of nuclear weapons).

MARCHES

Through looking at the role of borders as zones of transition and contact, as well as of differentiation, we are able to appreciate the importance of marches, which sometimes

[32] Op. cit., p. 116.

give rise to regionalisms and often constitute the nucleus of a new state. Austria, for example (Ostmark, Oesterreich), was the old march of the German Empire; Prussia was the former march of Brandenburg; we also see Serbia and Romania, amongst others. However, only states of a certain size can have marches, and there is a fine line between marches and buffer states. In modern times, where great empires, or superpowers, face each other off over vast zones, groups of states can sometimes act as buffer states: for example, Germany and Austria (as well as Switzerland), and Russia's satellite countries, if they became neutral. Of particular relevance here are the series of buffer states that were created between the Russian and British empires in Asia in response to the rivalry between the two empires.

An interesting psychological and political aspect of marches and borderlands is the way they affect the state of mind of their inhabitants. In times of peace, the inhabitants of marches have a heightened perception of their connections with neighbouring states than inhabitants away from the border; in times of conflict, their unique location either generates an increased level of patriotism or hopeless resignation. Regardless of the sentiment, there is a heightened sensitivity to everything related to international politics, which sometimes creates a certain lack of understanding or mistrust towards their compatriots living away from the border. We see these relations in Germany, which is in the centre of Europe and surrounded by foreign states, with the use of special words to designate those living in border areas: *grenzleute* and *grenzvolk*.

Gottmann has drawn attention to the historical role of marches in the borderlands of Central Europe in terms of the pressures emanating from Asia. "Over the centuries, the large zone of marches in Central Europe seems to have developed the role of 'barrier zone' for many important movements through history. Professor David Mitrany has observed that all the great waves that affected Europe's past ground to a halt along a line that runs from the depths of the Adriatic to the southern shores of the Baltic. Whilst this line may have shifted from its eastern incarnation of Leningrad to Fiume to its western manifestation of Lubeck to Venice, the great movements pushing towards Europe have always stopped within the vast triangle that lies between these lines. The advancing Slavs, the Ottoman Empire and the Orthodox Church all failed to move through this zone in their westward expansions; similarly, the Carolingian Empire, the Holy Roman Empire, the Roman Catholic Church, the Protestant Reformation, the Napoleonic conquests and the Industrial Revolution of the nineteenth century all floundered in this zone as they spread towards to the east. Today the Iron Curtain runs down through this zone."[33] Zones of this type are also found between other civilisations, though the reasons for them are not always clear.

Gottmann goes on to comment that "these vast barriers do not stop circulation. For reasons which we do not yet understand, they sometimes create marches between great civilisations. These zones are seen between the East and West in Europe, between Asian and Caucasian in Asia, between black and white Africa, and there may well be others in other parts of the world."[34] In line with the idea of Pirenne on the Mediterranean as a Christian-Muslim sea, we can view the Mediterranean as a liquid march between the

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33 Op. cit., p. 142.

34 Ibid., p. 143.

Western or European world and the Islamic world. After centuries of tensions — marked by the Reconquest of Spain, the Crusades, the Turkish counteroffensive and the era of protectorates — the Mediterranean, or *Mare Nostrum*, has become a zone of transition between political and cultural spheres which have finally accepted the need to coexist.

All this may just be a sign of the inability of civilisations to expand beyond certain limits, meaning that the phenomenon has more to do with culture and history than with geography. Gigantism is thus just as antinatural in international politics as it is in biology. Indeed, expansionism has often been the prelude to collapse or regression, which man tragically seems unable to learn from.

A DIGRESSION ON THE IDEA OF THE 'SHIFTING FRONTIER' IN NORTH AMERICAN CULTURE

In this brief digression we will look at the historical and cultural phenomenon of the border and its role in stimulating the development of a nascent society. Specifically, we will look at the North American frontier through the interpretation provided by Frederick Jackson Turner (1861-1932), professor at the University of Wisconsin, in his classic work *The Significance of the Frontier in American History* (1893).

As a child of the frontier, Turner felt its vital force and perceived its intrinsic movement as a key element in the development of US culture. The conditions under which the English migrated to North America, followed by a diverse range of other nationalities, gave rise, according to this interpretation, to an aggressive form of individualism which was further hardened by the tough conditions of the frontier. We thus see a situation in which individuals with their own, fully developed culture suddenly find themselves in an area of abundant, free land which anyone could claim as much of as they wanted. Importantly, free individuals could build a society upon this land and shape it as they wished, without the constraints of a pre-existing tradition. From this we see the rise of a certain type of farmer as the forerunner to a unique culture which was at the same time rooted in, and free from, European culture.

It is not within the remit of this article to carry out an extensive analysis of the concept of the North American frontier, which has been gloriously illustrated in many a good Western, as this falls into the realm of general sociology.[35] Nevertheless, it is worth referencing Karl Dietrich Bracher,[36] who sees within the frontier the roots of North American notions of progress, which, from the base of the concept of imperial succession, culminates in the pioneers' extolment of democracy as lauded by Walt Whitman. Whitman's *Leaves of Grass* is the equivalent of Homer's *Iliad* for this fledgeling nation, and Whitman wished to "define America, her athletic Democracy" (to foreign lands), and "project the history of the future" (to a historian), and encouraged the States

[35] For an overview of this theme, see the article by F. L. Paxton, "Frontier: American History," in *Encyclopaedia of the Social Sciences*, op. cit. pp. 500-503, and the corresponding bibliography.

[36] "*Der Frontier-Gedanke*: Motiv des amerikanischen Fortschrittsbewusstseins", in *Zeitschrift für Politik*, Neue Folge, II (1955), pp. 228-36

and cities of America, for their love of freedom, to "resist much, obey little."[37] Indeed, Whitman knew how to capture the way that men of the frontier created realities from their virgin land in his verses, which sprung like cosmic flows:

> We take up the task eternal, and the burden and the lesson,
> Pioneers! O pioneers!
> All the past we leave behind,
> We debouch upon a newer mightier world, varied world,
> Fresh and strong the world we seize, world of labour and the march,
> Pioneers! O pioneers!
> All the pulses of the world,
> Falling in they beat for us, with the Western movement beat,
> Pioneers! O pioneers!
> (*Pioneers! O pioneers!* verses 4, 5 and 15)

This poem, along with others, is worthy of a full reading.

[37] "To the States or any one of them, or any city of the States,
Resist much, obey little,
Once unquestioning obedience, once fully enslaved,
Once fully enslaved, no nation, State, city of this earth,
ever afterward resumes its liberty."

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General Articles

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Self-determination and Access to Independence under Current International Law: From Language to Concept

Helena Torroja Mateu*

Abstract: This article examines the legal concepts and principles describing and regulating the means of accessing independence under current general international law. It argues that there is a *gap* between a *legal language widely used by scholars* today and the *original state consensus* behind the *essential international principle of self-determination of peoples* as it relates to the protection of territorial integrity and secession of territories. As a result, academic legal language is erasing the concept of *the right to restore territorial integrity, i.e. to restore sovereignty* (attributed to colonial and occupied peoples). This is due to the assumption that the international right to external self-determination of peoples is *a right to unilateral secession in some circumstances as an exception to territorial integrity*. Academic legal language is likewise erasing the concept of *the right to freely determine without discrimination (against minorities or majorities) the status of one's own territory* (a right attributed to a state's whole population), which the same international norm protects through a *tacit limitation on secession*. In this case, the erasure is due to the widespread assumption that general international law is neutral with regard to secession.

Keywords: self-determination of peoples, territorial integrity, secession, remedial secession, customary norms, *jus cogens*.

(A) INTRODUCTION: SCHOLARS' LEGAL LANGUAGE *VERSUS* STATE CONSENSUS. THESIS OF THIS ARTICLE

Given the sheer volume of literature already written on the international principle of self-determination of peoples, one might wonder if there is anything left to say. Yet there are still arguments to be made and theses to be laid out. The one I will present here concerns the method and language used by scholars in their analysis of the principle. This method and language reveal a gap between a legal language widely used by scholars today and the original state consensus behind the essential international principle of self-determination of peoples as it relates to the protection of territorial integrity and secession of territories. By original state consensus, I mean the interstate consensus that drove the adoption of the principle in the 1960s and 1970s and remains in force today, as I contend that the essential content of the principle has not yet changed. By gap I mean

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the distance between what scholars say the norm says (language) and what the states actually adopted (state consensus) in this key international principle.

This gap between scholars' legal language and state consensus is, in fact, a gap between legal concepts as they are adopted by states and the academic language used to discuss them. As a result of this gap, scholarly legal language is erasing certain international legal concepts from the dialogue on the self-determination of peoples by excluding them from consideration — or relegating them to a minor role — in the general debate among scholars and practitioners, a group that includes the legal advisors to states' foreign offices or state departments. I argue that this is the case with the concept of the right to restore territorial integrity, i.e. to restore sovereignty (a right attributed to colonial and occupied peoples), as well as the concept of the right to freely determine without discrimination (against minorities or majorities) the status of one's own territory (a right attributed to a state's whole population), which the same international norm protects through a tacit limitation on secession. The former concept is being erased by the assumption that the international right to external self-determination of peoples is a right to unilateral secession in some circumstances as an exception to territorial integrity, an idea fostered by the Supreme Court of Canada's decision on the secession of Quebec. The latter is being erased by the widespread assumption that general international law is neutral with regard to secession, an idea espoused by the International Court of Justice (ICJ) in its Kosovo Opinion.

This is a study on public international law, addressed to scholars of the discipline. Therefore, when it refers to international legal concepts, it is referring to those reached by state consensus and generally contained in international norms. Needless to say, one could also discuss the term "self-determination of peoples" from a historical, philosophical, political, international relations, or constitutional law perspective, and it would have very different meanings. But my goal is to restore the specific meaning of the exercise of the (external and internal) rights to self-determination in public international law. Ultimately, I aim to show how scholarly legal language (from both internationalist and non-internationalist disciplines) can change the reality of an international norm in scholars' minds, and how this new legal language influences the language of legal practitioners and vice versa.

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The gap between scholarly language and international legal concepts has several causes. One is the practice of secessionist movements and their interpretation of the principle of self-determination of peoples. Each wave of secessionist movements has rekindled the scholarly debate on the link between this international principle and secession: from Katanga, Biafra, and East Pakistan in the 1960s and 1970s to Quebec, North Ireland, and the Basque Country in the 1980s, the displacements of sovereignty in Europe and Africa following the fall of the Berlin Wall in the 1990s, or the cases of Kosovo, Scotland, Catalonia, and Hong Kong — among others — in the early 2000s and today. Certainly, due to the subject's strong political connotations, the conclusions of some scholarly studies seem to blur the lines between politics, terminology, and fundamental international concepts in the process of determining the content of the self-determination principle.

Another cause is the confusion of different kinds of scholarly debate regarding the principle's content. Briefly, the myriad debates in the literature can be classified into two main groups: those aimed at determining the content of the positive norm (i.e. what the principle is) and those proposing a change to the norm and, thus, dealing with proposals *de lege ferenda* (i.e. what the principle should be). When these two types of debates – the *should be* approach and the *is* approach – and the language they use are confused, the dialogue in the literature becomes quite difficult, if not impossible.

For example, the *should be* approach addresses multiple questions. A particularly widespread one is whether an expanded notion of self-determination could be the solution to internal tensions caused by the presence within a state's population of minorities who want access to independence. Such approaches seek to contribute reflections and proposals to foster a change in the law toward what the authors view as greater social justice.[2] Alternatively, they may seek to deconstruct and critically argue about the positive law from a theoretical and political perspective.[3] In all these cases, the research has a policy (or political) aim of changing, suppressing, or reinterpreting the positive law.

I maintain that, in parallel to considering what the norm should be, we can also seek a clear understanding of what it is and why. After all, it is the states, not the scholarly literature, that create and change international law. Yet for years, this *is* has seemed impossible to pin down due to the ambiguity of some of the terms and wording of the norm as it is currently formulated by states. Certainly, this ambiguity is what first gave rise to the gap between scholars' language and the original state consensus. This problem has thus likewise affected the other scholarly debate, i.e. the *is* approach. One of the most hotly debated issues in this group is the question of whether this principle is applicable to minorities or fractions of the population of a state with secessionist ambitions and, if so, where that leaves the principle of territorial integrity. In the 1990s, many authors wondered whether the classic international principle was undergoing a new development in this sense.[4] Since the turn of the century, the number of studies in one way or another dealing with the question has only grown.[5]

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1 According to Professor Crawford, many studies have taken this approach (J. Crawford, 'The Right of Self-Determination in International Law: Its Development and Future', in P. Alston (ed.), *People's Rights* (Oxford University Press, 2001), at 7–8).

2 Including, among many others, Professor Klabbers's approach, which suggests that the right to self-determination is best regarded "as a procedural right: the right to be taken seriously" (J. Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', 28 *Human Rights Quarterly* (2006), at 18).

3 Among many others, this would be the approach taken by Professor Koskenniemi when he shows the "paradoxes inherent in the very notion of national self-determination" as a patriotic concept that justifies statehood versus a secessionist concept in cases of "abnormality" or exceptional situations (M. Koskenniemi, 'National Self-determination Today: Problems of Legal Theory and Practice', 43 *International and Comparative Law Quarterly* (1994), at 245–246).

4 Among many others, see C. Tomuschat (ed.), *Modern Law of Self-Determination* (Martinus Nijhoff Publishers, Dordrecht, 1993).

5 Among many others, see M. Kohen, *Secession: International Law Perspectives* (Cambridge University Press, 2006); M. Sterio, *The Right to Self-determination under International Law: "Selfistans," Secession, and the Rule of the Great Powers* (Routledge, 2012); M. Sterio, *Secession in International Law: A New Framework* (Edward Elgar, 2018); F. Bérard and S. Beaulac, *The Law of Independence: Québec, Montenegro, Kosovo, Scotland, Catalonia* (Lexis Nexis, 2017); C. Closa, C. Margiotta, and G. Martinico (eds.), *Between Democracy and Law: The Amorality of Secession* (Routledge, 2020).

This particular question has reached the highest levels of application and codification of public international law. In 2010, in an obiter dictum in its Advisory Opinion on Kosovo, the International Court of Justice (ICJ) asked "whether the right to self-determination allows a part of a state's population to separate" (paragraph 83). The Court considered it unnecessary to answer this question to continue with its legal argumentation. At the same time, however, it stated that general international law was neutral concerning declarations of independence, i.e. concerning secession.[6] Years later, in 2019, the question arose again, this time in the framework of the International Law Commission, where Special Rapporteur Dire Tladi asked "whether the circumstances in which the right applies would permit external self-determination (secession)". He, too, avoided answering what he considered a "complex problem" to solve.[7] For whatever reason, two international bodies that could have contributed greatly to settling the matter declined to do so.

The subject of the present article falls within this second group of debates (the *is* approach). The aim is not simply to respond to the question raised — but not answered — by the ICJ and Special Rapporteur Tladi (i.e. does the principle of self-determination of peoples include a right to separate from the state for a fraction of a state's population?). Rather, it seeks to address an even greater problem: is it possible to give a clear, coherent, and objective answer, reflective of the current positive state of international law on the matter, that consistently uses all the terminology and concepts in use today? The disparate terminology found in the scholarly language thus provides the rationale for this study.

* * *

To undertake this research, we must first tackle a preliminary methodological problem: if we want to discuss the gap between scholars' language and state consensus, we must first determine the content of that consensus despite the undeniably ambiguous wording of the principle in the international texts that formulate it. Section (B) deals with this problem by identifying the secondary rules of recognition and change of the essential principle of self-determination of peoples. It then applies these secondary rules in two separate stages since the principle of self-determination clearly comprises two distinct rights, as will be explained below, at the end of Section (B): the right to external self-determination and the right to internal self-determination. Section (C) addresses the problem of determining the content of the right to external self-determination and how it relates to the protection of territorial integrity and the legal concepts of separation and secession of territories. Section (D) focuses on the scope of the protection of territorial integrity established by the right of internal self-determination. Section (E) briefly addresses the problem of the link between events (facts) and the evolution (change) of the content of the international principle of self-determination (do facts change custom? has the principle been modified by state practice?). Finally, Section (F), the Conclusions, lays out the article's thesis in greater detail.

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6 See: ICJ, Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* 22 July 2010, paras. 59 56 and 82 83.

7 Fourth report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4/727, 31 January 2019, at 52, para. 115.

(B) THE INTERNATIONAL LEGAL PRINCIPLE OF SELF-DETERMINATION OF PEOPLES AND THE METHOD TO DETERMINE ITS CONTENT (STATE CONSENSUS)

To determine the content of the international legal concepts established by the principle of self-determination of peoples, it is essential to identify the original state consensus behind the principle's adoption. This is a matter of method. Only the right method will bring us to the answer most in keeping with the reality of the positive norm and the values it protects. To this end, certain basic methodological aspects of the general theory of international law should be taken into consideration. In general terms, to be valid, the process for interpreting an international norm must meet two requirements. First, it must respect the secondary rules of interpretation of international norms, which vary depending on the formal source of the norm in question. Second, and indissociably, the norm's interpretation must be guided by the necessary presence of a consensus or the consent of the states (again depending on the formal source) behind it, i.e. its material source.

In the present context, ICJ case law, including both advisory opinions and judgments, supports the existence of the customary rule of the right to external self-determination and independence of colonial peoples and of peoples subjected to occupation and exploitation,[8] its *erga omnes* effects,[9] and, ultimately, its imperative (*jus cogens*) nature,[10] which the ILC has also confirmed.[11] *State consensus is the material source of international custom referred to as "evidence of a general practice accepted as law" (Article 38 ICJ Statute). Two related requirements — general, constant, and uniform practice* (*usus*) and the *opinio juris*

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[8] Thus: "52. Furthermore, the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them" (ICJ, Advisory Opinion, *Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970),* 21 June 1971, at 31, para. 52). See also: ICJ, Advisory Opinion, *Western Sahara,* 16 October 1975, at 31 33, paras. 54 59, and at 68, para. 162. Likewise: "During 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" (ICJ, *supra* n. 6, at 436, para. 79; ICJ, Advisory Opinion, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, 25 February 2019, para. 152).

[9] ICJ, Judgment, *Case concerning East Timor (Portugal v. Australia),* 30 June 1995, at 102, para. 29: "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable … it is one of the essential principles of contemporary international law."

[10] ICJ, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* 9 July 2004, at 171 172, para. 88. Although the Court cautiously states that "the right of peoples to self-determination is today a right *erga omnes*", it was referring to the *imperative nature* as observed in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (A. Remiro Brotóns *et al.*, *Derecho internacional* (Tirant lo Blanch, 2007) at 68 69).

[11] The principle is included in point h) of the non-exhaustive list of international *jus cogens* norms added as an Annex to the ILC's *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)* (adopted by the International Law Commission at its seventy-third session, in 2022, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/77/10, para. 43)). As already noted, it had been included in ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Commentary to Article 26, para 5.

sive necessitatis — must be met to prove the content of a custom.[12] Thus, the determination of the existence and content of the jus cogens principle of self-determination of peoples must follow certain basic general secondary rules of recognition and change of customary norms. These rules are included in many books, as well as in the Draft conclusions on identification of customary international law adopted by the ILC in 2018 (hereinafter 2018 ILC Draft conclusions).[13] To help the reader understand the arguments I will be making here, I will summarize them briefly below.

First, written international legal instruments are useful for determining the existence and content of a custom. Interpreting and determining the existence and content of a custom are overlapping operations.[14] In the present case, the ICJ has referred to three main legal texts to determine part of the content of the principle of self-determination: UNGA Resolution 1514 (XV), from 1960; common Article 1 of the human rights covenants of 1966; and UNGA Resolution 2625 (XXV), from 1970. There is an intense debate in the literature on the relationship between international resolutions and customary law. From the perspective of the theory of international law, UNGA resolutions can be considered evidence of the customary norm itself (i.e. the *opinio juris* and state practice) or of only one of its elements (i.e. the *opinio juris* or state practice).[15] The ILC has done considerable work to clarify this point. Article 12 of its 2018 Draft conclusions clearly establishes that

> "1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law.
>
> 2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development
>
> 3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (*opinio juris*)."

When the texts are considered to reflect the *opinio juris*, general legal theory speaks of the *opinio juris of the consensus* as opposed to the *opinio juris of the precedent* (i.e. of every single state act).[16] In the case at hand, the cited texts reflect the *opinio juris of the consensus.* It could be argued that today these texts have a *declaratory effect* with regard to the custom.[17]

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12 J. Crawford, *Brownlie's Principles of Public International Law* (9th ed., 2012), at 21 *et seq*.

13 The international law system has secondary norms that have to be followed to prove the existence and content of a custom; these secondary norms are included in a custom as well and have recently been identified by the ILC in its *Draft conclusions on identification of customary international law*, adopted at its seventieth session, in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 65).

14 Remiro Brotóns *et al.*, *supra* n. 10, at 596. See also: Articles 11 and 12 of ILC, *supra* n. 13.

15 Remiro Brotóns *et al.*, *supra* n. 10, at 511, 548 549, and 554.

16 In the *opinio juris* of the *consensus* it is not necessary to individually analyse the behaviour of each state, as it has been reflected in international legal texts; this differs from the *opinio juris* of the *precedent*, which should be identified in the practice of each state (Remiro Brotóns *et al.*, *supra* n. 10, at 510, 511).

17 A separate matter is to consider in greater detail what the relationship was between international custom and the most relevant UNGA resolutions (Res. 1514 and Res. 2625) at the historical moment in which they were adopted, that is, whether their effect was declaratory of an existing norm which could be more easily affirmed in the case of Res. 2625 in its historical moment or generative of the future international custom,

Second, and *consequently; state consensus is not necessarily found only in written texts. Although in the pre*sent case study, the aforementioned international texts may reflect this *opinio juris* of the consensus, to determine the content of a customary norm, it is always necessary to identify the confluent practice *(usus)*. In other words, the legal method requires analysing both the texts themselves and states' positions toward them and state practice (*usus*). Forgetting to observe this *usus* in addition to the written texts when seeking to determine the existence and content of the self-determination principle would not, in my view, be conducive to finding the interpretation most in keeping with the reality.

Third, UNGA resolutions can be interpreted applying *mutatis mutandis* the rules of interpretation contained in the Vienna Convention on the Law of Treaties between States of 1969 (hereinafter, VCLT), provided their different nature is taken into account.[18] Under the general rule of interpretation (Article 31.1 VCLT), "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A "good faith" interpretation and use of the "ordinary meaning" of the "terms" "in their context" and "in the light of [the treaty's] object and purpose" are indissociable aspects. In other words, these three criteria are not disjunctive, but cumulative. Thus, the international legal method does not typically turn to what I would call the literal criterion (i.e. look only at the terms' ordinary meaning); rather, it requires that the trifold criterion (of literal meaning plus context plus object and purpose) be the main one applied. The VCLT further specifies that a "special meaning shall be given to a term if it is established that the parties so intended" (Article 31.4 VCLT). Additionally, recourse may be made to supplementary means of interpretation — such as the preparatory work for a resolution and the circumstances of its adoption — to *confirm* the meaning resulting from application of the general rule *or* to *determine* the meaning when the interpretation according to it remains ambiguous or obscure or leads to a *manifestly absurd* or *unreasonable* result (Article 32 VCLT). In short, these criteria are calling for a reasonable, coherent, and sound interpretation of any norm.

Fourth, it is important to bear in mind the principle of autonomy of sources of the international legal system. This refers to the absence of a hierarchy of sources. In other words, "the customary norms retain a separate identity even where the two norms [of a treaty and of a custom] may be identical in content".[19] From this perspective, an interpretation of the norm resulting from the merging of sources, e.g. to affirm that common Article 1 of the covenants prevails over the UNGA resolutions, would not be particularly useful.[20] Nor would it be in step with international secondary rules of

as the ICJ would argue and other authors believe (Remiro Brotóns *et al.*, *supra* n. 10, at 553; in ICJ, Advisory Opinion, *Western Sahara,* 16 October 1975, pp. 31 33, paras. 54 59, and p. 68, para. 162). The ICJ has reiterated this point, noting that "although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption" (ICJ, *Legal Consequences of the Separation…*, *supra* n. 8, para. 152).

[18] Remiro Brotóns *et al.*, *supra* n. 10, at 608.

[19] Crawford, *supra* n. 12, at 30; S.D. Murphy, *Principles of International Law* (Thomson West, 2006), at 83.

[20] In this regard, I do not consider the following statement to be correct: "Surely, the Declaration (which is not a treaty) does not prevail over the covenants (which are)" (Y. Dinstein, 'Is there a Right to Secede?', *ASIL, Proceedings* (1996), at 301, 299 303).

recognition to think that a treaty could include a provision contrary to a *jus cogens* custom *(Article 53 VCLT)*. In other words, the 1966 human rights covenants could not modify the customary *jus cogens* norm.

Fifth, as stated in UNGA Resolution 2625 (XXV) of 1970, in "their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles".[21] Proceeding to interpret the principle of self-determination of peoples without taking into account its relationship with other basic principles — such as the principle of sovereign equality and its indissociable principles of territorial integrity and political independence and the principle of non-intervention — will always lead to dubious claims.

Moreover, sixth, there are also international general secondary rules for determining changes in *jus cogens* customs that must be followed if one wants to prove that the content of the principle of self-determination of peoples has changed. The key question at this stage is whether events involving the secession or separation of territories since 1970 have changed the norm. In the wake of the fall of the Berlin Wall in 1989, Europe witnessed a fair number of changes in sovereignty, under different legal circumstances, as will be discussed below. Have these events changed the norm? Despite what some scholars, including a special rapporteur of the UN Council of Human Rights, might say,[22] events alone do not change customary norms. Any change to a *jus cogens* custom must be brought about by another *jus cogens* custom. If one wishes to argue that states have changed the norm to make it applicable to minorities within a state or to include remedial secession as an exception to the territorial integrity principle, one must prove it by demonstrating the *new* material practice (*usus*) and *opinio juris cogentis* (Article 38 ICJ Statute).

There is one final point in the process of determining the content of the principle: it is essential to distinguish between two main rules or norms included in it in order to better analyse the holder and object of the right in each one, namely, the norms of *external* and *internal* self-determination. At first glance, the wording of the main aforementioned legal instruments does seem confusing. This confusion stems from the assertion at the start of the texts that "all peoples" have the right to self-determination.[23] On the other hand, each instrument, immediately thereafter and in parallel, includes clear and unequivocal references that make it easier to understand that there are some specific peoples who, with the aim of ending colonialism, would have a right to sovereignty and independence should they so decide, in the exercise of their self-determination.

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[21] Para. 2, dispositive part of UNGA Res. 2625 (XXV).

[22] I.E. Alfred Zayas, in Note SG, 'Interim report of the Independent Expert on the promotion of a democratic and equitable international order', UN Doc. No. A/69/272, 7 August 2014, paras. 28 29.

[23] UNGA Res. 1514 (XV), para. 2: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Art. 1.1, common to the 1966 human rights covenants: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." And para. 1 of the principle's formulation in the Annex to Res. 2625 (XXV): "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."

In the words of Professor Tomuschat, this gives rise to an "enigma": "[h]ow can the two propositions: that all 'peoples' have a right to self-determination, and that self-determination includes the right to the establishment of a sovereign State, be reconciled to fit reasonably well into the edifice of present-day international law?" Because, it "can of course be presumed that, as representatives of States, they did not wish to ring the death-knell for their masters". On the contrary, it seems safe to assume that states were unlikely to be looking "to dig their own grave" by affording each minority, ethnicity, or otherwise differentiated group a right to secession.[24]

In this regard, Professor Cassese recalls the methodologically useful contribution of Professor Virally, namely: an essential principle is a *general norm*, which, in turn, can comprise several distinct legal rules (or norms);[25] each rule has its own subject and object (attributed rights/obligations). In this case, the essential principle comprises, at least, two basic legal rules (norms): those of external self-determination and of internal self-determination.[26] Neither the ordinary or literal meaning of the paragraphs in context nor the will of the states suggests that they sought to create a single norm encompassing multiple rights and obligations with multiple holders, something that, in any case, due to the very nature of a legal norm, is in itself impossible.[27] In other words, it seems to me that it would be unhelpful to conflate the subjects of each of the two main rules, which have different regulatory objects. It is thus necessary to identify the content of the term peoples and of their rights in each of the principle's two basic norms, in light of each one's specific content. In my view, this is one of the main methodological imperatives to deal with the intrinsic *enigma* of the international principle and determine its objective content.

Thus, in general terms, the first and main purpose of the principle is the rule attributing to colonial and occupied peoples a subjective right to sovereignty and, as a last resort, independence (right to external self-determination). The second purpose is the rule attributing to the people of a state a subjective right to determine their political, economic, cultural, and social future without foreign intervention (right to internal self-determination).

In the following sections, I will try to apply the basic general secondary rules of interpretation of international norms with the aim of determining the original state consensus behind the self-determination principle as it relates to the external and internal right to self-determination. I will then compare this consensus with some widely used scholarly legal language concerning the various problems, which I will present in each section.

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[24] C. Tomuschat describes this "enigma" thusly in 'Secession and self-determination', in Kohen, *supra* n. 5, at 24 25.

[25] A. Cassese, *Self-determination of peoples: A legal reappraisal* (Cambridge University Press, Cambridge, 1995), at 126 *et seq*. Professor Cassese bases his argument on the contribution of Professor Virally (M. Virally, 'El papel de los 'principios' en el desarrollo del Derecho Internacional' (original published in *Hommage à Paul Guggenheim*, 1968), in M. Virally, *El devenir del derecho internacional: Ensayos escritos al correr de los años* (Fondo de Cultura Económica, Mexico, 1998), at 222 223).

[26] Professor Cassese mentions a third one, namely, the rule concerning the prohibition of discrimination against majorities who are victims of apartheid in the exercise of their right to self-determination in the colonial context (Cassese, *supra* n. 25, at 108 115).

[27] H. Kelsen, *Teoría pura del Derecho (2ª edición de 1960)* (Editorial Porrúa, Mexico, 1997), at 17 30 and 123 199.

(C) PEOPLES' RIGHT TO EXTERNAL SELF-DETERMINATION: FROM LANGUAGE TO CONCEPT

In view of the historical background of the principle's adoption, the essential aim of the self-determination principle was to end colonialism. Therefore, its object and purpose were to recognize the right of colonial peoples — later expanded to include militarily occupied peoples — to access sovereignty and independence (rule of external self-determination). Only a minority of authors argue that any fraction of a state's population is legitimated to exercise the external right to self-determination. The majority of the literature considers only colonial and occupied peoples to have this right.[28] Although I will not go into this debate in depth here, I will briefly explain the arguments in this regard on which there is consensus.

The terminology used in the legal texts reflecting the *opinio juris cogentis* shows that the states are asserting that only colonies — whether trust or non-self-governing territories — and people under military occupation have the right to external self-determination.[29] The ICJ has indicated this multiple times in its case law interpreting and applying the principle of self-determination of peoples.[30] To put to rest any possible doubts regarding who the holders of this subjective right to sovereignty and independence were — information that the metropolitan states were to transmit to the UNGA (Article 73 UN

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[28] Among many others, R. Emerson, 'Self-Determination', 65 *AJIL* (1971), at 463 465; Cassese, *supra* n. 25, at 71 90; Tomuschat, *supra* n. 24, at 23; Koskenniemi, *supra* n. 3; H. Hannum, 'Rethinking Self-Determination', 34 *Virginia Journal of International Law* (1993); M. Kohen, 'La création d'Etats en droit international contemporain', VI *Cursos Euromediterráneos Bancaja de Derecho Internacional* (2002), at 108 141; J. Crawford, *The Creation of States in International Law* (2006), at 257 266; Special Rapporteur H. Gros Espiell (UN, *The right to self-determination: implementation of United Nations resolutions: study. Prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/405/Rev.1, 1979, *passim*); Special Rapporteur A. Cristescu (UN, *The right to self-determination: historical and current development on the basis of United Nations instruments: study. Prepared by Aurelio Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities*, E/CN.4/Sub.2/404/rev.1, 1981, para. 209, at 36. Among Spanish scholars, see, among others: J.A. Carrillo Salcedo, *Soberanía del Estado y Derecho Internacional* (2nd ed., Tecnos, Madrid, 1976), at 32; A. Remiro Brotóns, *Derecho internacional público 1. Principios fundamentales* (Tecnos, 1982), at 331; P. Andrés Sáenz de Santa María, 'La libre determinación de los pueblos en la nueva sociedad internacional', I *Cursos Euromediterráneos Bancaja de Derecho Internacional* (1997), at 133; X. Pons Rafols, *Cataluña: Derecho a decidir y Derecho internacional* (Reus, 2015), at 103 *et seq.*; J.F. Soroeta Liceras, 'El derecho a la libre determinación de los pueblos en el siglo XX: entre la realidad y el deseo', *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2011* (2013), at 473. See also the 'Statement on the lack of foundation in international law of the independence referendum in Catalonia', signed by about 400 members of the *Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales* (Spanish Association of Professors of International Law and International Relations, or AEPDIRI) *REDI* (2018), at 297.

[29] For example, there are references to "[t]he subjection of peoples to alien subjugation, domination and exploitation" (UNGA Res. 1514 (XV), para. 1); enabling "dependent peoples ... to exercise peacefully and freely their right to complete independence" (UNGA Res. 1514 (XV), para. 4); "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence" (UNGA Res. 1514 (XV), para. 5); "Non-Self-Governing and Trust Territories" and promoting their "right of self-determination" (common Art. 1 Covenants, para. 3); and "bring[ing] a speedy end to colonialism, ... bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights" (UNGA Res. 2625 (XXV), para. 2 of the principle).

[30] See *supra* notes 8, 9 and 10.

Charter) — the day after UNGA Resolution 1514 (XV) was adopted, the UNGA itself adopted Resolution 1541 (XV).[31] The list of peoples having the right to self-determination was drawn up based on this information and was not a matter of minorities, but rather the people of each colonial territory. In other words, the right was attributed to the people of the colonial territory (territory-people), which was geographically separate from the metropolis.[32] The population was thus of an *accessory* nature to the territory;[33] it was often made up of populations with distinct ethnic or cultural traits among themselves. There was no requirement for the people settled in the territory to be homogeneous, nor was any link established with the idea of people as a nation or people as an ethnic group. Identity was grounded in the colonial territory and not in national or ethnic traits. This is confirmed by another legal criterion typical of decolonization: the duty to respect the internal administrative borders or external borders between the different colonies inherited from colonization when establishing the borders of the newly independent states (principle of *uti possidetis juris*).[34] Practice (*usus)* corroborates that the peoples in question were multi-ethnic territory-peoples.[35] As Professor Tomuschat wrote, the territory-people method of establishing the holders of the right "ran against the idea of self-determination, according to which humans should be able freely to decide to which polity they wish to belong".[36] One can argue whether or not this state consensus was just, but it is beyond doubt that, when the states established this international right,

[31] UNGA Res. 1541 (XV), of 15 December 1960. Annex "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter".

[32] They were *geographically separate* and *ethnically and culturally distinct* peoples (Principles IV and V). They were also peoples who had not yet exercised the right of self-determination as they had not yet achieved independence, free association, or integration with an independent state (Principle VI). *Ibid*.

[33] It is true that "the human beings concerned were more or less treated as an appurtenance of the territory where they lived" (Tomuschat, *supra* n. 24, at 25). This is an undisputed and widely addressed point in the literature. See: Kohen, *supra* n. 28, at 585; A. Remiro Brotóns, 'Soberanía del Estado, libre determinación de los pueblos y principio democrático', in F. M. Mariño Menéndez (ed.), *El Derecho Internacional en los albores del siglo XXI. Homenaje al Profesor Juan Manuel Castro-Rial Canosa* (Editorial Trotta, Madrid, 2002), at 549; Andrés Sáenz de Santa María, *supra* n. 28, at 134. In this regard, it is relevant that paragraph 4 of UNGA Res. 1514 refers to the "*national* territory" of dependent peoples (emphasis added).

[34] This criterion for delimiting the colonial territory was imposed by international law, as set forth in paragraph 4 of UNGA Res. 1514 ("All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the *integrity* of their national territory shall be respected" (emphasis added)). Meanwhile, at its meeting in Cairo in July 1964, the OAU adopted a resolution recognizing the binding nature of the borders drawn by the colonial powers. As the ICJ has noted, the principle of *uti possidetis juris* was adopted for a purpose related to maintaining international peace and security (ICJ, Judgment, *Case concerning the frontier dispute between Burkina Faso and the Republic of Mali*, 22 December 1986, especially paras. 20 and 25). It is true that behind the adoption of the *uti possidetis juris* criterion lay the interests of the *elites representing the colonial territory-people* (Koskenniemi, *supra* n. 3, at 259). It is likewise true that the delimitation of the concept of "colonial territory" was not absolute, and there were political interests in restricting the concept and limiting it to what has been called the "'classic' colonialism" context (Hannum, *supra* n. 28, at 32). At the same time, the USSR also insisted on and achieved a consensus regarding the saltwater criterion (geographical separation by sea) to exclude many of its colonized territories from the norm's application.

[35] Indeed, the discriminated minorities of Katanga (Belgian Congo) in 1960 were attributed no right of external self-determination, nor were those of Biafra (Nigeria) in 1967-1979, or East Pakistan, who were the victims of human rights violations by Islamabad, in 1970-1971.

[36] Tomuschat, *supra* n. 24, at 25.

they had no intention of internationally legalizing the Wilsonian political idea of "one people/one state" or "one nation/one state".[37]

There is, however, a greater problem consisting of the discrepancies between the scholarly legal language and the original state consensus. It is a problem that has gone virtually unaddressed in the literature and which I wish to highlight. It is all but impossible to identify a common understanding of the meaning of this right of peoples to external self-determination among scholars due to the lack of uniform meanings in scholars' language. Some studies equate the international right of self-determination of peoples with a right of separation of territory or with a secession process as exceptions to the protection of territorial integrity. Others equate it with a restoration of the virtual sovereignty and territorial integrity of colonial and occupied peoples. The question thus becomes: what does it really mean to *exercise* a right to external self-determination according to the principle? Did the states establish such a right of secession or such a right of colonies to separate from the metropolis? Like numerous other scholars, I believe that the original state consensus was not to create any right to separate or secede from the territory. The exercise of the right to external self-determination by colonial peoples and, later, by occupied peoples was conceived of as an international right to restore the territorial integrity of colonial (or occupied) territories. It is a right that simultaneously preserves the territorial integrity of the metropolitan states and of the colonial people. In other words, it is a right of colonial and militarily occupied peoples to have their *usurped* territory restored. Let us now look, first, at scholars' legal language, before turning to the original state consensus.

(1) Scholars' Language: A Right to Secession as an Exception to Territorial Integrity

Provided below is a brief, non-exhaustive set of examples of arguments claiming that the international right of peoples to external self-determination consists of a right to separate from the territory of the state, or a case of secession, as an exception to the territorial integrity principle.

In UN practice, this was the view taken by Special Rapporteur Cristescu in his *Report on the right of self-determination* in 1981:

> "The principle of equal rights and self-determination, as laid down in the Charter of the United Nations, does not grant an unlimited right of secession to populations living in the territory of an independent sovereign State (…). *The right of secession unquestionably exists, however, in a special but very important case: that of peoples, territories and entities subjugated in violation of international law*."[38]

[37] In fact, the norms' selective subsequent application was soon called into question by the literature. See, for example, M. Pomerance, *Self-Determination in Law and Practice* (Martinus Nijhoff Publishers, The Hague, 1982).

[38] UN, *The Right to self-determination: historical…*, *supra* n. 28, at 31, para. 173 (emphasis added).

This same perception would seem to be implicit in the wording of the ILC Rapporteur's writings on *jus cogens* norms.[39] In the Council of Europe, the Venice Commission (the European Commission for Democracy through Law) also seems to have equated secession, separation, and self-determination.[40]

In national practice, in very similar terms, the Supreme Court of Canada considered the right of colonial and occupied peoples to self-determination to consist of a "right of secession" which originates as an exception to the principle of territorial integrity of the state. Specifically, the Supreme Court of Canada found

> "as will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and *consistently with the maintenance of the territorial integrity of those states*. *Where this is not possible*, in the *exceptional circumstances* discussed below, a *right of secession may arise*."[41]

The Court later addresses these exceptional circumstances, identifying three cases, namely, colonies, occupied peoples, and, presumably, situations of discrimination *(remedial secession)*. This suggests that it is equating these three cases with exceptions to territorial integrity because a right of secession has arisen. This case has had an important influence on other national cases, such as on Spain's Constitutional Court.[42] Furthermore, a majority of constitutional law scholars have accepted the terminology of the Canadian Supreme Court in the Quebec case; this means that they consider the right to external self-determination to be a secession or separation from the territory, and an exception to territorial integrity.[43] Some political scientists and international legal philosophers also follow this line of thinking.[44]

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[39] Specifically, as already cited, Tladi asks "whether the circumstances in which the right applies would permit external self-determination (secession)" (A/CN.4/727, *supra* n. 7, para. 115).

[40] See *Self-Determination and Secession in Constitutional Law*, Report Adopted by the Commission at its 41st meeting (Venice, 10 11 December 1999), CDL-INF (2000) 2 Or. F, at 3; and, again, in the *Revised Guidelines on the Holding of Referendums Approved by the Council of Democratic Elections at its 69th online meeting* (7 October 2020) and adopted by the Venice Commission at its 124th online Plenary Session (8 9 October 2020) Strasbourg, 8 October 2020 CDL-AD(2020)031, at 5.

[41] Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 S.C.R., para. 122 (emphasis added). The Supreme Court of Canada itself uses *secession* as equivalent to *unilateral separation*, therefore acknowledging that there are consensual separations; later, in its argumentation, it uses the expression "unilateral secession", which would seem to suggest that it considers such a thing as non-unilateral secessions to exist, i.e. secessions reached by consensus between the parties (Supreme Court of Canada, *Reference re Secession of Quebec*, para. 110). Again, in para. 131, the Supreme Court of Canada found that "the right to self-determination (…) operates within the overriding protection granted to the territorial integrity of 'parent' states", only to later say that in "certain defined contexts" (the "exceptional circumstances" of para. 122), the right may be exercised externally, which "would potentially mean secession", referring in this point to colonies and occupied peoples.

[42] As Professor J.M. Castellà states "[j]udgement 42/2014 represents the closest the Spanish Constitutional Court has ever been to the doctrine of the SCC of 1998" (J.M. Castellà Andreu, 'The Reception in Spain of the Reference of the Supreme Court of Canada on the Secession of Quebec', in G. Delledonne and G. Martinico (eds.), *The Canadian Contribution to a Comparative Law of Secession* (Palgrave Macmillan, 2019), at 84).

[43] Among many others, see the various contributions in: G. Delledonne and G. Martinico (eds), *ibid.;* and N. González Campañá, *Secession and EU Law: The deferential attitude* (Oxford University Press, 2023).

[44] According to A. Buchanan and E. Levinson, "Another difficulty is that while international legal doctrine [has] an arbitrarily restricted conception of the situations that generate a unilateral right to secede, sev-

A careful reading of the studies of various international legal scholars suggests that they, too, equate the exercise of the self-determination of peoples with a right of separation or a situation of secession, as an exception to the territorial integrity principle.[45] It would seem to be commonplace among some English-speaking authors to consider that "[t]raditionally, the external right to self-determination at international law has been equated with a right to unilateral secession under certain narrowly defined circumstances."[46]

All these statements are comprehensible and respectable if we consider them simply to be using the terms *separation* and *secession* and the content of the international right to self-determination interchangeably. In that case, they would be using them descriptively, without legal weight. However, I contend that there is a deeper way of talking and writing about international law: a way that takes into account the actual international law meaning (the concept) of these terms (the language).

This approach involves answering two different questions: first, are secession and separation of territories the same in public international law; and, second, was the original consensus reached by the states when they adopted the international norm of external self-determination to create a right to secession or to separation as an exception to the territorial integrity principle. In the following subsection, I will focus on the international legal concepts of secession and separation of territories in state practice and the theory of international law. I will then look at the international legal concept of the international right to external self-determination.

(2) Theory of International Law and the Concepts of Separation (Devolution) and Secession

According to international legal theory, when a parent state consents to the independence of a fraction of its people and territory, it is a case of *separation* (*devolution* or *grant of independence)*. In contrast, when the parent state opposes the action and there is a

eral important international legal documents include reference to an apparently much broader 'right of self-determination of all peoples' which is said to include the right to choose full independence, and hence the right to secede" (and here, note 10 refers to UNGA Res. 2625) (A. Buchanan and E. Levinson, 'Secession', in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2021 ed.), available at: <https://plato.stanford.edu/archives/win2021/entries/secession/>).

[45] Among others, Professor Weller considers that the "essence of the traditional right of self-determination of peoples is that it in itself constitutes a valid basis for a claim to secede, irrespective of the wishes of the central government" (M. Weller, 'Why the Legal Rules on Self-determination Do Not Resolve Self-determination Disputes', in M. Weller and B. Metzger (eds.), *Settling Self-determination Disputes: Complex Power-sharing in Theory and Practice, 20-23* (2008). The same idea can be found in M. Weller, https://www.ejiltalk.org/secession-and-self-determination-in-western-europe-the-case-of-catalonia/); T. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation* (CERIC, La Documentation française, Paris, 1999) ; and in 'La sécession: une question de simple fait?', *Working Papers of the European Society of International Law* (2008), at 2. Additionally, H. Hannum's detailed and comprehensive study equates external self-determination with secession (*supra* n. 28), at 64. So does R. Howse and R. Keitel, 'Humanity Bounded and Unbounded: The Regulation of External Self-Determination under International Law', 7 *The Law & Ethics of Human Rights* (2013), at 2, note 2.

[46] L. Seshagiri, 'Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law', 51 *Harvard International Law Journal* (2010), at 566 567.

revolutionary act by the secessionist people against the parent state, it is a process of *secession (forcible seizure of independence)*.

Professor Crawford refers to cases of a "grant of independence" (devolution) and of "forcible seizure of independence" (secession). What distinguishes them is "the presence or absence of metropolitan consent, although in some circumstances this distinction is formal and may even be arbitrary".[47] Elsewhere, in his *Report to the Government of Canada concerning unilateral secession by Quebec* (1997), he specifies,

> "'[S]ecession' is the process by which a particular group seeks to separate itself from the state to which it belongs, and to create a new state on part of the territory of that state. It is to be distinguished from a consensual process by which a state confers independence on a particular territory and people by legislative or other means, a process which may be referred to as devolution or the grant of independence. 2. The key difference between secession and devolution is that the former is essentially a unilateral process, whereas the latter is bilateral and consensual. For the sake of clarity I will use the term 'unilateral secession' throughout."[48]

Professor Remiro Brotóns clearly distinguishes between the separation (peaceful) and the secession (violent) of a part of the state territory.[49] Professor Kohen also contrasts "sécession" and "dévolution".[50] Other authors, such as Professors Tomuschat, Cassese or Tancredi, follow the same line of thought.[51]

In practice, *separation (devolution)* can be formalized in the constitution or based on politics. In the latter case, the right is neither included nor prohibited in the constitution; instead, it is the political will of the authorities to recognize it *ad hoc*.[52] In the former case, the basic law of the state can include a domestic right that may be called the "right to secession", the "right to separation", or even the "right to self-determination".[53] However, the name given to this right in a particular constitution does not change its nature as a discretionary domestic right. Thus, the fact that the constitutions of the former USSR and the former Socialist Federal Republic of Yugoslavia mentioned the principle or right to self-determination does not in any way mean that this wording was chosen

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47 Crawford, *supra* n. 28, at 330.

48 J. Crawford, *State Practice and International Law in Relation to Unilateral Secession: Report to the Government of Canada concerning unilateral secession by Quebec*, 1997, para., 6 (available online and in: A. Bayefsky, *Self-determination in International Law: Quebec and Lessons Learned, Legal Opinions Selected and Introduced by Anne F. Bayefsky* (Kluwer Law International, 2000)). Professor Crawford's use of the expression "unilateral secession" in the last sentence of this paragraph could be the origin of its use by the Canadian Supreme Court and, from there, by a great number of authors.

49 Remiro Brotóns *et al.*, *supra* n. 10, at 73 74. See also Andrés Sáenz de Santa María, *supra* n. 28, at 139.

50 Professor Kohen also contrasts "sécession" and "dévolution". By "sécession" he means those cases in which the separation is achieved "sans l'accord de l'Etat prédécesseur", whereas he uses the term "dévolution" to refer to cases in which this separation "se produit avec un tel consentement"; a separate issue is that of decolonization (Kohen, *supra* n. 5, at 572).

51 A. Tancredi, *La secessione nel diritto internazionale* (CEDAM, Padua, 2001); Cassese, *supra* n. 25, at 122 124; Tomuschat, *supra* n. 24, at 24 25. See also: A.G. López Martín and J.A. Perea Unceta, *Creación de Estados, secesión y reconocimiento* (Tirant lo Blanch, 2018), at 95.

52 If the UK or Canada with their flexible constitutions are able and willing to allow a vote on separation for a part of their populations (Scotland and Quebec, respectively), they may do so at their own discretion.

53 See Venice Commission, *supra* n. 40.

with a view to incorporating into their domestic jurisdictions the international right to external self-determination agreed by the states in the 1960s.[54] Although the term was the same, the concept behind it was entirely different. Because, if a state's domestic legal order recognizes a right of separation for part of its population, this would be a national internal right. It would be respected by international law under the equal sovereignty principle, but not imposed, promoted, or authorized by it. International law respects state sovereignty and independence, as they are the very basis for its existence. These concepts include a state's power to define its internal territorial organization, which is a discretionary power of states based on the self-organization principle. This means that management of the territory is protected by the sovereignty and independence principle, an essential principle of international law.

In this respect, to think that the notion that the domestic right to separation that some states may grant to a part of their population is based on an international norm that takes precedence over the principle of territorial integrity is nonsense. There is no international duty to allow a vote on separation for a part of a state's population. No norm in the international legal system recognizes the right of any part of a state's population to sovereignty and independence. States have not agreed to make such groups the holders of this right. Therefore, neither a domestic right to separation nor an *ad hoc* domestic agreement to enable separation should be confused with an international right to separation, which does not exist. According to the Supreme Court of Canada, the non-existence of this international right is precisely why secessionist movements resort to a contrived interpretation of the principle of self-determination.[55]

It is worth recalling that the functional concept of state sovereignty is defined in international law as a set of powers recognized by international law for states. These powers consist of both inherent rights, such as their political independence and territorial integrity, and duties, such as the effective exercise of sovereign powers, including the obligation to respect the rights of other states within their territory.[56] National unity and territorial integrity (generally cited together with political independence) are internationally recognized rights of the state, which are mentioned across the definitions of several fundamental principles in the main international texts that define them.[57] National unity and territorial integrity are thus a sovereign right, and not an

[54] The 1977 Soviet Constitution recognized the principle of self-determination of nations (Art. 70) and each republic's right to secede from the Union (Art. 72), although in practice these articles were "dead letter" (Cassese, *supra* n. 25, at 264–265). The 1974 Yugoslav Constitution recognized that the Federation was based on a right of self-determination in the Preamble and in principles I, III, and VI (*Ibid*., at 269).

[55] Supreme Court of Canada, *supra* n. 41, para. 110–111.

[56] See: Arbitral award from the *Island of Palmas (or Miangas) case* of 4 April 1928, *Recueil SA*, Vol. II, at 829–871 (https://legal.un.org/riaa/cases/vol_II/829-871.pdf).

[57] In 1945, Art. 2.4 UNC included it when it established the obligation to refrain "from the threat or use of force against the territorial integrity or political independence of any state". Likewise, UNGA Res. 2625 (XXV), of 24 October 1970, whose annex includes the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, mentions it in delimiting the content of several of the basic principles it contains. In defining the principle of the prohibition on the threat or use of force, it provides, "Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State…" Similarly, in defining the principle of sovereign equality, it provides, "All States enjoy sovereign equality …. In particular, sovereign equality includes the following elements: … c)

international obligation. And because they are a right, any state wishing to transfer its sovereign powers to a part of its population may do so. Consequently, the grounds for it always lie in the domestic legal order.

The constitutional recognition of a domestic right to separation is exceptional in contemporary state practice.[58] The practice of separations, since 1945, has been varied. Examples include Singapore in 1965, eleven of the former USSR republics in 1991,[59] the Czech Republic and Slovakia in 1993, and Montenegro in 2006.

In contrast with separation (devolution), a revolutionary act by a secessionist people against a parent state that opposes said act is a process of *secession* (*forcible seizure of independence*). This strict understanding of secession can be defined as the action of becoming independent from a state, undertaken by a part of its population, usurping a part of its territory in violation of constitutional norms and/or against the will of its government. In other words, to secede is to break away from a state in order to establish another state (or become part of a third state, which, though less common, is not unheard of) against the constitutional order and, therefore, against the will of the parent state. As Professor Remiro Brotóns so succinctly put it, secession is a "revolutionary act".[60] This is because it is contrary to domestic constitutional law. Even if there is a constitutional right to the territory's separation, if the parent state were to oppose it politically, it would become a process of secession. This was the case of the first new republics to emerge from the former Yugoslavia — the republics of Slovenia, Croatia, and Bosnia-Herzegovina, which were the first to embark on the secessionist path.[61] Furthermore, were a secession to come to pass through the creation of a new state — due to the

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Each State has the duty to respect the personality of other States; d) The territorial integrity and political independence of the State are inviolable." In defining the content of the principle of non-intervention, it states, "No State or group of States has the right to intervene directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law." Note that in the latter two cases, territorial integrity can also be understood to be comprised within the notion of the "personality of the State" and of its "political elements". The principle itself is also mentioned in the delimitation of the principle of self-determination of peoples, an aspect that will be examined in greater detail below. At the regional level, in 1975, in the context of peaceful co-existence, the Final Act of the Conference on Security and Co-operation in Europe (CSCE), or Helsinki Conference, also includes it generally in several of the ten stated principles (Conference on Security and Co-operation in Europe, Final Act, Helsinki, 975, available at: https://www.osce.org/es/mc/39506?download=true).

[58] See Venice Commission, *Self-Determination…*, *supra* n. 40.

[59] Ukraine, Belarus, Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan; they did not join the UN until 1992. Russia was the successor of the parent state, the USSR, under the name of the Russian Federation. These separations had been consented to via the treaty between Russia, Ukraine, and Belarus (founding republics of the *Union* of Soviet Socialist Republics) under the 1991 Minsk Agreements: Agreement of 8 December 1991, establishing the Commonwealth of Independent States, expressly declaring that the USSR ceased to exist; subsequently amended by the Alma-Ata Agreements of 21 December 1991 (Crawford, *supra* n. 28, at 295).

[60] A. Remiro Brotóns, 'La independencia como un hecho revolucionario', 34 *REEI* (2017).

[61] Followed by Macedonia. The cases differ in terms of the duration of the belligerent events; however, all involved hostilities and internal armed conflicts, with the conflict in Bosnia-Herzegovina being the bloodiest due to the interethnic and religious fratricidal fighting. Bosnia-Herzegovina, Croatia, and Slovenia joined the UN in 1992. The former Yugoslav Republic of Macedonia joined in 1993. On the "revolutionary" nature of this process, i.e. against the internal constitutional order, see Cassese, *supra* n. 25, at 270. The former Yugoslav constitution established the right but was, again, "dead letter"… (see *supra* n. 54).

effectivity principle – it would not retroactively attribute a right of separation to the part of the population that sought the revolution at the start of the secessionist process. A separate issue is that, in practice, some cases fall in a grey area, between secession and separation (devolution), or reflect a *sui generis* situation.[62]

Thus, conceptually there can be no doubt that, because states are jealous of their sovereignty, when they do not want to grant independence to a part of their population and that part of the population nevertheless seeks to break away, it will do so by means of a different phenomenon, namely, secession or the forcible seizure of independence. The fact that the states have never settled on a definition of secession – indeed, the term "secession" itself is rarely found in any written international norm – can itself be understood as a rejection of it. Certainly, the states did not use the term (language) "secession" in the Vienna Conventions on Succession of States of 1978 and 1983.[63] The Security Council, too, has expressed negative views of secessionist processes.[64] And, as we will see below, when adopting the principle of the self-determination of peoples, the states tacitly prohibited it.

[62] One such *sui generis* situation was the case of the three Baltic republics of the former USSR – Estonia, Latvia, and Lithuania; they joined the UN in 1991. They were not secessions, because these populations had an international legal right to recover their independence since they had been annexed by the USSR, most recently in 1940. Although the USSR ultimately yielded and did not oppose their declarations of independence, they were not cases of s*eparation* (*devolution*), but rather of *restoration of their former statehood.* Tomuschat affirms that they are cases of "*restitution*", as all three republics had been annexed in 1940 by the USSR (Tomuschat, *supra* n. 24, at 31). Other authors are similarly inclined (Kohen, *supra* n. 28, at 592; Cassese, *supra* n. 25, at 264).
Two cases in Africa likewise fall in this murky area: Eritrea and South Sudan. After years of armed conflict, both cases might initially be described as secession (from Ethiopia and Sudan, respectively). But in both cases, the birth of the new state was sponsored by the UN, facilitating a long process of pacification, in which the parent state ultimately consented to the separation (*devolution*). In the case of Eritrea, following a long and harrowing war, Ethiopia finally consented in 1992, such that the situation could be considered to have shifted from a secessionist process to a situation of separation (devolution). The case of South Sudan is similar in terms of the bloody war, which lasted more than 20 years, including various UN peacekeeping missions. Once a peace agreement was reached, a referendum was called for, leading to its independence in 2011.

[63] The actual term used in Art. 34 of the 1978 Vienna Convention and Arts.17, 30, and 40 of the 1983 Vienna Convention is simply "separation", in reference to parts of a state. This silence is relevant. In the preparatory work, especially in the context of the ILC, the terms "secession" and "separation" are sometimes used interchangeably. The fact that only the term "separation" is used in the actual Conventions enables any conclusion, namely, that "secession" is part of a generic concept of "separation", but also, on the contrary, that it falls beyond the scope thereof. In any case, the absence of the term "secession" reflects the reticence of the states to mention it, particularly when the Conventions establish its non-application in phenomena *not in conformity with international law.* Additionally, it is neither the object nor the purpose of these Conventions to regulate displacements of sovereignty, but rather their *legal consequences* in the matter of the succession of states. See: Vienna Convention on Succession of States in Respect of Treaties of 23 August 1978 (Doc. A/CONF.80/31) and Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 8 April 1983 (Doc. A/CONF.117/16).

[64] Security Council practice has used the term *secession* in relation to the violation of a state's *internal constitutional law* and in the absence of the said state's consent, always expressing a wary attitude toward and employing a disparaging tone with regard to the phenomenon of secessionism. In this regard, see: Kohen, *supra* n. 28, at 578–581; Christakis, *supra* n. 45, at 35. To cite just a few examples, see the Security Council Resolutions deploring the secessionist activities in Katanga (Res. 169, of 21 November 1961) or the declaration of secession of a part of the Republic of Cyprus (Res. 541, of 18 November 1983).

What I wish to underline here is that, in view of state practice, secession and separation (devolution) of territories are conceptually distinct in the theory of international law. Some scholars may say that this view is too strict or narrow, but concepts help us understand real-life social phenomena. And international legal concepts are not — or should not be — an exception. In the present case, these concepts help us understand that there are specific grounds for both situations (separation and secession), and that they fall within the internal jurisdiction of the state: they are internal phenomena, one in accordance with the constitutional order of the sovereign state, the other against it. The principles of sovereign equality (including political independence and territorial integrity) and of the duty not to intervene in the affairs of any state apply to both domestic situations. And, as will be seen below, these domestic situations are expressions of the content of the right to internal self-determination.

(3) **The Original State Consensus: An International Right to Restore Sovereignty and Territorial Integrity**

Having carefully distinguished between secession and separation (devolution) of territories, we must now determine whether they can be equated to the exercise of the international right of external self-determination of peoples. Therein lies the problem: did the states establish such a right of secession or such a right of colonies to separate from the metropolis? I contend that it is highly unlikely that they did.

First, at no point do the UNGA texts or the 1966 human rights covenants use the word "secession". Nevertheless, paragraph 6 of UNGA Resolution 2625 (XXV), of 1970, does contain an expression that includes the words "separate (…) from the territory":

> "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a *status separate* and *distinct* from the territory of the State administering it." (emphasis added)

It establishes the recognition of a separate and distinct legal status for the colonial territory, thereby precluding the application of the principle of territorial integrity in relations between the metropolises or administrators and the territory of the colonies (or between the occupant States and the occupied peoples). The profound importance of this recognition with respect to the territorial integrity principle included in the legal concept of sovereignty as an attribute of the state has not always been stressed enough.

Clearly, it resulted from the metropolitan states' agreement to abandon their traditional view that the colonies were their territorial possessions, i.e. part of the colonial power's territory. This is an important aspect of contemporary international law. Until then, under classical international law, colonies were considered the territory of the state. For example, in 1929, Professor Von Liszt wrote, "In addition to the motherland, internationally, colonies belong to the territory of the state. Even in the form of protectorates, colonies' relations with the motherland are not governed by international law but by political law."[65] And, of course, the colony's emancipation gave rise to a case of

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[65] F. Von Liszt, *Derecho Internacional Público* (Gustavo Gili, Barcelona, 1929), at 128 (emphasis added; translation by the author).

"separation of a colony or a province from the motherland".[66] All of this under classical international law.

Today, paragraph 6 benefits the colonial powers by minimizing the impact on their sovereignty, as there was no exception to the principle of territorial integrity. But it also benefits the populations of the colonies whose territorial integrity — taken from them by the heinous crime of colonialism — was restored to them. This is the meaning of the "status separate and distinct" from the administering state that this paragraph includes. Consequently, the colonies did not secede or separate from the territory because they were not a part of it. It may be considered a legal fiction. This was the state consensus behind the norm. To cite just one example, the delegation of Jordan called for the "right" to "recover [...] territorial integrity" during the debates of the General Assembly in 1960, preceding the adoption of Resolution 1514 (XV).[67] This is something that various prominent authors have highlighted.[68] Professor Cassese is clear on this point.[69] In 1971, Professor Emerson was likewise quite clear, noting, "[T]he transition from colonial status to independence is not regarded as secession, whether or not it is achieved by force of arms, but rather as the 'restoration' of a rightful sovereignty of which the people have been illegitimately deprived by the Colonial Power concerned."[70] Professor Higgins similarly asserts, "[T]here was no suggestion that the old colonial rulers should stay in State X, with 'the peoples' seceding, but rather that the colonial rulers should go. Secession was not in issue in this context."[71]

Let us recall that here we are interested in the legal concept of the exercise of the right to external self-determination agreed by the states, not the descriptive or lay meaning or a political idea of self-determination. This original state consensus — which reflected the balance of powers between the metropolises and the peoples of the colonial territories, already established in states that had recently gained independence — was clearly not to recognize an exception to territorial integrity through a right to separation freely granted by the metropolitan states. It went much deeper than that, namely, to recognize a compulsory right to the restoration of the colonial territory's territorial integrity, a kind of virtual sovereignty that had been *stolen* from it by the crime of colonization.[72] As noted above, this is confirmed by the principle of *uti possidetis juris*, another legal criterion

[66] *Ibid.*, at 247.

[67] Delegation of Jordan, UNGA, Official Records, 946th Plenary Meeting, 1960, at 1268, para. 39 (emphasis added).

[68] Kohen, *supra* n. 28, at 572. Among Spanish scholars, see: Remiro Brotóns *et al.*, *supra* n. 10, at 171; Remiro Brotóns, *supra* n. 33, at 549; and Soroeta Liceras, *supra* n. 28 at 468, n. 24.

[69] Cassese is quite clear regarding this idea of the restoration or recovery of sovereignty: "…the right to external self-determination *[is]* based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that *their 'territorial integrity,'* all but destroyed by the colonialist or occupying Power, *should be fully restored…*" (emphasis added) (Cassese, *supra* n. 25, at 334). Thus, approaches such as Portugal's which Spain would later imitate from 1956 to 1961 rooted in assimilation through the provincialization of overseas territories, were condemned (Remiro Brotóns *et al.*, *supra* n. 10, at 171). This is the deeper meaning of the inclusion of the *separate and distinct status* clause in UNGA Res. 2625 (XXV) of 1970.

[70] Emerson, *supra* n. 28, at 465.

[71] R. Higgins, 'Self-Determination and Secession', in J. Dahlitz (ed.), *Secession in International Law: Conflict Avoidance — Regional Appraisal* (The Hague: Asser Press 2003) 21, 35.

[72] The expression "virtual sovereignty" is highlighted in the Spanish literature (e.g. Remiro Brotóns *et al.*, *supra* n. 10, at 169).

typical of decolonization. The territorial integrity of the colony was thus also protected. Territorial integrity is therefore a principle that does not apply between metropolitan or administering states and colonial peoples, or between the occupant state and occupied peoples. The right to external self-determination is not an exception to the territorial integrity principle.

As a corollary, a second reason that states are unlikely to have established such a right is that, in attributing this kind of *virtual* sovereignty to the colonial people, the international norm confers international status on the relations between the colonial people and the metropolitan state. This is a crucial point. In fact, this international relationship between the metropolis and the people of the colonial territory is reflected in other international rules, such as: the consideration of national liberation movements as legitimate representatives of this territory-people with an international right to self-determination; the legitimization of resistance, including through the use of force; or the classification as international armed conflicts of any decolonization wars that may arise, as reflected in Article 1.4 of the Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977. In other words, unlike the case of separation, where the population has no international right, but rather a domestic one, the exercise of the international right to external self-determination is not an internal affair. Consequently, neither is it a case of secession, as secessionist processes remain internal affairs until the secession is effectively achieved.

Finally, the international right to external self-determination is not a discretionary right granted to the colonial people by the metropolitan state, but an international right attributed by a jus cogens norm. This is a key difference with any domestic right to separation. It is one thing for international law to allow states to engage in the peaceful transfer of sovereignty (*devolution*) through the granting, in the domestic sphere, of a right to separation; it is quite another for international law to establish a duty for the metropolitan state to undertake this displacement of sovereignty, an international duty that, moreover, is not included in a dispositive norm, but a *jus cogens* one. As such, it includes obligations *erga omnes*, and not only for the metropolitan/occupying states, but also for third states. The peoples of a colonial territory have the right to restore their sovereignty and to "freely" decide whether to become an independent state or seek free association or integration with an independent state or "the emergence into any other political status" (Res. 2625 (XXV), point 4).[73] The procedure for this decision had to be "informed and democratic" (Res. 1541 (XV), Annex, principles VII and IX): through referendums, with the participation of all the people belonging to the territory, without any discrimination (against majorities or minorities).

Here, I consider it possible to distinguish between the devolution of sovereignty (or grant of independence) and the exercise of the international right to external self-determination. In this, I differ from Professor Crawford, who considered the exercise of the international right to external self-determination to be similar to a grant of

[73] See UNGA Res. 1541 (XV), principles VII and IX, and UNGA Res. 2625 (XXV), point 4 of the definition of the principle in the Annex.

independence or devolution, or a secession in the case of colonial wars.[74] I respect that position, but I believe that it is possible to be more precise. Although it is true that the metropolises and the peoples of the colonial territories signed agreements for the transfer of powers, that was simply the method chosen to give effective content to a peremptory (*jus cogens*) duty to restore the usurped sovereignty, not the discretionary exercise of a right of the metropolitan states (internal grant of independence or devolution). Professor Remiro Brotóns clearly distinguishes between the separation (peaceful) and secession (violent) of a part of the state territory, in addition to the cases of decolonization.[75] In fact, international law distinguished between cases of colonial independence (newly independent states) and the separation of parts of a state in the 1978 and 1983 Vienna Conventions on Succession of States.[76] Clearly, as Professor Kohen states,[77] we are talking about an "international regime", which means that the holders and the right are directly established by an international norm that also creates a correlative duty to another international subject.

Thus, the deeper meaning of the original state consensus behind the creation of such a revolutionary right to access sovereignty and independence was the idea of simultaneously preserving the territorial integrity of the metropolitan states and the virtual territorial sovereignty of colonial territories. That is why their consensus was not to attribute to colonial territories any right to secede or to separate from the metropolitan states. It follows that a more accurate way to understand the content of the right to external self-determination is to consider it an international right to restore usurped territorial sovereignty, applicable to both colonial and occupied territories. Behind this consensus was a specific general interest of the international community as a whole, a specific value: the abolition of colonialism by recognizing a right of colonial territorial peoples to have their territorial integrity restored. This value was coherent with the protection of another basic value: the equal sovereignty of states as the grounds for international peace, a value that includes their right to political independence and

[74] In his book *The Creation of States…*, Professor Crawford includes the cases of decolonization as a type of *devolution* or grant of independence. Furthermore, he considers that where "self-determination was opposed by the colonial power it was a case of secession" (Crawford, *supra* n. 28, at 330, 387, 388). Elsewhere, he also affirms that "the principle of self-determination which, in the Court's words, was 'made... applicable' to all non-self-governing territories, did not involve an automatic right of *unilateral secession* for the people of those territories. In the vast majority of cases, the progress to self-government or independence was *consensual*. It occurred with the agreement of the State responsible for the administration of the territory, in accordance with law and pursuant to arrangements between the government of that State and local leaders. These arrangements dealt with the modalities of transfer of power and, in many cases, made provision for succession with respect to treaties, property and debt. (…). But it did not advocate or support unilateral rights of secession for non-self-governing territories, except where self-determination was opposed by the colonial power. This was the case for example in the Portuguese African territories (Angola, Mozambique, Guinea-Bissau). In the vast majority of cases, self-government or independence was achieved peacefully and by agreement with the administering authority." (Crawford, *supra* n. 48, para. 6 (emphasis added); in the same regard, see Crawford, *supra* n. 12, at 130 132).

[75] Remiro Brotóns *et al.*, *supra* n. 10, at 73 74.

[76] Both conventions conceive the diversity of phenomena similarly. See in the 1978 Convention the distinction between "newly independent states" (Art. 16 *et seq.*, 1978 Convention) and "separation of parts of a State" (Art. 34 *et seq.*, 1978 Convention).

[77] Professor Kohen clearly talks about a specific "international regime" as a separate matter of decolonization (Kohen, *supra* n. 5, at 571-572).

territorial integrity, a value grounded in international law from its origins as *jus gentium* with the creation of the modern state system.

Thus, the states decided to legally protect the value of the human dignity of the people subjected to colonialism, condemning and eradicating this widespread practice that, in one way or another, had been permitted since the 15th century. In 1970, the value of the protection of the human dignity of militarily occupied peoples was also incorporated. But the concept was never broadened to include minorities, nor was it considered a right to separation in violation of the principle of territorial integrity. That is, the new and revolutionary international right to access sovereignty and independence, where applicable, was created in a way that protected the territorial integrity of both the former metropolises and the colonial territories, before and after the exercise of self-determination.

To talk about a right to restore sovereignty and territorial integrity or a right to access sovereignty and independence, as appropriate, is not the same as to talk about a right to secession or a right to separation from the state territory. There is a more precise way to delimit the phenomena and their regulation under international law, a way that state representatives bore in mind for years, even if international practitioners (diplomats, legal officers of states' foreign ministries, etc.) subsequently forgot it, or never learned it, until it faded into obscurity.

(D) PEOPLES' RIGHT TO INTERNAL SELF-DETERMINATION: FROM LANGUAGE TO CONCEPT

The state consensus on the content of the right to internal self-determination insofar as it relates to the protection of territorial integrity principle is another point of contention among scholars. There are other debates surrounding this norm, such as whether it includes a right to democracy, which I will not discuss here.[78] The right is worded more or less similarly in the international texts. For instance, paragraph 1 of the principle's formulation in the Annex to Resolution 2625 (XXV) provides:

> "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."[79]

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[78] With the fall of the Berlin Wall, the decline of communism, and the triumph of liberal democracy, much of the specialized literature revived the interpretation of the rule of internal self-determination as a right of the people to democracy. Thus, in 1992, Professor Franck spoke of the emerging right to democracy, which, in 1993, was also defended by Professor Crawford (T.M. Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992), at 46; J. Crawford, *Democracy in International Law: Inaugural Lecture Delivered 5 March 1993* (1994)). In 1995, Professor Cassese published his "reappraisal" of the principle, in which, in addition to the traditional interpretation, he developed this democratic vision of it, considering it *de lege ferenda* (Cassese, *supra* n. 25, at 101). See P. Andrés Saénz de Santa María, 'A right of all peoples: the internal dimension of self-determination and its relation with democracy', *SYbIL* (2018), at 165 166.

[79] A sentence repeated thusly: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." (UNGA Res. 1514 (XV), para. 2). Likewise, in Art. 1.1, common to the 1966 human rights covenants: "All

This same Annex rounds out the right with paragraphs seven and eight of the principle's formulation. The seventh paragraph states:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

The eighth establishes:

> "Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country."

My contention is that the state consensus is to attribute the right to internal self-determination to the whole population of the state ("all peoples"), and that the main purpose of that seventh paragraph is to limit secession, among other practices. Thus, the state consensus was not to create any right to remedial secession, but to preserve democratic participation – without any discrimination against the whole people of the territory – in the decision regarding that population's political, economic, and social future, including the future of its territory.

Let us take a moment to review the positions taken and language used by scholars, before turning to my thesis.

(1) Scholars' Language: The Three Language-related Interpretation Problems

The main debates have to do with the meaning of "all peoples" and the scope of the protection of territorial integrity afforded under the norm.[80] In this regard, three language-related problems can be identified.

The first has to do with who holds the right. Some positions hold that the expression "all peoples" encompasses any population, including minorities or fractions of a state population. This very broad understanding of "all peoples" is endorsed by authors who argue that this paragraph likewise applies to the external self-determination rule.[81]

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peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

80 Professor Crawford was categorical: this norm is *lex obscura* concerning the holders of the right and remedial secession (Crawford, *supra* n. 1, at 31).

81 Among others: J. Zourek, *La lutte d'un peuple en vue de faire prévaloir son droit à l'autodétermination constitue-t-elle au regard du droit international un conflit interne ou un conflit de caractère international* (Studi Udina, I, Milan, 1975); J. Zourek, 'Le respect des droits de l'homme et des libertés fondamentales constitue-t-il une affaire interne de l'Etat?', in *Estudios de Derecho internacional: Homenaje al profesor Miaja de la Muela, I* (1979) 603; J. Brossard, 'Le droit du peuple Québécois de disposer de lui-même au regard du Droit international', *CYIL* (1977), at 84 *et seq*.; J. Duursma, *Fragmentation and the International Relations of Micro-States: Self-determination and Statehood* (1996), at 80; J. Klabbers and R. Lefeber, 'Africa: Lost between Self-Determination and *Uti Possidetis*', in Brölmann *et al.* (eds), *Peoples and Minorities in International Law* (1993), at 37; D. Turp, 'Le droit de sécession en droit international public', 20 *CYIL* (1982) 24; and Y. Dinstein,

But it is also advocated by authors who consider that the paragraph only concerns the internal self-determination rule.[82] This was the perspective taken in the Supreme Court of Canada's opinion in *Reference re Secession of Quebec* [1998]:

> "[it] is clear that 'a people' may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to 'nation' and 'state'. The juxtaposition of these terms is indicative that the reference to 'people' does not necessarily mean the entirety of a state's population."[83]

This statement by the Supreme Court of Canada has been pointed to as proof of certainty. The Court adds that the notion of "peoples" in this rule of the principle cannot refer to the state population, because,

> "[t]o restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose."[84]

In other words, it is as if the Supreme Court of Canada were asking itself: why would territorial integrity need to be protected if the notion of "peoples" meant the population of the state? This leads it to assert that "people" is any part of a state's population.

The second and third problems have to do with the object of the right and its relationship with the protection of territorial integrity included in the seventh paragraph of UNGA Resolution 2625 (XXV). Specifically, the second problem is precisely the lack of a scholarly consensus on whether the principle of territorial integrity has an *ad intra* application for states, in addition to its application in interstate relations. Does the protection of national unity and territorial integrity prohibit or set limits on secessionist practices? Or, on the contrary, is general international law neutral with regard to secession? As we will see, some authors consider the norm to establish a prohibition on secession and, thus, the principle of territorial integrity to have an internal application. Others claim that general international law is neutral as to secession and, therefore, that the territorial integrity principle does not have an *ad intra* application.[85] This is a matter of particular international legal interest. In its Advisory Opinion on Kosovo (2010), the ICJ stated that international law was neutral regarding unilateral declarations of independence and that the principle of territorial integrity did not apply internally, but rather only in relations between states.[86] Since this opinion, scholarly claims regarding the neutrality of international law concerning secession have become commonplace.

'Self-Determination revisited', in M. Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformación: Liber Amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga, I.*, Fundación de Cultura Universitaria, Montevideo, 1994, especially at 248 251.

82 For example, Crawford, *supra* n. 1, at 27 32 and 38.

83 Supreme Court of Canada, *supra* n. 41, para. 124.

84 *Ibid.*

85 Among others, see Crawford, *supra* n. 28, at 389 390; Sterio, *Secession in…*, *supra* n. 5, at 40; González Campañá, *supra* n. 43.

86 ICJ, *supra* n. 6, para. 80

Finally, and this is the third problem, still other authors consider that the norm establishes a right to remedial secession as an exception to the territorial integrity principle, from which perspective, the territorial integrity principle also has an internal application, although the authors endeavour not to notice it in this case. This problem stems from the interpretation of the second sentence of the seventh paragraph of the principle's formulation in the Annex to UNGA Resolution 2625 (XXV): "conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". The paragraph could *literally* be read as saying that, if a government is not representative, the part of the population that is discriminated against has the right to separate. The literature supporting this reading relies on this literal interpretation of the paragraph's second and last sentence. These authors talk about a right to remedial secession, not a domestic right, but an international right of separation as a remedy for or correction of situations of discrimination against populations and/or human rights violations by the government of a state. Even if we go all the way back to Professor Buchheit — one of the first to make this case in 1978 — it is difficult to find a single argument in this sense based on any text or interpretation other than this literal one.[87]

These three language-related problems could be summarized as problems with the method of interpretation of general international law and General Assembly resolutions. On this last point, the methods used by scholars and practitioners have something in common: they mainly, and often exclusively, focus on the literal meaning of the words and wording used in the international texts. However, this literal interpretation is not the one that follows under the secondary rule of interpretation of international texts when they are declaratory of an international custom.

(2) Theory of International Law and the General Rule of Interpretation of International Written Texts: The Trifold Criterion

Let us recall here what we saw in Section II. UNGA resolutions can be interpreted applying *mutatis mutandis* the rules of interpretation contained in the VCLT of 1969.

[87] L.C. Buchheit, *Secession: The Legitimacy of Self-Determination* (1978), at 221 222. One widespread school of thought considers that *any discrimination* gives rise to this right. See: E. Ruiloba Santana, 'Una nueva categoría del panorama de la subjetividad internacional: el concepto de pueblo', in *Estudios de Derecho Internacional…*, *supra* n. 81, 303, especially at 328. Another stricter one holds that it arises *only in cases of gross and systematic violations of human rights*. Professor Crawford also seems to take a favourable view of the applicability of remedial secession, pointing to the Supreme Court of Canada's opinion on Quebec (Crawford, *supra* n. 28, at 119). See, also: Cassese, *supra* n. 25, at 119 120; and D. Muswiek, 'The Issue of a Right of Secession: Reconsidered', in Tomuschat, *supra* n. 4, at 25 26. Among Spanish scholars see F. Mariño Menéndez, 'Naciones Unidas y el Derecho de Autodeterminación', in F. Mariño Menéndez (ed.), *Balance y perspectivas de Naciones Unidas en el Cincuentenario de su creación* (Ed. Universidad Carlos III de Madrid-BOE, 1996), at 85-86 (although he does not refer to secession as a remedy); J.A. Carrillo Salcedo, 'Sobre el pretendido 'derecho a decidir' en el Derecho internacional contemporáneo', *El Cronista del Estado Social y Democrático de Derecho* (2013), at 22; Pons Rafols, *supra* n. 28, at 149-156; Soroeta Liceras, *supra* n. 28, at 470; and 'La Opinión consultiva de la Corte Internacional de Justicia sobre Kosovo de 22 de julio de 2010: una interpretación judicial sui generis para un caso que no lo es. Aplicabilidad de la cláusula de salvaguardia de la Resolución 2625 (XXV) o de la "secesión como remedio', *REEI* (2013), at 28.

The international general secondary rule of interpretation does not say: texts may only be interpreted literally. It says that texts' ordinary meaning shall be taken in context and in consideration of their object and purpose (the trifold criterion) in good faith. Additionally, if the result is absurd, then the meaning must be gleaned based on the will of the states as evidenced in the preparatory work for the text.

Let us further recall that all of this simply provides us with the *opinio juris cogentis,* which is reflected in the UNGA resolutions and common Article 1 of the two international human rights covenants. It is still necessary to consider state practice (*usus*) as well to determine the content of the norm established by the states' consensus.

The trifold criterion (text — context — object and purpose) requires not only an examination of the text's ordinary meaning, but also a logical-systematic and teleologic interpretation.[88] Logical-systematic because the context of the text includes not only the paragraph in which it appears, but all the other paragraphs of the resolution or legal instrument (preamble, annexes, etc.). Furthermore, as paragraphs 2 and 3 of Article 31 VCLT state, the context also includes any contemporary agreements and instruments between the parties, as well as subsequent agreements, practice, or other relevant rules of international law that might apply. Teleologic because the object and purpose of the main instrument — in the present case, a UNGA Resolution — must also be considered. And this whole process must be performed, let us recall, in good faith.

I maintain that the first, seventh and eighth paragraphs of the formulation of the self-determination principle in the Annex to UNGA Resolution 2625 (XXV) must be interpreted together. The legal history of UNGA resolutions and the human rights covenants sheds light on this point. The internal self-determination rule was included in the definition of the self-determination principle at the initiative of the former USSR in the context of the tensions of the Cold War. For the USSR, internal self-determination — understood as the emancipation of people under the *yoke of the capitalist bourgeoisie* — was the basis for any recognition of human rights. In 1955, it thus sponsored its inclusion in the draft text that would later give rise to the two human rights covenants adopted in 1966.[89] The US, the UK, and their allies unsuccessfully sought to remove the paragraph, ultimately managing only to modify the wording to include the Wilsonian criterion of representative democracy as a form of government (although, in the end, the word "democracy" itself was not included).[90] From its inclusion in drafts of the covenants, it made its way into UNGA Resolutions 1514 (XV) and, later, 2625 (XXV). In the deliberations of the Special Committee on the Principles that drafted Resolution 2625 (XXV), the USSR again pushed for recognition of the right to internal self-determination to be identified with the right to non-intervention, in response to the US and UK's efforts to have the rule be considered to promote the representative democratic system. Moreover, for a time, the end of this first paragraph expressly included territorial integrity, as the

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88 Remiro Brotóns *et al.*, *supra* n. 10, at 598.

89 A. Miaja de la Muela, *La emancipación de los pueblos coloniales y el derecho internacional* (Tecnos, Madrid, 1968), at 98 112 *et seq*.

90 The UK and the US lobbied to include the words "enjoying a democratic government" in the first paragraph of the draft Res. 2625 (UNGA, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation among States*, 1970, UN Doc. No. Supplement No 18 (A/8018), para. 65).

USSR was consistently concerned with protecting it.[91] These deliberations further show that the expression territorial integrity was moved elsewhere in order to devote the final two paragraphs of the definition of the principle to its protection.[92] Therefore, the proper approach is to systematically interpret the first, seventh, and eighth paragraphs of the definition of the principle in UNGA Resolution 2625 (XXV), all of which concern the rule of internal self-determination, as highlighted by most of the literature.[93]

Consequently, determination of the state consensus on the meaning of "all peoples" and on whether to establish an exception to the principle of territorial integrity (remedial secession) cannot depend on a literal interpretation of these paragraphs alone, but rather must be based on the trifold criterion of interpretation.

It should also be borne in mind that, as a customary norm, the rule of internal self-determination coincides, in part, with the principle of non-intervention in the affairs of states.[94] However, there are some slight differences in both the holder of the right (which, in the former case, is the people of the state and, in the latter, the state itself) and in its object (which, in the former case, includes the *ad intra* protection of territorial integrity, but in the latter, includes only *ad extra* protection).

I will now apply the general rule (trifold criterion) of interpretation to each of the aforementioned three problems.

(3) The Original State Consensus (i): The Whole People Belonging to the State

There are several main arguments for why, in the context of this rule and with regard to its object and purpose, the term "peoples" refers to the people of a state, i.e. all the people who make up a state's population.

First, the paragraph itself must be read in its entirety, as it consists of a compound sentence made up of two juxtaposed simple sentences: "*all peoples* have the right" and "*all states* have the duty to respect this right". The right to freely determine their political condition is held by the people under the jurisdiction of the state that has the duty

91 See the amendments of the non-aligned countries in 1969 in the debates: Joint proposal by Algeria, Cameroon, Ghana, India, Kenya, Madagascar, Nigeria, Syria, the United Arab Republic and Yugoslavia (A/AC.125/L.48): "1. All peoples have the inalienable right to self-determination and complete freedom, the exercise of their full sovereignty and the integrity of their national territory" (UNGA, *Report of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States*, Official Records, Twenty-fourth Session, Supplement No. 19 (A/7619), 1969, at 58, para. 143). See also the USSR's amendment in the proposal submitted in 1969 by Czechoslovakia, Poland, Romania, and the Union of Soviet Socialist Republics (A/AC.125/L.74): "1. All peoples, large and small, have equal rights, the inalienable right to self-determination and complete freedom, the exercise of their full sovereignty and the integrity of their national territory" (*ibid.*, at 58, para. 145).

92 The two final specific paragraphs are paragraphs 7 and 8 of the principle's definition in the Annex to UNGA Resolution 2625 (XXV). For background, see UNGA, *supra* n. 91, at 58, paras. 143 and 145, and at 62, para. 150.

93 See, among others: Cassese, *supra* n. 25, at 110, in note 14.

94 See, among others: J. Salmon, 'Internal aspects of the right to self-determination: towards a democratic legitimacy principle?', in Tomuschat, *supra* n. 4, at 258; Cassese, *supra* n. 25, at 55 and 103.

to respect it. This is supplemented by the duty of third states not to interfere in such internal affairs of the state.

Second, this compound sentence makes two references to the United Nations Charter (UNC), in which context the phrase "equal rights and self-determination of peoples" (Article 1.2 UNC) has been identified with *the people of the state;* the background of the drafting of the Charter supports this reading of the scope.[95] Likewise, in the preparatory work for the drafting of Article 1 of the two human rights covenants, it was debated whether to include the phrase "all nations" together with the phrase "all peoples", prompting complaints due to the ambiguity of the terms and "the danger of encouraging the separatist attitude of some minorities". It was ultimately decided to leave only the phrase referring to "peoples", understood to mean "the state's people".[96]

Third, this first paragraph must be interpreted in the context of all the paragraphs delimiting the content of the principle, especially the last two, that is, the seventh and eighth paragraphs of the principle's definition in the Annex of Resolution 2625 (XXV). In referring to the requirement of a representative government, the seventh paragraph specifies it in relation to "the whole people belonging to the territory". It very clearly refers *to the whole people of the state territory.*

Fourth, when both rules (internal and external) are taken into account, the object and purpose of the principle lead to the same conclusion: internal self-determination presupposes the prior exercise of external self-determination. That the states would have sought to attribute a right to internal self-determination to part of a state's population without a prior right to external self-determination is utterly illogical. It is the people of the existing state, who have already exercised their right to external self-determination once, who come to permanently hold the right to internal self-determination.

Fifth, interpreting the term as referring to the people of the sovereign state is more in keeping with the reality of the international legal system and the will of its primary subjects: sovereignty resides in the people of a state, not in fractionable parts thereof. It is highly implausible that states would have attributed an international right to a sub-state entity so imprecisely. Whenever they have sought to do so, they have done it clearly, as in this norm itself, when it makes reference to colonial people and peoples subject to alien subjugation, domination and exploitation or uses other such expressions. State practice supports this interpretation, which is closely linked to a monist conception of sovereignty. This was the interpretation supported by the Spanish Supreme Court in the case of the Catalan secession process.[97]

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95 As indicated by Special Rapporteur Aureliu Cristescu, responsible for the study "The Right to Self-determination", published in 1981 (*supra* n. 28, at 45 46, para. 260 266).

96 Miaja de la Muela, *supra* n. 89, at 102.

97 One of the arguments made by the Spanish Supreme Court in the "Procés" case (on the Catalan secessionist independence process) to deny the existence under international law of a right to decide on independence attributed to some infrastate groups was precisely the *monist conception* of sovereignty within the territorially decentralized state of Spain. (Supreme Court of Spain, Criminal Division, Judgment 459/2019, of 14 October 2019, on the *Procés*, at 200). See H. Torroja Mateu, 'The 'right to decide' in International Law as grounds for exclusion of unlawfulness', Agora on 'The Catalonia independence process before the Spanish Supreme Court', 24 *Spanish Yearbook of International Law* (2020). Many Spanish authors hold this same position, considering the whole people of a state to be the holder of the right to internal

(4) The Original State Consensus (ii): The Tacit Limitation on Secession

Let us now focus on the object of the right to internal self-determination and its relationship to the protection of territorial integrity. To my knowledge, the states were not at all neutral regarding secession when preparing the content of the principle of international self-determination of peoples in the 1960s and 1970s. This is the sense of paragraph seven of the formulation of the principle of self-determination in UNGA Resolution 2625 (XXV). The first sentence is clear enough and bears repeating here:

> "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States (...)."

The whole paragraph seven is usually referred to as the territorial integrity safeguard clause. With this paragraph, the states clearly established that the right to external self-determination is not for the purposes of any part of a state's population. Thus, this rule prevents any portion of such a people from claiming that right for itself and seeking to usurp part of the territorial sovereignty of the old or new state in clear violation of the right of that state's people as a whole to its territorial integrity. It further formally establishes that the exercise of external self-determination is a right that may be exercised only once, a *one-shot affair* so to speak. Secession, which necessarily entails the absence of the parent state's consent and is, as we have seen, a revolutionary act, is, in this regard, tacitly limited by international law in the framework of this principle of self-determination of peoples. This tacit limitation is included in the phrase "dismember or impair, totally or in part, the territorial integrity" of states. What is prohibited is the use or construction (i.e. the interpretation and application) of the self-determination principle to promote the dismemberment of the territory of a state. The safeguard clause thus reinforces the position of the parent state before the secessionist movement: the state is not obliged by any international norm to grant this independence to a territory under the essential principle of self-determination. On the contrary, in theory, the parent state could enforce the international community's duty of non-recognition of any new state to emerge through secession – because it would violate this rule of the right to internal self-determination of peoples – despite the effectiveness rule.

To claim that this is the state consensus is reasonable according to the general rule of interpretation, i.e. the trifold criterion of interpretation. The right to internal self-determination protects the right of the whole population of the state to decide about its sovereign territory. The previous discussions and reports by the Special Committee on Principles that negotiated the subsequent UNGA Resolution 2625 (XXV) shed light on this matter, as they explain why there are two paragraphs and not one to protect territorial integrity. Indeed, of the various circumstances the states were dealing with during the debates (secession, territorial segregation, occupation, or the assimilation of enclaves to colonies), some were problems related to internal jurisdiction and others had to do with interstate relations. Hence, in the end, two paragraphs were established

self-determination. See, e.g.: Carrillo Salcedo, *supra* n. 28, at 69; Remiro Brotóns, *supra* n. 10, at 170 172; Andres Sáenz de Santa María, *supra* n. 28, at 153 154.

in the formulation of the principle in UNGA Resolution 2625 (XXV): the seventh, on the *ad intra* applicability of the protection of territorial integrity, and the eighth, on its *ad extra* implications, i.e. those applicable to interstate relations. In 1969, during the debate over the implementation of the principle by a state with respect to peoples within its jurisdiction (seventh paragraph), concerns were raised with regard to secession in relation to: a) future claims by minorities concerning respect for human rights; b) the need to safeguard territorial integrity against possible secessions; and c) the inconsistency of internationally prohibiting acts falling within the domestic sphere of a state.[98] Among the issues affecting domestic jurisdiction, the discussions show that the states wished to prevent potential secessions, such as those attempted by the secessionist leader Moïse Tshombe in Katanga (Belgian Congo) in 1960 or by the Biafran secessionist movement in Nigeria (1967–70). Ultimately, the states were so fearful of secession that they even avoided calling it by its name. But, of course, they still sought to prevent it, through the expression "dismember or impair, totally or in part, the territorial integrity or political unity".[99]

State practice (*usus*) has followed a similar path. The UN defended the territorial integrity of the newly independent states (whose borders were guided by the general principle of international law of *uti possidetis*), in faithful application of the rule of the safeguard of territorial integrity. It positioned itself against the secessionist processes in Katanga and Biafra, as well as in Bangladesh, although the latter ultimately succeeded as a result of certain favourable circumstances, including the external support of India. Nevertheless, it is worth recalling that Bangladesh only became a member of the UN once Pakistan had recognized it, and the principle of effectiveness was one of the main reasons for this recognition. The states were, and remain, opposed to secession.[100]

Since the right to territorial integrity is an inherent part of the principle to equal sovereignty and of the right to internal self-determination of all the people of a state, general international law clearly establishes the primacy of internal self-determination over any type of secession. What other purpose could the inclusion of the seventh paragraph have other than to recognize an *ad intra* application of the territorial integrity principle? Professors Kohen and Corten, among others, also affirm this *ad intra* nature of the principle of the protection of territorial integrity in this norm.[101] Interestingly, among other arguments, the Spanish Supreme Court cited precisely this paragraph protecting territorial integrity included in UNGA Resolution 2625 in its judgment in the

[98] See UNGA, *Report of the Special Committee on Principles…*, 1970, UN Doc. A/8018, *supra* n. 90, at 46; UNGA, *Report of the Special Committee on Principles…*, 1969, UN Doc. A/7619, *supra* n. 91, at 69.

[99] See *ibid.*, at 68, para. 176, and at 69, paras. 177 and 179.

[100] Remiro Brotóns *et al.*, *supra* n. 10, at 188 191; Kohen, *supra* n. 28, at 593; Andrés Sáenz de Santa María, *supra* n. 28, at 139. J. Crawford affirmed that the "unwillingness of the international community to accept unilateral secession from an independent state can be illustrated by reference to the so-called "safeguard" clause to the Friendly Relations Declaration…" (Crawford, *supra* n. 48, para. 61). Elsewhere, however, the same author considers international law to be neutral as to secession: Crawford, *supra* n. 28, at 389 390.

[101] Kohen, *supra* n. 28, at 595. Professor Corten concludes his study on the issue asserting that "l'expression de 'neutralité juridique' nous semble en tout cas fondamentalement inappropriée, le droit international favorisant visiblement l'Etat dans ses relations avec les mouvements sécessionnistes qui le menacent" (O. Corten, 'Are there gaps in the international law of secession?', in Kohen (ed.), *supra* n. 5, at 254).

Catalan independence process case in order to deny the existence of a Catalan "right to decide" or right to self-determination.[102]

The Supreme Court of Canada considered that there is an "implicit" prohibition on secession under the essential principle of self-determination, although it reached this conclusion through a different line of reasoning, which I do not share.[103]

On this point, let us now recall the idea that general international law is neutral concerning secession, claimed by the ICJ in its Kosovo Opinion. While this is not the place for an in-depth study of the ICJ's reasoning, it should be stressed, first, that the Court decided, surprisingly, to limit the scope of its arguments by not examining the self-determination of peoples principle.[104] Logically, as a result, it was incapable of realizing that preventing secessions is exactly what the norm does. Had the ICJ examined the principle of self-determination of peoples, it would have had to address the scope of the seventh paragraph of the principle's formulation in UNGA Resolution 2625 (XXV). Instead, the Court focused its arguments on general international law and declarations of independence (secession), rejecting the *ad intra* application of the principle of territorial integrity, and focusing only on its interstate application.[105] Arguments based on general international law that do not consider the principle of self-determination of peoples? To me it makes no sense at all to argue over the status of general international law without including such an essential principle of the international legal system.[106] It was a difficult problem to solve because of the political implications behind it. As Professor Anne

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[102] Supreme Court of Spain, *supra* n. 97, at 204.

[103] "International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g. the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below" (Supreme Court of Canada, *supra* n. 41, para. 112).

[104] The ICJ decided not to address the question of whether the right to self-determination allows a part of a state's population to separate. See ICJ, *supra* n. 6, paras. 59 56 and 82 83.

[105] The Court responded that "the scope of the principle of territorial integrity is confined to the sphere of relations between States", based on the wording of Art. 2.4 UNC, UNGA Res. 2625, and the principle of prohibition of the threat or use of force, the ICJ's own interpretation in *Nicaragua v. United States of America* from 1986, and the Final Act of the Helsinki Conference from 1975 (ICJ, *supra* n. 6, para. 80).

[106] In addition, the ICJ decided to apply *tacitly* the Lotus criterion (*that which is not prohibited is allowed*) established by the Permanent Court of International Justice in 1927 to facts falling within the scope of a state's internal affairs and to limit Serbia's sovereignty, when it is usually applied to relations between states precisely to affirm that limitations on sovereignty cannot be presumed. The ICJ uses this argument to note that no prohibition against secessionism can be inferred in international law. But it fails to realize that, in that case, it falls under domestic jurisdiction and, thus, international law likewise cannot *refrain from prohibiting* it. In other words, if international law does not regulate a situation because it is an internal affair it makes no sense to state that it does not prohibit it. Furthermore, if we were to accept the ICJ's reasoning that international law *does not prohibit it*, then we must likewise accept that it *cannot allow it.* Judge Bruno Simma criticized the ICJ's reasoning thusly: "… its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called Lotus principle. By reverting to it, the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from 'tolerated' to 'permissible' to 'desirable'. Under these circumstances, even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court's answer in the slightest" (*Declaration of Judge Simma*, in UN Doc. No. A/64/881/Add.1, at para. 8).

Peters has said, "What could have realistically happened if the Court had qualified the declaration of independence as unlawful? (...) the Court did not have a real choice, if it did not want to place its own legal, moral and political authority at risk."[107] As it stands, however, the right to internal self-determination of the Serbian people as a whole was completely disregarded.

To summarize so far, scholars' language concerning the neutrality of international law with regard to secession is erasing the international legal concept of the right of the whole population of a state to freely decide about its territory. A right reinforced by the tacit limitation on secession, in the sense that the internal self-determination norm restricts the use of the external self-determination norm by secessionist groups seeking to fracture the territorial integrity of old or new states. Indeed, this is an obvious conclusion. As Professor Koskenniemi recalled, "In fact, it is difficult to think of a situation where a secessionist self-determination claim would not be disputed by the argument that it violates the self-determination rights — the territorial integrity — [of] the larger community."[108] What is not so obvious is that the language of general international law's neutrality concerning secession undermines the value of — by rendering inferior — the right of the whole population of the state to decide its political future together, including that of its territory. My argument is that this is not what the states intended when they adopted the norm. On the contrary, the state consensus was to limit secession to protect the right of the whole population of the state to its internal self-determination.

(5) The Original State Consensus (iii): No Right to Remedial Secession

The last language-related problem concerns the so-called right to remedial secession. If we accept that the first part of the seventh paragraph of the principle's formulation in the Annex to UNGA Resolution 2625 (XXV) is intended to protect the *ad intra* territorial integrity of new and old states, it is difficult to accept positions that maintain that, in contrast, the second part of this paragraph establishes an exception to territorial integrity, a right to remedial secession.

After affirming the safeguard of the territorial integrity of sovereign and independent states, this seventh paragraph adds,

> "conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".

Some authors call this paragraph a safeguard against discrimination or the *democracy clause*. Despite the *literal* reading, an examination of the *text* in its *context*, taking into account its *object and purpose*, indicates that the states were not seeking to create a right of separation as an exception to territorial integrity here. Given that the term "remedial secession" does not appear in the language of the text of the Resolution or in the debates

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[107] A. Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?', 24 *LJIL* (2011) 95, at 108.
[108] Koskenniemi, *supra* n. 3, at 260.

that preceded it, let us consider the reasoning of the delegations discussing it at the General Assembly. As we have seen, they were quite reluctant to give even colonies a right to separation: why would they then make exceptions to give it to any minority in virtually the last paragraph of the UNGA resolution? To think this was their intention flies in the face of reason. It is likewise nonsensical to think that the paragraph whose object and purpose are to prevent the principle from being interpreted in any way that might call the safeguard of territorial integrity into question might give rise to such a right of separation. A right to access to sovereignty and independence recognized by international law, of an *erga omnes* and, today, a *jus cogens* nature? If the states had wished to recognize such a right, they would have established it in the norm. They did not. Instead, they recognized it exclusively for colonial-territory and occupied peoples.

In other words, after establishing a revolutionary international system recognizing colonies' rights to sovereignty and independence (a right to restore their stolen territorial sovereignty), with all the attendant corollaries (legality of the use of force, international relationship between the parties, flexibility of the effectiveness principle, etc.), would the states really have made the misstep of internationally undertaking to transfer sovereignty to minorities or to parts of their populations provided they had been victims of discrimination or gross and systematic human rights violations? It is *manifestly absurd or unreasonable* to think they would have, and so we must look to the preparatory work, as a *supplementary method* of interpretation (Article 32 VCLT).

As Professor Cassese stated, an examination of the work of the Special Committee on Principles indicates that the convoluted wording of this paragraph (a compound sentence that allows for such a literal interpretation) was due to a last-minute decision by the chairman of the Drafting Committee (specifically, to switch the order of two simple sentences and subordinate the second to the first) that altered the meaning (*object and purpose*) that the states had intended to give it.[109] Besides, the previous debates in the UNGA show that this safeguard against discrimination was established to protect victims of apartheid as in the cases of South Rhodesia or the Bantustans in South Africa. Specifically, the aim of the paragraph was and is to prevent any recognition of the exercise of (external or internal) self-determination that did not adhere to the criterion of *democratic procedure* for the determination of that population's political future. The expression *democratic processes* was already expressly stressed in UNGA Resolution 1541 (XV) of 15 December 1960.[110] This democratic procedure is supplemented here, requiring the presence of a "representative government" and of "the whole people belonging to the territory without distinction as to race, creed or colour".[111] Thus, the states protected the autochthonous majorities that were victims of apartheid – or the victims of any other kind of discrimination today: they are recognized as having a right to participate in the democratic decision concerning the future of the territory they belong to.[112]

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109 This final wording has been confirmed by Professor Cassese (Cassese, *supra* n. 25, at 117 and 123).

110 UNGA 1541 (XV), 1960, principles VII and IX, both related to the process of external self-determination.

111 The paragraph was intended precisely to prevent the type of abuse of the rule of external self-determination that led to the independence of South Rhodesia under the leadership of a racist white minority or, as in South Africa, that enabled the consolidation of an *apartheid* regime through the creation of Bantustans. See, among others: Kohen, *supra* n. 28, at 595.

112 Today, recent universal resolutions and declarations include the prohibition of discrimination of *any kind* and not only as to *race, creed, or colour*. See: *Vienna Declaration on Human Rights* from 1993; and UNGA Res.

State practice (*usus*) also bears witness to this part of the norm's content. The discriminated majorities in Rhodesia and South Africa were not interpreted to have a direct right to independence. Rather it was argued that they had to be allowed to vote in the exercise of independence, respecting their right to be represented in the government of the people belonging to the territory, as stated in the paragraph. Likewise, one need only look at how the states reacted in the cases of the discriminated minorities in Katanga and Biafra. Although the former Belgian Congo and Nigeria were said not to be respecting the minorities who lived in those regions, those minorities were not granted any right to separation. A literal interpretation of this final paragraph as remedial secession was not applied. On the contrary, UN member states, and even *blue helmets*, fought to safeguard both states' territorial integrity. Meanwhile, Bangladesh was a pure case of secession, achieved with the aid of the Indian army.

The ICJ has wisely indicated the *de lege ferenda* status of this "remedial secession" doctrine (Kosovo Advisory Opinion), as has the Supreme Court of Canada (Secession of Québec decision).[113]

In short, it is difficult to deduce from the application of the secondary rule of determination of the content of customs that the state consensus behind the right to internal self-determination was to include a right for minorities, or any part of a state's population, to separate in cases of discrimination and/or gross and systematic human rights violations as an exception to the principle of territorial integrity. Scholars who claim that such a right to remedial secession exists are erasing, or ignoring, the international legal concept of the right of the whole population of the state to freely decide, without any discrimination, including against majorities, the future of their territory, a right that includes the limitation on secession.

(E) HAS THE ORIGINAL STATE CONSENSUS EVOLVED TO CHANGE THE CONTENT OF THE RIGHTS TO SELF-DETERMINATION?

Recalling the methodological premise of how customs change, let us now determine whether there is a new custom that modifies the content of the self-determination principle, as it has been identified thus far. Few scholars have followed a rigorous path to study the existence of such a new custom of change. One is Professor Tomuschat, whose work provides a clear analysis in this respect. He has convincingly shown that there has been no modification of the customary norm.[114] Professor Crawford has likewise asserted that facts do not automatically change the law and that the post-1989 cases of secession provided no precedent for extending an international legal "right to secede

50/6, *Declaration on the Occasion of the 50th Anniversary of the United Nations*, 9 November 1995.

[113] ICJ, *supra* n. 6, at 436, para. 82; Supreme Court of Canada, *supra* n. 41, paras. 134 135 and 138. In the same sense, see some authors, such as E. Orihuela Calatayud, 'Does a Right of Remedial Secession Exist under International Law?', 22 *Spanish Yearbook of International Law* (2018), at 268; or J.A Perea Unceta, 'La ausencia de fundamentación de la secesión en el derecho de libre determinación de los pueblos y en la violación grave de los derechos humanos', in C. Fernández de Casadevante Romaní (ed.), *Consecuencias jurídicas de la secesión de entidades territoriales. Una visión para España* (Thomson Reuters-Aranzadi, 2020) at 59.

[114] Tomuschat, *supra* n. 24, at 23 45.

to the constituent units of federal states".[115] I agree with them both: recent practice has not changed the essential principle of self-determination of peoples to include a right to separation for any part of a state's population — nor, I would add, a right to remedial secession. I have explained why in detail elsewhere. In this study I wish only to focus on what I believe is the most useful *method* to arrive at this conclusion, distinguishing between two main questions.

The first question is the following: Have the states changed the jus cogens custom by agreeing a new one conferring the international right to external self-determination on minorities or a fraction of a state's population? To answer this question, it is necessary to prove that there exist both the requisite *opinio juris cogentis* and relevant material practice in this regard. To this end, let us first recall that there is no international treaty or UNGA resolution on the self-determination of peoples reflecting such a new trend, including the UNGA resolutions on the rights of minorities or indigenous peoples.[116] Consequently, there is no *opinio juris cogentis of consensus* to facilitate the demonstration of the existence of a new custom. To find relevant precedents, we must thus turn to individual instances of practice and see whether they are accompanied by an *opinio juris cogentis* in this sense. Should such relevant practice exist, it would be found in the cases of the creation of new states through secession, rather than those of devolution or separation of territories. Why? Because in cases of separation of territories there is an internal right to separate and/or it is the will of the parent state to transfer sovereignty. When there is no such domestic right or will on the part of the central government, we would have to prove that those minorities who seceded against the will of the parent state did so in the exercise of an international right. As Professor Tomuschat notes, compared to the number of cases in which states' territorial integrity has been maintained and defended, the cases of secession are strikingly few.[117] However, this point should not be overemphasized, as the relevant practice would include not only the practice of the parent states, but also the response of the rest of the states and international organizations to the secession phenomenon.

The attitude of the secessionist groups themselves cannot be taken as relevant material practice, as for all intents and purposes they are domestic actors for international law. Their attitudes do not constitute state practice for the purpose of assessing the material dimension of an international custom.[118] A separate issue is whether such domestic practice indirectly induces certain behaviours on the part of states and international organizations. It is this response or attitude toward secessions — of the parent states, third states, and international organizations — that must be studied. Furthermore, it is the *start* of the secession process that must be observed, for it is then, at the start of the secessionist revolution, that the rejection by the parent state and, in general, the

115 Crawford, *supra* n. 48, para. 46 *et seq*.

116 No UNGA resolution on the rights of minorities indicates that the states have conferred on them a right to sovereignty and independence. Nor is such a provision found in the resolutions on the rights and non-discrimination against indigenous peoples. For example, Arts. 3 and 4 of the UN Declaration on the Rights of Indigenous Peoples (UNGA Res. 61/295, of 13 September 2007) clearly state that the right to self-determination of these peoples is a right to autonomy or self-government and not a right to sovereignty and independence.

117 Tomuschat, *supra* n. 24, at 27.

118 See Article 4.3 of the ILC *Draft conclusions on identification of customary international law, supra* n. 13.

silence of third states — who will view it for what it is, i.e. an internal affair of that state — will occur. The *end* of the process scarcely matters, since, if the secession results in the creation of a new state, it will be due to a different international norm, namely, the effectiveness principle, which certainly does not retroactively endow the population in question with an original right to independence.

What would the attitude of rejection by the parent state and third states have to look like at that initial moment to be considered a relevant material precedent in the formation of an international custom modifying the previous one? What would the secessionist movements or the scholarly literature seeking to legitimize their violence against the will of the parent state, based on the essential international law principle of self-determination of peoples, need to prove? In my opinion, for it to constitute a relevant precedent, the parent state would have to accept that a part of the state population (e.g. a minority) could be entitled, under general international law rules, to separate from the state insofar as it fell within the concept of a people with a right to external self-determination. At the same time, however, it would have to reject that the factual situation provided for under the norm existed in the specific case, as well as the existence of an exception or other justification.[119] While this seems highly unlikely, it is certainly possible as a working hypothesis.

Let us examine, for example, Serbia's position regarding the declarations of independence by Slovenia, Croatia, and Bosnia-Herzegovina in the process of disintegration of the Socialist Federal Republic of Yugoslavia begun in 1991. Its course of action was not to accept that the international principle of self-determination of peoples was applicable to those parts of the Yugoslav state population yet at the same time reject the application of the principle in those specific cases on the grounds that the factual situation covered by the norm did not exist. On the contrary, Serbia did not even heed its own domestic constitutional law, which recognized that the Federation was based on a right of self-determination (Yugoslav Constitution of 1974). Indeed, if we accept as authoritative the positions of the International Conference on the Former Yugoslavia and its Badinter Commission — which did not authorize the external self-determination of the minorities of Serbian origin from the subsequent Republika Srpska, a federated republic of the Republic of Bosnia and Herzegovina — this case is even less indicative of an *opinio juris* in favour of the right of external self-determination of national minorities. Nor can the attitude of third states be considered a relevant material element. As Professor Andrés Sáenz de Santa María has noted, although the Badinter Commission referred to the requests submitted to it by the states of the former Yugoslavia as an exercise of self-determination, they were not cases of the exercise of this internationally

[119] I follow the ICJ's argument concerning the analysis of state practice to determine the existence of a customary rule in the *Case concerning military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States of America, Merits, 27 June 1986), at para. 186: " (...) In order to deduce the existence of customary rules, the Court deems it sufficient (.../...) that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

recognized right.[120] Likewise, as Professor Pellet affirmed, the then "twelve" did not intervene to enforce a right to self-determination of the former Yugoslav republics, but rather to maintain peace and international security.[121]

In other cases, such as those of Eritrea, South Sudan or even Crimea (2014), the parent states similarly have not acted in such a way as to induce an *opinio juris* recognizing an exception to the international rule of external self-determination, extending it to include any fraction of a state's population. In short, it is virtually impossible to prove a new *jus cogens* custom of change. On the contrary, parent states' attitude of rejection of the secessionist claims should be considered proof corroborating the existing norm.

The second question is: Have the states changed the international custom by agreeing a new one conferring a right to remedial secession as an exception to the territorial integrity protected by the right of internal self-determination? Unless the states were to draw up a treaty on the matter — which is by no accounts on the international agenda — it would have to be a new customary norm that modified the current status of the principle of territorial integrity as it is established in the context of the right to internal self-determination. Given that we are asking about the right of part of a state's population to access sovereignty and independence, there does not seem to be any other legal framework in which such a norm could be formulated. It would be a matter of proving that an exception to the principle of territorial integrity has been established conferring a right to sovereignty and independence on fractions of a state's population who are victims of discrimination or gross and systematic human rights violations. As there has been no UNGA resolution categorically affirming this in recent years other than Resolution 2625 (XXV), an inductive analysis cannot be based on an *opinio juris* of *consensus*; therefore, as in the previous case, we must carefully examine the individual instances of practice.

To this end, for the attitude of rejection of the secessionist process by the parent state to constitute a practice that could give rise to a custom of change in this regard, the parent state would have to accept that, in accordance with the norms of general international law, a minority or part of the population that had been discriminated against or been the victim of gross and systematic human rights violations would hold the right to separate from the state as an exception to the principle of territorial integrity contained in the internal self-determination norm, but reject that such a situation existed in the specific case. Again, this is unlikely to happen. A state that has such a bad conscious that it discriminates against its own population and/or commits gross violations of its people's

[120] According to this professor, the Member States of the then European Communities were more interested in politically managing a factual reality that was assumed to be a "descomposición estatal imparable" than in applying a legal principle of self-determination, which "ocupaba sin duda un lugar secundario que podía incluso no haber existido" (Andrés Saénz de Santa Maria, *supra* n. 28, at 180).

[121] "… les Douce comme le Conseil de Sécurité sont intervenus non pas pour faire respecter le droit des peuples à disposer d'eux-mêmes dans une variante nouvelle, mais pour préserver la paix et la sécurité internationales menacées par l'usage de la force au sein de la Yougoslavie. A aucun moment en tout cas, ni les Douze, ni les Nations Unies n'ont prétendu défendre un droit quelconque à l'indépendance des Républiques ou des peuples yougoslaves" (A. Pellet, 'Quel avenir pour le droit des peuples à disposer d'eux-mêmes ?', in M. Rama-Montaldo (ed.), *El derecho internacional en un mundo en transformación: Liber Amicorum en homenaje al profesor Eduardo Jiménez de Aréchaga*, I (Fundación de Cultura Universitaria, Montevideo, 1994), at 263).

fundamental rights is hardly going to simultaneously turn around and confer a right to sovereignty on that same part of its population. The two logics are diametrically opposed. The scholarly literature refers to the case of Bangladesh, which gained independence in 1971, as the first example of remedial secession. More recently, it refers to the case of Kosovo, which declared its independence in 2008. Yet an analysis of the two cases shows that neither includes relevant precedents constituting a new custom.[122]

Pakistan's attitude was not to reject the application of a right of separation recognized by the international norm at that time, on the grounds that the factual situation required did not exist in the case of the population of East Pakistan. On the contrary, the Pakistani army fought to the bitter end to hold on to the territory in which the Bengali population was settled. The General Assembly did not mention the right to self-determination in its resolution on the subject, nor did the Security Council take action until Pakistan had surrendered and withdrawn its state forces from the region.[123]

Similarly, Serbia's rejection of the Kosovo Assembly's declaration of independence in February 2008 — backed by the UN envoy Martti Ahtisaari — did not consist of recognizing an exception to the principle of territorial integrity that could be triggered in cases of gross and systematic human rights violations or discrimination but denying its applicability to Kosovo. Not at all. The members of the Kosovo Assembly may have defended their right to self-determination and their right to remedial secession,[124] but Serbia opposed it and expressed that opposition to the UN. The great Western powers' position in favour of the recognition of the new Republic of Kosovo has been the subject of various assessments, and an in-depth analysis thereof would exceed the scope of this paper.[125] Nevertheless, one can hardly infer from these responses a precedent for a new custom with an opposite content in order to change the existing *jus cogens* norm of internal self-determination.

Consequently, facts have not changed the norm. Secessions may be accepted and situations may be recognized by the majority of the states in one case and not in others, but the reason lies in the power of the states and in international relations. It does not

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[122] *Ibid.*

[123] India soon recognized the new state, followed by other states in 1972. Pakistan would not do so until 1974, after which Bangladesh joined the UN that same year. These and other details can be found in Crawford, *supra* n. 28, at 393, 140, 141 142.

[124] ICJ, *Written Contribution of the authors of the unilateral declaration of independence, Republika Kosova — Ministry of Foreign Affairs* 17 April 2009. Full text available at: https://www.icj-cij.org/files/case-related/141/15678.pdf.

[125] When independence was declared in 2008, the holder of the territory's sovereignty was Serbia, which had ceded the administration (not the sovereignty) to the international administration (UNMIK) established under UN Security Council Resolution 1244 (1994), which only exercised interim administration, to pacify the territory of Kosovo, with the aid of an EU mission. It cannot be accepted that, for that fourteen-year period, the population was the victim of a situation of gross human rights violations, as it would mean accusing UNMIK itself, and the EU, of having committed those violations. A few days after the declaration of independence, the Republic of Kosovo was recognized by the United States, France, the United Kingdom, Germany, and others, despite failing to meet the conditions of effectiveness, as the territory remained under the effective control of UNMIK. Critical voices claim that Kosovo was a planned secession fostered by the main Western powers (A. Mangas Martín, 'Kosovo y Unión Europea: una secesión planificada', *REDI* (2011) at 101 124).

lie in international law, let alone in a modified new legal principle of self-determination of peoples.

(F) CONCLUSIONS

There is a gap between a scholarly language that is widely used today and the original state consensus regarding the international principle of self-determination of peoples as it relates to the protection of territorial integrity and secession. I contend that this gap is not only a matter of different opinions but a result of the blurring or erasing of certain specific and essential international legal concepts in the discipline of public international law. If there is one debate in the literature that I would like to highlight, it is the debate over classic legal concepts in international law and whether they have evolved as a result of state consensus or scholars' arguments and language.

Research has shown that the equating of different terms (secession, separation, self-determination) arose as a result of a shift from the international legal system to national ones, in which the legal concepts of each type of system came to be regarded as the same. In this sense, authors sometimes use certain terminology neutrally (descriptively), disregarding the concrete legal content behind it. Is this simply a matter of technicalities, of the subtleties of language? I do not think so. Legal language imposes order and clarifies. It creates. In relation to the essential principle of self-determination of peoples, with its highly political and sensitive content, a return to the international method of interpretation of international norms is the only way to correctly identify to whom this principle truly applies and the rights and duties it entails. It is the only way to do so without being led astray by political positions, misused terminology, or terms from other disciplines (e.g. constitutional law) that might obscure the international reality of the phenomena of displacements of sovereignty in question. Because states have no memory, because they are no more than a fiction of international legal persons, the responsibility to understand their commitments lies with their leaders and the legal advisors to their foreign offices or state departments. When faced with the need to interpret general international law (customs and general principles of law), they rely on the scholarly literature, the ILC Draft Articles or Conclusions, relevant judgments handed down by international courts, ICJ case law, etc. Likewise, both national and international courts base their cases on the main scholarly literature, *amicus curiae* submitted by professors, state lawyers, etc. The significance of scholars' language is thus undeniable. In this regard, four clear conclusions concerning the international legal concepts behind the principle of the self-determination of peoples follow from this study.

First, despite the language of a majority of scholars, international practitioners, and the Supreme Court of Canada in its Secession of Quebec decision, among others, I maintain that the original state consensus behind the attribution of a right to external self-determination to colonial peoples was not to establish any right to unilateral secession or to separate from a territory as an exception to the protection of territorial integrity. The international legal concept at risk of being forgotten is the right to restore sovereignty and territorial integrity granted to the classic colonial peoples. The idea behind the creation of the right to external self-determination was certainly not the Wilsonian principle of nationalities. This is true not only because the holders of the right

were established by a political (i.e. artificial) delimitation and not equated to nations, but also because the meaning of the right was to take back a usurped virtual sovereignty. Therefore, there was nothing to separate; rather, this sovereignty was restored to its holders. Although it might be considered a legal fiction, the international norm is based on the already separate and legally distinct status of the colonial territory's people. To assert that it established a right to secession from the administering territories is to accept both a limitation on the principle of territorial integrity for the metropolitan states and the humiliation of dependence and a lack of virtual sovereignty for the recently independent states, which neither group wanted. The states never agreed to renounce their territorial integrity, nor to establish any exception to this essential principle of public international law. In this sense, it is urgent to revive this concept of a right to restore sovereignty and territorial integrity of colonies or occupied territories, a right of peoples that is always linked to a democratic procedure to protect the will of the whole people belonging to the territory, at least in the case of colonial peoples. (The norm does not address this point in the case of occupied peoples.)

Second, despite those positions that hold that general international law is neutral as to secession, such as that taken by the ICJ in its Kosovo Opinion, I maintain that the existing international norm of internal self-determination of peoples safeguards the right of the entire population of a state to freely determine, among other things, its territory's future without discrimination. In my opinion, notwithstanding some authors' proposals, the holders of this right under this norm are the whole people of a state (the state consensus behind "all peoples"), while the object of the right includes the protection of territorial integrity with an *ad intra* application. The safeguard clause establishes the tacit prohibition on secession: specifically, it prohibits the use (i.e. interpretation) of the external self-determination norm to promote the dismemberment of the territory of a state. Thus, general international law – which clearly includes the essential self-determination principle – both regulates and tacitly prohibits secession: it is not neutral toward it. The international legal concept at risk of being erased by this language concerning its alleged neutrality in this regard is the right of the whole people of any state to freely determine, without discrimination (i.e. through democratic processes), the future of their territory, including the tacit prohibition on secession.

Third, I further hold that the state consensus behind the content of the right to internal self-determination was never to establish a right to remedial secession in cases of discrimination or gross human rights violations as an exception to territorial integrity, despite the literal reading of the ambiguous wording of UNGA Resolution 2625 (XXV) followed by those authors who claim that such a right exists. Literal interpretation is not a method of interpretation of international legal texts in public international law; the general rule of interpretation includes a trifold criterion (text – context – object and purpose). Besides, when the norm is part of a custom, as in the present case, one must consider not only the *opinio juris* reflected through the text but also the relevant practice (*usus*) to prove its existence and content. To this end, it seems highly unlikely that the state consensus was to create a right to remedial secession. Given the great pains that the states took to avoid establishing any right of separation in the norm of external self-determination, why, in the norm intended to protect their territorial integrity, would they suddenly do an about-face and seek to establish exactly that for minorities in certain cases? It makes no sense. Remedial secession is a doctrine with no legal basis.

This latter norm and the content of the right to internal self-determination is not *jus cogens*; a state's population can decide to change its content by establishing an internal right to separation in that state's constitutional law or through politics. But this is due to the very concept of equal sovereignty and independence of states and to the right — not duty — of all peoples to decide the future of their state's territorial integrity. The revolutionary exercise of a process to secede when the majority of the population of the parent state does not accept it simultaneously entails a violation of the right of the population of that state as a whole to its territorial integrity, including the people in the secessionist territory in question who do not want to secede. Additionally, the international right to internal self-determination excludes any right to separation, even at the moral level: there is no conflict of values to weigh here between the right of a minority and the right of the population of the state as a whole, because the legal norm protects the right of a state's whole population to its internal self-determination. One can argue whether or not this is just, but it is what the states, i.e. the creators of international law, have established. There is a widespread bias against majorities and in favour of minorities on this issue: many consider that only a secessionist reading of the internal self-determination norm is just. But the view that secessionism may also be understood as establishing the supremacy of some human beings over others should not be dismissed: calls for secession may also contain such supremacist nationalism, which could likewise be found in the roots of the Second World War.

The fourth main conclusion is that the rights and duties included in the principle have not evolved in the sense of coming to include a right to sovereignty and independence from the territory for any fraction of a state's population, or even a right to remedial secession in exceptional circumstances of discrimination or gross human rights violations. It is impossible to prove the existence of relevant precedents of a new custom. The self-determination of peoples principle has not been modified by a new custom of change.

To sum up, the following table shows the current international legal concepts and principles that describe and regulate the means of accessing independence:

Access to independence and territorial integrity under current general international law

<table>
<tr><th>Process of independence</th><th colspan="2">Description and international legal concepts</th><th>General international law (main principles applied)</th></tr>
<tr><td rowspan="3">As a domestic affair</td><td colspan="2">At the origin, there is the single territory of the parent state</td><td rowspan="3">Principle of equal sovereignty (political independence and territorial integrity)

Principle of non-intervention in states' affairs

Right to internal-self-determination of the whole population of a state (which tacitly limits secessionist processes)</td></tr>
<tr><td>When a domestic right to independence is accorded by politics or the Constitution/law (regardless of what it is called in the norm)</td><td>Separation (devolution or discretionary grant of independence)</td></tr>
<tr><td>When an independence process is undertaken in violation of the domestic law and/or the central government</td><td>Secession (forcible seizure of independence)</td></tr>
<tr><td rowspan="2">As an international affair</td><td colspan="2">At the origin, there are two legally different territories
(the administering/occupant state's territory and the colonial/occupied territory)</td><td rowspan="2">Right to external self-determination (jus cogens)

Principle of equal sovereignty (political independence and territorial integrity)</td></tr>
<tr><td>When there is an international right to external self-determination held by:
-colonial peoples
-occupied peoples</td><td>International regime of external self-determination: a restoration of sovereignty and territorial integrity</td></tr>
</table>

Source: The author.

Understanding international legal concepts helps us understand the international reality, the interplay between international norms and politics. I may be wrong, and my language in this article about the state consensus on the self-determination of peoples and territorial integrity may be regarded as not reflective of the reality of international law. Maybe I am also in the gap. But this is the most rigorous way that I have found to contribute to this intense and passionate international dialogue on the topic among scholars of public international law.

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The Scope of the Extraterritorial Obligation to Respect in the Inter-American Human Rights System: An Approach Fully Consistent with the Demands of the Recognition of the Dignity of All Human Beings

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Abstract: The two primary supervisory bodies within the Inter-American Human Rights System, namely the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights, have demonstrated greater consistency than their European counterparts in identifying the basis for extraterritorial jurisdiction and consequently the responsibility of states for violations of their inherent duty to uphold human rights and freedoms. The Inter-American approach to extraterritorial jurisdiction aligns significantly with the 'functional-impact model of jurisdiction.' This model of jurisdiction relies on establishing a direct causal connection between a state's actions beyond its borders and the resulting harm to human rights. This functional, non-spatial approach to extraterritorial jurisdiction is evident in the extensive practice of the Inter-American Human Rights Commission. We argue that the Inter-American Commission's approach to the extraterritorial application of human rights, specifically with regards to the extraterritorial jurisdiction of human rights law a stance also adopted by the Inter-American Court of Human Rights in its jurisprudence is more in line with the fundamental requirements for the unconditional protection of human dignity. Consequently, it can be concluded that the aforementioned extraterritorial approach can serve as a source of inspiration for other human rights courts and monitoring bodies.

Keywords: extraterritorial obligations international human rights law obligation to respect human rights Inter-American system of human rights European system of human rights transboundary harm jurisdiction human dignity universality extraterritorial obligations international human rights law obligation to respect human rights Inter-American system of human rights European system of human rights transboundary harm jurisdiction human dignity universality

INTRODUCTION

States potentially can, and regretfully sometimes do, engage in conduct that negatively impacts on the enjoyment and exercise of human rights beyond their borders.[1] From

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[1] M Gibney, 'The historical development of extraterritorial obligations', in M. Gibney *et al.* (eds), *The Routledge handbook on extraterritorial human rights obligations* (Routledge, London, 2022), Chapter 1; D. Kinley and J. Tadaki, 'From talk to walk: The emergence of human rights responsibilities for corporations at international law' 44 *Virginia Journal of International Law* (2004) 931-1023, at 931 onwards; G. Grisel, *Application extraterritoriale du droit international des droits de l'homme* (Bruylant, Paris, 2010), at 3 and onwards.

the perspective of striving to bring about the non-repetition and reparations of those extraterritorial abuses against human dignity, such a causation of harm ought to engage the responsibility of the State to which the violation is attributable.[1]

In our opinion, this is something that follows from the universality that it is claimed human rights have. Why so? Because it demands the protection of the dignity of *all* human beings. We argue that this must be interpreted as requiring such a protection regardless of the origin of the threat, geographical or otherwise.[2] Hence, an interpretative effort should be made to permit protection from the *authors* of extraterritorial abuses under *lex lata*. And when technicalities get in the way of making remedies against them reasonably accessible, *lex ferenda* considerations would call for a revision of the law.

It is thus important to critically examine how supervisory bodies understand extraterritorial human rights obligations of States and their scope. In this article, we will study what the Inter-American Commission and Court of Human Rights have said on the issue. We advance that their approach is a very protective one that heeds the universality demands we pointed to, embracing what can be called as an impact-based approach to extraterritoriality along with other traditional criteria such as personal— and territorial-control based ones, leaving no gaps that could be exploited by abusive States subject to their jurisdiction to elude control and responsibilities, unlike what may happen under other systems.

In this regard, it is worth mentioning that some States and international courts and tribunals have put forth considerations according to which the obligation to respect (i.e., to not adversely impact the enjoyment of) human rights and freedoms has a restricted geographical applicability. In other words, they hold that the duty of States to refrain from violating human rights can exceptionally have an extraterritorial scope, which means in turn that States would supposedly not always be responsible for the negative impacts on human rights they cause when acting beyond or generating effects beyond their borders.

While this approach admits that extraterritorial obligations and the correlated responsibilities of States can sometimes exist extraterritorially, the fact that they implicitly hold that sometimes they do not present a problem, insofar as there would be cases in which individuals would be victimized but there would be an impossibility of bringing about claims against the State that *perpetrated* the violations. From an extra-legal perspective, for victims who find themselves in cases outside the conditions of extraterritoriality, the ensuing situations reeks of unfairness. One need to look at the

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1 Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *Leiden Journal of International Law* (2012) 857-884, at 857 onwards [doi: 10.1017/S0922156512000489].

2 Tellingly, the Vienna Declaration and Programme of Action not only mentions the goal of securing "full and universal enjoyment" of human rights, but also states that there is a commitment towards "universal respect for, and observance and protection of, all human rights and fundamental freedoms for all". We propose that the link between universality and respect can be understood in terms of respect being owed in the different situations in which the enjoyment of rights and freedoms may be imperiled. On universality as requiring protection from all threats, also see N. Carrillo-Santarelli, 'Enhanced Multi-Level Protection of Human Dignity in a Globalized Context through Humanitarian Global Legal Goods' , 13 German Law Journal (2012) 829-873, at 850-851 [doi: 10.1017/S2071832200020782]; Pasquale de Sena,'Dignità umana in senso oggettivo e diritto internazionale', 11 *Diritti umani e diritto* internazionale (2017) 573-586, at 573 onwards [doi: 10.12829/88602].

cases of individuals victimized by drone strikes who have been unable to bring any effective claims or obtain full (and sometimes any) reparations. Certainly, the idea of responsibility comes from the *respondere* need to respond for one's actions,[3] something that is missing at least under some circumstances in the restrictive extraterritorial obligations' model.

Both interpretive and political justifications –which we disagree with, considering what is at stake— may rest behind the reluctance of some individuals and organizations to assert that States always have international legal responsibility actions of their agents taking place or having effects beyond their territories which are inimical to human rights. Politically, some could consider that it would create excessive burdens and logistic difficulties under those Courts tasked with examining their obligations for actions taking place far away, turning them into "world" courts where anyone could apply; or that some political "leeway" ought to be given for foreign affairs.

But such a position reeks, in our opinion, of a nationalistic –or, shall we say, jingoistic— version of utilitarianism that, in the name of giving priority to the nationals, ends up denying the value, agency, and rights of foreigners under some circumstances. And that is unacceptable if one is true to the underlying values of human rights, such as the equal dignity of all human beings. And as to pragmatic considerations, should Courts not be the resort of last hope of those who find no domestic remedies and protection, as the late judge Cançado once said?[4] Moreover, evidence of domestic abuses can sometimes be likewise hard to find, and such considerations are sometimes more cynical than what befits a Court of law, which is *entrusted* with the control of the limits of executive and other action. And human rights speak to us about the inherent worth of every single individual, regardless of identity accidents including those of nationality. We therefore consider that arguments as the following on are *not* in tune with the philosophies inspiring them: "human rights treaties were intended for the protection of citizens from their own Government in times of peace".[5]

Conversely, the underlying rationale of protecting and respecting human dignity demand striving to find ways to close protection gaps in relation to extraterritorial State abuses and pointing them out calling for reforms if and whenever technicalities do not permit to fill them. Seen in light from these parameters, given how it does not suffer from the gaps that could be present in other systems, the Inter-American approach to this issue is one that is fully consistent with what should be expected and offered to human beings, insofar as it does not suffer from the voids that others have. In this sense, as has been perfectly illustrated by the Inter-American Commission on Human Rights, extraterritorial *acts* of the agents of a third State demand the presence of a *correlated* extraterritorial duty to *respect* human rights,[6] as demanded by the logic of human rights

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3 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, Cambridge, 2006), at 163.

4 Concurring Opinion of Judge A.A. Cançado Trindade to: Inter-American Court of Human Rights, *Case of Castillo-Petruzzi* et-al v. *Peru*, Judgment (Preliminary Objections), 4 September 1998, para. 35.

5 Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, International Court of Justice (ICJ), 9 July 2004.

6 Inter-American Commission on Human Rights, *Khaled El-Masri v. United States*, Report No. 21/16, 15 April 2016, para. 24.

law since, otherwise, according to it, "there would be a legal loophole regarding the protection of the human rights of persons that the American Convention is striving to protect, which would be contrary to the *purpose and end* of this instrument"[7] (emphasis added).

In our opinion, this is a powerful logic that technical constructions sadly sometimes disregard. We consider that extraterritoriality considerations should flow from the identification that human rights are founded upon a non-conditional human dignity and that States are forbidden to disrespect them: if such disrespect were allowed abroad, or impunity were to be upheld by international human rights law, the general principle that whoever harms must respond would be thwarted, and the rationale of human rights law would be trampled upon.

Therefore, dissemination of its position can be beneficial for other systems and human rights defenders, who can benefit from the lessons it offers in a comparative approach and provide inspiration for reforms, when needed. Regretfully, its study has been somewhat neglected, with much more studies having been devoted to the convoluted (and perhaps for that very reason) approach of the European Court of Human Rights. This text will explain why we argue this, and we hope that the reasons we provide, citing Inter-American case law, milestones and praxis, can likewise serve the dissemination function we pointed out above. This article thus aims to be both critical and descriptive, engaging mostly with the legal aspects of the debate and practice.

(A) JURISDICTION (AND THE ADOPTION OF A MODEL) AS THE CORNERSTONE OF THE APPLICABILITY OF EXTRATERRITORIAL OBLIGATIONS TO RESPECT HUMAN RIGHTS

From a technical legal perspective, much of the discussion logically rests on the understanding of jurisdiction. This is the result of the fact that the general human rights obligation to respect often pivots on their being applicable and required concerning what happens under a given State's jurisdiction. In this sense, for instance, article 1.1 of the American Convention on Human Rights indicates that States Parties to it commit "to respect the rights and freedoms recognized herein [...] to all persons *subject to their jurisdiction* [...] without any discrimination" (emphasis added). The European similarly states that Parties to it "shall secure to everyone *within their jurisdiction* the rights and freedoms" enshrined under it (emphasis added). The International Covenant on Civil and Political Rights, in turn, sets forth that a States Party to that treaty must respect the rights it recognizes "to all individuals *within its territory and subject to its jurisdiction*" (emphasis added).

The three aforementioned instruments thus make the obligation of a State to respect human rights dependent on the existence of its jurisdiction. The latter treaty, unlike the others, could be understood as adding an additional requirement, that of territory, which at first glance would be at odds with the extraterritorial possibility. As we will

7 Inter-American Commission on Human Rights, *Danny Honorio Bastidas Meneses and others* v. *Ecuador*, Admissibility, Petition 189 03, Report 153/11, 2 November 2011, para. 21.

remind later in this article, however, that is an alternative rather than an additional requirement for the obligation to respect to be applicable.

Based on the jurisdiction condition, one could then refute those who deny the applicability of human rights duties to respect beyond national borders on the basis or the alleged lack of explicit acknowledgment of that scope under international human rights law (IHRL) provisions in the context of armed conflict and other instances.[8] Why so? Because they would be implicitly covered by the scope of the respect obligation considering the possible presence of extraterritorial *jurisdiction*. On this point, the following passage of the judgment on the merits of the European Court of Human Rights (ECtHR) in the case of *Issa and others v. Turkey* is quite illustrative. This is a case that examined alleged extrajudicial killings of Iraqi Kurds by Turkish security forces in Iraq.[9] In the words of the ECtHR:

> "[T]he concept of "jurisdiction" within the meaning of Article 1 of the Convention *is not necessarily restricted to the national territory* of the High Contracting Parties [...] In exceptional circumstances the acts of Contracting States performed *outside their territory* or which produce effects there ("extra-territorial act") *may amount to exercise by them of their jurisdiction* within the meaning of Article 1 of the Convention"[10] (emphases added).

Accordingly, we insist that what some could see as an apparent lack of extraterritoriality provisions in general human rights law when it comes to the obligation to respect is just that: apparent. Indeed, the clauses on the scope of State obligations already encompass obligations that are applicable beyond a State's own borders.

As to the questions brought about by some readings of Article 2 (1) of the International Covenant on Civil and Political Rights (ICCPR), which we advanced before, the following can be said. An interpretation that deems territory and jurisdiction as cumulative conditions that must be present for a State to have an extraterritorial obligation to respect human rights would give more leeway to expansive and unfettered State executive discretional powers at the expense of the protection of human rights. This is at odds with their object and purpose, and so the teleological element of the general rule of interpretation, found among others in article 31.1 of the Vienna Convention on the

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8 Amplius see J. Grignon and T. Roos, 'La juridiction extraterritoriale des États parties à la Convention européenne des droits de l'Homme en contexte de conflit armé : analyse de la jurisprudence de la Cour européenne des droits de l'Homme', 33 Revue québécoise de droit international (2020) 1-17; B. Stern, 'Quelques observations sur les régles internationales relatives à l'application extraterritoriale du droit', 32 *Annuaire Français de Droit International* (1986) 7-52; T. E. Jürgenssen, 'La protección de los derechos humanos durante la realización de operaciones militares en el extranjero: un análisis crítico de la reciente sentencia del Tribunal Europeo de Derechos Humanos en el caso «Hanan contra Alemania»', 38 *Anuario español de derecho internacional* (2002) 487-523; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, Oxford, 2011).

9 European Court of Human Rights, Second Section, *Case of Issa and others v. Turkey*, Judgment, 16 November 2004, para. 68.

10 For a commentary, see: T. Abdel-Monem, 'The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey', 12 *Human Rights Brief* (2005) 9-11; T. Abdel-Monem, 'How Far Do the Lawless Areas of Europe Extend-Extraterritorial Application of the European Convention on Human Rights', 14 *Journal of Transnational Law and Policy* (2005) 159-214.

Law of Treaties, should in our opinion make such an interpretation at least *prima facie* suspect and in need of quite robust confirmation (which does not exist).

To recall, the provision under examination provides that States have positive obligations to respect and ensure human rights without discrimination: "to all individuals within [their] territory and subject to [their] jurisdiction". The question concerning this part is thus whether both territory and jurisdiction conditions are to be simultaneously satisfied in order to consider that a State has an extraterritorial duty to respect human rights.

While a literal interpretation of the text of this Article could be interpreted by some as suggesting that both conditions must be simultaneously met, a systemic interpretation bolstered by the teleological consideration of the goal to protect human dignity in universal and non-discriminatory terms is conducive to the opposite conclusion. After all, that goal demands among others not discriminating on the basis of the nationality or place of residence of someone affected by a given State's conduct. In this regard, it must be considered that all human beings are equal in value, regardless of their identities and location.[11]

Furthermore, supplementary means of interpretation (Article 32 of the Vienna Convention on the Law of Treaties) support this conclusion. In this regard, the *travaux preparatoires* of Article 2, para. 1 of the ICCPR suggest the understanding that the enjoyment of civil and political rights and liberties is to be respected without mediation, and that this is correlated by obligations of States.[12] On the basis of these and other arguments, the ICJ held in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* that the ICCPR: "is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory".[13] Interestingly, the Court also concluded that obligations towards economic, social and cultural rights can sometimes be applicable extraterritorially as well.[14]

As the comparison between treaty texts presented at the outset of this section demonstrates, Article 1 (1) of the American Convention on Human Rights (American Convention or ACHR) is drafted in less ambiguous terms, with a clarity that leaves no uncertainties as to the circumstances in which a State has extraterritorial obligations to respect human rights, namely whenever it exercises or has jurisdiction.[15] In this

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[11] A. Gattini *et al.* (eds), *Human dignity and international law* (Brill Nijhoff, Leiden, 2021).

[12] Doc A/C3/SR1181 in General Assembly Official Records (GAOR) (XVII) Agenda Item 43 237 para 23; Doc A/C3/SR1257 in GAOR(XVIII) Agenda Item 48 238 para 12; Doc A/C3/SR1427 in GAOR(XXI) Agenda Item 62 para 2. See also M. J. Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, Boston, 1987), at 10 onwards; D. Møgster, 'Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR", *EJIL: Talk*!, 27 November 2018, recalling that: "[T]here is no reason that the State would not be responsible for breaches of the negative duty to respect human rights even where it does not exercise jurisdiction in the spatial or personal sense described above. Rather, the State should respect human rights irrespective of the traditional notion of jurisdiction to the extent that it can".

[13] ICJ, *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* n. 6, para. 111.

[14] Ibid., paras. 107-113.

[15] Article 1 (1) of the American Convention reads as follows: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons *subject to their*

sense, unlike Article 2 of the ICCPR, Article 1 (1) does not refer to both territory and jurisdiction in ways that could lend themselves to confusion, but simply to the latter, by indicating that States are obliged to respect human rights "to all persons subject to their jurisdiction".

The key determination to be made is hence what is the meaning of jurisdiction under international human rights law.[16] Whenever it is found to have been exercised or had, the conduct of a State's agents that is inimical to human rights and freedoms, impacting their enjoyment, that State's responsibility will be engaged as a result of the breach of its duty to respect or, in other words, refrain from violating the human rights of individuals under their jurisdiction.

Given that the wording of Article 1(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) closely resembles that of Article 1(1) of the American Convention, these considerations are clearly equally applicable to both. However, the conclusions between their supervisory bodies are far from being identical. This is the result of different case law and interpretations as to precisely what *jurisdiction* means under those instruments. Indeed, despite the similarities between the texts of Articles 1 of the ECHR and of the ACHR, the Inter-American and European Conventions' supervisory organs have adopted different interpretations concerning the extraterritorial application of human rights obligations and extraterritorial jurisdiction.

According to Karen da Costa, the ECtHR's approach to extraterritoriality and to extraterritorial jurisdiction may be seen as an "erratic" one.[17] We concur with such a viewpoint, insofar as the EctHR has changed its position on whether and when the ECHR obligations are applicable extraterritorially. In its decision in the case of *Banković and others* v. *Belgium and others,* a case that concerned the NATO bombing of a Serbian Radio and Television station,[18] the European Court took a position according to which extraterritorial obligations of States, i.e., duties for conduct taking place beyond their borders, would be exceptional. The rationale for this, in its own words, was its understanding that: "the Convention is a multi-lateral treaty operating in an essentially regional context and notably in the legal space (*espace juridique*) of the Contracting States".[19]

jurisdiction the free and full exercise of those rights and freedoms, without any discrimination" (emphasis added). For a commentary, see: L. Hennebel and H. Tigroudja (eds), *The American Convention on Human Rights. A Commentary* (Oxford University Press, Oxford, 2022), at 20 ff.

[16] See also A. Ollino, 'Justifications and Limits of Extraterritorial Obligations of States: Effects-Based Extraterritoriality in Human Rights Law', in Hannah L. Buxbaum and Thibaut Fleury Graff (eds), *Extraterritoriality = L'extraterritorialité* (Brill Nijhoff, Leiden, 2022), at 613 ff.

[17] K. da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff, Boston, 2013), at 154-155.

[18] European Court of Human Rights, Grand Chamber, Judgment, 16 November 2001.

[19] For a commentary, see among the others: M. Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy, *supra* n. 9, pp. 208; K. G. Añaños, 'El alcance extraterritorial del Convenio Europeo de Derechos Humanos: análisis del caso Bankovic', LXVIII *Revista de la Facultad* de Derecho de México (2018) 275-306, at 293 [https://doi.org/10.22201/fder.24488933e.2018.272-1.67589] (criticizing how the European Court ignored violation effects); D. Benítez *et al.*, 'Jurisprudencia del Tribunal Europeo de Derechos Humanos en 2011: algunos avances, retrocesos y desafíos', *Anuario de Derecho Público Universidad Diego Portales* (2012) 515-539, at 534-537.

Conversely, in some other more recent decisions the EctHR refrained from resorting to the concept of "*espace juridique*". For instance, the Court held that the European Convention was applicable to alleged acts of State party agents in the non-Contracting States' territories of Northern Iraq,[20] Kenya,[21] Iran,[22] and the United Nations buffer zone in Cyprus.[23] Moreover, in the July the 7th of 2011 Grand Chamber's decision in the case of *Al-Skeini* the EctHR's decision may be seen as going beyond *Banković*, considering its argument that, in light of the necessity to prevent a "vacuum" of legal protection which would deprive populations beyond the territories of State parties to the ECHR of effective means to bring claims when domestic remedies are unavailable or not effective, "the importance of establishing the occupying State's jurisdiction [...] does not imply [...] that jurisdiction under Article 1 of the Convention can never exist outside the territory covered by the Council of Europe member States."[24]

Therefore, although the EctHR didn't formally overrule *Banković*, a decision that the defendant State relied on, there was a clear expansion in the compass of the extraterritorial operation of the ECHR through the personal model of jurisdiction –although not fully embracing that model, but rather implementing it only because the defendant State exercised public powers, according to Milanovic.[25] The notion of the *espace juridique* was understood broadly in terms of the impossibility of invoking it to refuse to find jurisdiction beyond the territories of State parties;[26] and accepting that ECH rights and freedoms may be divided and tailored.[27] As to the public powers consideration, Marko Milanovic has said that in the decision in the case of *Al-Skeini* reference to them proved "to be key", insofar as "Para. 71 of *Bankovic* was *not* about jurisdiction as authority and control over individuals (personal model), but about jurisdiction as effective control over territory (spatial model)".[28]

It is reasonable to ponder whether some of the positions that have been adopted by the European Court of Human Rights on the issue throughout its history can be attributed, from a judicial realist perspective to a desire to avoid making it an expansive forum or lose State support, given the multiple operations overseas in which European States have found themselves.

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20 European Court of Human Rights, *Issa and Others v Turkey*, Judgment, 16 November 2004.

21 European Court of Human Rights, *Öcalan v Turkey*, Grand Chamber, Judgment, 12 May 2005.

22 European Court of Human Rights, *Pad and Others v Turkey*, Decision, 28 June 2007.

23 European Commission of Human Rights, *Cyprus v. Turkey*, Decision, 26 May 1975.

24 European Court of Human Rights, *Al-Skeini and Others v UK*, Grand Chamber, Judgment, 7 July 2011. See also European Court of Human Rights, *Hanan* v. *Germany*, Grand Chamber, Judgment, 16 February 2021. On the case, see K. Pentney, 'Run on the Bank(ović): 18 years later, will the court provide clarity in Hanan v. Germany?' *Leidenlawblog*, 2021.

25 M. Milanovic, 'European Court Decides Al-Skeini and Al-Jedda', *EJIL Talk*, 7 July 2011. Amplius, see P. Stojnić, 'Gentlemen at home, hoodlums elsewhere': The Extraterritorial Application of the European Convention on Human Rights', 10 *The Oxford University Undergraduate Law Journal* (2021) 137-170, at 147 ff.

26 European Court of Human Rights, *Al-Skeini and Others v UK*, Grand Chamber, Judgment, 7 July 2011, para. 142.

27 Ibid., para. 137.

28 M. Milanovic, 'European Court Decides Al-Skeini and Al-Jedda', *EJIL: Talk!*, 7 July 2011. On the spatial (and its shortcomings) and personal (not limited to exercises of "legal power" for it to be robust) models, also see: M. Milanovic, '*Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*', *supra* n. 9, at 33, 129, 207, 262-263

Conversely, a different, more homogeneous and thus less erratic approach towards extraterritorial jurisdiction is found in the practice of the Inter-American Commission of Human Rights (the Inter-American Commission or the Commission), that in our opinion follows the so-called "impact" or "causal" model of jurisdiction.[29] As clarified by the Inter-American Commission in its decision in the case of *Danny Honorio Bastidas Meneses and others v. Ecuador* of 2 November 2011, while: "jurisdiction usually refers to persons located inside the territory of a State, in certain circumstances it can *also* refer to the conduct with an extraterritorial *locus*, where the person is not present in a State's territory".[30]

The reason why we argue that the Inter-American position is more aligned with an impact-based approach is the following. The practice of the Inter-American human rights bodies indicates that whenever a State *violates* human rights it does so as a result of the *exercised* of its power, and thus that it had jurisdiction. Accordingly, the state always has an obligation to refrain from such conduct, wherever it may take place. We consider that such an approach is, for the reasons presented in the introduction, a more appropriate one from a human rights perspective. Among other advantages, this prevents the manipulation or "identification" of gaps based on technicalities and euphemisms. For example, the Inter-American approach would not endorse arguments that say that a State might have violated a human right but fails to have legal responsibility because of the absence of a "legal space" or some other formality. As we have been insisting, this sort of arguments betray what human rights law's foundation, object and purpose hold dear. In line with this idea, Daniel Møgster has said that:

> "[T]here is no reason that the State would not be responsible for breaches of the negative duty to respect human rights even where it does not exercise jurisdiction in the spatial or personal sense described above. Rather, the State should respect human rights irrespective of the traditional notion of jurisdiction to the extent that it can".[31]

We will now turn to briefly describing the impact-based mode of jurisdiction as opposed to spatial or personal ones, to better frame those with which the Inter-American practice, to be described later, rely on. The impact-based approach can be understood as "causality-based", that is to say, as relying on the identification of a human rights violation *attributable to* (i.e., caused by) a State, which is thus understood as having exercised power or jurisdiction and being under a duty to not engage in such an abuse. From a comparative perspective, it is worth noting that somewhat recent developments of the Human Rights Committee coincide with this approach. In this sense, Daniel Møgster has mentioned how the Committee said in its General Comment No. 36 *on article 6 of the International Covenant on Civil and Political Rights, on the right to life* that:

"Impact" as a ground for the application of the ICCPR is considered a form of exercise of power by the State, one of two forms of exercise of extraterritorial jurisdiction.

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29 See M. G. Giuffré, 'A functional-impact model of jurisdiction: Extraterritoriality before the European Court of Human Rights', Questions of International Law, 30 June 2021.

30 *Danny Honorio Bastidas Meneses and others* v. *Ecuador*, *supra* n. 8.

31 D. Møgster, *supra* n. 13.

It replaces the formulation in GC31 § 10 of "power over an individual" (the personal model)".[32]

Møgster bases this observation on paragraph 63 of the General Comment:

> "In light of article 2, paragraph 1, of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, *all persons over whose enjoyment of the right to life it exercises power or effective control*. [261] This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless *impacted by its military or other activities in a direct and reasonably foreseeable manner*. [262] States also have obligations under international law *not to aid or assist activities undertaken by other States and non-State actors that violate the right to life*. [263] Furthermore, States parties must respect and protect the lives of individuals *located in places, which are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant*. States parties are also required to respect and protect the lives of all individuals located on marine vessels or aircrafts *registered by them or flying their flag*, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. [264] Given that *the deprivation of liberty brings a person within a State's effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory*. [265]"[33] (emphases added).

Furthermore, the Committee on the Rights of the Child expressly referred to the Inter-American case law and to causation of a negative human rights impact as a basis for finding that there has been jurisdiction in its decision in the case of Chiara Sacchi and others vs. Argentina, where it said that:

> "[T]he appropriate test for jurisdiction in the present case *is that adopted by the Inter-American Court of Human Rights* in its Advisory Opinion on the environment and human rights. This implies that when transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5 (1) of the Optional *Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory*, when the State of origin exercises effective control over the sources of the emissions in question. The Committee considers that, while the required elements to establish the responsibility of the State are a matter of merits, the alleged harm suffered by the victims needs to have been reasonably foreseeable to the State party at the time of its acts or omissions even for the purpose of establishing jurisdiction"[34] (emphasis added).

Altogether, conduct that affects the enjoyment of human rights preventing their enjoyment and exercise is considered to amount to an exercise of power or effective control that makes the victims fall under the jurisdiction of the respective State.

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32 Ibid.

33 Human Rights Committee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 2019, para. 63.

34 Committee on the Rights of the Child, Decision, communication No. 104/2019, 11 November 2021, para. 10.7.

In other words, extraterritorial State acts that violate human rights amount to a (wrongful) exercise of jurisdiction. Accordingly, they can be evaluated in light of the obligation to respect human rights. Likewise, aid or assistance to, or complicity in, violations of the same right also amount to a breach of the duty to refrain from negatively impacting the enjoyment of human rights. In this regard, it is useful to consider that the Committee referred to the notion of power over individuals as a basis of extraterritorial jurisdiction in prior comments. For instance, its General Comment No. 31 it explained that a State must respect the human rights of "anyone within the power or effective control of" that State, "even if not situated within [its] territory".[35] Therefore, States also breach that obligation under those circumstances, regardless of where the assistance is provided, and the conduct of the perpetrator takes place.

(B) THE INTER-AMERICAN ENDORSEMENT OF IMPACT-BASED JURISDICTION CRITERIA

There is a report adopted by the Inter-American Commission on Human Rights (the Commission), which is a good starting point to assess which of the three models of extraterritorial jurisdiction –the personal, the spatial or the "impact" or "causality"-based— comes closer to its position on the issue. It is the previously mentioned one adopted in the case of *Danny Honorio Bastidas Meneses and others v. Ecuador* of 2 November 2011. In it, the Commission provided the following ideas concerning extraterritorial jurisdiction:

> "Although jurisdiction *usually refers to the authority over persons located inside the territory* of a State, *human rights are inherent to all human beings and are not based on their nationality or location*. Under Inter-American human rights law, *every State is bound, as a result, to respect the rights* of all persons in its territory and *of those persons present in the territory of another State but subject to control of its agents*. This position matches that of other international organizations [...]
>
> Because individual rights are *inherent* to the human being, all American States are required to respect the protection rights of any person *subject to their jurisdiction*. Although this *usually refers to persons located inside the territory of a State, in certain circumstances it can refer to the conduct with an extraterritorial locus*, where the person is not present in a State's territory. In that regard [...] it must be determined whether or not there is a *causal connection between the extraterritorial conduct of a State and the alleged violation* of the rights and liberties of a person [...]
>
> the investigation does not refer to the nationality of the alleged victim or to his presence in a given geographical area, but rather to *whether or not, under those specific circumstances, the State observed the rights of a person subjected to its authority and control*. In view of the above, the Commission shall consider, when examining the merits of the case, *evidence regarding the participation of the agents of the Ecuadorian State in the incidents, regardless of whether the incidents took place outside its territory*. Because of the above, the Commission concludes that it is competent *ratione loci* to hear this petition because the petition claims violations of the rights protected under

[35] Human Rights Committee, *General comment No. 31 (2004) The nature of the general legal obligation imposed on States Parties to the Covenant,* CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

> the American Convention that were said to have been perpetrated by agents of the State of Ecuador"[36] (emphases added).

The highlighted sentences indicate without any doubt that the Commission coincides with our argument regarding the centrality of dignity and how, to be faithful to it, protection must be given against State acts that attempt to act contrary to it. Consistently with such a teleological approach, the notion of jurisdiction handled by the Commission permits to hold States accountable for extraterritorial actions even absent the exercise of identifiable public powers, legal spaces (whatever they may mean according to divergent interpretations), occupation, or other factors.

These arguments are confirmed by the findings of the Commission in the case of *Jose Isabel Salas Galindo and others v. United States*. In the respective report, it held that "it must be determined whether or not there is a *causal* connection between the extraterritorial conduct of a State and the alleged violation of the rights and liberties of a person".[37] This is in line with our consideration that impact-based approaches point towards a causality-based analysis of whether a violation was caused or is attributable to a State. This is confirmed by the Commission's consideration that it is necessary to consider whether State agents "interfere in the lives of persons who are on the territory of [another] State" and there is a "causal nexus between the extraterritorial conduct of the State and the alleged violation of the rights and freedoms of an individual".[38]

As a result, and as was also held by the Inter American Commission, it is not necessary to identify whether a given violation took place before or after the existence of territorial control –in this case, for instance, concerning the invasion of Panama by the United States of America.[39] Conversely, it is sufficient to find that a violation was caused by a State agent or body, regardless of whether the violation occurred after an occupation or invasion.[40] Effective control over an individual or private party can trigger the duty to respect human rights and freedoms.[41]

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36 Inter-American Commission on Human Rights, *Danny Honorio Bastidas Meneses and others v. Ecuador*, Report No. 153/11, Admissibility, 2 November 2011, paras. 19, 22-23.

37 Inter-American Commission on Human Rights, *Jose Isabel Salas Galindo and others v. United States*, Report No. 121/18, 5 October 2018, paras. 309, 313-314. Amplius, see R. Lawson, 'The Concept of Jurisdiction and Extraterritorial Acts of State', in G. Kreijen *et al*. (eds), *State, Sovereignty, and International Governance* (Oxford University Press, Oxford, 2022), chapter 2. See also M. G. Giuffré, *supra* n. 30, recalling that: "In order for the jurisdiction to arise, the State of origin has to exercise effective control over the act that causes the human rights violation, and when performing such act, the authorities of the State have to know, or should have known, 'of the existence of a situation of real and imminent danger for the life of a specific individual or group of individuals, and fail to take the necessary measures within their area of responsibility that could reasonably be expected to prevent or to avoid that danger".

38 Inter-American Commission on Human Rights, *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia*, , Report No. 112/10, 21 October 2010, paras. 99-100.

39 Inter-American Commission on Human Rights, Victims of the Military Dictatorship v. Panama, Report No. 68/15, 27 October 2015, para. 28. For further references see Karen Giovanna Añaños Bedriñana, *El Sistema Interamericano de Protección de los Derechos Humanos y su alcance extraterritorial*, Universidad Internacional de Andalucía, 2012, p. 135 ff.

40 Inter-American Commission on Human Rights, *Victims of the Military Dictatorship* v. *Panama*, *supra* n. 39.

41 Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, para. 150.

Furthermore, it is neither necessary to establish the *length* of time over which State agents operate in a foreign territory for extraterritorial jurisdiction to exist. Formal or *lawful* presence of foreign agents is not required for jurisdiction to exist either.[42] Again, it is sufficient that there is impact over the exercise and enjoyment of human rights or power to affect it for the duty to respect human rights to be applicable.[43] This was indicated in the Commission reports No. 68/15 and 112/10, in which it was indicated that:

> "[T]he following is essential for the Commission in determining jurisdiction: the exercise of authority over persons by agents of a State even if not acting within their territory, *without necessarily requiring the existence of a formal or structured legal relation over time to raise the responsibility of a State for acts committed by its agents abroad*"[44] (emphasis added).

It is nevertheless important to clarify that the extraterritorial approach adopted by the Inter-American Commission on Human Rights does not imply that a duty to ensure all human rights necessarily arises because of the exercise of State power abroad.[45] In this sense, according to it, the generation of the duty to respect human rights "[D]oes not necessarily mean that a duty to guarantee the catalogue of substantive rights established in the American Convention may necessarily be derived [...] including all the range of obligations with respect to persons who are under its jurisdiction for the (entire) time the control by its agents lasted".[46]

It is necessary to clarify that, in light of the Commission's position concerning jurisdiction, a mere link of nationality fails to activate in general terms the extraterritorial obligation to respect beyond national borders.[47] However, it has maintained that sometimes, by virtue of the dynamics related to certain rights, States must guarantee and respect them towards their nationals living abroad.[48] For example, the right to vote abroad generates entitlements of individuals living outside of their States of nationality. As the Inter-American Commission has put it:

> "[T]he nationals of a state party to the American Convention are subject to that state's jurisdiction in certain respects when domiciled abroad or otherwise temporarily outside their country or State and that *a state party must accord them, when abroad, the exercise of certain convention-based rights*. For example, a state party is obliged to accord such persons, based on their nationality, the right to enter the country of which they are citizens (Article 22(5)) and the right not to be arbitrarily deprived of one's nationality or of the right to change it (Article 20(3)). *Thus, the capricious refusal of a state party's consular official to grant or renew a passport to one of that state's*

[42] Inter-American Commission on Human Rights, Towards the Closure of Guantanamo, OAS/Ser.L/V/II, Doc. 20/15, 3 June 2015, para. 54.

[43] Inter-American Commission on Human Rights, Victor Saldaño v. Argentina, Report No. 38/99, 11 March 1999, paras. 17, 19.

[44] Inter-American Commission on Human Rights, *Victims of the Military Dictatorship v. Panama*, *supra* n. 39, para. 28; Inter-American Commission on Human Rights, *Franklin Guillermo Aisalla Molina, Ecuador v. Colombia, supra* n. 38, para. 99.

[45] Ibidem, para. 100.

[46] Ibid.

[47] Inter-American Commission on Human Rights, Report 38/99, March 11, 1999, available at: http://www.cidh.org/annualrep/98eng/inadmissible/argentina%20salda%C3%B1o.htm

[48] Inter-American Commission on Human Rights, Victor Saldaño v. Argentina, Report No. 38/99, 11 March 1999, para. 22.

> *nationals residing abroad, which prevents him from returning to his country, might well engage that state party's responsibility*" (emphases added).[49]

While we have examined the position of the Commission thus far, given the greater number of cases dealing with the issue it has received, the Inter-American *Court* of Human Rights (IACtHR or the Inter-American Court) has in our opinion likewise endorsed the causality-or impact-based approach to extraterritorial jurisdiction. Exemplary, in this sense, is the twenty-first advisory opinion, where the IACtHR held that: "the fact that a person is subject to the jurisdiction of the State is not the same as being in its territory". This explains why, for the Court, the principle of non-devolution can be invoked by "any alien over whom the State in question is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the air space of the State."[50]

A similar approach to extraterritorial jurisdiction is found in the Court's Advisory Opinion on *The Environment and Human Rights*, where it was of the opinion that: "if there is a causal link between the action that occurred within its territory and the negative impact on the human rights of persons outside its territory', the individuals whose rights have been violated come within the jurisdiction of that State".[51] The Court has also held that the obligation to respect human rights is based on the "attributes of the human personality", regardless of migration or residence status.[52]

It is interesting to note that, in our opinion, the Court's position on extraterritorial jurisdiction is also coincident with the argument that extraterritoriality, in terms of the obligation to respect human rights and freedoms, flows from the non-conditionality of human dignity and its associated universal respect. It is therefore fully in tune with the object and purpose of human rights law and not prone to contradictions with it, unlike might have been the case with other supervisory bodies at both national and regional levels.

(C) THE CONSISTENCY OF THE INTER-AMERICAN CASE LAW ON EXTRATERRITORIALITY

The Inter-American Commission on Human Rights started dealing with extraterritorial issues from early on. This is the result of its examination of cases dealing with abusive operations of State agents that took place beyond their national borders. In this regard, as was studied by Karen Giovanna Añaños Bedriñana, in its 1985 *Report on the Situation of Human Rights in Chile* the Commission condemned killings of Orlando Letelier del Solar and Carlos Prats González at the hands of Chilean agents in the United States of America and Argentina.[53] The Commission even declared that, apart from the heinousness of the

[49] Ibid., para. 22.

[50] I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 219.

[51] Inter-American Court of Human Rights (IACtHR), The Environment and Human Rights, Advisory Opinion, OC-23/17 (15 November 2017).

[52] I/A Court H.R., Rights and guarantees of children in the context of migration, *supra* n. 50, para. 62.

[53] K. G. Añaños Bedriñana, *supra* n. 39, at 98-100.

killings, the fact that they took place beyond the frontiers of Chile"[54] added to their seriousness.

Sometimes, the Commission studied cases of a different nature unlike that of agents operating abroad in a territory they do not control. For instance, because of invasions or occupation, at times the Commission has found jurisdiction without discussing the matter, perhaps implicitly considering control over a foreign area as a sufficient basis to find jurisdiction, while at others even absent occupation a mere impact-based approach to the matter has been the basis of its exercise of supervisory powers.

In this regard, it is useful to look at the circumstances under which the Inter-American human rights bodies have found States to be under extraterritorial obligations to. According to Karen Giovanna Añaños Bedriñana's study, these include:

a) Situations of military occupation, such as that in Grenada by the United States of America. The Commission noted in its report No. 109/99 that while none of the parties contested the extraterritorial application of the American Declaration, such application is called for and required when a person is "subject to the control of another state" which does not have sovereignty over the territory in which that person is found.[55] These circumstances align with spatial models of extraterritorial jurisdiction.

b) Impact causation, in the sense of the *generation* of harm by State conduct (military or otherwise), such as the downing of airplanes by Cuban authorities (which Bedriñana said is a criterion at odds with the *Bankovic* decision). In its Report 86/99, the Commission argued that foreign State agents have a duty to respect human rights when there is impact or control "through the actions of [...] state's agents abroad".[56]

c) Finally, detention of individuals by State agents outside of their territory such as in Guantanamo Bay, because individuals are under the authority and control of those agents in practice.[57] This category aligns with a personal-based model of jurisdiction.

In addition to those three circumstances identified by the cited author, we would like to mention that we believe that there is another fourth set of possible circumstances in which a State may be found to have had extraterritorial jurisdiction. They are based on case law considerations of the Inter-American Court and Commission and include the following. States could also be found responsible in connection with extraterritorial happenings when they acknowledge, acquiesce to, or have effective control over private conduct that is inimical to human rights (elements that the Commission referred to

[54] Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.66, Doc. 17, 9 September 1985, paras. 80-91.

[55] Inter-American Commission on Human Rights, *Coard et al. v. United States*, Report No. 109/99, 29 September 1999, para. 37.

[56] Inter-American Commission on Human Rights, *Armando Alejandre Jr., Carlos Costa, Mario de la Peña, and Pablo Morales v. Cuba*, Report No. 86/99, 29 September 1999.

[57] K. G. Añaños Bedriñana, *supra* n. 39, p. 113-128.

in its 2019 report on Business and Human Rights)[58] and takes place abroad.[59] Indeed, effective control over an individual or private party is sufficient to trigger the obligation to respect human rights[60] –and such actors may well operate extraterritorially.

Altogether, as can be seen from the foregoing classification, impact-based considerations are *not* the only ones handled by the Commission. But the latter is one on which it is always possible to rely, even absent other models pertaining bases of extraterritorial jurisdiction. In other words, because of its adoption of a causality —or impact— based approach, it is not required for the bodies of the Inter-American system of Human Rights to identify whether a violation perpetrated abroad takes place before or after occupation, invasion, or control of the territory of a third State.[61]

As to when the Commission has addressed the matter of extraterritorial State obligations to respect human rights, it is necessary to add that it has recognized extraterritorial jurisdiction of States both implicitly and explicitly in the exercise of its different functions (contentious jurisdiction, etc.). These include the adoption of country and thematic reports, precautionary measures issued when there is a risk of extraterritorial abuse, and other actions.

An example of a precautionary competence is its Resolution Nº 2/06 *On Guantanamo Bay Precautionary Measures*. In it, the Inter-American Commission strongly condemned the failure of the United States of America to "give effect to the Commission's precautionary measures" towards detainees at Guantanamo Bay.[62] No express detailed reference to the matter was found by the authors of this article in the precautionary measures adopted in favor of those detainees. However, it is our understanding that, when considering the adoption of precautionary measures regarding the detainees, the Inter American Commission implicitly found that there was an extraterritorial exercise of jurisdiction by the United States of America. This conclusion is supported by the fact that, in its report No. 17/12, the Commission explicitly stated that:

> "[T]he issuance of precautionary measure MC 259-02 in 2002, directed at all prisoners detained in the Guantanamo Bay Detention Facility at that time, reflects the IACHR's understanding that Guantanamo Bay *falls under the jurisdiction* of the United States"[63] (emphasis added).

The reasons why the Commission considered that the United States of America exercised jurisdiction over detainees at Guantanamo Bay, and why they coincide with the impact-based approach, are illustrated by the Commission's holding that State human rights obligations exist when there is:

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[58] Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19, 1 November 2019, paras. 67-78.

[59] Ibid., paras. 152, 165, 175.

[60] Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Interamericanos*, para. 150.

[61] K. G. Añaños Bedriñana, *supra* n. 39, p. 135.

[62] Resolution Nº 2/06 *On Guantanamo Bay Precautionary Measures,* available at: http://www.cidh.oas.org/resolutions/resolution2.06.htm

[63] Inter-American Commission on Human Rights, *Djamel Ameziane v. United States of America*, Report No. 17/12, 20 March 2012, para. 34.

> "[C]onduct with an extraterritorial locus where the person concerned is present in the territory of one State, *but subject to the control of another State*, usually through the acts of the latter's agents abroad. In these cases, the inquiry turns on whether the alleged victim was subject to the authority and control of the acting State"[64] (emphasis added).

Likewise, in its report entitled "Towards the Closure of Guantanamo", the Commission argued that it is empowered to examine the compatibility of extraterritorial State actions with human rights obligations "when the victim is subject to the effective authority and control of the agents of" a State.[65] According to Brian D. Tittemore, in regard to the Guantanamo Bay precautionary measures, the Commission:

> "Determined that the United States was responsible for ensuring the fundamental rights of the detainees at Guantanamo Bay because they clearly fell within the authority and control of the United States, *regardless of whether they could be said to have been detained within US territory*"[66] (emphasis added).

In light of the previous legal materials, one can conclude that the Commission has acted on the basis of the argument that whenever and wherever State agents behave in ways that have a negative impact on the enjoyment of human rights, their State has had jurisdiction over the affected individuals. This is consistently demonstrated in the outcomes of different manifestations of the functions of the Commission, for example in relation to the adoption of reports in which certain interpretations are found. This very fact also highlights the importance of the Commission having a variety of competences that permit it to attempt to influence human rights practices in ways that go beyond what contentious jurisdictional actions (can) do.

On the other hand, the allusion to "control" in the case-law of the Inter-American Commission should not make one think that it is necessarily referring to personal or spatial factors. As argued above, while they are sometimes (albeit implicitly) handled, there is always the fallback option of an impact-based consideration. This is so because what matters for the Commission is the causation of impact by State conduct, a condition which in itself suffices to satisfy the threshold of jurisdiction of the Inter-American standards. This seems to be confirmed by the understanding of other scholars. For instance, according to Diana María Molina-Portilla's analysis based on the Inter-American system, States bear legal responsibility when their agents directly participate in the violation of human rights, which is an event in which the duty to respect those rights is breached.[67]

Another report (No. 38/99), on the *Saldaño v. Argentina* case, further demonstrates the consistency of the Commission's rationales on extraterritoriality throughout the years.

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[64] Ibid., para. 30.

[65] Inter-American Commission on Human Rights, *Towards the Closure of Guantanamo*, OAS/Ser.L/V/II, Doc. 20/15, 3 June 2015, para. 54.

[66] B. D. Tittemore, 'Guantanamo Bay and the Precautionary Measures of the Inter-American Commission on Human Rights: A Case for International Oversight in the Struggle Against Terrorism', 6 *Human Rights Law Review* (2006) 378-402, at 384 [doi: https://doi.org/10.1093/hrlr/ngl008].

[67] D. M. Molina-Portilla, 'Sistema Interamericano, empresas transnacionales mineras y Estados de origen: improcedencia de la falta de jurisdicción entre Estados miembros', 29 *International Law, Revista Colombiana de Derecho Internacional* (2016) 57-91, at 73-74 [doi: https://doi.org/10.11144/Javeriana.il14-29.siet].

In this report, the Commission relied on the same, and constantly invoked, causality or impact criterion by indicating that all States have an obligation to respect the human rights of individuals, both inside and outside their borders, when those individuals are subject to the power of State agents.[68] In the words of the Commission:

> "The Commission does not believe, however, that the term "jurisdiction" in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention *may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory* […].[69] This understanding of jurisdiction--and therefore responsibility for compliance with international obligations--as a notion linked to authority and effective control, and not merely to territorial boundaries, has been confirmed and elaborated on in other cases decided by the European Commission and Court" (emphasis added). [70]

Altogether, the Inter-American Commission on Human Rights does not equate competence with the territory. Rather, it considers how State agents can engage the responsibility of their State because of their conduct when it has effects (transboundary situation) *or* takes place abroad[71] —either in the territory of a third State or in international spaces such as the High Seas.[72] This is something that is relevant in respect of migrants' rights, among others. In this regard, it is important to note that the IACtHR has found that there is an extraterritorial scope of *non-refoulement*, as can be read in OC-25/18.[73] In that advisory opinion, it is mentioned that when someone has been recognized as a refugee by a State, such recognition is also valid extraterritorially.[74]

CONCLUSIONS

To conclude, the present study has unraveled the Inter-American's approach to extraterritorial jurisdiction as the approach most in harmony with the basic rationale behind human rights, namely, the protection of the inherent dignity of all human beings. As was very well put by the IACtHR, "Although jurisdiction usually refers to the authority over persons located inside the territory of a State, human rights are inherent to all human beings and are not based on their nationality or location".[75]

68 Inter-American Commission on Human Rights, Victor Saldaño v. Argentina, Report No. 38/99, 11 March 1999, paras. 17 to 19.

69 Ibid.

70 Ibid.

71 Inter-American Commission on Human Rights, *Informe Empresas y Derechos Humanos: Estándares Inter-americanos*, para. 150.

72 Ibid., p. 103, 108-109.

73 I/A Court H.R., The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights). Advisory Opinion OC-25/18 of May 30, 2018. Series A No. 25, paras. 99, 108.

74 Ibid., para. 123.

75 Inter-American Commission on Human Rights, *Danny Honorio Bastidas Meneses and others v. Ecuador*, Report No. 153/11, Admissibility, 2 November 2011, paras. 19, 22-23.

The main reason behind this conclusion is clear: the causality-based model of jurisdiction that the Inter-American human rights bodies adopt and can be used in case that any of the other models fails to be applicable mirrors the recognition of the engagement of responsibility as a result of the attribution of negative impacts on the enjoyment of human rights to States whose agents — or actors they have effective control over or whose conduct is otherwise attributable to the States — cause violations either abroad or inside State with transboundary and external effects.

Alternative approaches that fail to endorse an impact-based model may end up tolerating and reinforcing situations in which States violate human rights with impunity, offering no hope of remedies if domestic litigation is impossible or ineffective. This would run against the foundations of international human rights law and, in political terms, encourage an unfettered panoply of extraterritorial abuses that scrutiny. But in our world, in which actions abroad, with technological developments or agents being deployed, is ever increasing, international human rights supervision is all the most necessary. Human rights must keep at pace with the practical needs of human beings who need defense from excessive State power. Likewise, environmental degradation calls for checks on State contributions to climate change and crises. The law may be interpreted in ways permitting control over those actions, as the case law of the Inter-American Commission and Court indicate and from which much can be learned. But provisions similar to those on which they rely can also be interpreted in ways inimical to humane needs, with technicalities ending up giving greater *de facto* priority to politics and apparatuses over individuals and their dignity. This would be translated into justice refusals, vacuums of protection, gaps and loopholes, ironically allowing States to get away with negative human rights impacts on the basis of "human rights" law. In such a scenario, victims would be unprotected *vis-à-vis* the State causing violations. That would be unacceptable.

Certainly, the Inter-American approach to extraterritorial jurisdiction is based on the protection of victims, whereas some decisions and judgments of the European Court of Human Rights on extraterritorial obligations and duties seem to, as Roxtrom, Gibney and Einarsen have rightly posited,[76] resemble a system in which "human rights are not owed to human beings *qua* human beings", as cited by Karen da Costa,[77] but only to those individuals who find themselves in specific circumstances, with all others not being truly benefiting from the protection of a system that supposedly seeks to defend all of them without discrimination.

We advance the hypothesis that the impact-based approach to the extraterritorial scope of the duty to *respect* human rights is the most consistent one from a human-centered perspective (instead of a pernicious State-based approach, which may end up giving States undue privileges and leaving victims vulnerable), as well as being the one better reflecting principles and the object of human rights law. This may be the reason why international human rights supervisory bodies such as the United Nations Human Rights Committee have adopted an approach to extraterritorial jurisdiction

76 E. Roxtrom *et al.*, 'The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection', 23 *Boston University International Law Journal* (2005) 55-136, p.. 87-104, 111.

77 K. da Costa, *supra* n. 18, p. 155.

that seems to coincide with the one espoused by the Inter-American Commission and Court of Human Rights.[78] Therefore, carefully looking at the case-law of international human rights supervisory bodies that have been working on the basis of this model of extraterritorial jurisdiction for several years, and which have defined its features and contours, can prove useful for other human rights supervisory bodies, practitioners, and those others who want to advance the prosecution of gross human rights violations outside the country in which they occurred.

Future research beyond the scope of the present work can engage with another, much more complex, question about the existence of an extraterritorial duty to *ensure* human rights. Indeed, while experts have come up with initiatives such as the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights,[79] the Inter-American Commission indicated, in its report on *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, that States may have responsibility: "for conduct that takes place in another country when [their] acts or omissions cause human rights violations and the State in which the conduct has taken place is unable to protect or enforce the human rights in question". The Commission also indicated that it is worrisome that some States have engaged in activities of "*economic diplomacy*" by means of which they have leveraged problematic investments; and that calls to address the abuses that national corporations or individuals perpetrate abroad must be heard.[80] Yet, according to the Commission, unlike the duty to respect human rights:

> "[T]his is an emerging and evolving area, now the subject of deep discussion [...] the IACHR continues to urge foreign states of origin to put mechanisms in place voluntarily to secure better human rights practices of their corporate citizens abroad [...] the IACHR notes with appreciation that the state of Canada has given assurances at hearings, in discussions with the Commission and even publicly, that it intends to strengthen, voluntarily, its existing corporate social responsibility rules for its companies operating abroad".[81]

As can be gleaned from the previous excerpt, allusion to non-binding standards, such as those of social responsibility, refers to the recommendation of adopting strong protections *voluntarily*. The express indication that the Commission considers that there are uncertainties surrounding the possible responsibility of States as a result of the conduct of their nationals (not agents or actors whose conduct is directly attributable to them) abroad reveals that this is an area in which developments are called for both in interpretive terms and *de lege ferenda*.

[78] Cf. D. Møgster, *supra* n. 32.

[79] Vid. O. De Schutter *et al.*, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', 34 *Human Rights Quarterly* (2012) 1084-1169, at 1084.

[80] Inter-American Commission on Human Rights, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II, Doc. 47/15, 31 December 2015, paras. 79-80.

[81] Ibid.

Altogether, issues of extraterritoriality under *human* rights law ought to be guided by a victim-centered approach. This is the way in which the Inter-American Commission (mostly) and Court of human rights have dealt with questions in extraterritorial obligations to respect human rights. Law is a construction that must be used in ways that serve the defense of the dignity of human beings and their dignity. This is the central focus and objective of the branch under examination, and not a problematic approach that ends up bolstering excessive State privileges to the detriment of the enjoyment of human rights.

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On the present and the future of land freight transport dispute-resolution

Alejandro García Jiménez*

Abstract: The resolution of land freight transport disputes along Europe-China corridors and along the regional routes that link China to other Asian countries poses legal challenges to the existing *lex mercatoria* in this field. The CMR is the unrivalled convention on the road freight transport contract and the adhesion of China and other Asian countries to it is the most reasonable way of bringing legal certainty to the resolution of these relatively new road freight transport disputes. The cross-border legal regime of rail freight is geographically fragmented (between the CIM Rules and SMGS) and the universalization of these regimes seems unfeasible in the short term. In the long term, a new overarching convention on the rail freight transport contract could resolve the challenges derived from fragmentation. So far, when neither the CIM Rules nor SMGS can be applied *proprio vigore*, the resolution of disputes relies upon a series of contractual legal instruments designed by rail freight industry associations. When it comes to third-party adjudication, international treaties favor litigation before State courts through private international law mechanisms on *lis pendens* and on the recognition and enforcement of court rulings. Meanwhile, the aforementioned contractual legal instruments often favor the utilization of ADR mechanisms.

Keywords: Land (road and rail) freight transport disputes – Europe-China rail corridors – Convention on the Contract for the International Carriage of Goods by Road (CMR) – Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM Rules) – CIM/SMGS Consignment Note – Alternative Dispute Resolution (ADR) mechanisms.

(A) INTRODUCTION: THE RECUPERATION AND THE CREATION OF LAND FREIGHT TRANSPORT ROUTES

Land transport physical and legal infrastructure are catalyzers of development, trade and the fight against climate change. Events such as the scarcity of containers available for maritime freight transport caused by the recent global pandemic and the blockade of the Suez Canal in March 2021 evidence the urgent need to diversify the global supply chains upon which our common economic prosperity relies.[1]

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Maritime freight is the predominant mode of freight transport at a global scale. It is “the lifeblood of the World economy”, as has been described in World Trade Organization (WTO) Report No. S/C/W/315.[1] Meanwhile, at a regional scale, land transport is already crucial. Land transport plays a quintessential role in continental logistics in Europe: in 2019 road transport accounted for 53.4%, followed by maritime (29.6%) and rail (21.3%).[2] Land freight transport has also increased its role in Western China and its importance in global supply chains will keep growing.

Along the ancient Silk Roads, land transport was carried out across the old continents: Europe, Asia and parts of Africa. The heyday of maritime trade fostered by the discovery of the American continent came along with the decay of transcontinental land transport. Relatively inefficient land transport became a constraint to global trading routes. In times of the great spice trading routes and the first globalization led by the Iberian peoples, the price of spices coming from the West Indies to the port of Lisbon used to double as these reached the markets of Toledo –in the interior of Castile, Spain– due to onerous land transport.[3]

Throughout contemporary history, land transport allowed major geopolitical regional changes in the newly discovered continents, such as the conquest of the West of the United States of America and the control of the Australian territory. However, transcontinental trading routes since the modern ages became increasingly maritime ones. Along the 19th and 20th Centuries, maritime transport infrastructure and engineering projects such as the Suez Canal and the Panama Canal enabled the creation of contemporary transcontinental maritime trading routes. It is still to be seen whether contemporary land transport infrastructure in our days will lead to a new paradigm in global logistics.

Multilateral and national infrastructure initiatives, including the Belt and Road Initiative (BRI) are contributing to the construction, upgrading and refurbishing of land transport infrastructure, notably in Western China, Central Asia and Eastern Europe.[4] Land transport, unlike maritime and air transport, does not only require ports and mobile equipment, but also road and rail networks. The road and rail freight transport

1 ‘Suez Canal blocked after huge container ship runs aground’, Financial Times on 24 March 2021, text available electronically at <https://www.ft.com/content/eec9f3a6-2817-45f5-b007-a290f3e530c6>, accessed on 25 March 2021.
‘Suez Canal Blocked After Giant Container Ship Gets Stuck’, The New York Times on 24 March 2021, text available electronically at <https://www.nytimes.com/2021/03/24/world/middleeast/suez-canal-blocked-ship.html>, accessed on 25 March 2021.
‘Un megabuque provoca el caos en el canal de Suez y atasca el comercio global [A Sheer Scale Vessel Causes Havoc at the Suez Canal Blocking Global Trade]’, El País 25 March 2021, at 42.
‘El cierre del canal de Suez amenaza el comercio global durante semanas [The Closure of the Suez Canal Threatens Global Trade for Weeks]’, El País 26 March 2021, at 39.

1 WTO Report No. S/C/W/315, 7 June 2010.

2 The modal split mentioned above refers to intra-EU transport. The weight of land transport between the EU and the rest of the World is much lower, but still significant.
See: Eurostat, ‘Freight Transport Statistics: Modal Split’, text available electronically at <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Freight_transport_statistics_-_modal_split#Modal_split_in_the_EU>, accessed on 29 June 2021.

3 J.H. Elliot, La España Imperial: 1.469-1.716 [Imperial Spain: 1,469-1,716] (Vicens Vives, 1972), at 124-125.

4 A.G. Jiménez, ‘Land Freight Transport along the Belt and Road: State-to-State and Investor-State Disputes’, 13(3) *Journal of WTO and China* (2023), at 82-114.

infrastructure that is currently being built enables two kinds of relatively new land freight transport routes: Europe-China corridors and the regional routes that link China to other Asian countries.

The development of the “legal infrastructure” required for the resolution of land freight transport disputes along these new routes is as important as the development of physical infrastructure.[5] The resolution of land freight transport dispute along these new routes constitutes an opportunity for the improvement of the *lex mercatoria* for the resolution of land freight transport disputes.

(1) Europe-China Corridors and Regional Land Freight Transport Routes that Link China to other Asian Countries

WTO Report No. S/C/W/324 identified the global trends and the bottlenecks of cross-border road freight transport.[6] Road transport takes place predominantly within the regions of Europe, Asia and North America, since there are no road routes connecting North America neither to Asia nor to Europe.[7] In 2010, when the aforementioned report was issued, it was noted that, although Europe-Asia road transport was possible, it was too complex and seldom used. Europe-Asia corridors have been gaining ground in recent years, but trade in goods between Europe and Asia will continue to be carried out predominantly by sea in the foreseeable future.

Maritime transport will continue to lead the modal split of freight transport.[8] However, upgrading land freight transport is a priority for the development and policy banks in Europe, China, India, Japan, Russia and Turkey, as well as in other Middle Eastern, Central Asian and South-East Asian countries.[9] International Financial Institutions (IFIs) also award great importance to land freight transport, including the World Bank’s International Bank for Reconstruction and Development (IBRD) and International Development Association (IDA), the European Investment Bank (EIB), the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB) and the Asian Infrastructure Investment Bank (AIIB).

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5 J.A.E. Faria, ‘Uniform Law for International Transport at UNCITRAL: New Times, New Players, and New Rules’, 44 *Texas International Law Journal* (2009), at 277, 290-292.

6 WTO Report No. S/C/W/324, 29 October 2010.

7 By 2014 the construction of the China-Russia-Canada-America high-speed train was discussed, which would have permitted the creation of land freight transport routes between Asia and North America. This project has, at least so far, not become a reality.
Jonathan Kaiman, ‘Chinese experts in discussion over building high-speed Beijing-US railway: China-Russia-Canada-America line would run for 13,000 km across Siberia and pass under Bering Strait through 200 km tunnel’, The Guardian, 8 May 2014.

8 Trade in goods is predominantly carried out by sea. According to UNCTAD, “more than 80 per cent of world merchandise trade by volume is carried by sea”.
UNCTAD, *2020 Review of Maritime Transport* (Geneva, 2020), at 20 [doi: 10.18356/9789210052719].

9 See, for instance, Connecting Europe facility for the period 2021-2027:
European Commission, *Agreement on 2021-2027 Connecting Europe Facility*, available electronically at: <https://ec.europa.eu/inea/en/news-events/newsroom/agreement-2021-2027-connecting-europe-facility>, accessed 12 July 2021.

The Center for Strategic and International Studies (CSIS), a think tank, launched the Reconnecting Asia database, which tracks infrastructure projects (with an emphasis on land transport and energy infrastructure) financed by major Asian economies and Europe, as well as International Financial Institutions.[10] The main idea behind this project is that land routes had great importance in the Ancient World and their revival may have a major geostrategic impact. By March 2021, 812 tracked projects were related to rail infrastructure, 1,545 to road infrastructure and 157 to other dry ports and logistical infrastructure that can support land transport.

The institutional interest in developing land freight transport infrastructure serves two main objectives. First, transport infrastructure fosters economic growth and development. The current frontiers for the improvement of global logistics and supply chains can be largely found in the need to build and upgrade land transport infrastructure. Second, a modal shift towards land transport –and notably towards rail transport– can have a positive effect towards the decarbonization of the global economy and can contribute to reduce the vulnerability of global supply chains to the effects of climate change by diversifying risks. Sustainable, efficient and resilient freight transport is key to foster the objectives of the main global governance initiatives currently supported by the United Nations: the 2030 Agenda for Sustainable Development and the Paris Climate Change Agreement.[11]

Regional land transport routes are primarily those that connect China to Southeast Asia, South Asia and the Korean Peninsula. Regional routes are often part of bilateral or regional economic corridors, such as the China-Pakistan Economic Corridor, the Bangladesh-China-India-Myanmar (BCIM) Economic Corridor and the China-Indo-China Peninsula Economic Corridor (CICPEC). Some regional land transport routes launched by international organizations also receive the support of China. Such is the case of projects launched by the ADB, such as the ones under the Greater Mekong sub-region and the South Asia sub-regional Economic Cooperation (SASEC). China also supports projects launched under the auspices of the Association of South-East Asian Nations (ASEAN), such as the Singapore-Kunming Rail Link.

The development of overland corridors to link Europe and Asia has been a priority of the international community at least for the last two decades and may well be considered the major challenge in global logistics of our times. Already in 2002, in view of the rapid growth of merchandise trade between Europe and East Asia, the United Nations Economic Commission for Europe (UNECE) and the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) launched the Euro-Asian Transport Links (EATL). This project had three phases. In Phase I of this project, which lasted until 2007, an Expert Group was created in order to identify priority rail and road

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10 Reconnecting Asia Project Overview', available electronically at: <https://reconasia.csis.org/about/>, accessed 15 March 2021.

11 UNCTAD, 'Urgent need for climate adaptation in transport, say experts', available electronically at: <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2063&Sitemap_x0020_Taxonomy=UNCTAD%20Home;#1721;#Transport;#1788;#Transport%20Policy%20and%20Legislation;#2170;#Transport,%20Climate%20Change%20and%20Maritime%20Transport;#2197;#Transport,%20Climate%20Change%20Impacts%20and%20Adaptation;#1450;#Technology%20and%20Logistics>, accessed 12 September 2020.

routes between Europe and Asia. In Phase II of this project (from 2008 to 2013) the Expert Group identified nine Eurasian rail corridors and another nine road corridors that link Europe and Asia. Phase III of the EATL started in 2013 and finished in 2017. It focused on making EATL overland links operational. In order to achieve this, it dealt with financing of infrastructure and "facilitating and removing physical and administrative bottlenecks when crossing borders in overland transport between Europe and Asia".[12]

When it comes to Europe-China land freight corridors currently being effectively and efficiently utilized, trans-Siberian routes outstand. The trans-Siberian route from China to Europe, which can be made shorter through the territories of Kazakhstan (trans-Siberian Kazakh route) or Mongolia (trans-Siberian Mongolian route). The diversification of trans-Siberian routes is a priority of the BRI and other infrastructure initiatives, including the Moscow-Beijing Railway Initiative, the Mongolia-China-Russia Trilateral Economic Corridor, the Northern Railway Links of Economic Corridor. We may see the consolidation of new Europe-China corridors in the years and decades to come through the extension of the land routes that link Pakistan, Iran and Turkey to the West towards Europe and to the East towards China.[13]

Among the transcontinental routes directly supported by the BRI, the following must be mentioned: the International Transit Corridor "Western Europe–Western China", the East-West Economic Corridor, the Central Asia Regional Economic Cooperation Program (CAREC), the China-Kyrgyzstan-Tajikistan-Afghanistan-Iran railway (Five Nations railway), the Russia-Kazakhstan-Kyrgyzstan-Tajikistan railway, the Trans-Asian Railway.

The world's longest land routes are the ones that go from China to Europe. The so-called "silk road train" has been operating between the cities of Yiwu and Madrid since 2014. With 13.052 km, it was considered the world's longest rail route, going through inland China, Kazakhstan, Russia, Belarus, Poland, Germany, France and Spain. The Madrid-Yiwu train is an example of how new overland freight routes may link cities that had never before been directly connected.[14]

Besides road and rail networks, dry ports also play a major role in fostering land freight transport routes. Khorgos dry port is a clear example of how this kind of logistics infrastructure can not only contribute to the recovery and upgrading of ancient overland trading routes, but also support relatively new road and rail routes. Khorgos dry port was constructed in the border between China and Kazakhstan, since this city had great importance in the trading routes of the old Silk Roads. Khorgos International Centre for Cross-Border Cooperation has already become the biggest land port in Central Asia and a key logistical center for the region. This sort of new infrastructure enables the modal

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12 UNECE, 'Trade: Euro-Asian Linkages' (2019), available electronically at: <https://unece.org/about-us-31>, accessed 19 January 2021 [doi: 10.18356/16e21aa9-en].

13 These corridors were identified in a study published by the Organization for International Carriage by Rail (OTIF) in 2016.
D. Galushko, 'Study on Corridors' (OTIF publications, 2016), available electronically at: <https://otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/Studien/STUDY_ON_CORRIDORS_-_Final.pdf>, accessed 15 July 2023, at 4-6.

14 'El tren que batió el récord mundial y tenía su destino final en Madrid [The Train that Broke the World Record with destination to Madrid]', El País (Madrid's regional supplement) 21 March 2021, at 3.

diversification of freight transport. Goods can reach Europe in 15 days from Khorgos dry port, constituting an alternative that is faster than maritime routes and cheaper than air routes. However, the volume of goods handled in Khorgos is still not comparable to that of the biggest Chinese and international ports.[15]

(2) Land Freight Transport Disputes and the Creation of Contemporary Cross-border Commercial Usages and Practices

Land transport enabled trade both in Ancient Rome and in Ancient China. Ensuring the adequate condition of the network of roads was a major concern of traditional political and economic thought in these two civilizations. Ancient Romans built a complex system of roads that was the basis of the material prosperity of Roman provinces –such as Hispania– and enabled East-West trading routes.[16] Hence the well-known aphorism, often attributed to which, "all roads lead to Rome". Similarly, a well-known Chinese aphorism, "要想富，先修路", could be translated as "those who want to prosper, first have to build [or repair] roads". It can be argued whether these trading routes allowed direct economic exchanges between ancient Romans and the Han Dynasty.[17] However, both of these old civilizations –one of them in Western Europe, the other one in Eastern Asia– were well aware of the importance of land routes.

The term "Silk Roads" evokes the historical phenomenon of trade between the East and the West of the Eurasian continent described by 19th century European scholars. Throughout history, East-West trading routes led to the development of norms that governed and facilitated economic exchanges. Trade involving Mediterranean City-States during the 11th and 12th Centuries led to the creation of legal compilations that received the name of *lex mercatoria* or *jus mercatorum*: the laws of merchants. Commercial

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15 These projects also create synergies with the development strategies of Central Asian nations through initiatives such as the Khorgos-Eastern Gates Special Economic Zone.
R. Nurgozhayeva, 'Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 264-271 [doi: 10.1093/cjcl/cxaa006].

16 T. Mommsen, *Historia de Roma I* [*History of Rome I*] (RBA, 2005), at 216 *et seq*.
"(…) [T]he Orient supplied Italy with perfumes and diverse ornaments, as well as with fabrics and purple dye, ivory and incense, which served since very old times for making ribbons, royal scarlet cloaks, scepters, and also for the sacrifices."
"(…) [A]ncient Italy, as well as imperial Rome, brought from the Orient all their luxury items before starting to manufacture their own ones by copying models from abroad."
The original version was written in German. I translated into English from a Spanish translation first published in 1876 and revised in 2003.
See also: J. Marías, *España Inteligible: Razón Histórica de las Españas* [*Intelligible Spain: Historical Reason of the Spains* (*Sic.*)] (Alianza Editorial, 2014), at 65-67.
"The urban density of Hispania was much higher than in other Occidental provinces of the Roman Empire. […] Cities are the organs of cohabitation, dialogue and projects. […] Romanization was always about urbanization. Roads allowed the links among cities, giving cohesion to the territory and its diverse populations."

17 Sinologist believe that Chinese Silk was popular in Rome already in 44 BC, during the Han dynasty. However, Silk trade was carried out with the help of intermediaries, namely, Indian and other merchants.
P. B. Ebrey, *The Cambridge Illustrated History of China* (Cambridge University Press, Cambridge, 1999), at 70 [doi: 10.1017/9781009151436].

usages and practice along the Mediterranean crystallized into the statutes (*statuta*) of the trading cities of the Western Mediterranean, such as Valencia, Barcelona, Marseille, Milano, Genoa, Pisa, Florence, Siena, Amalfi and Venice.[18] At the other end of the ancient Silk Roads, there seems to be historical evidence that Chinese courts would exercise jurisdiction over cross-border trade, even when it involved non-Chinese (such as Iranian) merchants.[19]

The concept of "new *lex mercatoria*" refers to the contemporary set of rules, including customary norms, usages and practices, applied in international commercial relations; such norms can be found in international conventions, statutory norms, arbitration practices, trade practices, norms created by business associations, etc.[20] "New *lex mercatoria*" may also be translated as "contemporary cross-border commercial usages and practices". In our days, there is no *lex mercatoria* as a true legal order, but rather an ensemble of sectorial *lege mercatoriae* for specific sorts of economic transactions, that are used in specific economic sectors.

The sectorial *lex mercatoria* applicable available for the resolution of land freight transport needs to be adapted to the needs of these relatively new road and rail routes and deserves particular attention as road and rail freight transport infrastructure is upgraded. The resolution of land freight transport disputes along Europe-China land corridors and along the regional land routes that link China to other Asian countries is a relatively new phenomenon.

A remarkable feature of these disputes is that they emerge out of or in relation with a land freight transport contract in which either the place for taking over the goods or the place for delivery of the goods is located in China. More often than not, Chinese parties will be present in this particular kind of commercial disputes. In the following section, the resolution of land freight transport disputes along these relatively new routes will be addressed from the perspective of the development of the so-called BRI dispute-resolution system.

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18 A.L.C. Caravaca & J.C. González, *Derecho Internacional Privado Vol. 2* [*Private International Law Vol. 2*] (16th ed., Comares, Granada, 2016), at 866-874.
According to Calvo Caravaca the *lex mercatoria* could be characterized through three main features: (i) it was a set of rules built on the basis of commercial custom, the usages and practices of merchants, adapted to an urban and transnational economy of the late Middle Ages. (ii) It was a sort of law created by and for the merchants, not by the political power through legislative action, and such laws were applied by their own Judges, often called consuls". (iii) These laws presented certain uniformity: despite the fact that each guild had its own set of rules, these were quite similar among analogous guilds in distant cities.
See also: 'Lex mercatoria y arbitraje privado internacional', 12(1) *Cuadernos de Derecho Transnacional* (2020) 66-85 [doi: 10.20318/cdt.2020.5180].
R. Nurgozhayeva, 'Rule-Making, Rule-Taking or Rule-Rejecting under the Belt and Road Initiative: A Central Asian Perspective', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 264-271 [doi: 10.1093/cjcl/cxaa006].

19 Valérie Hansen refers to the existence of judicial remedies along the overland trading routes of the ancient Silk Roads.
V. Hansen, *The Silk Road: A New History* (Oxford University Press, 2012), at 3.

20 There have been attempts to codify a new *lex mercatoria*, such as the UNIDROIT Principles of International Commercial Contracts and, at a regional level, the Principles of European Contract Law (PECL) and the Organization for the Harmonization of Business Law in the Caribbean (OHADAC) Principles on International Commercial Contracts.

(B) LAND FREIGHT TRANSPORT DISPUTES WITHIN THE BRI DISPUTE-RESOLUTION SYSTEM

The presence of Chinese parties in this relatively new and currently evolving kind of disputes makes it useful to study them from the perspective of the so-called BRI dispute-resolution system. The so-called BRI dispute-resolution system is the ensemble of dispute-resolution mechanisms and institutions available for the resolution of disputes related to the Belt and Road Initiative.[21] A remarkable feature of BRI disputes is the presence of Chinese parties.

BRI disputes are often classified using a tripartite division into: State-to-State, investor-State and commercial disputes. The disputes that may occur out of or in relation with a land freight transport contract or other land freight transport documents along Europe-China corridors and along the regional routes that link China to other Asian countries (which could receive the name of "BRI land freight transport disputes") belong to the third category of BRI disputes, that is, they fall under the category of BRI commercial disputes. State-to-State disputes in the field of land freight transport will be briefly characterized in the following sub-section. However, these must be clearly differentiated from BRI land freight transport disputes, which are of a commercial nature.

[21] On the BRI dispute-resolution system, see:
J.X. Shi, 'The Belt and Road Initiative and International Law', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 9-31 [doi: 10.1017/9781108332651.002].
J.M. Lee, 'The Belt and Road Initiative under Existing Trade Agreements', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 59-80 [doi: https://doi.org/10.1017/9781108332651.004].
W. Shen, 'The Belt and Road Initiative, Expropriation and Investor Protection under BITs', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 132-162 [doi: https://doi.org/10.1017/9781108332651.007].
Y.H. Chai, 'Regional Dispute Resolution', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 261-276 [doi: 10.1017/9781108332651.012].
S.L. Jiang, 'Establishment of an International Trade Dispute Settlement Mechanism under the Belt and Road Initiative', in Z. Yun (ed.), *International Governance and the Rule of Law in China under the Belt and Road Initiative* (Cambridge University Press, 2018), at 295-311 [doi: 10.1017/9781108332651.014].
S. Zhang, 'Developing China's Investor-State Arbitration Clause', in W.H. Shan *et al.* (eds.), *Normative Readings of the Belt and Road Initiative: Road to New Paradigms* (Springer, 2018) [doi: 10.1007/978-3-319-78018-4_8].
J.Y. Wang, 'China's Governance Approach to the Belt and Road Initiative (BRI): Partnership, Relations and Law', 14 *Global Trade and Customs Journal* (2019) 5, at 223 [doi: 10.54648/gtcj2019021].
M. Sornarajah, 'Chinese Investment Treaties in the Belt and Rad Initiative Area', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 55-78. (2020) [doi: 10.1093/cjcl/cxaa008].
Y.L. Tan, 'Global PPPs and the Choice of Law Challenge', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 79-115 [doi: 10.1093/cjcl/cxaa011].
Y.L. Zhang, 'Developing Cross-Border Blockchain Financial Transactions under the Belt and Road Initiative', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 143-176 [doi: 10.1093/cjcl/cxaa010].
J.F. Chen, 'Tension and Rivalry: The Belt and Road Initiative, Global Governance, and International Law', 8 *The Chinese Journal of Comparative Law* (2020) 1, at 177-196 [doi: 10.1093/cjcl/cxaa009].
W.X. Gu, 'Belt and Road Dispute Resolution: New Development Trends', 36 *Chinese (Taiwan) Yearbook of International Law and Affairs* (2020), at 152 [doi: 10.1163/9789004414181_007].
J. Chaisse & J. Kirkwood, 'Chinese Puzzle: Anatomy of the (Invisible) Belt and Road Investment Treaty', 23 *Journal of International Economic Law* (2020), at 245-269 [doi: 10.1093/jiel/jgz047].

(1) State-to-State and Investor-State Disputes Related to Land Freight Transport

(a) State-to-State Disputes Related to Land Freight Transport

The main kinds of State-to-State disputes related to land transport include: disputes related to freedom of transit (Art. V GATT and Chapter 11 of the Trade Facilitation Agreement), the controversies related to the liberalization of road and rail freight transport services that may eventually arise and the investment disputes that could eventually arise out of or in relation with the construction of BRI land transport infrastructure projects. The latter may often give rise to investor-State disputes instead of State-to-State disputes.

So far, there has been no dispute under the Dispute Settlement Understanding (DSU) of the WTO concerning the liberalization of land freight transport services. However, there have been two cases concerning freedom of transit, namely DS512 and DS532.[22] In both of these cases Ukraine has acted as claimant and the Russian Federation as respondent. As road and rail freight transport services further liberalize and infrastructure enables new land freight transport routes and reduces the bottlenecks in land freight transport, disputes concerning not only freedom of transit, but also WTO commitments on the liberalization of land transport services, are increasingly likely to take place.

(b) Investor-State Disputes Related to Land Freight Transport

Potentially, there may be BRI investor-State disputes related to BRI land transport infrastructure projects for building, upgrading and refurbishing Europe-China land corridors and the regional overland routes that link China to other countries in Asia. To our knowledge, no such dispute has arisen yet. In any case, in the current context of Investor-State Dispute-Settlement (ISDS) reform, the position that China may adopt in relation to the resolution of BRI investment disputes will contribute to shape the future of investor-State dispute-resolution.[23]

(2) On the Resolution of BRI Commercial Disputes

The discipline of "BRI commercial disputes" aims at overcoming the challenges of resolving commercial disputes that involve Chinese parties (especially from Mainland China) and non-Chinese parties. The legal complexity of BRI commercial disputes

[22] WTO, 'DS512-Russia: Measures Concerning Traffic in Transit', available electronically at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds512_e.htm>, accessed 10 October 2022.
WTO, 'DS532-Russia: Measures Concerning the Importation and Transit of Certain Ukrainian Products', available electronically at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds532_e.htm>, accessed 10 October 2022.

[23] See, for instance: J.A.C. Fernández *et al.*, 'Paradojas del arbitraje comercial y de inversiones, desde la perspectiva interna, europea y transnacional [Paradoxes of Commercial and Investment Arbitration, from the Internal, European and Transnational Perspective]', in J.S. Liceras *et al.* eds., *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz 2021* [*Vitoria-Gasteiz International Law and International Relations Courses 2021*] 325-402 (Tirant lo Blanch, 2022).

derives to a large extent from the legal, political and cultural diversity of the countries that have signed BRI agreements. In Asia only, it is possible to find a large variety of legal systems, including Islamic law, common law and civil law.[24]

BRI commercial disputes may arise out of a large variety of commercial contracts, including contracts for the sale of goods, supply contracts, contracts for the sale of services (such as insurance contracts), contracts concerning intellectual property rights and, of course, freight transport contracts. Depending on the mode of transport, freight transport contracts may be classified into maritime, air, inland waterways, rail, road and multimodal freight transport contracts.

Commercial disputes may be resolved either before State Courts (including international commercial courts) or utilizing ADR methods. The resolution of BRI commercial disputes before State courts relies upon the norms of private international law of countries along the BRI. Private international law has been substantially harmonized among European nations. In the American continent, there have also been attempts to harmonize private international law. However, at a global scale, there is very little harmonization of the norms on private international law.

China is trying to facilitate the cross-border enforcement of State court judgements along the BRI through bilateral and multilateral international treaties. The Hague Convention on Choice of Court Agreements of 2005 may serve to foster legal certainty in the resolution of BRI commercial disputes before State courts in general.[25] However, this convention is not applicable to the particular field of the carriage of goods. Therefore, The Hague Convention on Choice of Court Agreements cannot facilitate the resolution of BRI land freight transport disputes before State courts.

International commercial courts could play a major role in the resolution of BRI commercial disputes. Besides, China launched the China International Commercial Court (CICC), a sui generis one-stop dispute resolution mechanism that aims at facilitating the resolution of BRI commercial disputes through a dispute-resolution system that integrates State court litigation and ADR methods.

Among ADR methods, arbitration has consolidated throughout the second half of the 20th Century as the preferred means for the resolution of cross-border commercial

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[24] On 27 June 2018, the General Office of the Communist Party Central Committee and the General Office of the State Council issued the Opinions Concerning the Establishment of International Dispute Settlement Mechanism and Institutions for the Belt and Road, which enshrines four principles. First: "extensive consultation, joint efforts, shared benefits". Second: fairness, efficiency and convenience. Third: party autonomy. Fourth: diversity in dispute resolution, encouraging "the integration of these methods".
See: China International Commercial Court, 'Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions', available electronically at: <http://cicc.court.gov.cn/html/1/219/208/210/819.html>, accessed 26 July 2021.
Original version in Mandarin: 最高人民法院国际商事法庭 [SPC CICC], '中共中央办公室 国务院办公厅印发《关于建立"一带一路"国际商事争端解决机制和机构的意见》[Opinion Concerning the Establishment of the Belt and Road International Commercial Dispute Resolution Mechanism and Institutions]', available electronically at: <http://cicc.court.gov.cn/html/1/218/149/192/602.html>, accessed 26 July 2021.

[25] The Hague Conference on Private International Law, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements', available electronically at: <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf>, accessed 23 September 2021.

disputes, along with the universalization of the New York Convention of 1958.[26] Arbitration has indeed played a vital role in the reform and opening-up of the Chinese economy and will continue to be widely utilized for the resolution of BRI commercial disputes, including BRI land freight transport disputes. The success that the Singapore Convention may reach in the coming years will determine the role that cross-border mediation may be able to play in the resolution of BRI commercial disputes.

(a) The resolution of BRI commercial Disputes Before State Courts

The resolution of BRI commercial disputes before State Courts relies upon the norms on Private International Law of China and other countries along the BRI.[27] Jurisdiction over cross-border commercial disputes derives from a duty of the State to respect international standards concerning the treatment of aliens. In the words of Ian Brownlie, the obligation to "maintain a system of courts empowered to decide civil cases and, in doing so, prepared to apply private international law where appropriate in cases concerning a foreign element".[28]

Each State defines its own norms on Private International Law, that is, regulates private international situations. Calvo Caravaca refers to this feature as "statehood" of Private International Law. The Courts of each state apply the Private International Law of that particular state (the so-called "exclusivity" of Private International Law). Meanwhile, the "relativity" of the norms on Private International Law refers to the fact that these norms differ from State to State.[29] Exclusivity and relativity of Private International Law lead to legal uncertainty in cross-border commercial transactions.

The harmonization of Private International Law can reduce legal uncertainty in cross-border mercantile transactions and in the resolution of cross-border commercial disputes. Legal certainty in the resolution of BRI commercial disputes could be greatly improved through Private International Law harmonization among States along the BRI. Private International Law harmonization among European States has reached the highest standards so far. This has reduced legal uncertainty in commercial transactions and in the resolution of commercial disputes across this region, contributing to consolidation of the European single market. There have also been more modest attempts to coordinate Private International Law in the American Continent, such as the Bustamante Code. Nonetheless, the coordination of Private International Law at a global scale has much room for improvement.

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[26] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted New York 10 June 1958, entered into force 7 June 1959), 330 UNTS 3.

[27] On the Private International Law of China, see for instance:
W.Z. Chen, *Chinese Civil Procedure Law and the Conflict of Laws* (Tsinghua University Press, Beijing, 2011).

[28] I. Brownlie, *Principles of Public International Law* (7th ed., Oxford University Press, 2010) at 300.

[29] A court judgement or a writ of execution obtained in one State does not produce legal effects in another state unless it obtains recognition and enforcement from the competent authorities. The dynamics of Private International Law lead to the phenomena of "rush to the courts" and "forum shopping". That is, the parties to a dispute have an incentive to sue first and to sue before the State courts that will apply the most favorable laws to its case.
A.L.C Caravaca & J.C. González, *Derecho Internacional Privado Vol. 1* [*Private International Law Vol. 1*] 1-65 (16th ed., Comares, Granada, 2016), at 1-65.

The SPC's BRI Opinions address the need to foster the mutual recognition and enforcement of judgements. Foreign Sentences can be enforced in China either as agreed by treaty or following the criteria of reciprocity, according to Arts. 281 and 282 of China's Civil Procedure Act.[30] "Sino-foreign judgements mutual recognition was rare not long ago" but, as Zhang Wenliang and Tu Guangjian have acknowledged, the BRI "might have urged Chinese courts to be more liberal towards [the recognition and enforcement of] foreign judgements".[31]

Improving China's treaty network on mutual recognition and enforcement of commercial judgements is key for the efficient resolution of BRI commercial disputes before State Courts, especially since China has not yet concluded such treaties with some of its main trading partners.[32] According to China Justice Observer (CJO, 中国司法观察), as updated by May 2020, the following countries had concluded bilateral treaties on judicial assistance in civil and commercial matters containing provisions on the enforcement of foreign judgements: Algeria, Argentine, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Cuba, Cyprus, Egypt, Ethiopia, France, Greece, Bulgaria, Iran, Italy, Kazakhstan, Kuwait, Kyrgyzstan, Laos, Lithuania, Mongolia, Morocco, North Korea, Peru, Poland, Romania, Russia, Singapore, South Korea, Spain, Tajikistan, Thailand, Tunisia, Turkey, United Arab Emirates, Ukraine, Uzbekistan and Vietnam.[33]

Another vector that can foster the transnational recognition and enforcement of commercial judgements across the BRI consists on moving from China's traditional "de facto reciprocity" system towards the "presumptive reciprocity" system, that is, the recognition of reciprocity with another country if that country has not yet refused to recognize and enforce a judgement by a People's court.[34] Steps in this direction were

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[30] 北大法宝 [Beijing University Law Search Engine], '中华人民共和国诉讼法 (2021修正) [Civil Procedure Law of the People's Republic of China, with amendments as to 2021]', original version in Mandarin and unofficial English translation available electronically at: <https://www.pkulaw.com/en_law/3ce82cb92ee006b6bdfb.html>, accessed 18 December 2023.

[31] W.L. Zhang & G.J. Tu, 'The Hague Judgements Convention and Mainland China-Hong Kong SAR Judgements Arrangement: Comparison and Prospects for Implementation', 20 Chinese Journal of International Law (2021), at 125 [doi: 10.1093/chinesejil/jmab009].

[32] *Ibid*. at 133.

[33] M. Yu, 'List of China's Bilateral Treaties on Judicial Assistance in Civil and Commercial Matters (Enforcement of Foreign Judgements Included)', available electronically at: <https://www.chinajusticeobserver.com/a/list-of-chinas-bilateral-treaties-on-judicial-assistance-in-civil-and-commercial-matters>, accessed 23 August 2021.
Legal instruments for the recognition and enforcement of Court judgements have been concluded between the Mainland and the Special Administrative Region (SAR) of Hong Kong. The 2019 Arrangement on Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong SAR (the "Mainland China-Hong Kong SAR Judgements Arrangement"), substitutes a previous agreement that had a narrower scope (which was limited to monetary judgements), the 2006 Arrangement on Reciprocal Recognition and Enforcement of Judgements in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region Pursuant to Choice of Court Agreements between Parties Concerned.

[34] A list of cases on recognition and enforcement of foreign judgements between China and selected jurisdictions, updated as of 16 July 2019, can be found in: Du Guodong & Yu Meng, List of China's Cases on Recognition of Foreign Judgements, available at: https://www.chinajusticeobserver.com/a/list-of-chinas-cases-on-recognition-of-foreign-judgments (retrieved on the 1st of August 2021).
See: J.Y. Wang, 'Dispute-Settlement in the Belt and Road Initiative: Progress, Issues and Future Research Agenda', 8 The Chinese Journal of Comparative Law (2020) at 13-14.

taken within the China-ASEAN Justice Forum, such as the Nanning Declaration of 2017.[35]

The Hague Convention on Choice of Court Agreements of 2005 has a huge potential to foster legal certainty in the resolution of BRI commercial disputes before State Courts.[36] The Hague Convention of 2005 aims at ensuring the effectiveness of choice of court agreements (also referred to as "forum selection clauses" or "jurisdiction clauses") in commercial cross-border transactions among parties located in contracting parties.[37] Choice of court agreements are not automatically recognized in many jurisdictions and this Convention aims at redressing this situation and promoting cross-border legal certainty.[38]

In order to be truly effective for the resolution of BRI commercial disputes, The Hague Convention on Choice of Court Agreements of 2005 would require more ratifications from countries along the BRI. This entered into force on the 1st of October 2015, but is has primarily been ratified by States in the European continent so far.[39] In Asia, only Singapore has ratified this Convention. China (just like the United States of America) has signed this Convention, becoming a contracting party to it. Nevertheless, since China has not (yet) ratified this Convention, it has not entered into force for this country.

Acknowledging the great potential of The Hague Convention of 2005 for the resolution of BRI commercial disputes in general, it must be noted that "the carriage of passengers and goods" is excluded from the scope of application of this convention, according to Art. 2(2)(f) of The Hague Convention.[40] The exclusion of freight transport contracts from the scope of this convention seems to be: "the existence of more specific international

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[35] G.D. Du & M. Yu, 'The Nanning Statement: A Milestone in Recognizing and Enforcing Foreign Judgements in China', available electronically at: <https://www.chinajusticeobserver.com/a/the-nanning-statement-a-milestone-in-recognizing-and-enforcing-foreign-judgments-in-china>, accessed 1 August 2021.

[36] The Hague Conference on Private International Law (HCCH) is constantly developing instruments that could be useful for the resolution of BRI commercial disputes. Among the current concerns of the HCCH, the following issues should be addressed: "On which grounds should the parties to a civil or commercial dispute be able to seize the courts of a certain State; on which grounds can a State exercise jurisdiction in civil and commercial matters; how can harmonized rules in this area reduce the risk of parallel litigation in multiple States?".
The Hague Conference on Private International Law, 'Jurisdiction Project', available electronically at: <https://hcch.net/en/projects/legislative-projects/jurisdiction-project>, accessed 24 September 2002.
See also: M. Hwang *et. al.*, 'One Belt, One Road, One Clause for Dispute Resolution?', in Shan Wenhua *et. al*. eds., *China and International Dispute Resolution in the Context of the "Belt and Road Initiative"* (Cambridge University Press 2020), at 23-47.

[37] The Hague Conference on Private International Law, 'Choice of Court Section', available electronically at: <https://www.hcch.net/en/instruments/specialised-sections/choice-of-court>, accessed 23 September 2021.

[38] The Hague Conference on Private International Law, 'Outline: The Hague Convention of 30 June 2005 on Choice of Court Agreements', text available electronically at: <https://assets.hcch.net/docs/89be0bce-36c7-4701-af9a-1f27be046125.pdf>, accessed 23 September 2021.

[39] The Hague Conference on Private International Law, 'Status Table: The Hague Convention of 30 June 2005 on Choice of Court Agreements', available electronically at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>, accessed 23 August 2023.

[40] The Hague Conference on Private International Law, 'The Hague Convention of 30 June 2005 on Choice of Court Agreements', text available electronically at: https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf, accessed 9 October 2021.

instruments, and national, regional or international rules that claim exclusive jurisdiction for some of these matters".[41] The reason for excluding the carriage of goods from the scope of application of the Convention on Choice of Court Agreements is to avoid conflicts with more specific conventions, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Convention concerning International Carriage by Rail (COTIF).[42]

(b) *International Commercial Courts and the Resolution of BRI Commercial Disputes*

International commercial courts may play an active role in the resolution of BRI commercial disputes. International commercial courts may be utilized by Chinese parties when carrying out commercial transactions abroad. China has created the China International Commercial Court (CICC), which is a sui generis International Commercial Court institutionally linked to the Supreme People's Court (SPC) for the resolution of BRI commercial disputes.

International commercial courts had traditionally been established in places with a strong commercial activity, such as the International Commercial Chamber of Paris Appellate Court, the German Chambers for International Commercial Disputes, The Netherlands Commercial Court, the London Commercial Court, the Delaware Court of Chancery and Federal District Court for the Southern District of New York.[43]

Since the beginning of the 21st Century, international commercial courts have proliferated in newly-industrialized countries and even in developing countries. Such is the case of Dubai International Financial Centre (DIFC) Courts, established in 2004, Qatar International Court and Dispute Resolution Centre (QICDRC), founded in 2009, Abu Dhabi Global Markets (ADGM) Court, and Singapore International Commercial

[41] The Hague Conference on Private International Law, *supra* n. 37.

[42] Convention on the Contract for the International Carriage of Goods by Road (CMR), 399 UNTS 189. Convention concerning International Carriage by Rail (COTIF), 1396 UNTS 2 et seq., 1397 UNTS 2 *et seq*. The Explanatory Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements mentioned explicitly potential conflict with The Hague-Visby Rules (The Hague Rules of 1924 amended by the Brussels Protocol of 1968). However, conflicts may well occur with other conventions concerning other modes of transport.
See: M. Dogauchi & T.C. Hartley, 'Explanatory Report on the Preliminary Draft Convention on Exclusive Choice of Court Agreements, 10-11', available electronically at: https://assets.hcch.net/upload/wop/jdgm_pd26e.pdf, accessed 9 October 2021 [doi: 10.1017/CBO9780511551215.013].
The general rule *specialia generalibus derogat* is also useful to avoid conflicts among international conventions. Besides, the specialty rule in Art. 71 of the Brussels I bis Regulation as interpreted by the judgment of the Court of Justice of the European Union (CJEU) TNT *v*. AXA. of 4 May 2010 (Case C-533/08) and the respect of unimodal conventions such as the CMR should be recalled.
See: J.J.A. Rubio, 'La regla de especialidad como cauce para superar los conflictos normativos entre el Derecho comunitario y los Convenios internacionales en materias especiales. [The Specialty Rule as a Channel to Overcome Normative Conflicts between EU Law and International Conventions on Special Matters.]', 7499 *Diario La Ley* (2010).

[43] Secretariat to the Standing International Forum of Commercial Courts, 'SIFoCC: France', available electronically at: <https://sifocc.org/countries/france/>, accessed 2 October 2020.
The Netherlands Commercial Court, 'Commercial litigation in the Netherlands', available electronically at: <https://netherlands-commercial-court.com>, accessed 2 October 2021.

Court (SICC) since 2015.[44] More recently, in 2018, the Court of Astana International Financial Center (AIFC) was created in Kazakhstan.[45]

SICC is particularly well situated among international commercial courts in order to resolve BRI commercial disputes. Singapore's historical role as a hub for trade between China and India contributes to the general perception of this city-State as a neutral place for dispute resolution.[46] The recognition and enforcement of international commercial court's rulings abroad, as a general rule, is subject to numerous challenges from the perspective of private international law. The recognition and enforcement of state-court judgements between Singapore and China has been upgraded through a non-binding Memorandum of Guidance between the SPC and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgements in Commercial Cases.[47]

Initiatives such as the Asian Business Law Institute (ABLI), the Singapore International Commercial Court (SICC) and the Singapore-China Annual Legal and Judicial Roundtable also contribute to fostering the role of Singapore in the resolution of BRI disputes. ABLI, which focuses on the harmonization of Asian business laws, has made significant progress on the recognition and enforcement of foreign judgement across the continent.

Besides, Singaporean court rulings benefit from reciprocal enforcement in various jurisdictions. Enforcement of Singaporean rulings may be obtained in jurisdictions such as the United Kingdom, Australia and Hong Kong under the legal framework of the Commonwealth. Furthermore, enforcement of SICC rulings in China and in the United Arab Emirates may be sought in the terms of the Memorandum of Guidance on the Enforcement of Money Judgements with the SPC, DIFC Courts and ADGM Courts. Besides, The Hague Convention of 2005 has already entered into force in Singapore.

The CICC is a permanent adjudication organ of the SPC, established for the purpose of resolving disputes under the BRI. The SPC Provisions on Several Issues Regarding the Establishment of the International Commercial Court contain guidelines for establishing the CICC and create CICC tribunals in the cities of Shenzhen and Xi'an. Judge Sun Xiangzhuang defines the CICC as a "one-stop forum for a dispute settlement

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44 Dubai International Financial Centre Courts, 'About the DIFC Courts', available electronically at: <https://www.difccourts.ae/about-courts-2/>, accessed 2 October 2021.
Qatar International Court and Dispute Resolution Centre, 'QICDRC: History', available electronically at: <https://www.qicdrc.gov.qa/history-origins-court>, accessed 2 October 2021.
Abu Dhabi Global Markets Courts, 'About ADGM Courts', available electronically at: <https://adgm-courts.com/ADGM/About>, accessed 2 October 2021.
Singapore International Commercial Court, 'About SICC', available electronically at: <https://www.sicc.gov.sg/about-the-sicc/establishment-of-the-sicc>, accessed 2 October 2021.

45 Astana International Financial Centre Court, 'AIFC Court: An Introduction', available electronically at: <https://court.aifc.kz/an-introduction/>, accessed 2 October 2021.

46 S. Chong, 'Dispute Settlement in the Belt and Road Initiative: Lessons from the Singapore Experience', 8 *The Chinese Journal of Comparative Law* (2020) at 31-33 [doi: 10.1093/cjcl/cxaa013].

47 Supreme Court of Singapore, 'Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgements in Commercial Cases', available electronically at: https://www.supremecourt.gov.sg/docs/default-source/default-document-library/spc-mog-english-version---signed.pdf, accessed 1 August 2021.

mechanism integrating litigation, mediation, and arbitration".[48] Meanwhile, Judge Long Fei highlights that the CICC "creates an organic connection between mediation, arbitration and litigation".[49]

The CICC is supported by an International Commercial Expert Committee (ICEC), composed of 31 Chinese and foreign legal experts. After assuming jurisdiction, the CICC may entrust the dispute to mediation before members of the ICEC or before an international commercial mediation institution. Under the CICC mechanism, disputes may also be submitted to an international commercial arbitration institution, to be chosen among the ones that have concluded agreement with the CICC.[50]

(c) ADR Mechanisms for the Resolution of BRI Commercial Disputes

ADR methods tend to be a good option for the resolution of disputes among parties with different legal and cultural backgrounds. Arbitration and mediation outstand among the ADR methods that may be used for the resolution of BRI commercial disputes. The institution of arbitration is recognized, in a more or less liberal form, in nearly all jurisdictions. The lowest common denominator of different regulations concerning arbitration is the authorization for private parties to conclude a binding contractual agreement that stipulates that present and future disputes shall be settled by the arbitral mechanism chosen by them (the arbitration agreement or the arbitration clause).[51]

In the last decades of the 20th Century and the beginning of the 21st Century, international commercial arbitration has consolidated as the preferred ADR method for the resolution of commercial disputes. Furthermore, arbitration has been and will continue to be a key legal tool for the consolidation of the reform and opening-up of the Chinese economy. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is the cornerstone of the success of this ADR method. Cross-border enforceability of arbitral awards under the New York Convention is a clear advantage of arbitration over other ADR methods.[52] The New York Convention of 1958

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48 X.Z. Sun, 'A Chinese Approach to International Commercial Dispute Resolution: The China International Commercial Court', 8 *The Chinese Journal of Comparative Law* (2020), at 45 [doi: 10.1093/cjcl/cxaa015].

49 F. Long, 'Innovation and Development of the China International Commercial Court', 8 *The Chinese Journal of Comparative Law* (2020) at 42-43 [doi: 10.1093/cjcl/cxaa014].

50 On 21 November 2018, the SPC issued the Procedural Rules for the International Commercial Court of the Supreme People's Court.
See: China International Commercial Court, 'Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation)', available electronically at: <http://cicc.court.gov.cn/html/1/219/208/210/1183.html>, accessed 27 July 2021.
Original version in Mandarin: 最高人民法院国际商事法庭 [SPC CICC], '最高人民法院办公厅关于印发《最高人民法院国际商事法庭程序规则（试行）》的通知 [Procedural Rules for the China International Commercial Court of the Supreme People's Court (For Trial Implementation)]', available electronically at: <http://cicc.court.gov.cn/html/1/218/19/278/1122.html>, accessed 27 July 2021.

51 S. Greenberg *et al*., *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, 2010) [doi: 10.1017/CBO9780511997365].
See also: M.G. Jene, *Arbitraje comercial internacional* [*International Commercial Arbitration*], (Civitas, 2023).

52 Contemporary commercial arbitration finds its origins in the first decades of the 20th century, with the Geneva Protocol of 1923 concerning arbitration clauses and the Geneva Convention of 1927 on the enforcement of Foreign Arbitral Awards, which were designed within the League of Nations. The Protocol

became one of the most successful international treaties ever, having reached virtually universal recognition, with 168 parties.[53]

The United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention) was signed in 2019 with the aim of creating a legal instrument in the field of cross-border mediation analogous to the New York Convention.[54] The names of these conventions are rather symbolic: the heyday of the New York Convention is contemporaneous to the consolidation of the United States of America as a mercantile unrivalled superpower and the drafting of the Singapore Convention coincides with the unprecedented prosperity of the Asia-Pacific Region.

The Singapore Convention can potentially play a major role in the resolution of BRI commercial disputes. However, it is far from having reached the universality of the New York Convention. It has reached 56 signatories so far, with a strong presence of countries in the Asia-Pacific Region, but also from Africa and the Middle East. However, it has only entered into force for eleven parties and, among G20 countries, only Saudi Arabia and Turkey have ratified this convention.[55]

ADR institutions in Asia and around the World have designed their own strategies in order to better serve to the resolution of BRI disputes. Most ADR institutions in China have launched BRI dispute resolution strategies. In the mainland, for instance, China International Economic and Trade Arbitration Centre (CIETAC), Beijing Arbitration Commission (BAC), Shanghai International Arbitration Centre (SHIAC) and Shenzhen Court of International Arbitration (SCIA) have made efforts to better adapt to the resolution of BRI commercial disputes. ADR institutions in other parts of China have also sought to serve the BRI commercial dispute-resolution system, such as Hong Kong International Arbitration Centre (HKIAC).

Various ADR institutions across Asia also explicitly aim at contributing to the resolution of BRI commercial disputes, such as Singapore International Arbitration Centre (SIAC), the Singapore International Mediation Centre (SIMC) and the Asian International Arbitration Centre, in Kuala Lumpur. The resolution of BRI commercial disputes has also received considerable attention in regional arbitration institutions, such as the Arbitration Foundation of Southern Africa (AFSA) and the Nairobi Centre for International Arbitration (NCIA). At a global scale, the International Chamber

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of 1923 was paradigmatic in recognizing the validity of an agreement between private parties for the resolution of commercial and other arbitral disputes. The New York Convention includes and combines elements of the aforementioned Geneva Protocol of 1923 and the Geneva Convention of 1927. By using this ADR method, the parties to a dispute could avoid the jurisdiction of state Courts and Tribunals.
UNCITRAL, 'Dispute Settlement: International Commercial Arbitration' (United Nations, Geneva / New York, 2005), available electronically at: < https://unctad.org/system/files/official-document/edmmisc232add38_en.pdf>, accessed 20 July 2023.

[53] UNCITRAL, 'Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)', available electronically at: <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>, accessed 6 May 2021.

[54] United Nations Treaty Collection, 'Status: United Nations Convention on International Settlement Agreements Resulting from Mediation', text available electronically at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en>, accessed 20 April 2022.

[55] *Ibid*.

of Commerce (ICC) has also developed a specific strategy for the resolution of BRI commercial disputes.

(3) On the Legal Nature of BRI Land Freight Transport Disputes

BRI land freight transport disputes are commercial disputes, but they have to be treated in a specific way, given the peculiarities of the legal regime applicable to the cross-border land freight transport contract. The regulation of the transport of goods is the result of municipal and international legal regimes that sometimes overlap, which results into the multi-layered legal regime of road and rail freight transport contracts.[56]

In the words of de la Vega Justribó, there is "a network of uniform material rules that can be considered the most complete one in the field of Commercial Law, even though the uniformity pursued by them is not full".[57] The main differences among substantive legal instruments regulating land transport include: the scope of application, the nature of the carrier's liability (different grounds for exception of responsibility), the period of responsibility, and the persons for whom the carrier is liable.[58] Such differences may often be at the origin of land freight transport disputes.

In order to understand the present and the future of the resolution of road and rail freight transport disputes along Europe-China corridors and along the regional routes that link China to other Asian countries, some of the "layers" of the legal regime applicable to the land freight transport contracts that may give rise to such disputes must be analyzed. First and foremost, the role of international conventions and other cross-border legal instruments will be addressed. Subsequently, the contractual legal instruments that enable the legal interoperability across rail transport legal regimes need to be analyzed. Following, the suitability of different dispute-resolution mechanisms for the resolution of BRI land freight transport disputed (including litigation before State-courts, arbitration and other ADR mechanisms) will be explored.

(C) THE ROLE OF THE CMR, THE CIM RULES, SMGS AND CONTRACTUAL INSTRUMENTS IN THE RESOLUTION OF BRI LAND FREIGHT TRANSPORT DISPUTES

The cross-border legal instruments that will be here analyzed are the primary legal instruments for the resolution of cross-border land freight transport disputes. The first one is an international treaty: the Convention on the Contract for the International Carriage of

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[56] Nevertheless, there is a "significant international legal uniformity".
See: C.L.G. de Segura, 'La Ley aplicable al contrato de transporte internacional según el reglamento Roma I', 2 *Cuadernos de Derecho Transnacional* (2009), at 161.

[57] As translated by the author of the present article.
B. de la V. Justribó, 'Arbitraje marítimo internacional [International Maritime Arbitration]', in Estudio Mario Castillo Freyre eds., *Diccionario Terminológico del Arbitraje Nacional e Internacional (Comercial y de Inversiones): Vol. 18 Biblioteca del Arbitraje [Dictionary on National and International Commercial and Investments Arbitration Vol. 18 Arbitration Library]* (Lima, 2011), at 243.

[58] Y. Zhu & V. Filimonov, 'Comparative Study of International Carriage of Goods by Railway between CIM and SMGS', 13 Frontiers of Law in China (2018), at 124-134 [doi: 10.3868/s050-007-018-0008-5].

Goods by Road (CMR). The second one is an annex to COTIF (which is an international treaty): the Uniform Rules concerning the Contract of International Carriage of Goods by Rail (CIM Rules). The third one is an agreement among the Ministries with competence over transport, which finds its historical and legal roots in cooperation among Soviet republics: the Agreement on International Railway Freight Communications (SMGS).[59]

(1) The Convention on the Contract for the International Carriage of Goods by Road

The CMR is the unrivalled legal instrument for the resolution of road freight transport disputes.[60] Even if China is not a party to this convention, the BRI commercial dispute-resolution system can benefit from this legal instrument by applying it on a contractual basis. The CMR applies *proprio vigore* along Europe-China road freight corridors, as well as along some regional Asian routes. Along other regional routes involving only countries that are not parties to the CMR, at least the substantive norms in this legal instrument can still be applied on a contractual basis.[61]

The CMR brings legal certainty to the resolution of road freight transport disputes before State courts through private international law norms: this convention refers to the courts with jurisdiction over covered disputes and creates a cross-border *lis pendens* mechanism and a mechanism for the recognition and enforcement of judgements. The

[59] CMR *supra* n. 43.
COTIF *supra* n. 43.
'Uniform Rules concerning the Contract for International Carriage of Goods by Rail, contained in Appendix B to COTIF, (CIM Rules)', available electronically at: <https://otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/01_COTIF_80/cotif-cim-1980-e.PDF>, accessed 20 May 2023.
Throughout this text, any reference to the CIM Rules is to the CIM Rules 1999, as revised through the Vilnius Protocol of Amendment in June 1999.
Organization for Cooperation of Railways (OSJD), 'Agreement on International Railway Freight Communications (SMGS)', available electronically at: <https://en.osjd.org/api/media/resources/2067?action=download>, accessed 15 November 2022.
Note that SMGS is not an international treaty, but rather an agreement among the Ministries with competence over rail transport of the countries that decide to join this legal instrument. Hence, this instrument cannot be found in the United Nations Treaty Series.

[60] M.A. Clarke, *International Carriage of Goods by Road: CMR* (6th ed., Informa Law Routledge, 2014), at 21 [doi: 10.4324/9781315851402].
See also: U.B. Martín, *Derecho europeo y transporte internacional por carretera* [*European Law and International Road Transport*] (Thomson Reuters Aranzadi, 2015).
D.C. Aguado, 'Regulación jurídico-privada del contrato internacional de transporte de mercancías por carretera [Private-International-Law Regulation of the Contract for the Cross-border Transport of Goods by Road]', in M.V.P. Lavall & A. Puetz eds., *El transporte como motor del desarrollo socioeconómico* [*Transportation as a Driver of Socioeconomic Development*] (Marcial Pons, 2018).
J. Putzeys, *Le contrat de transport routier de marchandises* [*The Contract for the Carriage of Goods by Road*] (Brussels, Bruylant, 1981).
F.J. Sánchez-Gamborino, *El contrato de transporte internacional de mercancías por carretera: CMR* [The Contract for the International Transport of Goods by Road: CMR] (Madrid, Tecnos, 2020).
A. Messent & D. Glass, *CMR: Contracts for the International Carriage of Goods by Road* (4th ed., Informa Law from Routledge, 2017) [doi: 10.4324/9781315689623].

[61] According to Art. 6(1)(k) of the CMR, the CMR consignment note shall contain "a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention".
See: CMR, *supra* n. 43, Art. 6(1)(k).

routes that are key to the BRI go through the territory of countries, some of which are not parties to the CMR. Therefore, these legal mechanisms that facilitate the cross-border resolution of road freight transport disputes before State courts cannot always be utilized.

In the mid and long run, China and other Asian countries may join the CMR, which would foster legal certainty in the resolution of BRI road freight transport disputes before State courts.[62] However, in the short run, ADR mechanisms –and notably arbitration– may be utilized for the resolution of BRI road freight transport disputes.[63]

(2) The Role of the CIM Rules and SMGS

The resolution of BRI rail freight transport disputes is determined by the coexistence of two cross-border legal instruments on rail freight transport contracts: the CIM Rules and SMGS.[64]

Each of these legal instruments contains norms on dispute resolution and plays an important role across different BRI rail freight transport routes. CIM Rules pay great attention to the resolution of covered disputes before State Courts, in a similar pattern to the CMR. CIM Rules address the jurisdiction of State Courts over covered disputes and creates both a cross-border *lis pendens* mechanism and a mechanism for the cross-border recognition and enforcement of judgements, favoring the resolution of covered disputes before State Courts. This convention also awards importance to the reports mechanism and even creates a special ADR mechanism: COTIF arbitration. However, this special kind of arbitration has been barely used in practice.[65] A major reason why COTIF arbitration is seldom utilized is that the vast majority of differences that arise under a CIM consignment note can be resolved without resource to third-party adjudication, just by using the reports system created by the CIM Rules.[66]

SMGS also favors the early settlement of claims through a very detailed reports system and defines in great detail –in an almost administrative manner– the mechanisms

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62 International Road Transport Union, 'Road Transport in the People's Republic of China' (2009), available electronically at: < https://www.iru.org/sites/default/files/2016-01/en-rt-in-china.pdf>, accessed 16 July 2023, at 50.

63 On the private-international-law aspects of jurisdiction and arbitration related to the cross-border transport of goods by road, see, for instance:
U.B. Martín, 'Jurisdicción / arbitraje en el transporte de mercancias por carretera: ¿comunitarización frente a internacionalización? [Jurisdiction / Arbitration in the Carriage of Goods by Road: Communitarization *versus* Internationalization?]', 7(3) *Arbitraje: Revista de Arbitraje Comercial y de Inversiones* 707-743 (2014).
U.B. Martín, 'The CMR 1956 Convention: Some Specific Issues from a Private International Law Perspective', 18 *Yearbook of Private International Law* 569-590 (2016-2017) [doi: 10.9785/9783504385637-025].
U.B. Martín, 'El presupuesto de validez de la cláusula arbitral en el CMR: extensión vs. límites. Sentencia del Tribunal Superior de Justicia de Cataluña de 27 de mayo de 2022 [The Assumption of Validity of the Arbitration Clause in the CMR: Extension vs. Boundaries. Ruling of the Superior Court of Justice of Catalonia of May 27, 2022]', 14 *La Ley: Mediación y Arbitraje* (2023).

64 International Rail Transport Committee, 'Freight Traffic CIM/SMGS (2019)', available electronically at: <https://www.cit-rail.org/media/files/documentation/freight/scopes/scope_of_application_of_cim-smgs_2019-05-01.pdf?cid=204902>, accessed 15 June 2023.

65 M. A. Clarke & D. Yates, *Contracts of Carriage by Land and Air* (2nd ed., Informa Law Routledge, 2008), at 15-18 [doi: 10.4324/9781315795881].

66 Interview to Prof. Dr. Erik Evtimov, Deputy Secretary General of the International Rail Transport Committee on 2 June 2021.

for handling claims covered by this cross-border agreement. Disputes covered by SMGS may be resolved before States Courts, as well as utilizing ADR mechanisms. However, in SMGS, there is a clear preference for the settlement of disputes without the intervention of a third-party adjudicator. State courts and ADR mechanisms receive very little attention in SMGS.

China is a party to SMGS, but not to the CIM Rules contained in COTIF. A number of countries in Asia have decided to join the CIM Rules in order to facilitate cross-border rail freight transport along Europe-Asia corridors, even when they are not contracting parties to other COTIF annexes. China has shown little interest in joining this convention, at least in the short term.

So far, the resolution of rail freight transport disputes across different legal regimes – that is, involving countries that are only parties to CIM Rules as well as countries that are only parties to SMGS– is primarily enabled through contractual agreements.[67] The most popular, standardized contractual legal instruments have been created under the auspices of rail industry associations, notably the International Rail Transport Committee (CIT).

In the long term, a new overarching convention on the rail freight transport contract may be developed. In the short term, China may not join the CIM Rules, but this may eventually take place in the middle and long term. A new convention would only be effective in resolving the problem of fragmentation if it truly became an overarching convention among —at least — all the current members to the CIM Rules and SMGS. Chinese scholars believe that, at least in the short and middle term, China will not adhere to the CIM Rules.[68] They consider that, if a new international treaty was to be drafted, it would be an opportunity include some demands of the Chinese rail freight services industries. The main technical constraint of the current railway transport documents, as perceived by Chinese rail freight services industries, is the fact that these are non-negotiable, and therefore "the consignee cannot obtain financing by opening a letter of credit".[69]

Multimodal freight transport documents, unlike land freight transport documents, tend to be negotiable instruments. However, the utilization of multimodal transport documents does not seem to be a solution to this challenge of land freight transport documents. The 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) presents two major impediments. First, it is a "maritime plus" multimodal transport contract and, therefore, it cannot be utilized for a land freight transport contract that does not include at least one maritime haul.[70] Second, this treaty requires twenty ratifications to enter into force,

[67] E. Evtimov, *European and International Rail Transport Law* (Editions Weblaw, Bern 2020), at 177.

[68] Written interview to Prof. Dr. Zhang Lying, Professor at the China University of Political Science and Law, received on 12 March 2022. As translated by the author.

[69] L.Y. Zhang & C. Shao, '中欧班列铁路运单的公约困境及解决路径 [The Challenges Ahead the Europe-China Rail Waybill and the Path to Overcome Them]', 3 国际贸易 [*International Trade Journal*] (2021).

[70] On the Rotterdam Rules see, e.g.:
C.L.G. de Segura, 'Las Reglas de Rotterdam (I) [The Rotterdam Rules (I)]', 1 *Cuadernos De Derecho Transnacional* 165-185 (2010).
C.L.G. de Segura, 'Las Reglas de Rotterdam (II) [The Rotterdam Rules (II)]', 2 *Cuadernos de Derecho Transnacional* 104-125 (2010).

whereas only five States have done it so far.[71] The 1980 United Nations Convention on Multimodal Transport of Goods has not entered into force either, which would require at least thirty ratifications, having reached eleven so far.[72]

(3) The Role of Legal Instruments Designed by Rail Industry Associations

"[The] [c]reation of the harmonized international rail freight legal regime has been the declared long-term legal and political goal for the next 10-15 years. Whilst waiting for the states to create this new uniform legal framework, the United Nations Economic Commission for Europe (UNECE) is encouraging the railways and trade associations involved to achieve harmonized solutions on a contractual basis".[73] This is the main challenge of rail freight transport in our days, as Erik Evtimov has synthesized it.

The creation of a new overarching convention on the rail freight transport contract would constitute a milestone in global logistics that François Davenne, Director General of the International Union of Railways (UIC) has compared to the Chicago Convention on International Civil Aviation.[74] However, in the meanwhile, cooperation in the field of rail freight transport law primarily takes place among the members of the industry, not among states, as Sandra Géhénot, Director for Freight of the International Union of Railways, reminds us.[75]

In the short and middle term, when neither the CIM Rules nor SMGS may be applied *proprio vigore*, the parties to a rail freight transport contract may contractually agree upon the utilization of either a CIM consignment note or a CIM-SMGS consignment

R.E. Calabuig, 'Jurisdicción, libertad contractual e intereses de terceros en las reglas de Rotterdam [Jurisdiction, Contractual Freedom and Third-Party Interests in the Rotterdam Rules]', in R. E. Calabuig ed., Las Reglas de Rotterdam Sobre Transporte Marítimo: Pros y Contras del Nuevo Convenio [The Rotterdam Rules on Maritime Transport: Pros and Cons of the New Convention] (Tirant lo Blanch, Valencia, 2013).
M.A. Fernández, 'Solución de controversias en las reglas de Rotterdam: jurisdicción y arbitraje. Normas sobre jurisdicción en las reglas de Rotterdam: del conflicto en el mercado al compromiso en la ley [Dispute-resolution in the Rotterdam Rules. Norms on Jurisdiction in the Rotterdam Rules: from Conflict in the Market to Commitement through the Law]', in R.E. Calabuig ed., Las Reglas de Rotterdam Sobre Transporte Marítimo: Pros y Contras del Nuevo Convenio [The Rotterdam Rules on Maritime Transport: Pros and Cons of the New Convention], (Tirant lo Blanch, Valencia, 2013).
T. Fujita, 'Jurisdicción y arbitraje [Jurisdiction and Arbitration]', in R.I. Ortiz & M.A. Fernández eds., Las Reglas de Rotterdam: Una Nueva Era en el Derecho Uniforme del Transporte [The Rotterdam Rules: A New Era in Transportation Uniform Laws] (Dykinson, 2012) at 141-158.

[71] UNCITRAL, 'Status: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea', available electronically at: <https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules/status>, accessed 31 August 2022.

[72] United Nations Treaty Collection, 'Status: United Nations Convention on International Multimodal Transport of Goods', available electronically at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-E-1&chapter=11&clang=_en>, accessed 31 August 2022.

[73] E. Evtimov, 'Moving to a new legal regime for global rail freight', 25 Global Railway Review (2019) 2, at 26-29. See also: A.G. Jiménez, 'Resolving Rail Freight Transport Disputes along Europe-China Corridors and Asian Regional Routes', 13(4) Journal of WTO and China 27-56 (2023).

[74] F. Davenne, 'Interview to François Davenne, Director General, International Union of Railways' (15 June 2021) (Interview carried out by the author of the present article).
Convention on International Civil Aviation 1944, 15 UNTS 295.

[75] S. Géhénot, 'Interview to Sandra Géhénot, Director for Freight, International Union of Railways' (15 June 2021) (Interview carried out by the author of the present article).

note on a contractual basis. In these cases, a number of legal instruments created under the auspices of CIT may be particularly useful for the avoidance of differences, the early settlement of claims and the resolution of rail freight transport disputes.

When a CIM consignment note is utilized on a contractual basis, the following contractual legal instruments could be utilized in order to resolve the disputes that may arise: the CIM Consignment Note Manual (GLV CIM) the CIM General Terms and Conditions (GTC-CIM) and the Agreement Concerning the Resolution of Rail Freight Transport Disputes in Respect of International Freight Traffic by Rail (AIM).[76] Meanwhile, under a CIM-SMGS common consignment note, the following contractual instruments may contribute to the resolution of disputes: the CIM-SMGS Consignment Note Manual (GLV CIM-SMGS), the EurAsia General Terms and Conditions (GTC Eurasia) and Appendix 10 to AIM.[77]

All the contractual legal instruments analyzed aim, first and foremost, at avoiding the emergence of disputes and try to foster the early settlement of claims among the parties. The preservation of the long-term commercial relationship is key in the rail freight transport services market, given the limited number of railway undertakings operating in each country. Standard forms foster the settlement of dispute among the parties involved.

If a settlement cannot be reached among the parties, standard forms also provide a basis for the eventual resolution through third-party adjudication. Both GTC CIM and GTC EurAsia refer to the resolution of disputes through third-party adjudication, giving preference to the utilization of the dispute-resolution mechanisms that may best preserve the long-term business relationship.

(a) CIM Consignment Note used on a Contractual Basis

When the parties to a rail freight transport contract agree upon the utilization of a CIM consignment note, GLV CIM and AIM focus on the avoidance and early settlement

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[76] International Rail Transport Committee, 'CIM-SMGS Consignment Note Manual (GLV CIM) (2019)', available electronically at: <https://www.cit-rail.org/secure-media/files/glv-cim_en_2019-07-01.pdf?cid=251703>, accessed 15 June 2023.
International Rail Transport Committee, 'General Terms and Conditions of Carriage for International Freight Traffic by Rail (GTC CIM) (2019)', available electronically at: <https://www.cit-rail.org/media/files/abb-cim-en_2019-01-01_signed.pdf?cid=294317>, accessed 15 June 2023.
International Rail Transport Committee, 'Agreement concerning the Relationships between Carriers in respect of International Freight Traffic (AIM) (2021)', available electronically at: <https://www.cit-rail.org/en/freight-traffic/products/agreements/#content-330235>, accessed 15 June 2023.

[77] International Rail Transport Committee, 'CIM/SMGS Consignment Note Manual (GLV-CIM/SMGS) (2023)', available electronically at: <https://www.cit-rail.org/secure-media/files/glv_cim-smgs_en_2023-03-06_app_1_signe.pdf?cid=329115>, accessed 16 June 2023.
International Rail Transport Committee, 'General Terms and Conditions of Eurasian carriage by rail (GTC EurAsia) (2019)', available electronically at: <https://cit-rail.org/secure-media/files/documentation/freight/gtc-eurasia/gtc-eurasia_en_2019-01-01.pdf?cid=103623>, accessed 16 June 2023.
International Rail Transport Committee, 'Appendix 10 to the Agreement concerning the Relationships between Carriers in respect of International Freight Traffic: Handling of CIM-SMGS Claims (Appendix 10 AIM) (2021)', available electronically at: <https://www.cit-rail.org/en/freight-traffic/products/agreements/#-content-330235>, accessed 16 June 2023.

of disputes through the utilization of standard forms and the description of claims-handling mechanisms. Meanwhile, GTC CIM addresses the resolution of disputes through third-party adjudication.

GTC CIM envisages the resolution of disputes through ADR. This instrument refers to conciliation, mediation and arbitration and makes special mention to COTIF arbitration.[78] The reason for this is that, when the CIM Rules apply on a contractual basis –as opposed to *proprio vigore*– the resolution of covered disputes before State Courts does not benefit neither from the cross-border *lis pendens* mechanism, nor from the mechanism for the cross-border recognition and enforcement of court rulings that the CIM Rules create. Therefore, ADR could be utilized in order to avoid parallel proceedings and non-enforcement of judgements.

AIM brings legal certainty to the relationship among successive carriers, but also projects its legal effects on the defense from claims against carriers. The utilization of AIM by Chinese railway undertakings (RUs) could contribute to the resolution of BRI rail freight transport disputes. Even before Chinese RUs eventually decide to apply AIM, this legal instrument still plays a role in the resolution of BRI rail freight transport disputes, since it is binding upon the remaining successive carriers that are CIT members.

(b) CIM-SMGS Consignment Note

When the parties to a rail freight transport contract decide to utilize a CIM-SMGS consignment note, the reports mechanism in GLV CIM-SMGS and the claims-handling mechanism contained in Annex 10 AIM contribute to the avoidance and early settlement of differences. The approach to the avoidance and early settlement of disputes under these two legal instruments strongly resembles that of SMGS.

Meanwhile, GTC EurAsia addresses the resolution of disputes through third-party adjudication, including litigation before State courts and ADR. In the absence of a treaty that contains norms on private international law that avoid parallel proceedings and the non-enforcement of courts judgements, the resolution of BRI land freight transport disputes through third-party adjudication could benefit from the utilization of ADR mechanisms, notably arbitration.

(D) THE ROLE OF ARBITRATION AND OTHER DISPUTE-RESOLUTION METHODS

In the long term, if China decides to join the CMR and/or the CIM Rules, litigation before State courts could eventually become the method of choice for the resolution of BRI land freight transport disputes, contributing to the diversification of the BRI commercial dispute-resolution system. However, in the short and middle term, arbitration is expected to consolidate its role in the resolution of this specific sort of commercial disputes.

[78] Intergovernmental Organization for International Carriage by Rail, 'OTIF Arbitration Rules', available electronically at: <https://otif.org/fileadmin/user_upload/otif_verlinkte_files/02_organe/07_schiedsger/RA_TAR_01.01.2007_e.pdf>, accessed 17 August 2022.

(1) The Role of Arbitration

Arbitration has become the unrivalled ADR mechanism for the resolution of commercial disputes and its importance to the BRI commercial dispute-resolution system is unfathomable. Cross-border legal instruments on land freight transport contracts –CMR, CIM Rules, SMGS–, as well as contractual legal instruments developed under the auspices of CIT focus on the avoidance and early settlement of claims. Some of these instruments specifically refer to the resolution of disputes through arbitration, among other forms of third-party adjudication.

Both the CMR and the CIM Rules favor the resolution of disputes before State courts through the creation of a cross-border *lis pendens* mechanism and a mechanism for the recognition and enforcement of court rulings that resolve road freight transport disputes and rail freight transport disputes respectively. Since China is not a party to these conventions, arbitration may be a more suitable form of third-party adjudication in the context of the BRI, given the fact that arbitration awards benefit from cross-border recognition and enforcement under the New York Convention of 1958. Some of the contractual legal instruments that enable legal interoperability of rail freight transport across SMGS and CIM Rules, such as GTC EurAsia –which may be incorporated to a CIM-SMGS common consignment note–, explicitly foresee the utilization of arbitration.

In some cases, specific forms of arbitration are explicitly mentioned in these legal instruments, but this does not preclude the possibility to utilize other forms of arbitration as agreed by the parties. For instance, CIM Rules, as well as GTC CIM refer to COTIF arbitration. In fact, this form of arbitration is seldom used.[79] The reason for this, as has been explained by the legal department of COTIF, can be found in the preference of the parties concerned "to bring their disputes before the national courts" (when third party adjudication is required, since most disputes are settled among the parties through the utilization of standard forms).

Meanwhile, GTC EurAsia foresees the utilization of ICC arbitration. ICC arbitration seated in Paris is the preferred form of arbitration among members of the rail freight transport services industry (at least among those that belong to CIT) could well amount for at least 50% of the disputes resolved through ADR under a CIM-SMGS consignment note.[80] The ICC also seems to be a good option for the resolution of BRI land freight transport disputes through arbitration, since the ICC International Centre for ADR has sought specialization in BRI disputes through the creation of the ICC Belt and Road Commission and has published "guidance notes on resolving Belt and Road disputes using mediation and arbitration".[81]

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79 Written answer from the legal department of OTIF, received on 13 September 2021.

80 Interview to Prof. Dr. Erik Evtimov, *supra* n. 67.

81 International Chamber of Commerce, 'Guidance notes on resolving Belt and Road disputes using mediation and arbitration', available electronically at: <https://iccwbo.org/content/uploads/sites/3/2019/02/icc-guidance-notes-belt-and-road-disputes-pdf.pdf>, accessed 5 October 2021.
International Chamber of Commerce, 'Belt and Road Commission', available electronically at: <https://iccwbo.org/dispute-resolution-services/belt-road-dispute-resolution/belt-and-road-commission/>, accessed 16 March 2022.

Other forms of arbitration may be utilized for the resolution of BRI land freight transport disputes, including other arbitration institutions, as well as specialized forms of ad hoc arbitration developed under the auspices of certain industry associations, such as specific trade-in-commodities arbitration, maritime arbitration and aviation arbitration. These specialized forms of arbitration tend to be coined through model dispute resolution clauses and general terms and conditions, specialized arbitration rules and lists of arbitrators proposed by industry associations. Hence the swift adaptability of these forms of arbitration to the market structure, which is a clear asset for the resolution of BRI land freight transport disputes.

However, trade-in-commodities arbitration, maritime arbitration and aviation arbitration are often *ad hoc* forms of arbitration. This may be perceived as an obstacle for the resolution of BRI land freight transport disputes, since there is still a traditional preference for institutional arbitration in mainland China, despite the progressive easing of the use of *ad hoc* arbitration in China (notably in Free Trade Zones (FTZs)).[82] In fact, arbitration in some of these industries is increasingly being carried out before arbitration institutions. Such is the case of maritime arbitration, in which institutional arbitration is gaining ground against ad hoc arbitration, notably in Asia. Besides, ad hoc arbitration is being eased in mainland China. A clear example of this trend is the creation of Shanghai International Aviation Court of Arbitration (SIACA) and China (Shanghai) Pilot FTZ Arbitration Rules.

Cotton arbitration, grains and feed arbitration, oil, seeds and fats arbitration, coffee arbitration and cocoa arbitration –among others– may be utilized for the resolution of BRI land freight transport disputes related to contracts for the carriage of each of these commodities respectively. Very often, these disputes will arise out of a land haul within a multimodal (maritime plus) freight route.

Maritime arbitration may be utilized for the resolution of BRI land freight transport disputes, notably when disputes arise out of maritime plus route which ends with a land regional haul that goes from a seaport in Asia to the designated place in mainland China. The utilization of forms of arbitration originally created for the resolution of maritime disputes for resolving transport disputes that arise in other modes of transport is not new. This phenomenon can be explained as a result of the preponderance of maritime freight transport over other modes of transport. For instance, China Maritime

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The ICC also settled and office in Hong Kong in 2008 and has signed a memorandum of understanding with Shenzhen Court of International Arbitration in order to favor the use of SIAC facilities in the context of the BRI.

See also: International Chamber of Commerce, 'History', available electronically at: <https://iccwbo.org/about-us/who-we-are/history/>, accessed 17 November 2021.

On international commercial mediation, see, for instance: F.R. Risueño & J.C.F. Rozas, *Mediación civil y mercantil* [*Civil and Commercial Mediation*] (2nd ed., Tirant lo Blanch, 2022).

82 On commercial arbitration in China, see:
X.W. Zhao, *International Commercial Arbitration Law* (3rd ed., Renmin University Press, 2012).
J.Z. Tao, *Arbitration Law and Practice in China* (Kluwer Law International, 2004).
F. Kun, *Arbitration in China: A Legal and Cultural Analysis* (Hart Publishing, 2013).
J.Z. Tao & M. Zhong, 'Resolving Disputes in China: New and Sometimes Unpredictable Developments', in P. Quayle & X. Gao eds., *International Organizations and the Promotion of Effective Dispute Resolution: 2019 AIIB Yearbook of International Law* (Brill, 2019), at 60-61 [doi: 10.1163/9789004407411_006].

Arbitration Commission (CMAC), which finds its origins in the resolution of maritime disputes, has created specialized sections for the resolution of transportation disputes for each mode of transport.[83]

(2) The Role of Other Dispute-Resolution Methods

Besides arbitration, other dispute-resolution methods may play a considerable role in the resolution of BRI land freight transport disputes, such as mediation, med-arb and Chinese courts –including Rail Transport People's Courts and the CICC– for the resolution of BRI land freight transport disputes. The Transport Administrative Adjudication Boards (TAABs) system has also been studied as a potential source of inspiration for reforming the resolution of BRI land freight transport disputes.

Despite the growth of mediation in the Asia-Pacific region and the creation of specialized cross-border mediation institutions, this ADR mechanism on its own cannot compete with arbitration for the resolution of BRI land freight transport disputes, notably due to the limited geographical scope of the Singapore convention (at least so far).[84] Recognition and enforcement of arbitral awards under the New York Convention of 1958 –which has reached virtually universal scope– is still a major advantage of arbitration when compared to cross-border mediation.[85] However, combined ADR mechanisms that include mediation, such as med-arb, constitute solid alternatives to arbitration for the resolution of BRI land freight transport disputes.[86]

The resolution of BRI land freight transport disputes before Chinese courts faces considerable private international law challenges, despite the Chinese efforts to foster the cross-border recognition and enforcement of commercial court judgements as part of the BRI commercial dispute-resolution system.[87] The norms on cross-border *lis pendens* and cross-border recognition and enforcement of court judgements contained

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83 China Maritime Arbitration Commission, 'CMAC Introduction', available electronically at: <www.cmac.org.cn/en/about-us-cmac>, accessed 27 April 2022.

84 UN Treaty Collection, *supra* n. 55.

85 UNCITRAL, *supra* n. 54.
Awards The New York Convention became one of the most successful international treaties ever, having reached virtually universal recognition, with 168 parties.

86 On med-arb, see: S.F. Ali, 'The Legal Framework for Med-Arb Developments in China: Recent Cases, Institutional Rules and Opportunities', 10 *Dispute Resolution International* (2016) 2, at 123-124, 127-128.
C. Kang, 'Oriental Experience of Combining Arbitration with Conciliation: New Development of CIETAC and Chinese Judicial Practice', 40 *Fordham International Law Journal* (2017) 3, at 919-952.
W.X. Gu, 'Hybrid Dispute Resolution Beyond the Belt and Road: Toward a New Design of Chinese Arb-Med(-Arb) and its Global Implications', 29 *Washington Law Review* (2019), at 117-172.
See also: Singapore International Mediation Centre, 'SIAC-SIMC Arb-Med-Arb Protocol', available electronically at: <www.simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf>, accessed 7 October 2021.
International Chamber of Commerce, 'ICC Mediation Clauses', available electronically at: <https://iccwbo.org/content/uploads/sites/3/2014/12/Suggested-ICC-Mediation-clause-in-ENGLISH-1.pdf>, accessed on 7 October 2021.

87 Asian Business Law Institute, 'ABLI Asian Principles for the Recognition and Enforcement of Foreign Judgements', available electronically at: <https://abli.asia/Projects/Foreign-Judgements-Project>, accessed 2 May 2022.
A Chong (ed.), *Asian Principles for the Recognition and Enforcement of Foreign Judgements* (ABLI, Singapore, 2020).

in the CMR and in the CIM Rules cannot fully display legal effects for the resolution of BRI land freight transport disputes, since China is not a party to these two international conventions. If China eventually decided to join these conventions, much of their potential would be unleashed.

Former Rail Transport People's Courts were specialized courts for the resolution of land transport disputes in China from 1980 to 2008, when these were integrated into ordinary People's Courts.[88] These courts predominantly resolved municipal disputes, given the few cross-border land freight transport routes involving China that existed at that time. In any case, arbitration still presents considerable advantages over State court litigation, especially concerning the possibility to seek cross-border recognition and enforcement of arbitral awards under the New York Convention.

The CICC creates a "one-stop" dispute-resolution mechanism that integrates mediation, arbitration and State-court litigation.[89] The CICC system was conceived for the resolution of the most important cross-border commercial disputes within the BRI commercial dispute-resolution system. Therefore, it is not suitable for the overwhelming majority of BRI land freight transport disputes, but only for the most important ones.

The TAABs system for the resolution of land freight transport disputes could serve as inspiration for reform of the resolution of BRI land freight transport disputes in China. This model presents advantages over litigation, including the high level of specialization of the members of the boards, the absence of excessive formalities and the possibility to seek cross-border enforcement of TAABs arbitration awards under the New York Convention. Furthermore, TAABs present a clear advantage over international commercial arbitration, which is the fact that they charge no litigation fees to the parties (except from those derived from the production of evidence).[90]

China International Commercial Court, 'The Nanning Declaration at the 2nd China-ASEAN Justice Forum', available electronically at: <https://cicc.court.gov.cn/html/1/219/208/209/800.html>, accessed 29 April 2022.

Singapore Courts, 'Enforcement of Money Judgements between Singapore and Foreign Courts', available electronically at: <https://www.judiciary.gov.sg/who-we-are/enforcement-money-judgements-singapore-foreign-courts>, accessed 2 May 2022.

88 Global Times, 'China reforms railway court system', available electronically at: <https://www.globaltimes.cn/content/724320.shtml>, accessed 23 August 2022.

89 X.Z. Sun, *supra* n. 49.

F. Long, *supra* n. 50.

China International Commercial Court, 'Provisions of the Supreme People's Court on Several Issues Regarding the Establishment of the International Commercial Court: Judicial Interpretation of the Supreme People's Court of the People's Republic of China Fa Shi [2018] 11', available electronically at: <https://cicc.court.gov.cn/html/1/219/208/210/817.html>, accessed 4 May 2022.

China International Commercial Court, 'The China International Commercial Court in 2018', available electronically at: <http://cicc.court.gov.cn/html/1/219/208/209/1316.html>, accessed 5 October 2021.

90 M.M. Tejedor, *La Actividad Arbitral de la Administración en el Transporte Terrestre* [*The Arbitration Functions of the Administration in the Field of Land Trasnport*] (Marcial Pons, 1998), at 52-53, 59-60, 75-76.

F. Sánchez-Gamborino, 'Juntas arbitrales del transporte: actividades de mediación [Transport Arbitration Boards: Mediation Functions]', in M. Sanz ed., *Manual de Derecho del Transporte* [*Handbook on Transport Law*] (Marcial Pons, 2010), at 250.

M.B. de Cominges, 'El arbitraje de transporte terrestre: las juntas arbitrales de transporte [Land Transport Arbitration: Transport Arbitration Boards]', in *I Congreso Internacional de Transporte: Los Retos del Transporte en el Siglo XXI* [*First International Congress on Transportation: The Challenges ahead in the 21st Century*] (Tirant lo Blanch, Valencia, 2005), at 1821.

(E) CONCLUSIONS

The present article has analyzed the legal instruments and the dispute-resolution mechanisms available for the resolution of land freight transport disputes along relatively new road and rail routes, namely Europe-China corridors and along the regional routes that link China to other non-SMGS Asian countries.

(1) **Which Dispute-Resolution Mechanisms Should Prevail?**

The current legal framework is a multi-layered and geographically fragmented one and the existing legal instruments at different levels, such as international conventions and contractual arrangements, provide for different options that find solutions for the resolution of land freight transport disputes. All these dispute-resolution methods currently coexist, each of them playing an important role under different circumstances. The answer to whether a dispute-resolution method should prevail over others largely depends on the concrete land freight transport contract that gave rise to the dispute in question.

International treaties on land freight transport contracts (CMR, CIM Rules and SMGS) will play a major role in the resolution of BRI land freight transport disputes. Some of these treaties (CMR and CIM Rules) have an enormous potential for playing an even greater role in the resolution of BRI land freight transport disputes. In the case of road freight transport, this potential could be unleashed if China would become a party to the CMR. As for rail transport, China may –in the middle and long term– either join COTIF's CIM Rules or support the international efforts towards the creation of a new overarching convention on the rail freight transport contract.

In the short term, the resolution of BRI rail freight transport across a fragmented cross-border legal regime can rely upon contractual instruments, notably the ones that have been developed under the auspices of CIT, an association of the rail freight transport industries. When a CIM consignment note is utilized on a contractual basis, legal instruments such as GLV CIM, GTC CIM and AIM could be utilized for the avoidance, early settlement and resolution of rail freight transport disputes. Meanwhile GLV CIM-SMGS, GTC Eurasia and Appendix 10 AIM can contribute to the avoidance, early settlement and resolution of disputes under a CIM-SMGS consignment note.

When disputes cannot be settled among the parties by themselves and third-party adjudication is required, both the CMR and the CIM Rules favor litigation before State courts through the creation of cross-border *lis pendens* mechanisms and mechanisms for the recognition and enforcement of judgements. Since China is not a party to these

J.M.T. Jiménez, 'El arbitraje de derecho administrativo [Administrative Law Arbitration]', 143 *Revista de Administración Pública* (1997), at 84.

A.A. Lucas, 'Ejecución de laudos arbitrales. Especialidad de laudos de las juntas arbitrales en el extranjero [Enforcement of Arbitral Awards. The Specificity of Transport Arbitration Awards Seeking Enforcement Abroad]', in *Consejería de obras públicas, urbanismo y transportes eds., Jornadas Organizadas por la Dirección General de Transportes de la Comunidad de Madrid* [*Workshop Organized by the Directorate General of Transportation Of Madrid*] (Comunidad de Madrid, 2000), at 55-62.

conventions, at least for the time being, arbitration constitutes the most suitable option for the resolution of most BRI land freight transport disputes, since arbitral awards may be enforced under the New York Convention of 1958.

A large variety of forms of arbitration could be utilized for the resolution of BRI land freight transport disputes. GTC CIM refers to COTIF arbitration; however, China is not a member of OTIF, and this form of arbitration has *de facto* not been used for decades. GTC EurAsia refer to ICC arbitration, which is one the most suitable forms of arbitration available for the resolution of BRI land freight transport disputes. Among other arbitration institutions suitable for the resolution of BRI land freight transport disputes, HKIAC and SIAC clearly outstand.

The forms of arbitration developed by trade-in-commodities industry associations can easily adapt to changes in the structure of markets, which is a major advantage for the resolution of BRI commercial disputes. A potential negative point of these forms of arbitration is that these are often of an *ad hoc* nature. Similarly, ad hoc arbitration has been common for the resolution of maritime and air transport disputes. The double-track arbitration system in China has traditionally favored institutional over ad hoc arbitration, but there is a growing trend towards easing the utilization of ad hoc arbitration, especially in Free Trade Zones and we may see further easing of ad hoc arbitration in mainland China in the coming years.

Mediation on its own cannot rival with arbitration for the resolution of BRI land freight transport disputes, but combined ADR mechanisms –such as med-arb– could play a major role in the resolution of BRI land freight transport disputes, especially along the regional routes that link China and other Asian countries.

Cross-border legal certainty in the resolution of BRI land freight transport disputes before State courts –including international commercial courts– will largely rely upon the consolidation and extension of the network of treaties on the recognition and enforcement of foreign commercial judgements of China and other countries in the region (notably Singapore).

(2) The Present *versus* the Future of Land Freight Transport Disputes: Is the Current Legal Framework Enough?

BRI land freight transport disputes, both along Europe-China corridors and along the regional routes that link China to other Asian countries, can be resolved under the current legal framework. However, there is room for simplification and improvement of the current multi-layered legal system. Ideally, geographical fragmentation concerning the international conventions on land freight transport contracts should be progressively reduced.

In the case of BRI road freight transport disputes, the solution seems to be rather straightforward: as China and other Asian countries eventually join the CMR, legal harmonization would improve, including the private international law aspects of the resolution of cross-border road freight transport disputes. This is due to the fact that there is no convention comparable to the CMR concerning the regulation of road freight transport disputes.

The CMR creates a cross-border *lis pendens* mechanism, as well as a mechanism for the recognition and enforcement of court rulings. Therefore, if and when the CMR reaches wider geographical scope in Asia –including China–, State court litigation may become the preferred dispute-resolution method for BRI road freight transport disputes. However, for the time being, arbitration seems to be the most efficient means for the resolution of this particular kind of commercial disputes. This is, to a large extent, due to the fact that arbitral awards may benefit from virtually universal cross-border recognition and enforcement under the New York Convention of 1958.

In the field of rail freight transport, the coexistence of two cross-border legal regimes on the rail freight transport contract adds complexity to the resolution of BRI rail freight transport disputes. In face of the difficulties to unify the cross-border legal regimes on the rail freight transport contract, contractual solutions have been designed to enable the resolution of this kind of commercial disputes. If China and other Asian countries eventually decided to adhere to the CIM Rules, State court litigation could become an efficient mechanism for the resolution of BRI rail freight transport disputes. Nevertheless, so far, interoperability across the CIM Rules and SMGS is made possible through the utilization of contractual arrangements. Under these circumstances, commercial arbitration presents the advantage that arbitral awards may seek cross-border recognition and enforcement under the New York Convention.

A major constraint of the current cross-border legal regimes on the rail freight transport contract, as perceived by the Chinese rail sector, is that rail consignment notes are non-tradable. Creating a new overarching convention may constitute an opportunity to overcome this shortcoming of rail transport documents. However, this project would not only require remarkable human and material resources and lengthy negotiations, but it also entails considerable risk of further legal fragmentation, eventually leading to the coexistence of three cross-border legal instruments instead of two. In order to avoid this, a hypothetical new convention on the rail freight transport contract should include –at least– all the current members to both the CIM Rules and SMGS.

There is no single path towards the future of land freight transport dispute-resolution. The present thesis has explored the legal options currently available for the resolution of BRI land freight transport disputes, as well as some policy options that may be taken into consideration in order to foster legal certainty along the new Silk Roads and further improve the BRI commercial dispute-resolution system.

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Translucent barriers that foreign award holders encounter when seeking to enforce the awards in India: navigating the Indian Judiciary

Mónica Benavente Norza*

Abstract: The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards should enable prevailing parties in international arbitrations to enforce awards in a timely manner in any of its 172 signatory countries. Nevertheless, when it comes to India there are considerable differences in the time and cost entailed by enforcement compared to the rest of Asia. This paper examines the different legal obstacles and reasons behind this situation and proposes some alternatives to try to improve the situation, which is not only harmful for interested parties but also damages India's reputation.

Keywords: Arbitration India New York Convention Enforcement Foreign awards Legal obstacles.

(A) INTRODUCTION

We are living in a globalised age in which cross-border trade and investment are increasing rapidly in every country, leading to a growth in the number of disputes between parties based in different countries.[1] It is well-known that if both parties fulfil a contract,[2] it is concluded to their satisfaction. However, if either party breaches the obligations set out in the contract a dispute may arise[3] and the non-defaulting party may have to overcome many problems to protect its rights;[4] in such cases the non-defaulting party's top priority is having the adequate means to do so.[5] Assuming that the contract stipulates that any controversy should be resolved by arbitration, international practice shows that obtaining an arbitral award may not immediately end disputes between the

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1 See H. Pathak, "International standardization of arbitration as an alternate dispute resolution forum and its acceptance in India", 6 (Special) *Juridical Tribune* (2016) 99 107, at 103.

2 See J. Chitty and H.G. Beale, *Chitty on contracts* (30th ed., Sweet & Maxwell, London, 2008) Vol. 2, at 43-266.

3 See J.D.M. Lew, L.A. Mistelis and S.M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, The Hague, 2003) 1-1, at 1.

4 See Lew, *supra* n.3, 1-3, at 2.

5 See Hill Dickinson Lawyers, "Dealing with and Resolving problems", *Continuing Professional Development Programme* (2012) at 71. See also P.W. Becker, *The recognition and enforcement of international commercial arbitration awards in a South African context* (Doctoral dissertation at North-West University, South Africa, 2005) at 26, accessed 27 May 2023.

parties[6] because the prevailing party expects the award to be enforced without delay. Even if it is the exception rather than the rule, there are instances in which the losing party refuses to comply promptly and voluntarily with the award,[7] frustrating the prevailing party's expectations.[8]

In an international context it is therefore in each country's best interests to have the means to be able to execute foreign awards properly, promptly, successfully and without undue delay in the country in which the defaulting party is based or holds assets. The most influential treaty for achieving this goal is probably the New York Convention,[9] also known as the "New York Arbitration Convention" or the "New York Convention"(NYC from now on).[10] As UNICITRAL Secretary Mr Reanid Sorieul has stated, the NYC's main aim is "to oblige State Parties to ensure non-discrimination of foreign and non-domestic arbitral awards, such that these awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards".[11] As of August 2023 the New York Convention has 172 state parties including India, which signed it on 10 June 1958 and ratified it on 13 July 1960.

However, the application of the NYC in India has not been problem-free, and this may lead the international legal community to feel that India is not a pro-enforcement of foreign arbitral awards forum. The biggest barrier is the time that Indian courts take to enforce awards — and the associated costs.

This article examines whether the Indian judiciary system properly and effectively protects foreign award holders' rights against Indian parties under the NYC umbrella. Part II compares the length and cost of enforcement proceedings for foreign awards in some Asian countries which are also signatories to the NYC, while Part III considers the main practical hurdles that foreign award holders may face in enforcing their awards in India within a reasonable time period. Part IV contains the conclusions and suggests a wide range of potential solutions, ranging from increasing the number of current judges to establishing an enforcement procedure based on the blockchain technique.

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[6] See P. Comsa, "Enforcing arbitral awards in Romania always a challenge", 5(1) *Challenges of the Knowledge Society* (2015) 182 195, at 182, accessed 27 May 2023.

[7] See Comsa, *supra* n. 6, at 182.

[8] See Becker, *supra* n. 5, at 2. See also R. N. Yao, "L'Exécution d'une sentence arbitrale nationale ou internationale en Côte d'Ivoire, cadre légal enjeux et obstacles" 4(3) *KAS African Law Study Library*, (2017) at 382 393, at 383, accessed 27 May 2023 [doi: 10.5771/2363-6262-2017-3-38].

[9] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

[10] See K. Fach Gómez and A.M. López Rodríguez, *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International, Alphen aan den Rijn, 2019). See also F. Ferrari, F. Rosenfeld and C. Kotuby, *Recognition and Enforcement of Foreign Arbitral Awards: A Concise Guide to the New York Convention's Uniform Regime* (Edward Elgar Publishing, Cheltenham, 2023) [doi: 10.4337/9781035302079]. See also E. Gaillard and B Siino, "Enforcement under the New York Convention", in J.W. Rowley QC, E. Gaillard and G.E. Kaiser (eds.), *The Guide to Challenging and Enforcing Arbitration Awards* (Law Business Research, London, 2021), 86-99, at 87.

[11] See R. Sorieul, *Message from Secretary of UNCITRAL*, on the 1958 New York Convention Guide website (2013), accessed 27 May 2023.

(B) COMPARATIVE ANALYSIS OF THE LENGTH AND COST OF ENFORCEMENT PROCEEDINGS FOR FOREIGN AWARDS IN THE TWO SIGNATORY COUNTRIES TO THE NEW YORK CONVENTION IN SOUTHERN ASIA WHICH HAVE ALSO SIGNED FREE TRADE AGREEMENTS WITH THE EUROPEAN UNION

India is an emerging economy[12] and a commodity import and export market. Between 2021 and 2022 the country imported goods to the value of USD613,052.05 million and exported goods to the value of USD291,808.48 million. From April 2022 to November 2022 these amounts increased to USD493,456.31 million (imports) and USD298,285.79 million (exports).[13] Such transactions are normally supported by written sales and purchase contracts between the contracting parties,[14] which in the scenario discussed here would be an India-based company and an international company based in another country. Contracts of this kind usually contain provisions such that any dispute will be solved by arbitration in one of the NYC's signatory countries and the analysis here is based on this premise. In some cases, the non-prevailing party in an arbitration is the one based in India, which may decide not to honour the award. This situation generates a chain of legal problems which will be analysed in Part III of this paper.

On the basis of these premises any contracting party to the NYC which has obtained an unambiguous award against an Indian-based company in an NYC country signatory (except India) is considered the holder of a foreign-based award.[15] The regulation of the enforcement of these awards, which is laid down in Chapter I, Part II of the 1996 Indian Arbitration and Conciliation Act, plays a key yet controversial role. Foreign award holders are required to file an execution petition if the defaulting party does not honour its obligations under the award. The security and protection of foreign parties' rights rely on and lie in India's proper, efficient and effective execution of foreign awards.

The possibility that enforcing foreign arbitral awards in any country may lead to unpredictable outcomes (mainly with respect to the length and cost of the procedure) can be a significant barrier to entry for international trade, commercial agreements and foreign investment[16] and detracts from the reputation, trustability and reliability of the country.[17]

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12 See S. Bhattacheryay, "Multinational enterprises motivational factors in capitalizing emerging market opportunities and preparedness of India", 12(4) *Journal of Financial Economic Policy* (2020) 609-640, at 610 [doi: 10.1108/JFEP-01-2019-0010]. See also Pathak, *supra* n. 1. See also J. Sankalp, "Enforcement of Foreign Arbitral Awards: International Conventions and Legal Regime in India", *SSRN*, posted 11 May 2016, accessed 10 June 2023 [doi: 10.2139/ssrn.2778548].

13 See Government of India Ministry of Commerce and Industry, "Export Import Data Bank Import: Commodity-wise", *Department of Commerce*, accessed 27 December 2022.

14 See Hill Dickinson, *supra* n. 5, at 15.

15 Article 44 The Arbitration and Conciliation Act, 1996, 16 August 1996 (Gazette of India Extraordinary, Part II, sec. 3(i), 22 August 1996).

16 See Z. Safi, Z. Omarzai, "Overview of Arbitration in Afghanistan: A Practical Approach", *Legalico*, published on 19 March 2019, accessed 25 March 2023.

17 See M.R. Dahlan, "Dispute regulation in the institutional development of the Asian infrastructure investment bank: Establishing the normative legal implications of the belt and road initiative", 2(9) *International Organizations and the promotion of effective dispute resolution: AIIB Yearbook of International Law 2019* (2019) 121-144 [doi: 10.1163/9789004407411]. See also L. Kerin and A. Cullen, "Enforcement of foreign awards:

For a country to provide legal certainty when it comes to enforcing foreign awards its legal and judiciary systems must have implemented the means to do so in a timely and cost-efficient manner, the only exceptions being cases which fall under the refusable case umbrella as specified in Article V of the NYC.[18] With this in mind, the following comparative analysis of the time needed to enforce foreign awards in Vietnam, Singapore and India[19] shows that the results differ greatly from one country to another.

According to the sources of legal information consulted, in Singapore from 1 to 3 months would be needed to register and enforce a foreign award if unopposed and from 3 to 6 months if opposed.[20] In Vietnam it would be from 6 to 8 months if unopposed and 12 months or more if opposed.[21] In India the process can be significantly longer and may take years, as shown by the following examples:

(i) *Centrotrade Minerals and Metals Inc. v. Hindustan Copper*, an award approved in 2001, was enforced after 19 years.[22]

(ii) In *National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta S.A.* the Supreme Court of India (SCI) ruled against enforcing a foreign award after 31 years:[23] Alimenta, a Swiss-based company, commenced arbitration in London before FOSFA[24] alleging breach of a commercial contract by NAFED, an India-based company and in 1989 the arbitral tribunal determined that NAFED should pay Alimenta over USD 4 million. As NAFED failed to honour its obligations under the award Alimenta filed an execution petition in India in 1993; however, NAFED objected, claiming the exception that the award was

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a London perspective", 3(4) *International Journal of Diplomacy and Economy* (2017) 388 398, at 388 [doi: 10.1504/IJDIPE.2017.088845].

[18] Incapacity of the signatories of the arbitration agreement; invalid arbitration agreement; the notice of the arbitrator's appointment was not given properly or one party was unable to present his or her case; the award refers to a matter beyond the scope of the arbitration; the arbitral tribunal was not composed in accordance with what the parties agreed or according to the law of the country where the arbitration took place, the award is not binding or has been set aside or suspended by a competent authority. Article V United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[19] This comparative analysis only takes Vietnam and Singapore into consideration because these are the only Southeast Asian countries which have already signed Free Trade Agreements with the European Union: a) Free Trade Agreement between the European Union and the Socialistic Republic of Vietnam, signed on 30 June 2019 and entered into force on 1 August 2020; b) Free Trade Agreement between the EU and the Republic of Singapore, signed on 19 October 2018 and entered into force on 21 November 2019. On 17 June 2022, the European Union restarted negotiations with India for a Free Trade Agreement.

[20] The cost is between USD10,000-50,000 if unopposed and over USD100,000 if opposed. See Baker McKenzie, "Singapore", *Cross-Border Enforcement Center* (2020) 225-232, at 226-227. See also R. Khoo *et al.*, "Singapore", in J. Herring and A. Goddard (eds.), *Enforcement of Judgments 2023*, (Chambers and Partners, London, 2023) 559-579, at 573-574.

[21] The cost is between USD10,000 20,000 if unopposed and USD35,000 50,000 if opposed. See Baker McKenzie, "Vietnam", *Cross-Border Enforcement Center* (2020), 324 330, at 325. See also J. Frangos *et al.*, "Enforcement of Foreign Arbitral Awards: Thailand and Vietnam", *Tilleke & Gibbins*, published on 3 September 2021, accessed 7 February 2023. See also N.N. Minh, N. T. T. Trang and N. Mai Anh, "Vietnam", *Global Arbitration Review*, published on 24 May 2019, accessed 7 February 2023.

[22] *Centrotrade Minerals and Metals Inc.* v. *Hindustan Copper*, SCI, 2 June 2020 (Civil Appeal No. 2562 of 2006 and No. 2564 of 2006).

[23] *National Agricultural Cooperative Marketing Federation of India* v *Alimenta S.A.*, SCI, 22 April 2020 (case No. 667/2012).

[24] The Federation of Oils, Seeds and Fats Associations.

contrary to public policy. In 2000 the appropriate Superior Court ruled in favour of Alimenta; NAFED then filed a request for review and an appeal before the High Court (HC), both of which were dismissed. NAFED finally filed an appeal under the SCI, which in 2020 ruled that the foreign arbitration award should not be enforced as it was contrary to public order. It took the Indian courts 31 years to dismiss a case based on this exception.

(iii) *Shri Lal Mahal Ltd (Shri Lal) v. Progetto Grano Spa (Progetto)*:[25] a dispute between an Indian supplier and an Italian buyer over a supply contract concluded in 1994. In 1997 the dispute was resolved by a GAFTA arbitral tribunal in London (UK) in favour of Progetto, who sought to enforce it before the Delhi HC with Shri Lal's opposition. The Delhi HC ruled in favour of Progetto in 2012 and Shri Lal filed an appeal under the SCI, which again ruled in favour of Progetto after dismissing Shri Lal's appeal, which was filed on the ground that the award was contrary to Indian public policy. It took the Indian courts 15 years to dismiss the enforcement.

(iv) *Nagarjuna Fertilizers & Chemicals Limited v. Keytrade AG*:[26] Keytrade AG (Keytrade), a Swiss-based commodity trading company, commenced arbitration in London in 2014 against India-based company Nagarjuna Fertilizers & Chemicals Limited (Nagarjuna), claiming that the latter had breached two commercial contracts. The arbitral tribunal determined that Nagarjuna's legal defence was baseless and awarded in favour of Keytrade for an amount of over USD 2 million. As Nagarjuna decided not to honour their obligations under the Award, in 2017 Keytrade filed an execution petition in the competent court in India[27] under the NYC umbrella. Despite the fact that both Hyderabad HC[28] and the SCI[29] ruled in favour of Keytrade the case remains open more than 7 years later.

(v) *Trammo Ag (Trammo) v. MMTC Limited (MMTC)*:[30] execution proceedings were instituted in respect of an award dated 25/27 November 2014 approved by an arbitral tribunal in favour of Trammo (a Swiss company) against MMTC, a company based in India. MMTC's challenge of the award was dismissed by the Delhi HC[31] and reaffirmed by a Division Bench judgment.[32] By an order dated 14 November 2018[33] the SCI again declined MMTC's request for special leave to appeal and also dismissed its review petition[34] on 12 February 2019. The award attained finality but Trammo had to seek the help of the Delhi HC (execution

[25] *Shri Lal Mahal Ltd* v *Progetto Grano Spa*, SCI, 3 July 2013 (Civil Appeal No. 5085/2013).

[26] *Nagarjuna Fertilizers & Chemicals Limited* v. *Keytrade AG*, execution petition No. 3/2017, 2 December 2016, under Hyderabad HC.

[27] See *supra* n. 25.

[28] Hyderabad HC judgment, 27 November 2018 (in execution petition No. 3/2017, 2 December 2016).

[29] SCI judgment 3 January 2019, (in petition(s) for Special Leave to Appeal, No(s). 32553/2018, arising out of impugned final judgement and order dated 27 November 2018 in execution petition No. 3/2017 passed by the HC Hyderabad).

[30] *Trammo Ag v. MMTC Limited*, Delhi HC, 17 August 2022 (in execution petition 164/2015 and execution application 3058/2022).

[31] Delhi HC Judgement, 11 March 2015 (in O.M.P. No. 212/2015, 11 March 2015).

[32] Delhi HC Division Bench Judgment, 22 January 2016 (in FAO(OS) 256/2015, 22 January 2016).

[33] In SLP (Civil) No. 7810/2016.

[34] Review Petition (Civil) No. 124/2019, on 12 February 2019.

court) again in 2022 due to MMTC's unwillingness to voluntarily honour the award. The case is still pending.

The cost of the proceedings is linked to their length and the longer the process takes, the more expensive it turns out to be. The time and cost entailed in enforcing foreign awards in India are far greater than in Singapore and Vietnam and the next section looks at the reasons for the delays.

(C) THE MAIN PRACTICAL HURDLES TO ENFORCING FOREIGN AWARDS IN INDIA

India has a single integrated judicial organisation which follows the common law system. The SCI is the highest court, below which are the High Courts (with appellate jurisdiction and original jurisdiction for certain matters) in each state or group of states[35] followed by a hierarchy of subordinate courts.[36] While the subordinate court judges are appointed by the state governor in consultation with the HC exercising jurisdiction over the state, the High Courts and SCI judges are appointed directly by the president of India following the recommendation of a collegium led by the Chief Justice and four other senior judges of the court.[37]

Applications for the enforcement of foreign awards in India are made to the HC with jurisdiction.[38] It is possible to file an appeal against an HC judgment with the SCI after the HC has certified that it involves questions of substantive law as to the interpretation of the Constitution. It is also possible to appeal to the SCI against this court's judgments.[39]

The Ease of Doing Business Ranking[40] published by the World Bank Group in May 2019 lists India as one of that year's ten top improvers, holding 77th position[41] (of 190 countries). In the 2018 ranking India was in 100th position[42] and in the 2016 ranking it was in 130th position.[43] In 2019 India implemented a series of reforms making it easier to do business there (compared to previous years) in the fields of starting a business, dealing with construction permits, obtaining electricity, obtaining credit, tax payment

[35] India is made up 28 states and 8 union territories.

[36] See S.N. Jain and V. Vahini, "Judicial system and legal remedies", *Indian Legal System* (2006) 139-153, at 140.

[37] See Articles 124(2), 217 and 233 Constitution of India, 1950 (adopted 26 November 1949, entered into force 26 January 1950). See also B.N. Kirpal *et al.*, *Supreme but not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, New Delhi, 2004) at 48-56.

[38] Article 47 The Arbitration and Conciliation Act, 1996. See also, HC Bombay judgement, 9 October 2017, *Trammo DMCC v Nagarjuna Fertilizers and Chemicals Limited* (Commercial arbitration petition (Lodge) No. 359 of 2017).

[39] Articles 132(1), 133(1) and 134 Constitution of India, 1950.

[40] "The Ease of Doing Business Ranking is an indication of an economy's position relative to that of other economies." World Bank, *Doing Business 2019: Training for Reform* (World Bank, Washington D.C., 2019), at 10 [doi: 10.1596/978-1-4648-1326-9].

[41] "Economies are selected on the basis of the number of reforms and ranked on how much their ease of doing business score improved." World Bank, *supra* n. 39, at 11.

[42] See World Bank, *Doing Business 2018: Reforming to create jobs* (World Bank, Washington D.C., 2017), at 4 [doi: 10.1596/978-1-4648-1146-3].

[43] See World Bank, *Doing Business 2016: Measuring Regulatory Quality and Efficiency* (World Bank, Washington D.C., 2016) at 5 [doi: 10.1596/978-1-4648-0667-4].

and cross-border trading. However, according to the report there are three fields in which such reforms were not (sufficiently) implemented, which are registering property, enforcing contracts and resolving insolvency.[44]

The enforcing contracts indicator is highly significant because it measures the time and cost needed to resolve a standard commercial dispute and the quality of the judicial processes involved, and India's results in the 2019 ranking[45] clearly showed the country's improvement. Thus, in 2016 India held 178th position out of 190 in the enforcing contracts ranking, Singapore held 1st position and Vietnam 74th position. In 2018 India was ranked 164th, Singapore 2nd and Vietnam 66th and in 2019 India held 163rd position, Singapore 1st position again and Vietnam 62nd position. A considerable difference between Singapore and Vietnam and India can be observed and although the trend for India is positive (178-164-163), the country still ranks very low overall. In practice this means that while in Singapore the average time needed to solve a court case is 164 days at a cost of 25.8% of the value of the claim and in Vietnam it is 400 days at a cost of 29% of the value of the claim, in India it is 1,445 days (almost 4 years) at a cost of 31% of the value of the claim. This is the reason why India's enforcement score was 41.19[46] in 2019 (compared to 62.07 in Vietnam and 84.53 in Singapore) and the quality of the judicial processes index was 10.5[47] in India (compared to 15.5 in Singapore and 7.5 in Vietnam). In short, the data provided by the World Bank Group in this report shows that executing any contract in Indian courts is a very lengthy and expensive process. This data can be extrapolated to the enforcing of foreign awards and is the tip of the iceberg, which suggests that there is a serious case management problem in procedural law in India.[48]

The long duration and high cost of enforcement proceedings entails a negative reputational cost for India as a place for the due and timely protection of party rights, including award holders' rights. The problems plaguing the enforcement of foreign awards can mainly but not solely be correlated with the current state of the judiciary system. The main issues are the following:

a) A huge backlog of court cases (court pendency):[49] in India, which has a population of over a billion,[50] there are currently about 44 million pending cases in all

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[44] See World Bank, *supra* n. 39, at 11.

[45] See World Bank, supra n. 39, at 1 and 98.

[46] This rank scores from 0 to 100. The higher, the better.

[47] This rank scores from 0 to 18. The higher, the better. See World Bank, *supra* n. 39, at 177.

[48] See H. Narasappa and S. Vidyasagar, *State of the Indian Judiciary: A report by Daksh* (Eastern Book Company, Bengaluru, 2016), at XXIX.

[49] See Government of India Ministry of Law & Justice Department of Justice, "Unstarred question no. 2116 to be answered on Friday, the 29th July, 2022: Sanctioned posts in courts", *Lok Sabha*, at 2-3, accessed on 31 March 2023. See also Government of India Ministry of Law & Justice Department of Justice, "Unstarred question no. 953 to be answered on Friday, the 22th July 2022: Analysis of pendency of cases in courts", *Lok Sabha*, at 2-3, accessed on 31 March 2023. IANS, "Singh urges judiciary to clear huge backlog of pending cases", *Gulf News India*, published on 16 August 2009, accessed 28 March 2023. See also S. Krishnaswamy, S. K. Sivakumar and S. Bail, "Legal and Judicial Reform in India: A call for systemic and empirical approaches", 2(1) *Journal of National Law University New Delhi* (2014) 1-25, at 8 [doi: 10.1177/2277401720140101]. See also Y. Ghosh, "Indian Judiciary: An analysis of the cyclic syndrome of delay, arrears and pendency", 5(1) *Asian Journal of Legal Education* (2017) 21-39, at 22 [doi: 10.1177/2322005817733566].

[50] 1,425,775,850 people in April 2023. United Nations Department of Economic and Social Affairs, "India overtakes China as the world's most populous country", policy brief no. 153 *Future of the World* (June 2023) [doi: 10.18356/27081990-153].

courts,[51] 25% of which are civil cases.[52] Among these 74% are more than a year old,[53] 6.29% are around 10 to 20 years old[54] and 1.26% are between 20 and 30 years old.[55] There are even 34,646 cases that have been in civil courts for more than 30 years.[56]

According to the Indian judiciary its main concern is to reduce the pendency rate,[57] but the strenuous efforts made in the past to tackle this problem have proved fruitless[58] and India still has a huge number of pending court cases. The number of pending civil cases is currently 10,963.357[59] and the annual percentage increase in pendency is 6.40% in the High Courts and 22.76% in the district and subordinate courts.[60] While pendency in district courts was 2 crore 65 lakhs[61] in 2016, it increased to 4 crore 11 lakhs in 2022, a rise of 54.64%.[62]

The more complex the case is, the longer it takes to be resolved in court.[63] The courts are overloaded[64] and the number of cases scheduled on a specific day may differ greatly from one court to another. For example, on 28 April 2023 Hyderabad HC Court 15 listed 1917 cases, while Court 21 listed 1552 cases and Court 26 only 42.[65] It is clear that while certain courts only schedule a few cases

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51 43,207,597 on 31 March 2023. "National Judicial Data Grid (NJDG) is a database of orders, judgments and case details of 18,735 District & Subordinate Courts and High Courts". Government of India Ministry of Law and Justice, "The National Judicial Data Grid (NJDG)", *Department of Justice*, accessed on 31 March 2023.

52 10,963,357 (16 March 2023). See NJDG, *supra* n. 50.

53 8,119,440 (16 March 2023). See NJDG, *supra* n. 50.

54 684,167 (16 March 2023). See NJDG, *supra* n. 50.

55 114,793 (16 March 2023). See NJDG, *supra* n. 50.

56 See Sir Dorabji Tata Trust, *India Justice Report: Ranking states on police, judiciary, prisons and legal aid* (Tata Trusts, New Delhi, 2023), at 58, accessed 15 May 2023.

57 See Supreme Court of India, *Indian Judiciary*: *Annual Report 2021-2022* (The Supreme Court of India, New Delhi, 2022), at 7.

58 See S.P. Sharma, *Indian Legal System* (Mittal Publications, New Delhi, 1999), at 13.

59 Data on 16 March 2023. Government of India Ministry of Law and Justice, "The National Judicial Data Grid: Pending Dashboard", *Department of Justice*, accessed 16 March 2023.

60 See Supreme Court of India, *Court News*, XIV (2) (April-June 2019), at 8-9.

61 The Indian currency is the Indian Rupee (INR): 1 lakh equals INR one hundred thousand and 1 crore equals INR ten million.

62 Joint Conference of Chief Ministers of States and Chief Justices of High Courts, which took place on 30 April 2022 and was conducted by the Chief Justice of India, N. V. Ramana. See Government of India Department of Justice, *Full text of the speech delivered by Hon'ble the Chief Justice of India Shri Justice N V Ramana at the inauguration of 11th Joint Conference of the Chief Ministers and Chief Justices*, published on 30 April 2022, accessed 20 May 2023.

63 See F.S. Nariman, "Application of the New York Convention in India", 25(6) *Journal of International Arbitration* (2008) 893-898 [doi: 10.54648/joia2008069].

64 See Government of India Department of Justice, *supra* n. 61.

65 Under the Hyderabad HC on 28 April 2023 the DCL showed: 83 cases in Court 1; 434 in Court 2; 186 in Court 3; 397 in Court 4; 40 in Court 6; 291 in Court 7; 87 in Court 8; 158 in Court 9; 65 in Court 10; 96 in Court 11; 46 in Court 12; 64 in Court 13; 146 in Court 14; 1917 in Court 15; 34 in Court 17; 67 in Court 19; 162 in Court 20; 1552 in Court 21; 67 in Court 22; 118 in Court 23; 36 in Court 25; 42 in Court 26; 92 in Court 27; 50 in Court 28; 94 in Court 29; 115 in Court 31; 52 in Court 32; 51 in Court 33, 115 in Court 35 and 62 in Court 46. High Court for the State of Telangana, *Daily cause list*, (cause list dated 28 April 2023), accessed 28 April 2023.

for a specific date, others can schedule 1,917 cases for a single court session,[66] which seems unrealistic.

b) Covid-19: as in many other countries the lockdowns during the pandemic obliged the Indian courts to slow down. On 13 March 2020 the SCI ordered that only urgent matters were to be listed in courts and while the SCI itself continued working at very reduced capacity, lower courts suffered temporary shutdowns.

The number of new cases fell by 32% during the pandemic but case disposal also fell by 42.33%, negatively affecting the execution petition disposal rate, which fell by between 69.9 and 33.65%.[67]

c) The high number of vacancies: the courts in India do not work at full capacity due to a shortage of judges. In January 2023 the total number of vacancies amounted to 5,780.[68] The judge-population ratio is very low.[69] Vacancies might occur for several reasons, the main ones being holidays, retirement, resignation, death and promotion.

Court holiday periods are regulated: summer holidays cannot exceed seven weeks and the total length of the summer holidays and other holidays for the court and court offices cannot exceed 103 days (excluding Sundays that do not fall during the summer holidays or on public holidays).[70] In 2022 the SCI worked for 222 days[71] and High Courts an average of 210 days,[72] but no data on the number of working days in the lower courts is kept centrally.[73] Given the

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66 See HC for the State of Telangana, Daily cause list, *supra* n. 64, Court 15.

67 The number of new cases fell from 46,447,870 (2018-2019) to 31,559,309 (2020-2021). The number of disposed cases fell from 38,896,865 (2018-2019) to 22,428,561 (2020-2021). See S. Tripathy *et al.*, *Data Speak: A look at the District Court's performance during the pandemic*, (Vidhi Centre for Legal Policy, India, 2022), at 24.

68 See Department of Justice Government of India, *Dashboard for analytical review of projects across nation: CSS for Judicial Infrastructure – Total Number of Vacancies*, accessed on 29 March 2023. On 30 January 2023 there were 7 vacancies in the SCI and in the High Courts: 64 in Allahabad, 5 in Andhra Pradesh, 30 in Bombay, 18 in Calcutta, 8 in Chhattisgarh, 15 in Delhi, 1 in Gauhati, 26 in Gujarat, 8 in Himachal Pradesh, 3 in Jammu and Kashmir and Ladakh, 5 in Jharkhand, 11 in Karnataka, 10 in Kerala, 22 in Madhya Pradesh, 23 in Madras, 2 in Manipur, 1 in Meghalaya, 11 in Orissa, 19 in Patna, 19 in Punjab & Haryana, 15 in Rajasthan, 10 in Telangana, 3 in Tripura and 5 in Uttarakhand. See Open Government Data (OGD) Platform India, "Court-wise Statement Showing Sanctioned Strength, Working Strength and Vacancies of Judges in the Supreme Court and the High Courts of the India as on 30-01-2023", session 259 *Answers data of Rajya Sabha questions*, published on 30 June 2013, accessed 1 July 2023.

69 The ratio of judges per million population is: 9.7 in Andhra Pradesh, 11.1 in Bihar, 15.2 in Chhattisgarh, 17 in Gujarat, 16.9 in Haryana, 15.5 in Jharkhabd, 16.6 in Karnataka, 14.5 in Kerala, 18.4 in Madhya Pradesh, 16.0 in Maharashtra, 18.0 in Odisha, 20.7 in Punjab, 16.1 in Rajasthan, 14.7 in Tamil Nadu, 11.7 in Telangana, 11.2 in Uttar Pradesh, 24.1 in Uttarakhand, 9.9 in West Bengal, 23.2 in Arunachal Pradesh, 26.0 in Goa, 23.1 in Himachal Pradesh, 16.3 in Meghalaya, 34.0 in Mizoram, 35.1 in Sikkim, 27.3 in Tripura, 12.7 in Assam, 14.1 in Manipur, 11.4 in Nagaland, 32.9 in Andaman & Nicobar Islands, 25.7 in Chandigarh, 7.5 in D&N Haveli and Daman & Diu, 34.7 in Delhi, 18.6 in Jammu & Kashmir, 31.2 Ladakh, 30.4 in Lakshadweep and 7.5 in Puducherry. The recommended ratio is 50 judges per million people. See Sir Dorabji Tata Trust, *supra* n. 55, at 19.

70 Articles 4(2) and 4(3), Supreme Court Rules 2013, 27 May 2014 (Gazette of India Extraordinary, Part II, Section 3 (i), 29 May 2014).

71 Supreme Court of India, *Calendar 2022,* accessed on 30 March 2023.

72 See Government of India Ministry of Law & Justice, "Working days in courts", *Press Information Bureau*, published on 11 March 2011, accessed 29 March 2023.

73 See Government of India Ministry of Law & Justice, *supra* n. 71.

huge number of pending cases at all levels in the judicial hierarchy the 230th Law Commission report on reforms in the judiciary has considered the need to increase the number of working days[74] but the regulation has not yet been amended.

While retirement age for trial court judges is 60, it is 62 for High Court judges and 65 for SCI judges.[75] This reduces judges' working lifetimes and creates still more vacancies.

d) The low judge-population ratio: according to SCI Judge Abhay S. Oka 50 judges are required for every million people in India, but there are currently only 21 judges per million.[76] The Chief Justice of India, Mr N.V. Ramana, has stated that this figure is alarmingly low.[77] The low judge-population ratio contributes to large-scale case pendency in different courts.

e) Delays in releasing daily cause lists:[78] the Indian judiciary system uses an Automatic Cause List Generation Module to automatically assign cases to the appropriate benches according to the roster.[79] Courts usually publish advanced weekly and/or monthly cause lists (which are incomplete) and (consolidated) daily cause lists[80] on their websites and this information is available to the public. The consolidated daily list is final and binding and is used by lawyers to prepare their court appearances. The key point here is exactly when the consolidated daily lists (which are followed in court sessions) are released. An analysis has been carried out as to how many high courts have released their (consolidated) daily court lists on a given Saturday[81] for the session to take place on the following Monday and only 8 out of 25 high courts had such information available.[82]

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74 Government of India, Law Commission of India Report No. 230 Reforms in the Judiciary Some suggestions, published in August 2009, accessed 10 July 2023.

75 Articles 124(2), 224(3) and 227 Constitution of India, 1950.

76 See India News Press Trust of India, "50 Judges per 10 Lakh Needed to Reduce Case Pendency in India: Supreme Court Judge", *NDTV*, published on 3 January 2023, accessed 3 July 2023.

77 See LegalWorld.com, "20 judges per 10 lakh population is alarmingly low: Chief Justice", *The Economic Times*, published on 30 April 2022, accessed 3 July 2023.

78 Order III, Rule 7(2), Supreme Court Rules, 2013.

79 See e-Committee Supreme Court of India, "Automatic Causelist Generation", *Information and Communication Technology in Indian Judiciary*, accessed on 19 May 2023.

80 A cause list is a list of all cases to be heard on a working day.

81 20 May 2023 between 09.58 am and 11.28 am Spanish time (13:28 pm and 14:58 pm Indian time).

82 On 20 May 2023: (i) Allahabad HC showed the daily cause list (DCL) 8 19 May 2023; (ii) Andhra Pradesh HC showed the DCL 8-19 May 2023; (iii) Bombay HC showed the DCL 2 22 May 2023; (iv) Calcutta HC did not show the DCL for Monday 22 May 2023 onwards; (v) Chhattisgarh HC showed the DCL for Monday, 22 May 2023, for 3 court rooms (10, 13 and 99); (v) Delhi HC showed an incomplete DCL for Monday 20 May 2023 (with only 10 entries in total for all its court rooms); (vi) Gauhati HC showed the DCL for 2 May-2 June 2023; (vii) Gujarat HC showed an incomplete DCL for Monday 20 May 2023; (vii) Himachal Pradesh HC showed the DCL for Monday 22 May 2023; (viii) Manipur HC only showed the DCL for the same day, 20 May 2023 (ix) Jammu & Kashmir HC and Ladakh showed the DCL for 15-19 May 2023; (x) Jharkhand HC only showed the DCL for 15-19 May 2023; (xi) Karnataka HC showed the DCL for Monday 22 May 2023; (xii) Kerala HC did not respond when the author tried to retrieve the cause list; (xiii) Madhya Pradesh HC showed the DCL for only some of the court rooms; (xiv) Madras HC showed DCL from 21 April to 19 May 2023; (xv) Meghalaya HC showed the DCL for Monday 22 May 2023; (xvi) Orissa HC did not show the DCL for Monday 22 May 2023; (xvii) Patna HC showed the DCL for 26 April 19 May 2023; (xviii) Punjab and Haryana Chandigarh HC showed the DCL for Monday, 22 May 2023; (xix) In the Rajasthan HC Principal

This short notice of the coming hearings only increases the costs incurred by prevailing parties instead of minimizing them because their lawyers need to check the lists on a daily basis to verify whether the case has been listed in court for the following day. Each case usually requires many hearings before a judgment is rendered.[83] Furthermore, if a party urgently needs assistance they have the option of making a spontaneous appearance in court through a process called "oral mentioning" in which they mention the case to the judge and request an early hearing date. This system allows parties with urgent needs to appear in court with the judge's prior permission and without being listed in the cause list but increases foreign award holders' execution costs.

f) Lack of or poor physical infrastructure: an adequate judicial infrastructure is a pre-requisite for reducing pendency and case backlog in courts[84] and enhances efficiency.[85] Physical infrastructure includes courtrooms, lawyers' rooms and units for judicial officers.

India suffers from a shortage of courtrooms.[86] On 31 March 2021 the sanctioned strength of the judiciary[87] was 24,291 but only 20,115 courts were available, while 2,423 were under construction.[88] If these are added together there was still a shortfall of 7.22%.

A study conducted by the Vidhi Centre for Legal Policy shows that the quality of the existing infrastructure is poor: (i) only 20% of the district courts have floor plans and only 45% have help desks; (ii) while 88% of court complexes have washing and toilet facilities, only 40% are fully functioning and around 100 district court complexes do not have facilities for women; (iii) only 54% of district court complexes have designated waiting areas; (iv) only 27% of court complexes are accessible via ramps and/or lifts, whereas only 11% of court complexes have designated washing and toilet facilities for persons with disabilities and only 2% of court complexes have built-in visual aid features.[89]

The shortcomings in court infrastructure create problems not only for litigants and their lawyers, but also for judges and court staff, slowing down case resolution.

Seat Jodhpur the system advised that the DCL for 22 May 2023 was not yet ready; (xx) At the Rajasthan HC bench Jaipur the system advised that the DCL for 22 May 2023 was not yet ready; (xxi) Sikkim HC only showed the DCL until 19 May 2023; (xxii) Tripura HC, Agartala, only showed the DCL until 18 May 2023; (xxiii) Uttarakhand at Nainital HC showed the DCL for Monday 22 May 2023, informing that it was uploaded on 20 May 2023 at 12.55:33 pm (Indian time); (xxiv) Telangana HC only showed the daily court list for 28 April 18 May 2023.

83 In *Nordscot Rig Management Pvt. Ltd. v. Essar Oilfelds Services Limited Mauritius* (Execution Petition 2/2017, 25 May 2017, Hyderabad High Court) the court system in Hyderabad High Court records that there have been at least 28 hearings between 2017 and 2018.

84 See Government of India Ministry of Law, "Judicial Infrastructure", *Department of Justice*, accessed on 20 May 2023.

85 See N. Sahoo and J. A. Khan, "Improving India's Justice delivery system: Why infrastructure matters", issue brief no. 562 *Observer Research Foundation.* (July 2022), accessed 21 May 2023.

86 See Sir Dorabji Tata Trust, *supra* n. 55, at 87 and 92.

87 The sanctioned strength means the authorized judges in the Indian judiciary system.

88 See Government of India Ministry of Law, *supra* n. 83.

89 See S. Chandrashekaran, S. Sanyal and R. Sekhar, *Building Better Courts. Surveying the Infrastructure of India's District Courts* (Vidhi Centre for Legal Policy, New Delhi, 2019), at 30.

According to former Chief Justice of India, the Honourable Mr Justice Dipak Misra,[90] "The infrastructure gaps should not be allowed to multiply and should be addressed at the earliest opportunity before it leaves a deep scar on the administration of justice, and it becomes too late to act wisely. Fiscal constraints is no excuse. The need to strengthen the judiciary because of which the justice delivery system becomes fast, qualitative responsive and serve the purpose of justice."[91]

g) Lack of digital infrastructure: an electronic case display board provides information about court numbers, presiding judges and on-going case numbers, which helps to expedite judges' work as it enables them to reduce the time between one case and the next. However, only 26% of court complexes have electronic case display boards at the entrance and in the waiting areas.[92] Court celerity depends on many factors and having appropriate digital infrastructure is one of them, because it will serve to achieve the judiciary's objectives.[93]

h) Roster changes: as a matter of routine and procedure Indian courts have implemented a roster system, which is a mechanism through which court cases are allocated to specific benches to be heard on a merit base. In practice roster changes result in changes in the judges hearing cases until they are marked part-heard and can stay with the same judges. The roster changes every 6 months, and the Chief Justice is the Master of the Roster.[94]

This constant shifting of cases between judges increases resolution time because all judges need time to understand the cases on their rosters and this ultimately increases overall case length.

i) Rising number of pending cases: due to economic expansion and population growth the caseload is rising alarmingly.[95] Between 2010 and 2020 pendency across all courts grew by 2.8% annually. However, between 2019 and 2020 it increased by 20% in High Courts and 13% in subordinate courts.[96] The higher the

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90 The Honourable Mr. Justice Dipak Misra was the 45th Chief Justice of India from 28 August 2017 to 2 October 2018. See National Legal Services Authority, *Patron-in-Chief: Hon'ble Mr. Justice Dipak Misra*, accessed 1 July 2023.

91 See The Times of India, "Infrastructure gaps in judicial system need to be addressed early: CJI", *India News*, published on 1 September 2018, accessed 1 July 2023. See also The Times of India, "To make justice accessible, infrastructure is necessary: CJI Dipak Misra", published on 25 August 2018, accessed 1 July 2023.

92 See S. Chandrashekaran, S. Sanyal and R. Sekhar, *supra* n. 88, at 7-8.

93 See DAKSH, "Paper 2: Transition and Implementation", *Whitepaper Series on Next Generation Justice Platform* (2020) [doi: 10.2139/ssrn.3562166].

94 *State of Rajasthan v. Prakash Chand* (1998) 1 SCC 1. See P. Iyengar, *Copyright Enforcement and Privacy in India, SSRN*, at 11, published on 14 June 2011, accessed 2 July 2023.

95 At the Joint Conference of Chief Ministers of States and Chief Justices of High Courts, which took place on 30 April 2022, the Chief Justice of India, N. V. Ramana, stated that "The rising number of frivolous litigations is an area of concern." See Government of India Department of Justice, *supra* n. 61. See also K. Vivek, "Why pending court cases have been going up", *LiveMint*, published on 11 February 2019, accessed 3 December 2022.

96 See PRS Legislative Research, "Vital Stats: Pendency and Vacancies in the Judiciary", *Institute for Policy Research Studies*, published on 11 October 2021, accessed 2 July 2023.

number of pending cases in court, the greater the pendency and the more time needed to dispose of them.

j) Inadequate funding: the average state budget for the judiciary for each pending case is INR 8,071, that is, USD97.75 per case.[97] Inadequate funding has a direct negative influence on the lack of adequate infrastructure (physical and digital), vacancies, the low judge-population ratio and court pendency.

k) Dilatory tactics (guerrilla tactics) used by certain parties in court: if courts do not use their powers to control litigants and their conduct the negative impact of any dilatory tactics employed by defendants cannot be mitigated.[98]

The most common dilatory tactic is to request an adjournment[99] of the hearing on the same date. Rule 1 of the Indian Code of Civil Procedure (CPC)[100] allows courts to grant time to all the parties or any one of them and adjourn a hearing, provided that no such adjournment is granted more than three times to a party during the hearing unless this is due to circumstances beyond the party's control.

Courts would traditionally adjourn a case if a lawyer presented a sick note because lawyers are human beings and can fall ill. However, the SCI has reported that the facility of adjournment available to lawyers on this ground has frequently been abused.[101]

It is also quite common for parties seeking to delay the proceedings to use the excuse of their counsels' non-appearance and requesting adjournments, although in 2010 the judiciary stated that a "counsel being out of station" is not a ground for conceding an adjournment.[102]

It is also quite common for defendants to fail to file the documents ordered by the judge to delay proceedings and seek extensions for filing them, which are mainly granted. Parties who repeatedly abuse the system are given pecuniary fines only in exceptional cases.[103]

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97 See Centre for Budget and Governance Accountability and DAKSH, *Memorandum to the Fifteenth Finance Commission on Budgeting for the Judiciary in India*, at 4, published in December 2018, accessed 2 July 2023.

98 See V. P. Singh, A. Jha, and A. Vidyarthi, "The More Things Change, the More They Stay the Same: Guerrilla Tactics in Arbitration in India", 24(2) *Asian Dispute Review*, (2022) 58-65. See also E. Sussman and S. Ebere, "All's Fair in Love and War Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration", 22(4) *The American Review of International Arbitration* (2011) 611 623, at 613 and 622.

99 See Government of India Ministry of Law & Justice Department of Justice, "Unstarred question no. 595 to be answered on Thursday, the 21st July 2022: Pendency of cases in courts", *Rajya Sabha*, accessed on 2 July 2023.

100 The Code of Civil Procedure, 1908, 21 March 1908 (Gazette of India, Central Act 5 of 1908)

101 Supreme Court of India *Rais Ahmad v. State of U.P. & Ors* on 13 August 1999.

102 Supreme Court of India *Ram Siromani Tripathi and Ors. v. Territory of U.P and Ors.*, Civil Appeal Nos. 9142-9144 of 2010.

103 The court imposed a payment of INR 50,000. National Company Law Appellate Tribunal at Chennai (appellate jurisdiction). Company Appeal (AT) (CH) (Insolvency) No. 433 of 2022. [(Arising from the Impugned Order dated 05.12.2022 in CP (IB) No. 348/7/HDB/2020 passed by the "Adjudicating Authority" (National Company Law Tribunal, Bench-II; Hyderabad)]. Case of *Nagarjuna Fertilizers & Chemicals Ltd. v. IDBI Bank Limited and National Company Law Tribunal.*

l) Corruption: as in any other country, corruption is a complex phenomenon in India.[104] The 2022 Corruption Perception Index published by global anti-corruption coalition Transparency International ranks India in 85th place (of 180) with a CPI score of 40 (out of 100).[105] Singapore and Vietnam are ranked 5th and 77th respectively.

Between 2017 and 2021 the Centralised Public Grievance Redress and Monitoring System (CPGRAMS)[106] received 1,631 complaints regarding the judiciary's functioning, including judicial corruption.[107]

The huge court pendency is at the root of this issue, as some parties may be desperate and willing to use illegal means to try to expedite their cases in court or obtain positive resolutions.

m) Cultural and legal clashes between foreign claimants and the Indian judiciary system: legal cultures differ radically from one jurisdiction to another.[108] Each jurisdiction is a different world with its own set of written and unwritten rules about behaviour, appearance and strategy in court. Written rules are easier to understand and follow but grasping unwritten rules requires more time. Foreign claimants need to set aside their understanding of how cases are conducted in courts in their home country and learn how the Indian judiciary works. This takes time but is essential for success.

The 1961 Advocates Act[109] defines two classes of advocate, senior advocates and others. There are over 1.4 million advocates in India,[110] of which only 488 are senior advocates;[111] that is, less than 0.035% of practicing advocates. Senior advocates' "face value" in court is consequently higher than that of other advocates and is directly related to the fees that they charge per appearance, which, according to the 2013 SCI Rules, should not exceed INR 8,000 (approximately USD100)

[104] See N. Charron, "The Correlates of Corruption in India: Analysis and Evidence from the States", 18(2) *Asian Journal of Political Science* (2010) 177-194 [doi: 10.1080/02185377.2010.492986]. See also S. Sondhi, "Combating corruption in India: The Role of Civil Society", *XVIII World Congress of International Political Science Association*, at 2-3, published in July 2000, accessed 4 July 2023.

[105] CPI refers to the Corruption Perception Index. It runs from 0 to 100; the higher score, the better. See D. Eriksson, "Corruption Perception Index", published in 2022, accessed 17 May 23.

[106] "CPGRAMS is an online platform available to citizens 24/7 to lodge their grievances with the public authorities on any subject related to service delivery." See Government of India Ministry of Personnel, Public Grievances & Pensions, Centralized Public Grievance Redress and Monitoring System, *Department of Administrative Reforms & Public Grievances*, (2023), accessed om 17 May 2023.

[107] See Government of India Ministry of Law and Justice, "Corruption in Judiciary", *Press Information Bureau*, published on 1 April 2022, accessed 18 May 2023.

[108] See S. I. Strong, K. Fach Gomez and L.C. Piñeiro, *Comparative Law for Spanish-English Speaking Lawyers: Legal Cultures, Legal Terms and Legal Practices* (Edward Elgar Publishing, xxx, 2016), at 17-19, 222, 449, 494-498. [doi: 10.4337/9781849807876]

[109] Article 16 The Advocates Act, 1961, 16 August 1961 (Gazette of India Extraordinary, Part II, sec 3(ii), 7 September 1961).

[110] See A. K. Ganguli, "The Legal Profession Worldwide: Overview of the Legal Profession in India", *International Association of Lawyers* accessed 1 July 2023.

[111] See Supreme Court of India, List of Senior Advocates designated by the Supreme Court (as on 07.07.2022), Registrar, published on 7 July 2022, accessed 2 July 2023.

per hearing,[112] but in practice may vary between INR 5 lakh and INR 25 lakh (approximately between USD6,000 and USD30,000) per hearing under the SCI, and between INR 3 lakhs to INR 6 lakhs per hearing (approximately between USD3,600 and USD7,200) before an HC. In fact, as advocates charge according to their clients' ability to pay[113] legal fees vary from client to client and are applied when a hearing finally takes place on the day listed — and also if it does not.

Furthermore, because senior advocates' practice is restricted and they can neither receive instructions directly from clients nor file documents in court,[114] the financial effort to employ a senior advocate to have a higher "face value" in court is not the only expense. The award holder will also need to hire a leading or junior counsel who will communicate directly with clients and file all the necessary documentation in court. The financial investment that award holders need to make to try to protect their rights in court is very high and, depending on the value of the award, it might not be worthwhile. Costs should be calculated before commencing the enforcement of foreign awards in India, but this is extremely difficult because some of the variables in the equation cannot be known beforehand (how many hearings will be required, court pendency, roster changes, guerrilla tactics, etc.).

Another factor with a relatively similar weight to the "face value" of a senior advocate is the impact that foreigners have in Indian courtrooms, especially if they are European or American. In such situations there might be a feeling that the international community is watching the Indian judiciary, which could increase their willingness to do things properly and in a timely manner.

These reasons, whether taken separately or jointly, entail negative consequences for the enforcing of foreign awards in India. The legal costs to prevailing parties are very high and as a general rule only recoverable at the court's discretion.[115] If the case is listed on a specific date lawyers charge the parties for every appearance regardless of whether the case is heard by the court or not, even if the other party only appears to request an adjournment, which is granted, and the hearing lasts five minutes or even less.[116] Furthermore, lawyers not only charge for every appearance but there is also a list of miscellaneous costs which they may deem to be associated with their appearance,[117] which increase the invoice. As noted previously, court cases can be listed more than forty times before a judgment is rendered, creating a huge burden for the claimant.

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112 Part IX Second Schedule, Supreme Court Rules, 2013.

113 See Aapka Consultant, "Law on advocates fees", *Hamesha Aapke Saath*, published on 20 September 2022, accessed 2 July 2023.

114 Senior Advocates shall not file a vakalatnama, appear without an Advocate on Record or accept instruction to appear in court directly from a client. Part VI, Chapter I Bar Council of India Rules 6 September 1975 (under The Advocates Act, 1961) (Gazette of India, Part III, section 4, 6 September 1975).

115 Section 35(1) The Code of Civil Procedure, 1908.

116 K.V. Viswanathan Senior Advocate, *Memo No. 132/20-21. PAN No. (AACPV4233G) in SLP(C) No. 9252/2020 Keytrade AG v. Nagarjuna Fertilizers Chemicals Limited and Anr.*, (17 August 2020).

117 K. R. Reddi, *Appearance, Conference, Clerkage and Miscallaneous., S.C. Memo of Fees. Ref: Bill No. 32/2018* (4 September 2018).

The parties to a conflict who resort to arbitration to resolve it do so because of the efficiency and effectiveness attributed to this method of conflict resolution. When the non-prevailing party in the conflict decides not to voluntarily comply with the award, the country in which the award is to be executed must use the full power of "ius imperium" to render the decision effective in a timely matter, and for this purpose an obstacle-free path must be available.

(D) CONCLUSIONS

The aim of the 1996 Indian Arbitration and Conciliation Act is to make the enforcing of a foreign award cost effective and expeditious. However, as has been seen, court case pendency is extremely high and foreign award enforcement does not have priority in the courts, which are completely overloaded with other civil cases. The length of the enforcement process is worrying and negatively affects the goal of a quick and affordable solution to disputes, which could save time and money for the parties involved as well as third parties (including India), protect prevailing partys' rights and India's reputation as a reliable and investor-friendly country.

The Indian judiciary seems very much aware of the problem discussed here; that is the delays that foreign award holders have to withstand in order to enforce them there and the importance of meeting (international) award holders' expectations.[118] In 2021 the SCI therefore laid down a direction (2021 SC Direction) for lower courts indicating that any "execution petition must be disposed within 6 months from the date of filing, which can be extended only by recording reasons in writing for such delay".[119]

India's efforts in the commercial sphere are not negligible, as is evident from the 2015 Commercial Courts Act, which provides for a separate court process for commercial matters. Moreover, the frequent amendments to the 1996 Indian Arbitration and Conciliation Act are aimed at making the country an international arbitration hub and the steps taken in this regard are considerable and extremely positive. However, if Indian courts are unable to ensure the realization of foreign awards, any progress made otherwise will be futile because it is the ultimate enforcement of foreign awards that is important to the international community.

India is trying to reverse this situation which is damaging both its reputation and hopes of attracting international investors:

> "Disposal of cases pending in courts is within the domain of Judiciary. Though Government has no role in disposal of cases in courts, the Central Government is committed to speedy disposal of cases and reduction in pendency. The Government

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[118] See J. Sindhu, "Public policy and Indian Arbitration: Can the judiciary and the legislature rein in the "unruly horse"?", 58(4) *Journal of the Indian Law Institute* (2016) 421 446, at 423.

[119] *Rahul S. Shah v. Jinendra Kumar Gandhi* (2021) 6 SCC 418. According to the NJDG, at the District and Taluka Courts of India 26.67% of pending execution petitions were filed a year ago (in 2022); 26.18% between 1 and 3 years ago; 20.46% between 3 and 5 years ago; 18.83% between 5 and 10 years ago, 6.46% between 10 and 20 years ago and 0.33% more than 30 years ago, totalling more than 11 million cases (11,040,497). 52.92% of the execution petitions were disposed between 0 and 3 years, 26,66% between 3 and 5 years, 17,96% between 5 and 10 years, and 2,46% above 10 years. See National Judicial Data Grid, *supra* n. 50, accessed 31 December 2022.

> has adopted a co-ordinated approach to assist judiciary for phased liquidation of arrears and pendency in judicial systems, through various strategic initiatives like improving the infrastructure for courts including computerisation, increase in strength of judicial officers/judges and filling up of vacant positions in High Courts/ SCI, policy and legislative measures in areas prone to excessive litigation, repeal of outdated and archaic laws, initiatives to fast track special type of cases and emphasis on Alternate Dispute Resolution etc."[120]

However, the question which arises here is: which additional system could be implemented to help India to effectively enforce foreign arbitration awards within the SCI timeframe of six months?

The enforcement of all foreign awards could be expedited if just one or a combination of the following measures were taken: increasing the number of judges; reducing the number of vacancies for judges (by raising the retirement age or shortening the holiday period); improving infrastructure (physical and digital); reducing/eliminating corruption, banning guerrilla tactics in court and punishing them with higher fines and creating specialized courts, or establishing an enforcement procedure based on the blockchain technique, among others.

When court delays are long and award holders believe that they have been denied justice in Indian courts because the delays in enforcing them surpass all reasonable limits, one way of moving a case forward could be to begin an arbitration suit against the Government of India if the foreign award holder's country has signed a Bilateral Investment Treaty (BIT) with India which is still in force. The request to the Government of India would be based on India's treaty obligations for Fair and Equitable Treatment (FET) under the BIT. FET has been held to encompass refusals to entertain suits, undue delay, seriously inadequate administration of justice and the clear and malicious misapplication of the law[121] because this denial of justice occurs in cases of unwarranted delays.[122] Although such action could certainly open a new door for foreign award holders, it is no less certain that the time and costs would undoubtedly increase were the result unpredictable.

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[120] See Government of India Ministry of Law and Justice, "Unstarred question no. 2023 to be answered on Thursday, the 5th August 2023: Holidays in Judiciary", *Rajya Sabha*, published on 5 August 2021, accessed on 1 July 2023.

[121] *Robert Azinian v. United Mexican State ICSID*, ARB (AF)/97/2, (1 November 1999).

[122] *Belgium v. Spain* (Barcelona Traction, Light and Power Co. Ltd. (1970) (Judge Tanaka Separate Opinion).

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State liability for damage caused to individuals for breach of EU air quality law

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Abstract: The purpose of this paper is to examine the jurisprudence of the Court of Justice of the European Union concerning the compensation of individuals for damages suffered due to the degradation of air quality, for which we will previously analyse its reaction to other rules relating to the environment, both sectoral and procedural. Furthermore, although our analysis will compare different jurisprudential solutions from other regional and universal human rights control bodies, we will also take into account the legislative proposals presented by the institutions of the Union insofar as their normative changes can remove the obstacles presented judicially that would prevent this type of actions from succeeding.

Keywords: Court of Justice of the European Union, air quality, infringement of EU law, compensation for damage to health, limit values

(A) INTRODUCTION.

Air pollution has a huge impact on our health. About 6.7 million premature deaths are associated with it each year. Yet 99% of the world's population continues to live in places with high levels of pollution, exceeding the limits recommended by the World Health Organization[1]. In the European Union, despite the efforts being made, it is estimated that there are around 300,000 early deaths per year[2]. In addition, it causes 10% of cancer cases, apart from other diseases such as asthma or cardiovascular problems[3]. It especially affects vulnerable groups such as children, the elderly and people with pre-existing conditions.

Compliance with the limits laid down in EU law is very low. The Court of Justice has confirmed that a very large group of Member States have failed to comply with the air quality directives insofar as the limit values laid down in these rules had been systematically and continuously exceeded[4]. Among them is Spain, for having infringed

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1 WHO (2022), *Ambient (outdoor) air pollution*, Retrieved from https://www.who.int/health-topics/air-pollution#tab=tab_1

2 EEA (2021), *Air Quality in Europe* 2021.

3 EEA (2022). *Beating cancer — the role of Europe's environment.* Retrieved from https://www.eea.europa.eu/publications/environmental-burden-of-cancer/beatingcancer-the-role-of-europes

4 Judgments of 10 May 2011, *Commission v Sweden* (C-479/10, EU:C:2011:287); of 15 November 2012, *Commission v Portugal* (C-34/11, EU:C:2012:712); of 19 December 2012, *Commission v Italy* (C-68/11, EU:C:2012:815); of 5 April 2017, *Commission v Bulgaria* (C-488/15, EU:C:2017:267); of 22 February 2018, *Commission v Poland*

its obligations for several years in certain areas of Barcelona and Madrid and for failing to adopt appropriate measures to ensure that the period of exceeding the limit values was as short as possible[5]. In addition, there are still other *sub judice* proceedings against a good number of States.

This situation could have led to countless claims for damages before domestic courts on the basis of the principle of State liability for damage caused to individuals as a result of infringements of Union law. However, the Court of Justice has closed this avenue in the *Ministre de la Transition écologique and Premier ministre* case, adopting a restrictive approach to the conditions necessary for such liability to be incurred[6]. This pronouncement comes at a time when the lack of adequate national responses to air pollution and climate change[7] is triggering a wave of claims from civil society through different jurisdictional channels in order to push for stronger domestic actions[8]. Almost all regional courts have had or have to resolve claims of this nature, which allows us to compare arguments and reasoning even though we are dealing with judicial procedures with their own particularities and admissibility requirements. Not surprisingly, all of them are faced with slow and diffuse pollution phenomena, where it is complex to establish the individual or personal nature of the damage and the causal link. Likewise, the United Nations treaty bodies have already taken relevant decisions whose *ratio decidendi* is more favourable to the interests of individuals and where alternatives to the more conservative doctrines or jurisprudence on the subject are proposed.

Although the purpose of our work is to examine the jurisprudence of the Court of Justice regarding the compensation of individuals for damages suffered due to the degradation of air quality, we consider it necessary to first analyse its reaction to other rules relating to the environment, both of a sectoral and procedural nature. Furthermore, although our analysis will confront different jurisprudential solutions, we will take into account the legislative proposals presented by the institutions of the European Union insofar as their normative changes may remove the obstacles presented judicially that would prevent this type of actions from succeeding.

(B) THE DIRECTIVES ON BIODIVERSITY

According to settled case law of the Court of Justice, injured individuals have a right to compensation for the damage suffered provided that three requirements are met: that

(C-336/16, EU:C:2018:94); of 24 October 2019, *Commission v France* (C-636/18, EU:C:2019:900); of 30 April 2020, *Commission v Romania* (C-638/18, EU:C:2020:334); of 10 November 2020, *Commission v Italy* (C-644/18, EU:C:2020:895); of 3 February 2021, *Commission v Hungary* (C-637/18, EU:C:2021:92); of 4 March 2021, *Commission v United Kingdom* (C-664/18, not published, EU:C:2021:171); of 3 June 2021, *Commission v Germany* (C-635/18, EU:C:2021:437); and of 28 April 2022, *Commission v France* (C-286/21, EU:C:2022:319).

[5] Judgment of the Court of 22 December 2022, *Commission v Spain (Valeurs limites–NO2)*, (C-125/20, ECLI:EU:C:2022:1025).

[6] Judgments of 22 December 2022, *Ministre de la Transition* écologique *and Premier ministre* (C-61/21, EU:C:2022:1015).

[7] See P. de Vilchez Moragues, 'Panorama de litigios climáticos en el mundo', 26, *Anuario de la Facultad de Derecho de la Universidad Autónoma de Madrid* (2022), 349-381.

[8] See information on those cases in: http:// climatecasechart.com/climate-change-litigation/non-us-jurisdiction/european-court-of-human-rights

the rule of European Union law infringed is intended to confer rights on individuals, that the infringement of that rule is sufficiently serious and that there is a direct causal link between this infringement and the damage suffered by those individuals[9]. The purpose of the substantiation of claims for compensation is to ensure the full effectiveness of EU rules and the protection of the rights of injured parties[10].

The first condition, then, for a State to be held liable for a breach of EU law and, consequently, for individuals to be able to obtain compensation for the damage suffered, is that the legal rule must be to confer rights to the injured individuals. According to settled case law, EU Law generates rights that become part of the legal assets of individuals[11]. The effectiveness of this principle depends on the domestic courts, but they do not enjoy total freedom, since in many cases they will have to resort, as in the case that we will later examine, to the help of the Court of Justice through preliminary rulings[12].

The Court has used this concept in a broad sense, covering legal interests from which individuals can benefit as a result of compliance with Community provisions[13]. But it has also recognised that such rights may be created not only when EU law attributes them explicitly, but also implicitly by virtue of obligations (positive and negative) that are imposed in a well-defined manner on both individuals and on the States and the institutions of the Union, so that failure to comply with them alters the legal situation of individuals[14].

In the case of environmental directives, individuals obtain advantages or benefits arising from the obligation to achieve certain objectives or outcomes in order to improve the environment[15]. They are not limited to obligations of a substantive or material nature but also procedural, whose rights, in the latter case, are more clearly outlined[16]. Likewise, although European jurisprudence does not expressly contemplate it, it would be necessary to differentiate those that develop transversal and horizontal aspects, applicable to all environmental sectors, from the material normative instruments that regulate specific problems.

Thus, certain directives aim to promote the maintenance of biodiversity in the European Union through the conservation of natural habitats and wild species of fauna and flora[17]. In principle, these rules are intended to protect a general interest, so that

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9 Judgments of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79), paragraph 51; of 30 September 2003, *Köbler* (C-224/01, EU:C:2003:513), paragraph 51; and of 10 December 2020, *Euromin Holdings* (Cyprus) (C-735/19, EU:C:2020:1014), paragraph 79.

10 Judgments of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530), paragraph 56.

11 Judgments of 19 november 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428), paragraph 40; of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51.

12 E. Cobreros Mendazona, *Responsabilidad patrimonial del estado por incumplimiento del derecho de la Unión Europea* (Iustel, Madrid, 2015), at 126.

13 C. Plaza Martín, *Derecho ambiental de la Unión Europea* (Tirant lo Blanch, Valencia, 2005) at 888.

14 Judgments of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465), paragraph 19; of 6 June 2013, *Donau Chemie and Others* (C-536/11, EU:C:2013:366), paragraph 20.

15 C. Plaza Martín, *supra* n. 13, at 889.

16 *Ibid.*, at 1236.

17 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992.

it will not be easy to find in them an attribution of rights. The opinions of Advocate General Fenelly in the *Commission v. France* case seem to support this position. The issue here was whether the State had failed to comply with its obligations under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora, by not having adopted all the necessary provisions, and where the Court of Justice held that the current French legislation in force was not in accordance with it by excluding the assessment of the effects of certain projects on account of their small size or because they were specific areas[18]. While initially acknowledging that directives aimed at environmental conservation are very important for the protection of individual rights, the Advocate General stated that it would be very difficult to argue that the directive was intended to create rights for individuals. Rather, what it creates are obligations. In any event, he concluded, this does not mean "that the transposition requirements are necessarily less stringent than in the case of directives which create individual rights; on the contrary, the effectiveness of directives which create obligations for the Member States not matched by rights under Community law for individuals demands even more urgently a complete regulatory framework"[19].

In this sense, Advocate General Kokott in the *Ministre de la Transition écologique and Premier ministre* case considered that the biodiversity directives only indirectly benefit individuals[20], giving as an example the obligation to comply with the critical levels for the protection of vegetation set out in Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air in Europe. In short, it is difficult to detect the presence of individual or private interests.

(C) ENVIRONMENTAL DIRECTIVES THAT PRIMARILY PROTECT PEOPLE'S HEALTH.

A large majority of the directives aim, in addition to preserving the environment, to avoid significant impacts and risks to human health, through control mechanisms, prohibitions, quality levels or limit values. One of the first pronouncements recognising the rights of individuals was made in relation to Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances, the purpose of which was to prevent the discharge of substances of human origin which endanger human health or damage living resources and the aquatic ecological system[21]. The conclusions of Advocate General Walter Van Gerven, which were not ignored by the Court, stated that the Directive obliged "Member States to introduce a set of rights and duties as between national authorities and those concerned with the substances referred to by the directive, and therefore is designed to create rights for individuals"[22]

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[18] Judgments of 6 April 2000, *Commission v France* (C-256/98, EU:C:2000:192), paragraph 39.

[19] Opinion of Advocate General Fenelly delivered on 16 september 1999 in case *Commission v France* (C-256/98, ECLI:EU:C:1999:427), paragraph 19.

[20] Opinion of Advocate General Kokott delivered on 5 May 2022 in case *Ministre de la Transition écologique and Premier ministre* (C-61/21, ECLI:EU:C:2022:359), paragraph 78.

[21] OJ L 20, 26.1.1980.

[22] Opinion of Advocate General Van Gerven delivered on 25 September 1990 in case *Comisión/Alemania*, (C-131/88, ECLI:EU:C:1990:332), paragraph 7.

The Court began its argument by recalling that "the transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts"[23]. Consequently, the purpose of this Directive, which contains a set of prohibitions, authorisations and controls to limit the discharge of certain substances, is to create rights and obligations of individuals[24].

Both objectives (ecological and health) also appeared in the directives on the quality of water for fish life (Council Directive 78/659/EEC of 18 July 1978[25]) and shellfish farming (Council Directive 79/923/EEC of 30 October 1979[26]), which led the Court, in examining in one case whether Germany had taken the necessary measures to transpose the Community rules into national law, to declare that where failure to comply with them endangers the health of individuals "persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights" [27].

In addition to the conservation of water resources, and leaving aside the cases of atmospheric pollution that we will see later, we find similar reasoning in pronouncements relating to other areas of protection. An example of this is Council Directive 82/501/EEC, of 24 June 1982[28], which sought to prevent serious accidents which could result from certain industrial activities, in order to avoid possible harmful consequences for the population and the environment, where the Court reiterates its jurisprudence on the recognition of the rights of individuals[29].

It can be inferred from these decisions that the mere fact that a directive pursues general interests does not preclude the recognition of individual interests[30]. After all, they all seek to address the concerns of a broad group of people. The distinction ceases to be a matter of degree[31].

(D) THE TRANSVERSAL DIRECTIVES THAT INCLUDE PROCEDURAL RIGHTS.

As mentioned above, there are other types of directives that contemplate different horizontal techniques for environmental protection, among others, access to information

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[23] Judgments of 28 February 1991, *Commission v Germany*, (C-131/88, ECLI:EU:C:1991:87), paragraph 6.

[24] Para. 7.

[25] OJ L 222, 14.8.1978.

[26] OJ L 281, 10.11.1979.

[27] Judgment of 12 December 1996, *Commission* v *Germany*, (C298/95, ECLI:EU:C:1996:501), paragraph 16.

[28] OJ L 230, 5.8.1982.

[29] Judgment of 20 May 1992, *Commission v Netherlands* (C-190/90, ECLI:EU:C:1992:225), paragraph 17.

[30] In this regard see J. D. Janer Torrens, *La responsabilidad patrimonial de los poderes públicos nacionales por infracción del derecho comunitario* (Tirant lo Blanch, Valencia, 2002) at. 151.

[31] See S. Prechal, *Directives in european Community Law. A study of directives and their enforcement in National Courts* (Clarendon Press, Oxford, 1995), at 136-139.

and participation in environmental decision-making processes. These are not substantive or material rights, but of an instrumental or procedural nature.

Most decisions have examined whether this was the case with respect to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[32] (repealed by Directive 2011/92/EU of the European Parliament and of the Council, of December 13, 2011[33]) which aimed to identify, describe and assess the direct and indirect effects of a project, among other factors, on humans, fauna, flora or material assets[34].

In the *Wells* case concerning a preliminary ruling on the interpretation of this directive, which concerned the granting of a mining license without a prior environmental impact assessment, liability for non-compliance was raised for the first time. It stated that it was incumbent on the State to make good any damage caused by the failure to carry out an environmental impact assessment[35], although it was for the national court to determine "whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered" [36].

In more detail, but following the same line of jurisprudence, it ruled in the *Leth* case, which dealt with another reference for a preliminary ruling in the context of a domestic dispute in which the claimant sought compensation for the financial loss she claimed she had suffered due to the decrease in value of her home following the expansion of the Vienna-Schwechat airport (Austria). While stating that the assessment did not include the impact on the value of material assets[37], it considered that this did not mean that the absence of an assessment of the factors identified in the directive did not confer on individuals a right to compensation for the decrease in value[38]. And this could occur because exposure to noise from the new project could affect the habitability of the dwelling, in addition to entailing a deterioration in the quality of life and health of those affected[39], and therefore concludes that the prevention of damage to property as a consequence of the direct economic repercussions of a project is an objective protected by the Community legislation examined[40].

In any case, when analysing the three requirements necessary in order to declare the responsibility of the State, it warns that failure to comply with the evaluation does not in itself confer a right to compensation for the decrease in the value of the house derived

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32 OJ L 175, 5.7.1985.

33 OJ L 26, 28.1.2012.

34 Apart from those analysed below, see Judgments of 17 November 2016, *Stadt Wiener Neustadt* (C348/15, EU:C:2016:882), paragraph 45; of 26 July 2017, *Comune di Corridonia and Others* (C196/16 and C197/16, EU:C:2017:589), paragraph 36.

35 Judgment of 7 January 2004, *Wells* (C201/02, EU:C:2004:12), paragraph 66.

36 Para. 69.

37 Judgment of 14 March 2013, *Leth* (C420/11, EU:C:2013:166), paragraph 30.

38 Para 31.

39 Para 35.

40 Para 36.

from the environmental repercussions, although it leaves it in the hands of domestic judges to determine the requirements for compensation to be granted, pointing out, specifically, the finding of a direct causal relationship between the infringement and the damages suffered[41].

In this respect, the doctrine tells us that in these cases we are dealing with subjective public rights[42], with a more clearly delimited content, but whose infringement does not always result in material damages, which will make it difficult to declare compensation in economic terms[43].

(E) THE CASE OF AIR QUALITY DIRECTIVES

Air quality directives are just one of the pillars of the regulatory framework to substantially reduce air pollution throughout the EU. Alongside these, there are those that seek to reduce anthropogenic emissions of compounds and substances that are very harmful to health (sulphur dioxide (SO_2), nitrogen oxides (NO_x), non-methane volatile organic compounds (NMVOC), ammonia (NH_3) and fine particulate matter), known as the National Emissions Ceilings Directive (NEC) [44], and another set of directives that regulate certain highly polluting sectors, such as industrial activities[45], road transport[46] or mobile machinery[47].

The current Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe[48], the provisions of which are the subject of interpretation in the *Ministre de la Transition écologique and Premier ministre* case, has undertaken a task of simplification and systematisation by bringing together five legislative acts (Council Directive 96/62/EC, of September 27, 1996, on ambient air quality assessment and management[49], Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides, particulate matter and lead in ambient air[50], Directive 2000/69/ EC of the European

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[41] Para 47.

[42] C. Plaza Martín, *supra* n. 13, at 892.

[43] *Ibid*. at 1236.

[44] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, OJ L 344, 17.12.201.

[45] Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010; Directive (EU) 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants, OJ L 313, 28.11.2015.

[46] Regulation (EU) 2019/631 of the European Parliament and of the Council of 17 April 2019 setting CO_2 emission performance standards for new passenger cars and for new light commercial vehicles, and repealing Regulations (EC) No 443/2009 and (EU) No 510/2011, OJ L 111, 25.4.2019.

[47] Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery, amending Regulations (EU) No 1024/2012 and (EU) No 167/2013, and amending and repealing Directive 97/68/EC, OJ L 252, 16.9.2016.

[48] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008.

[49] OJ L 296, 21.11.1996

[50] OJ L 163, 29.6.1999

Parliament and of the Council of 16 November 2000 on limit values for benzene and carbon monoxide in ambient air[51], Directive 2002/3/EC of the European Parliament and of the Council of 12 February of 2002 relating to ozone in ambient air[52] and Council Decision 97/101/EC of 27 January 1997 establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States[53]). In order to reduce the harmful effects on human health and the environment, the aim is to reduce the most polluting emissions, for which, in addition to other requirements relating to the assessment and reporting of air quality, two essential obligations are established. On the one hand, States must ensure that limit values for a set of pollutants are not exceeded in all their zones and agglomerations (Article 13, paragraph 1). On the other hand, in cases where these thresholds are exceeded, as well as the margin of tolerance, they must draw up air quality plans (article 23).

When the Commission carried out the evaluation of said regulation through the "fitness check", it determined that this had only been partially effective, as not all the objectives had been met, although it recognised that it had contributed to a downward trend in air pollution[54]. As a result of these conclusions, it has proposed a review of the current regulations that would merge the current directives (Directives 2004/107/EC and 2008/50/EC) [55]. Its clear purpose is to adapt to the recommendations of the World Health Organization, not fully but only by carrying out closer harmonisation, with the ambitious goal of achieving an environment free of toxic substances no later than 2050[56]. The proposal includes improvements to the monitoring system, modelling techniques and assessment, which will allow for periodic monitoring of the evolution of air quality as well as access to information for citizens. As for the two key elements mentioned above, in addition to revising the limit values to bring them into line with the WHO and strengthening the obligations regarding air quality plans ensure compliance as soon as possible, the provisions regulating them are modified in a more precise manner, leaving less room for discretion. Instead, a new precept is added that seeks to establish an effective right to compensation for damage to human health, which reinforces class actions and simplifies the proof of causal link.

These changes must be analysed in light of the case law of the Court of Justice, where, as in other areas, such as those examined above, it has recognised that the principle of State liability for damage caused to individuals is one of the ways to ensure the effective protection of the rights conferred on them by EU law[57]. However, it was not until recently, in the case of *JP v. Ministre de la Transition écologique*, that it examined in depth the requirements for the corresponding compensation to arise, adopting a very

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[51] OJ L 313, 13.12.2000

[52] OJ L 67, 9.3.2002

[53] OJ L 35, 5.2.1997

[54] Fitness Check of the Ambient Air Quality Directives Directive 2004/107/EC relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air and Directive 2008/50/EC on ambient air quality and cleaner air for Europe, SWD(2019) 427 final, 28 November 2019.

[55] Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe, COM/2022/542 final, 26.10.2022.

[56] Article 1.

[57] Judgment of 19 December 2019, *Deutsche Umwelthilfe* (C752/18, EU:C:2019:1114), paragraphs 54 .

restrictive approach that hinders, for various reasons that we will now examine, access to this compensatory remedy.

(1) Individual rights are not conferred by the possibility of initiating internal actions

The judicial decisions prior to this ruling seemed to mark a tendency to recognise certain rights in the case of infringement of the obligations contained in the directives on this area, although their analysis was limited to examining those relating to air quality plans. Before the entry into force of the current directive, the Court indicated in the *Janecek* case that "where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution"[58]. These conclusions were already confirmed by the new regulation (*ClientEarth*) [59], which stipulated that when the limit values and the margin of tolerance were exceeded, the States should draw up quality plans with the aim of complying with the levels set. Furthermore, such a plan should provide for appropriate measures so that the period during which the limit values are exceeded is as short as possible[60].

Advocate General Kokott, in her conclusions in *JP v. Ministre de la Transition écologique*, considered, following this line of jurisprudence, that we were dealing with an *autonomous* obligation, the purpose of which was to confer rights on individuals[61]. For its part, the Court of Justice also stated that these were clear and precise obligations as to the result to be guaranteed[62]. And, in principle, most relevantly, it also stated that these requirements were met with respect to the obligations arising from Article 13, that is, those obligations imposed on States to ensure that certain limit values are not exceeded.

Despite this statement, the Court seems to take up again, as the doctrine has pointed out, an unfinished jurisprudence that separated the possibility of invoking Community rules at a national level from the granting of rights capable of triggering the corresponding compensation[63]. In particular, the decision in the *Berlington* case, in which the Court said that although Directive 98/34/EC laid down a procedure for the provision of information in the field of technical standards and regulations[64] "is intended to ensure the free movement of goods by organising a preventive control the effectiveness of which requires the disapplication, in the context of a dispute between

58 Judgment of 25 July 2008, *Janecek* (C237/07, EU:C:2008:447) paragraph 42.

59 Judgments of 19 November 2014, *ClientEarth* (C404/13, EU:C:2014:2382, paragraph 55-56.

60 Article 23(1) of Directive 2008/50.

61 Opinion of Advocate General Kokott delivered on 5 May 2022 in case *Ministre de la Transition écologique and Premier ministre* (C-61/21, ECLI:EU:C:2022:359), paragraphs 69-103.

62 Para 54.

63 M. Fisicaro, 'Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza JP c Ministre de la Transition écologique', 8 *Europen Papers* (2023), at 141 [doi: 10.15166/2499-8249/643].

64 OJ L 204, 21.7.1998

individuals, of a national measure adopted in breach of Articles 8 and 9 thereof, that directive does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. Thus, that directive creates neither rights nor obligations for individuals"[65]. In that regard, Advocate General Kokott, contrary to the opinion of certain States, which in their observations argued that the obligations of Directive 2008/50 allowed a certain margin of appreciation by permitting a balancing of competing interests, argued that those considerations were not decisive in conferring rights on individuals because it was sufficient for them to be able to invoke respect of the limits before the national courts[66]. This argument was not accepted by the Court, however, insofar as it stated that the possibility of initiating administrative or jurisdictional procedures relating to their particular situation did not imply that the obligations under consideration (compliance with limit values and air quality plans) were intended to confer individual rights or that failure to comply with them could change the legal situation of the injured parties[67].

Having ruled out the recognition of this responsibility, the Court sets out other possible ways of ensuring that compliance with the obligations deriving from the EU clean air directive, basically administrative sanction mechanisms, with coercive fines[68]. Such suggestions would be in line with what the EU authorities put forward in their new proposal for a Directive, which adds new provisions to improve access to justice, in line with Article 9 of the Aarhus Convention on access to justice, information, public participation in decision-making and access to justice in environmental matters[69], the content of which was implemented in the EU by directive 2003/35/EC[70]. But certainly, as with Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment[71], whose content is very similar[72], the proposal limits its application to controlling the legality of the actions of the Administration relating to air quality plans[73], a possibility that is already included in some domestic legal systems

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65 Judgment of 11 June 2015, *Berlington Hungary and Others* (C98/14, EU:C:2015:386), paragraph 108.

66 Para 71.

67 Para 62.

68 Para 64.

69 OJ L 124, 17.5.2005

70 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003.

71 OJ L 26, 28.1.2012.

72 Article 11.

73 Article 27 (*Access to justice*):
"1. Member States shall ensure that, in accordance with their national legal system, members of the public concerned have access to a review procedure before a court of law, or another independent and impartial body established by law, to challenge the substantive or procedural legality of all decisions, acts or omissions concerning air quality plans referred to in Article 19, and short term action plans referred to in Article 20, of the Member State, provided that any of the following conditions is met:
(a) the members of the public understood as one or more natural or legal persons and, in accordance with national law or practice, their associations, organisations or groups, have a sufficient interest;
(b) where the applicable law of the Member State requires this as a precondition, the members of the public maintain the impairment of a right.
Member States shall determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.

such as ours, which allow actions and omissions of public authorities to be challenged in many environmental areas (such as air pollution) [74].

(2) The prevalence of teleological interpretation: the protection of general interests

The fundamental reason why the Court denied, despite the clarity and precision of the obligations, that the provisions of the Directive did not confer rights on individuals was that they pursued a general objective of protecting human health and the environment in general[75]. On this point, their opinion also contradicts that of the Advocate General who, as established by jurisprudence[76], determined that the recognition of rights should be done through the examination of the purpose of the Community rules[77]. For her, health protection is deduced from the provisions of the Directive and its recitals, in harmony with what has been said by the States and the Court of Justice itself. However, it considers that the interest in guaranteeing people's health "is highly personal and thus individual in nature"[78], unlike what happens with other environmental legislation (such as those related to nature conservation) with an indirect benefit to individuals[79]. And as an example of the opposite, the *Paul* case was brought up, one of the few cases where it was said that a right could not be recognised for individuals seeking compensation for the loss of their deposits. For the Court, the main or essential objective of the

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The interest of any non-governmental organisation which is a member of the public concerned shall be deemed sufficient for the purposes of the first paragraph, point (a). Such organisations shall also be deemed to have rights capable of being impaired for the purposes of the first paragraph, point (b).

2. To have standing to participate in the review procedure shall not be conditional on the role that the member of the public concerned played during a participatory phase of the decision-making procedures related to Article 19 or 20.

3. The review procedure shall be fair, equitable, timely and not prohibitively expensive, and shall provide adequate and effective redress mechanisms, including injunctive relief as appropriate.

4. This Article does not prevent Member States from requiring a preliminary review procedure before an administrative authority and does not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures referred to in this Article".

[74] Law 27/2006, of 18 July, which regulates the rights of access to information, public participation in decision-making and access to justice in environmental areas (BOE no. 171, of 19 July 2006). Although in this case it is a question of challenging acts that contravene the rights that this Law recognises in terms of information and public participation (art. 3.3) or any acts relating to the environment, but by diffuse legitimisation of environmental organisations (arts. 21-22). On the other hand, it should not be forgotten that, in matters of environmental liability, Law 26/2007, on liability (BOE no. 255, of 24 October 2007), exempts damages suffered by the resource "atmosphere". In general, all final administrative acts and provisions can be challenged, provided that they affect the rights or interests of the claimant, unless there is a public action (Coastal Law, Biodiversity Law, Land Law) or a "popular" action (environmental organisations can challenge any action in environmental areas if they meet the requirements of the Law).

[75] Para. 55.

[76] Judgments of 8 October 1996, *Dillenkofer and Others* (C178/94, C179/94, C188/94 and C190/94, EU:C:1996:375), paragraph 39.

[77] Para. 72.

[78] Para. 77.

[79] Para. 78.

regulations on banking supervision at the time was to achieve freedom of establishment, freedom to provide services in the sector of credit institutions[80] and mutual recognition of authorisations[81]. In short, they could not be interpreted "as meaning that they confer rights on depositors in the event that their deposits are unavailable as a result of defective supervision on the part of the competent national authorities"[82].

Although we are dealing with different jurisdictional procedures, some recent conclusions from other international bodies, basically those of the United Nations treaty bodies, point in the same direction as the Advocate General. These are also issues related to diffuse interests, specifically, the damage caused to human rights by climate phenomena, whose impacts affect a broad group of individuals. As is well known, human rights protection systems do not in principle admit complaints related to global public interests, such as those we are examining, since it is very difficult to prove that people's health is being affected[83]. It is worth remembering that their competence *ratione personae* is limited to those individuals who prove their status as victims, which involves demonstrating that they are directly and personally harmed by the alleged violation[84]. Nevertheless, some decisions have managed to overcome these obstacles, as is the case of *Chiara Sacchi et al v. Argentina*, brought by a group of minors before the Committee on the Rights of the Child, in which, on the one hand, it was stated that the complainants had justified that the impairment of their rights resulting from the actions or omissions of the State partly in relation to the carbon emissions originating in their territory was reasonably foreseeable, and on the other hand, that they had personally experienced a real and sensitive damage that justifies their status as victims[85].

The Advocate General, on the other hand, was aware both of the high number of breaches of Community air quality standards declared by the Court of Justice and of the procedures still pending at European and national level. If the answer to their proposal were to be successful, that is, that rights are conferred on individuals, it would lead to a large number of awards of compensation and a considerable increase in the workload of domestic courts[86]. Well, this has already happened in Spain, for example, in relation to "floor clauses", where the Court of Justice opened the door to a very high number of domestic claims[87]. In this case, the situation is indeed more serious, since its impact is not only economic, but we are talking about consequences on health, where it has been shown that non-compliance can, in specific cases, cause premature death in certain individuals. In any case, as is rightly pointed out in its conclusions, it would not affect an unlimited group of individuals, but only those who live or reside in very specific places,

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80 Judgment of 12 October 2004, *Paul and Others* (C222/02, EU:C:2004:606), paragraph 36.

81 Para. 42.

82 Para. 46.

83 *Sdružení Jihočeské Matky v. the Czech Republic* (dec.), no. 19101/03, 10 July 2006.

84 *Caron et autres c. France* (déc.), no 48629/08, 29 June 2010, para 1; *Rabbae et al. v. Netherlands*, communication no 2124/2011, 14 July 2016, CCPR/C/117/D/2124/2011, para. 9.5.

85 *Chiara Sacchi et al. v. Argentina*, communication no 104/2019, 22 September 2021, CRC/C/88/D/104/2019, para 10.14

86 Paras. 95-98.

87 Judgment of 21 December 2016, *Gutiérrez Naranjo and Others* (C154/15, C307/15 and C308/15, EU:C:2016:980).

which are the most polluted areas, so that specific and identifiable groups of people can be identified[88].

With regard to these comments, it is also worth recalling the jurisprudence of the European Court of Human Rights in relation to cases of air pollution, which in several cases has found violations of certain rights recognised in the European Convention on Human Rights, notably Article 8 on the right to private and family life. In principle, on the basis of the findings of domestic courts and the scientific reports submitted, it has accepted that polluting dust particles can have serious adverse effects on health, especially in densely populated areas with heavy traffic, so that individuals can be considered victims of a possible violation[89]. Many cases have found that prolonged exposure to emissions can deteriorate the health of claimants[90], but only when the geographical proximity (within a few metres) of the pollutant source the claimants' residence was found[91]. This is, certainly, a very ambiguous criterion, which seems to have led the Court in recent rulings to soften its application. Thus, in the case of *Pavlov et al v. Russia*, where the applicants did not live in the immediate vicinity of the contaminating industries, but rather several kilometres away, it considered that this fact was not sufficient reason to exclude the application of Article 8, but that the particular circumstances of the case and the available evidence would have to be verified[92]. Consequently, it had no hesitation in upholding the claimants who live in a city inhabited by more than half a million people, despite the opinion of some judges who also pointed to the high cost of compensation[93].

Continuing with this very restrictive approach, the Court of Justice also held that "obligations laid down in those provisions, with the general objective referred to above, that *individuals or categories of individuals* are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage caused to individuals" [94]. With this reasoning, it comes close to the restrictive jurisprudence on the requirement of direct and individual impact required of individuals in order to recognise them as having standing to bring an action for annulment, as was again evident in the case of *Armando Carvalho et al v. European Parliament and Council of the European Union*.

According to the fourth paragraph of article 263 of the TFEU "any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does

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88 Paras 100-101.

89 *Greenpeace E.V. et al v. Germany;* no. 18215/06, inadmissibility decision of 12 May 2009, para 1. The Court dismissed the application, based on the refusal of the German authorities to adopt specific measures to curb emissions from diesel vehicles, relying on the subsidiary role it must play with respect to domestic environmental policies, where States enjoy a wide margin of appreciation, so that it has a certain discretion to choose different means to fulfil its obligations. (See also *Fadeyeva v. Russia*, no 55723/00, § 103, 9 June 2005; *Budayeva and others v. Russia*, n.° 15339/02, 21166/02, 20058/02, 11673/02 y 15343/02, § 146, 20 march 2008).

90 *Ledyayeva and Others v. Russia*, n.° 53157/99, 53247/99, 53695/00 56850/00, § 100, 26 October 2006.

91 *Fadeyeva v. Russia*, n.° 55723/00, § 88-90, 9 june 2005; *Băcilă c. Romania*, nº. 19234/04, § 63, 30 march 2010.

92 *Pavlov and others v. Russia*, nº. 31612/09, § 65, 11 October 2022. See also Çiçek *and Others v. Turkey* (dec.), no 44837/07, § 29, 4 February 2020.

93 Partly dissenting opinion of Judges Elósegui and Roosma, para 2.

94 Para 56 (Emphasis added).

not entail implementing measures". As the doctrine has pointed out, the requirement of "individual concern" is the real litmus test that individuals have to pass in order for their appeal to succeed[95], as it has been interpreted in a very restrictive manner: this only occurs when the contested act affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed[96]. On the basis of this jurisprudence, the applicants in the aforementioned case (a group of families from various countries of the European Union and the rest of the world together with a Swedish association representing indigenous Sami youth), who sought the annulment of a set of acts constituting the *2030 Climate and Energy Package*[97] because, in short, they were not sufficiently ambitious with respect to the objectives of reducing greenhouse gas emissions, considered that the set of measures adopted by the EU directly affected their legal position since they infringed fundamental rights[98]. The legislative package would contribute to exacerbating the effects of climate change and, consequently, to the infringement of rights in a different and unique way for each individual[99]. The General Court (and later the Court of Justice[100]), while considering that when an act of general application is adopted higher ranking rules of law must be respected, and also recognizing that each individual may suffer from the effects of climate change, held that this is not in itself sufficient to establish the appellants' standing, as otherwise the fourth paragraph of Article 263 of the TFEU would be rendered meaningless by creating a *locus standi* for all individuals[101].

(3) The proof of the direct causal link

The greatest difficulty in obtaining a right to compensation lies, as the Advocate General pointed out in the *Ministre de la Transition écologique* case, in providing a direct causal relationship between the infringement of air quality standards and actual damage to health, which is a matter for the

[95] A. Mangas Martín and D. Liñán Nogueras, *Instituciones y Derecho de la Unión Europea* (10th ed., Tecnos, Madrid, 2016) at 485

[96] Judgments of 15 july 1963, *Plaumann* v Commission (25/62, EU:C:1963:17), paragraph 223; of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council* (C-583/11 P, EU:C:2013:625), paragraph 72.

[97] Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (OJ 2018 L 76), in particular Article 1 thereof, Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 (OJ 2018 L 156), in particular Article 4(2) thereof and Annex I thereto, and Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU (OJ 2018 L 156), in particular Article 4 thereof.

[98] The right to life (Article 2), the right to the integrity of the person (Article 3), the rights of the child (Article 24), the right to engage in work and to pursue a freely chosen or accepted occupation (Article 15), the freedom to conduct a business (Article 16), the right to property (Article 17) and the right to equal treatment (Articles 20 and 21).

[99] Order of 8 May 201, *Carvalho and Others v Parliament and Council* (T330/18, not published, EU:T:2019:324), paragraph 30.

[100] Judgment of 25 March 2021, *Carvalho and Others v Parliament and Council* (C565/19 P, EU:C:2021:252).

[101] Para 50.

national courts[102]. The mere fact that the limit values are exceeded is not sufficient proof of the impairments suffered by a given person, since they may have their origin in other causes such as predisposition or personal behaviour[103]. The injured party must therefore prove that, for a sufficiently long period of time, they were in an environment, their home or workplace, where the established threshold values were exceeded, which in principle requires scientific medical data. On this point, there is agreement with the jurisprudence of the ECHR, which recognizes the difficulties in quantifying the effects of air pollution in each individual case, as it depends on different factors such as age or occupation[104]. The existence of harm caused to individuals depends on the circumstances of the case, such as the intensity and duration of the pollution and its physical or psychological effects[105].

Given the difficulties that the individual may face, the conclusions reached propose a simplification by invoking the principle of effectiveness, especially "where the full standard of proof, beyond any reasonable doubt, would make it excessively difficult to obtain compensation". In this sense, it is advocated, firstly, that the injured party should be able to determine the degree of contamination by means of simulations and, secondly, for an *iuris tantum* presumption that typical damage to health has been caused by exceeding the limit values[106]. This position is in line again with the verification of the causal link required by the ECHR, which, while also applying the "beyond all reasonable doubt" standard of proof, argues that it can be inferred from the coexistence of sufficiently consistent, clear and concordant inferences[107]. Indeed, in a case involving serious industrial pollution, it held that damage to health could be established on the basis of a combination of indirect evidence and strong presumptions[108].

The proposal for a Directive on ambient air quality also contains some new developments in this area. First of all, it incorporates a new Article 28 that includes some interesting new features. This provision begins by stating that "Member States shall ensure that natural persons who suffer damage to human health caused by a violation of Articles 19(1) to 19(4), 20(1) and 20(2), 21(1) second sub-paragraph and 21(3) of this Directive by the competent authorities are entitled to compensation in accordance with this article" [109]. This is an interesting but very limited recognition, because it only concerns obligations relating to air quality plans, short-term action plans and transboundary air pollution. In addition, there is a constant reference to national legislation which will leave, as in the previous version, considerable discretion to the States[110]. There is only one clear indication as to the limitation periods for bringing actions for compensation, which should now be no less than five years (such periods shall not begin to run before the infringement has ceased and the person claiming compensation knows or can reasonably be expected to know that they have suffered damages resulting from an

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[102] Para 128.

[103] Para 130.

[104] *Ledyayeva and Others v. Russia*, n.º 53157/99, 53247/99, 53695/00 56850/00, § 90, 26 October 2006.

[105] *Dubetska and Others v. Ukraine*, no. 30499/03, § 107, 10 February 2011.

[106] Para 138.

[107] *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 75, 2 December 2010.

[108] *Fadeyeva v. Russia*, n.º 55723/00, § 79-88, 9 june 2005.

[109] Para 1.

[110] In this regard see D. Misonne, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science', 30, *Review of European, Comparative & International Environmental Law* (2021), at 36 [doi.org/10.1111/reel.12336].

infringement) [111], which is not in line with what is established, for example, in Spanish law[112]. But it does, however, include some relevant considerations as to the burden of proof, which, as a general principle, should be designed in a way that does not make it impossible or excessively difficult to exercise the right to compensation for damages[113]. Furthermore, relaxing this requirement in our opinion indicates that when a claim is supported by evidence that demonstrates that the violation is "the most plausible explanation for the occurrence of the damage of that person, the causal link between the violation and the occurrence of the damage shall be presumed"[114].

At the same time, it is envisaged that non-governmental organisations for the protection of health or the environment will be granted standing, going beyond the popular action in environmental matters provided for in the 1998 Aarhus Convention insofar as it states that they may "represent natural persons" [115]. This alternative is not provided for in most domestic legal systems, unlike the ECHR, which has admitted this on more than one occasion. The general rule is that the system does not allow *actio popularis*, in defence of general interests[116]. However, collective claims are allowed, as long as the environmental damage directly affect all members of the group of claimants[117]. But it has also recognised, in exceptional situations, the status of victim of some associations that have appeared before the ECHR as representatives of their members, since, in its understanding, recourse to collective bodies is one of the accessible means in

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111 Para 6.

112 See Law 39/2015, of 1 October, on Common Administrative Procedure of the Public Administrations (BOE no 236, of 2 October 2015):
Article 67. Requests for initiation in the procedures for patrimonial liability.
"1. Interested persons may apply for civil liability proceedings to be initiated only if their right to seek compensation has not become time-barred. The right to seek compensation shall be time-barred one year after the event or act giving rise to compensation occurred or after its adverse effect became apparent. In cases of physical or psychological harm caused to individuals, the period shall run from the time of recovery or from the determination of the extent of the sequelae.
In cases where it is appropriate to recognise the right to compensation for annulment on administrative or administrative grounds of a general act or provision, the right to claim shall be prescribed for the year in which it has been notified. the administrative decision or the final judgment.
In the cases of liability referred to in Article 32(4) and (5) of Law [40/2015], the right to seek compensation shall be time-barred one year after publication in the "Boletín Oficial del Estado" or in the "Official Journal of the European Union", as appropriate, of the decision finding the rule to be unconstitutional or declaring it contrary to [EU] law.
2. In addition to the provisions of Article 66, the application made by the persons concerned must specify the injuries produced, the alleged causal link between them and the operation of the public service, the economic assessment of the liability, if possible, and the time when the injury actually occurred, and shall be accompanied by any allegations, documents and information deemed appropriate and the proof of the proposed evidence, giving the means that claim the claimant"

113 Para 5.

114 Para 4.

115 Para 2.

116 See R. Fernández Egea, 'Climate change litigation and human rights: Addressing the rights of future generations', in M. Campins Eritja and R. Bentirou Mathlouthi (eds), *Understanding vulnerability in the context of climate change* (Atelier, Barcelona, 2022) at 93; F. Jiménez García, 'Cambio climático antropogénico, litigación climática y activismo judicial: hacia un consenso emergente de protección de derechos humanos y generaciones futuras respecto a un medio ambiente sano y sostenible', 46 *Revista Electrónica de Estudios Internacionales* (2023) , at 46 [DOI: 10.36151/reei.46].

117 *Di Sarno and Others v. Italy*, no. 30765/08, § 81, 10 January 2012.

modern-day societies, if not the only one, to be able to defend oneself against complex administrative actions[118].

(F) CONCLUDING REMARKS

Civil society legal proceedings, whether brought by individuals or associations, are of great strategic value because, regardless of the outcome, they offer a good opportunity to raise awareness of the environmental problems we face, thereby raising public awareness and pushing for a more demanding regulatory framework. Many of these demands only aim to improve the quality of life or well-being of individuals. However, in the case of air quality standards under discussion, we are faced with serious harmful effects on human health. For this reason, urgent, immediate solutions are required, which do not allow further delays. In the case of Spain, for example, we have been talking about infringements of air quality rules for more than a decade, based on outdated values, in urban centres where a large part of the population lives.

Given this situation, the best way to speed up compliance with air quality standards, in addition to legislative changes, would have been to recognise *a priori* a possible right to obtain compensation for damage to health, as has been done in the case of many environmental directives, leaving it to the national courts to determine whether the required criteria have been met on a case-by-case basis. The restrictive stance adopted by the Court of Justice, however, hinders not only this type of claim, but also any other claim based on environmental directives, in which general interests will always prevail. We do not understand, therefore, why it has been recognised on other occasions and not in this case, where people's lives and therefore individual interests are at stake.

We cannot place much hope in the new legislative proposal of the institutions of the European Union, since the rights to compensation that are included are limited in scope. If there is any element to be praised, it is its attempt to simplify the proof of the causal link between the infringement and the damage, since the scientific evidence traditionally required, with *ad hoc* medical certificates, makes it a true *probatio diabolica119*.

Thus, in the face of serious episodes of atmospheric pollution, permanent over time, and in certain specific areas, the individual will have to seek other jurisdictional alternatives to safeguard their rights, perhaps finding a suitable route in the regional and universal systems of protection, since, as we have seen, their control bodies offer more generous hermeneutic solutions on this point in the defence of individuals. We are not dealing with one-off events, but, as has been judicially recognised, with a systematic and continuous violation, so that, by virtue of the positive obligations of the State, in situations where the lives of individuals are endangered, effective protection of citizens must be guaranteed, with appropriate measures, so that the passivity or permissiveness of public authorities can be considered a violation of the rights conferred by the respective treaties[120].

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[118] *Gorraiz Lizarraga and others v. Spain*, no. 62543/00, § 36-38, 27 april 2004.

[119] Partly dissenting opinion of Judges Zupančič y Gyulumyan in the case *Tătar v. Rumania*, no. 67021/01, 27 january 2009.

[120] *Bor v. Hungary;* no. 50474/08, § 27, 18 June 2013; *Băcilă v. Romania*, no. 19234/04, § 68, 30 March 2010.

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European Union´s governance through trade: Considerations on the Proposal for a Regulation on prohibiting products made with forced labour on the Union market

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Abstract: The European Union has been governing through trade for decades, trying to export its core values beyond its borders through its trade instruments. Recently, the European Commission has launched a Proposal for a Regulation on prohibiting products made with forced labour on the Union market that aims to put an end to one of the most despicable contemporary practices: forced or compulsory labour. Nevertheless, this measure, like any other unilateral measure, must meet a number of requirements to be compatible with World Trade Organization law: it must fall within the exceptions contained in Article XX of GATT 1994 and must not constitute an arbitrary or discriminatory measure. In the event that the European Union's unilateral measure does not meet these requirements and a state is affected, the World Trade Organization's dispute settlement system could take action. However, the entire World Trade Organization is at an impasse that is very difficult to resolve, putting into risk the whole multilateral international trade system.

Keywords: European Union International Trade Forced Labour Unilateral Measures WTO Law

(A) INTRODUCTION

The elaboration of products using forced labour is one of the most despicable practices in existence. Even more so if this forced labour is carried out by children. Far from being an isolated occurrence, according to the data offered by International Labour Organization (ILO), 49.6 million people were living in modern slavery in 2021, of which 27.6 million were in forced labour, being the 12% of all those in forced labour children at a young age. More than half of these children are in commercial sexual exploitation[1].

The international community has been trying for years to combat these practices within the different regimes of international law. One of the regimes that has received the most attention has been the international trade law regime, because of its ability to bend the will of states in the face of fears of loss of access to foreign markets and the deterioration of their economies. The European Union (EU) was one of the first economic powers, along with United States, to use its trade instruments to enforce its values beyond its borders, including the abolition of forced or compulsory labour. This has been termed by Sophie Meunier and Kalypso Nicolaïdis as "govern through trade",

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[1] ILO, `Global Estimates of Modern Slavery Forced Labour and Forced Marriage, September 2022', Geneve, 2022.

referring to the fact that the EU uses the power of its market access and market size to "export" its norms, standards and core values[2].

For decades, the EU has been incorporating core labour standards protection clauses into its free trade agreements and its generalized scheme of preferences. More recently, the European Commission has launched a Proposal for a Regulation that aims to prohibit the placing and making available on the EU market and the export from the EU of products made with forced labour, including forced child labour[3]. This is what is known as unilateral measures and, for the multilateral international trade system, they are permitted, or rather not prohibited, in very limited situations, namely, whenever these measures fall within the exceptions of the article XX of the GATT 1994 and do not constitute an arbitrary or discriminatory measure.

This research paper aims to analyze, firstly, what is meant by forced or compulsory labour and the importance of its abolition for the international community. Secondly, we will provide some considerations on the Proposal for a Regulation on prohibiting products made with forced labour on the Union market and, finally, we will examine its compatibility with World Trade Organization (WTO) law. As we will have the opportunity to witness, with a WTO on stand-by, the adoption of unilateral measures by States will be increasingly frequent and there is a risk that some of them will constitute a disguised restriction on international trade for protectionist purposes.

(B) THE ABOLITION OF FORCED AND COMPULSORY LABOUR: A PENDING SUBJECT

The abolition of forced or compulsory labour is a central mandate in international human rights law. However, this concept of forced or compulsory labour has undergone a long and complex evolution and is often confused with other related abusive practices such as slavery, servitude or trafficking in human beings, all of which fall under the umbrella of "human exploitation". Therefore, it becomes necessary to precisely delimit its content and differentiate it from other phenomena in order to determine whether the EU´s Proposal for a Regulation really focus on products made with forced labour or rather intend to go beyond[4].

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[2] S. Meunier & K. Nicolaïdis, `The European Union as a Conflicted Trade Power´, 13 *Journal of European Public Policy* (2006) 906-925 at 906 [doi: 10.1080/13501760600838623].

[3] EU, `Proposal for a Regulation of The European Parliament and of the Council on prohibiting products made with forced labour on the Union market´ (COM(2022) 453 final, 2022/0269 (COD), 14 September 2022).

[4] Some authors that have studied these differences are:
C. Espaliú Berdud, `La Definición de Esclavitud en el Derecho internacional a Comienzos del Siglo XXI´, 28 *Revista Electrónica de Estudios Internacionales* (2014) 1-36 [doi: 10.17103/reei.28.04].
E. Rojo Torrecilla, `Nueva Esclavitud y Trabajo Forzoso. Un Intento de Delimitación Conceptual desde la Perspectiva Laboral´, in E. Pérez Alonso (dir), *El Derecho ante las Formas Contemporáneas de Esclavitud* (Tirant Lo Blanch, Valencia, 2017) at 721-756.
J. Allain, `125 Años de Abolición: El Derecho de la Esclavitud y la Explotación Humana´, in E. Pérez Alonso (dir), *El Derecho ante las Formas Contemporáneas de Esclavitud* (Tirant Lo Blanch, Valencia, 2017) at 147-182.

The different forms of human exploitation can be classified according to their degree of severity, understood as the level of coercion suffered by the victims. Regarding this scale, among the “less serious” forms of human exploitation, we find the one that just pursues economic ends, i.e., that seeks to exploit the victim’s labour force, without the victim having volunteered and under the threat of a penalty, to obtain economic benefits. This form of exploitation does not preclude the possibility of the victim receiving remuneration or enjoying periods of rest. This is what is currently understood as forced or compulsory labour. When the victim, in addition, sees certain considerations of the labour relationship suppressed, such as salary or rest periods, and is “at the mercy” of the exploiter, we speak of servitude[5], which is an abusive practice analogous to slavery, but not identical, since in the latter figure, tacking on, the exploiter exercises attributes of the right to property, the victim is the property of the exploiter. Finally, the concept of “trafficking in human beings” should be understood as the “recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”[6]. Therefore, we could affirm that human trafficking is a previous (but not essential) step to any of the above-mentioned forms of human exploitation. Although servitude, slavery or trafficking in human beings are really interesting to analyse, in this paper we will focus only on the elimination of all forms of forced or compulsory labour.

Some forms of human exploitation such as slavery, servitude and forced or compulsory labour have not always been regulated by international law. However, the Brussels Anti-Slavery Conference of 1890 marked a turning point by imposing limits on the practice of slavery, after which states began to agree on the progressive abolition of slavery and to enshrine it in binding international legal instruments. The first of these series of instruments was the 1926 Slavery Convention[7], adopted by the General Assembly of

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J. Bonet Pérez, `La Interpretación de los Conceptos de Esclavitud y de otras Prácticas Análogas a la Luz del Ordenamiento Jurídico Internacional: Aproximación Teórica y Jurisdiccional´, in En E. Pérez Alonso (dir), *El Derecho ante las Formas Contemporáneas de Esclavitud* (Tirant Lo Blanch, Valencia, 2017) at 183-210.
J. López Rodríguez, `Trabajo Forzado u Obligatorio: El Significado Contemporáneo de un Viejo Fenómeno a la Luz de la Jurisprudencia del Tribunal Europeo de Derechos Humanos´, 48 *Revista General de Derecho del Trabajo y de la Seguridad Social* (2018) 372-417.
L. Swepston, *Forced and Compulsory Labour in International Human Rights Law* (ILO Publishing, Geneve, 2014).
P. Rivas Vallejo, `Aproximación Laboral a los Conceptos de Esclavitud, Trabajo Forzoso y Explotación Laboral en los Tratados Internacionales´, 2 *Revista de Estudios Jurídico Laborales y de Seguridad Social* (2021) 99-135 [doi: 10.24310/rejlss.vi2.12445].

5 The categories of servitude most widely shared by the doctrine are debt bondage, serfdom of the glebe, servile marriage and child exploitation. Espaliú, *supra* n. 4, at 29; Bonet, *supra* n. 4, at 185; López, *supra* n. 4, at 402.

6 Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) *2237 UNTS 319*.

7 Slavery Convention (adopted 25 September 1926) *60 LNTS 253*.
This Convention has been amended by the Protocol amending the Slavery Convention signed at Geneva on 25 September 1926 (A/RES/794/(VIII) of 23 October 1953) and by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (A/RES/608/(XXI) of 30 April 1956).

the League of Nations on the proposal of the Temporary Slavery Commission[8]. Forced labour is included in Article 5 of the Slavery Convention, in which the "The High Contracting Parties recognise that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery". It also clarifies that it is understood that "compulsory or forced labour may only be exacted for public purposes" and that "this labour shall invariably be of an exceptional character [and] shall always receive adequate remuneration and shall not involve the removal of the labourers from their usual place of residence".

The 1926 Slavery Convention did not prohibit forced labour, but it opened the door to its limitation, thus constituting the most direct precedent for the first international legal instrument whose primary objective was the abolition of forced or compulsory labour imposed by colonial powers within indigenous communities: ILO Convention No. 29 on Forced Labour of 1930[9], one of the most widely ratified ILO conventions. For Lars Thomann, although the adoption of this Convention was justified from a moral perspective, in reality it served a clear economic purpose: to eliminate the comparative advantages of those states and territories that still engaged in these practices[10].

ILO Convention No. 29 defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"[11]. All authors agree on two elements that must always be present when we speak of forced or compulsory labour[12]: the first is the "involuntariness" of the individual to perform the work or service, understood as the lack of free and informed consent in the context of an employment relationship and his or her freedom to terminate the employment relationship at any time, and the second is the "threat of a penalty", this penalty not being understood as a criminal sanction, but as the loss of rights or privileges[13]. The duration of the work or the possibility for the individual to receive remuneration for it are irrelevant in qualifying it as forced or compulsory, as

8 J. Goudal, `The Question of Forced Labour before the International Labour Conference´, 19 *International Labour Review* (1929), 621-638 at 622.

9 ILO Forced Labour Convention, No. 29, 1930 (adopted 28 June 1930, entered into force 1 May 1932).

10 L. Thomann, *Steps to Compliance with International Labour Standards: The International Labour Organization (ILO) and the Abolition of Forced Labour* (VS Research, Bremen, 2011) at 190.

11 ILO Forced Labour Convention, *supra* n. 9, Article 2.

12 Allain, *supra* n. 4, at 159; López, *supra* n. 4, at 392; Rivas, *supra* n. 4, at 110; Thomann, *supra* n. 10, at 191. K. Bakirci, `Human Trafficking and Forced Labour: A Criticism of the International Labour Organisation´, 16 *Journal of Financial Crime* (2009) 160-165 at 162 [doi: 10.1108/13590790910951830].

13 Situations examined by the ILO have included threats to report victims to the police or immigration authorities when their employment status is irregular, or complaints to village elders in the case of girls forced into prostitution in distant cities. Other sanctions may be economic in nature, including economic sanctions linked to debts, non-payment of wages or loss of wages accompanied by threats of dismissal if workers refuse to work overtime beyond the scope of their contract or national law. Employers also sometimes require workers to hand over their identity documents and may use the threat of confiscation of these documents to demand forced labour. ILO, `A Global Alliance Against Forced Labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work´, adopted by the International Labour Conference at its 93rd Session, Geneva, 2005.

long as it is unjust and oppressive[14]. A decade ago, the ILO developed a list of indicators that represent the most common signs or "clues" that point to the possible existence of a forced labour case: abuse of vulnerability, deception, restriction of movement, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, withholding of wages, debt bondage, abusive working and living conditions and excessive overtime[15].

In 1953, the ILO and the UN decided to jointly set up an *ad hoc* Committee on Forced Labour to review the postulates of Convention No. 29[16]. As a result of the studies and reports of this Committee, one year after the adoption of the 1956 Supplementary Convention on the Abolition of Slavery[17], the International Labour Conference adopted Convention No. 105 on the Abolition of Forced Labour in 1957[18], which complements — rather than revises — Convention No. 29. As Pilar Rivas Vallejo states, "the Convention has no bearing on the concept itself, but rather on the purpose for which the subjection to forced or compulsory labour may be used, an element that also allows for the construction of the concept, which in reality defines the cases in which forced labour may be considered prohibited (...) This nuance distances forced labour even more clearly from the concept of slavery or trafficking and seems to bring it closer to a situation of transitory instrumentality, linked to political regimes that use forced labour mainly as a way of subduing political ideologies"[19].

Later on, 1998 was the year of adoption of the ILO Declaration on Fundamental Principles and Rights at Work[20], which states that forced or compulsory labour is one of the five principles concerning the fundamental rights[21], deserving, therefore, the special protection foreseen in its Follow-up mechanism.

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[14] A. Naidu, `The Right to be Free from Slavery, Servitude and Forced Labour´, 20 *The Comparative and International Law Journal of Southern Africa* (1987) 108-113 at 111.

[15] ILO, `ILO Indicators of Forced Labour´, Geneve, 2012.

[16] Swepston, *supra* n. 4, at 8.

[17] The adoption of this Convention has a noteworthy historical background: in the context of the Cold War, there was an exchange of accusations between Western and socialist states that both were using forced or compulsory labour. In the case of the Western states, for economic purposes. In the case of the socialist states, as a means of exerting political pressure against ideological opponents. The facts were reflected in the Report of the Special Committee on Forced Labour, which is why Convention No. 105, in its articles 1(a) and 1(b), mentions forced labour as a means of political coercion and as a method of using labour for economic purposes. See Thomann, *supra* n. 10, at 196; Allain, *supra* n. 4, at 160-161.

[18] ILO Abolition of Forced Labour Convention, No. 105, 1957 (adopted 25 June 1957, entered into force 17 January 1959).

[19] Rivas, *supra* n. 4, at 115.

[20] ILO, `Declaration on Fundamental Principles and Rights at Work and its Follow-up´, adopted at the 86th Session of the International Labour Conference (1998) and amended at the 110th Session (2022).

[21] Since the adoption of the Declaration, this categorization has supposed legal problems of interpretation: are the core labour rights included in the Declaration abstract principles or enforceable rights? The author of this paper coincides with the part of the doctrine that believes that the Declaration clearly placed the emphasis on the 'meta-constitutional' dimension of the concept of principles, on the principles understood as constitutional objectives. See F. Maupain, `Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights´, 16 *The European Journal of International Law* (2005) 439-465 at 450.
Moreover, the use of the word principle deliberately facilitates a certain amount of ambiguity, which is necessary in this case so that states that have not ratified the ILO fundamental conventions are willing to follow them .Thus, the 1998 ILO Declaration systematises labour rights in the legal sense of the term

In 2001, the ILO Governing Body adopted a Special Action Programme to Combat Forced Labour[22] as part of its work to promote and follow up the 1998 ILO Declaration on Fundamental Principles and Rights at Work. The origin of this programme is to be found in the Director-General's Global Report "Stopping Forced Labour"[23] and the discussions at the 89th Session of the ILC in 2001. The idea of this Special Action Programme is to adapt the postulates of Conventions Nos. 29 and 105 to the new contemporary forms of forced or compulsory labour. To this end, the Programme has a core staff and a budget for awareness-raising activities, studies and research, seminars and dissemination of results[24].

Finally, in 2014, the ILC adopted a Protocol to the Forced Labour Convention[25] that reaffirms the definition of "forced or compulsory labour" contained in the 1930 Convention.

Outside of the ILO, several states and international organizations have their own action programmes. For example, the African Union has the African Union Ten Year Action Plan on Child Labour. The United States has the National Action Plan to Combat Human Trafficking and the Focused Trade Strategy to Combat Forced Labour. Also, Spain presented in 2022 its National Strategic Plan against Trafficking and Exploitation of Human Beings 2021-2023. It is worth mentioning, finally, that the abolition of forced or compulsory labour is one of the main objectives (Objective No. 8.7) of the 2030 United Nations Agenda for Sustainable Development.

Notwithstanding all of the above, almost one hundred years later, the complete abolition of forced or compulsory labour is still a pending subject. As stated in the introduction, 49.6 million people were living in modern slavery in 2021, of which 27.6 million were in forced labour, being 3.3 million of all those in forced labour children at a young age[26]. Instead of decreasing, forced labour has grown in recent years. According to the ILO, "A simple comparison with the 2016 global estimates indicates an increase of 2.7 million in the number people in forced labour between 2016 and 2021, which translates to a rise in the prevalence of forced labour from 3.4 to 3.5 per thousand people in the world"[27]. Forced labour occurs mostly in the private sector, being the 63% in the private economy other than commercial sexual exploitation, the 23% in the commercial sexual exploitation and the remaining 14% in state-imposed forced labour[28]. Regarding the forms of coercion to compel people to work against their will, these have not changed

that have been categorised as fundamental because they refer to the principles contained in the ILO Constitution, which have a special value. *Ibid*., at 451.

22 ILO, `Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Priorities and action plans for technical cooperation´, adopted by the Governing Body at its 282nd Session, Geneva, 2001 (GB 282/TC/5).

23 ILO, `Stopping Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work´, adopted by the International Labour Conference at its 89th Session, Geneva, 2001.

24 R. Plant & C. O´Reilly, `El Programa de la OIT para Luchar contra el Trabajo Forzoso´, 122 *Revista Internacional Del Trabajo* (2003) 81-95 at 84.

25 ILO Protocol of 2014 to the Forced Labour Convention, 1930 (adopted 21 June 2014, entered into force 9 November 2016).

26 ILO, *supra* n 1, at 2.

27 *Ibid*.

28 *Ibid*., at 3.

either. The systematic and deliberate withholding of wages is still the most common one, and within the less common but worst forms of coercion, we find forced confinement, physical and sexual violence, and the deprivation of basic needs[29]. Finally, it is worth mentioning that forced labour nowadays has an important gender dimension: within forced commercial sexual exploitation, four out of five people trapped in these situations are women or young girls[30].

The ILO has been trying to put an end to this practice for several decades. Nevertheless, the enforcement capacity of the Organization is rather limited. The complexity of the ILO supervisory system, the lack of timely and reliable information from the states, and the limited scope of Article 33 of its Constitution[31] are limits that make the doctrine affirm that the ILO is a "toothless tiger", being "naming and shaming" the main system of control, which does not provide any legal sanctions against the member states[32]. This is the reason why states and doctrine have been paying attention to other regimes of international law to make the abolition of forced or compulsory labour effective, being the international trade law the most attractive one due to its capacity to bend the will of states in the face of fears of loss of access to foreign markets and the deterioration of their economies. The impossibility of including labour clauses within the multilateral international trade system, i.e., the WTO law, made states include them in their bilateral and regional free trade agreements[33]. In today's majority trade agreements, when a state violate core labour norms, within which we find the abolition of forced labour, this state can be seen trade benefits derived from the agreement supressed. Apart from these labour clauses, and due to the impasse of the WTO that we will study next, several states and regional blocs are adopting unilateral measures in order to protect the main multilateral environmental conventions[34] and fundamental labour conventions, as is the case with the ILO Forced Labour Convention No. 29 and ILO Abolition of Forced Labour Convention No. 105. One of the most active ones in doing so is the EU, who has

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29 *Ibid.*

30 *Ibid.*, at 4.

31 Article 33 of the ILO Constitution foresees that "in the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith". These actions can include sanctions; however, this article has only been used once against Myanmar in 1996. Precisely because of the use of forced labour. Nevertheless, the actions were finally carried out by States, instead by the ILO.
See ILO Constitution (adopted 28 June 1919).

32 N. Lyutov, `The ILO System of International Labour Standards and Monitoring Procedures: Too Complicated to be Effective? ´, 64 *Zbornik Pravnog Fakulteta u Zagrebu* (2014) 255-276, at 256.

33 See C. Martínez San Millán, `Hacia una efectiva implementación de los capítulos de Comercio y Desarrollo Sostenible de los Acuerdos de Libre Comercio de la Unión Europea´, 75 *Revista de Estudios Europeos* (2020) 72-85; X. Fernández Pons, `La Unión Europea y la promoción del desarrollo sostenible a través del comercio internacional´, in A. Pigrau Solé, *et al.* (eds), *La comunidad internacional ante el desafío de los objetivos de desarrollo sostenible* (Tirant lo Blanch, Valencia, 2023) 289-310.

34 Although it is not the subject of study in this paper, it is worth mentioning the EU´s `Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010´ (COM(2021) 706 final, 2021/0366 (COD), 17 November 2021), which aim is to curb deforestation and forest degradation that is provoked by EU consumption and production.

recently proposed a Regulation on prohibiting products made with forced labour on the Union market. In subsequent sections we will analize this Proposal, together with its compatibility with WTO law.

(C) KEY FEATURES OF THE PROPOSAL FOR A REGULATION ON PROHIBITING PRODUCTS MADE WITH FORCED LABOUR ON THE UNION MARKET

On 15 September 2021, Ursula Von der Leyen, current president of the European Commission, on her speech about the State of the Union stated that "doing business around the world, global trade, all that is good and necessary. But this can never be done at the expense of people's dignity and freedom. There are 25 million people out there, who are threatened or coerced into forced labour. We can never accept that they are forced to make products — and that these products then end up for sale in shops here in Europe. So, we will propose a ban on products in our market that have been made by forced labour"[35]. Few months later, in the Commission Communication on decent work worldwide[36], the European Commission outlined the first fundamental elements of its Proposal: "The initiative will cover both domestic and imported products and combine a ban with a robust, risk-based enforcement framework. The new instrument will build on international standards and complement existing horizontal and sectoral EU initiatives, in particular the due diligence and transparency obligations"[37]. Finally, on 14 September 2022, and after stakeholder consultations[38], the Commission released its Proposal for a Regulation on prohibiting products made with forced labour on the Union market[39], legally based on Articles 114 and 207 TFEU, which final goal is to prohibit economic operators from placing and making available on the Union market or exporting from the Union market products made with forced labour. This prohibition includes domestically produced and imported products.

On its particularly long recital, the Proposal alludes to the definition of forced labour given by the 2014 ILO Protocol of the Convention No. 29, according to which, the forced labour constitutes serious violation of human dignity and fundamental human rights[40]. Right after, the Proposal confirms the nature of the abolition of forced labour as a principle concerning the fundamental rights as systematised in the aforementioned 1998 ILO Declaration.

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[35] EU, `2021 State of the Union Address by President von der Leyen´, 15 September 2021.

[36] EU, `Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on decent work worldwide for a global just transition and a sustainable recovery´, (COM(2022) 66 final, 23 February 2022).

[37] *Ibid.*, at 14.

[38] The main stakeholders consulted included companies, trade union organizations, EU Member States and non-EU countries, international organizations and civil society organizations, including NGOs. Regarding these consultations, it is worth mentioning that representatives of Member States and other stakeholders underlined the importance that the envisaged EU instrument must be compatible with WTO law and based on international standards, such as the ILO's definition of forced labour. EU, *supra* n 3, at 5-6.

[39] EU, *supra* n 3.

[40] ILO Protocol of 2014 to the Forced Labour Convention, *supra* n. 25.

The recital of the Proposal also emphasizes the fact that all Member States have ratified the fundamental ILO Conventions on forced labour and child labour but remains strategically silent about the aforementioned 2014 ILO Protocol, which has not been yet ratified by 8 EU Member States almost 10 years later. Although the 2014 Protocol has optional nature and it deems to supplement the Forced Labour Convention and complement existing international instruments by providing specific guidance on effective measures to be taken, its ratification by all EU Member States would support the statement made by the European Commission on the Proposal, according to which "the eradication of forced labour is a priority for the Union"[41].

The twentieth paragraph of the Proposal´s preamble affirms that "in order to increase the effectiveness of the prohibition, competent authorities should grant reasonable time to economic operators to identify, mitigate, prevent and bring to an end the risk of forced labour"[42]. Also, if the competent authorities find out that economic operators have violated the prohibition, these authorities should set a reasonable time within which the economic operators should comply with the decision taken[43]. Although certain level of flexibility is needed when the economic operators are heterogeneous in distance, size and shape, the failure to determine certain time periods may lead to disparate implementation of the Regulation in the different territories of the EU Member States.

It is also important to stress the connection between this Proposal and the Proposal for a Directive on corporate sustainability due diligence[44], which lays down rules on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship and on liability for violations of the obligations mentioned above[45]. The author of this paper is critical with the concept of "due diligence" as it remains undefined. The Article 3 of the Proposal for a Directive on corporate sustainability due diligence, among all the definitions, does not include the definition of "due diligence". Instead, Article 4 gives substance to the concept by listing several actions that constitute "due diligence" for the purpose of this Directive[46]. This list is, nevertheless, *numerus apertus*. Surprisingly, the Proposal for a Regulation on prohibiting products made with forced labour on the Union market does define "due diligence" but only in relation to forced labour as "the efforts by economic operator to implement mandatory requirements, voluntary guidelines, recommendations or practices to identify, prevent, mitigate or bring to an end the use of forced labour

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41 EU, *supra* n 3, at 12.

42 *Ibid.*, at 16.

43 *Ibid.*, at 17.

44 EU, `Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937´ (COM/2022/71 final, 2022/0051(COD), 23 February 2022).

45 *Ibid.*, at 46.

46 These actions include integrating due diligence into their policies; identifying actual or potential adverse impacts; preventing and mitigating potential adverse impacts and bringing actual adverse impacts to an end and minimizing their extent; establishing and maintaining a complaints procedure; monitoring the effectiveness of their due diligence policy and measures; and publicly communicating on due diligence. *Ibid.*, at 53.

with respect to products that are to be made available on the Union market or to be exported"[47]. In the view of the author, the main problem of this concept relies on how to measure the efforts made in relation to implement voluntary or non-binding norms. Moreover, will these non-binding international norms become practically binding for non-state actors that have not formally and solemnly consent to it at some point due to the implementation of these future Regulation and Directive? We won´t dive into this debate, as it would constitute another completely different research.

An additional important definition included in the Proposal is the one regarding forced labour. For the purpose of this Regulation "forced labour" means forced or compulsory labour as defined in Article 2 of the Convention on Forced Labour No. 29 of the ILO, including forced child labour. Cross-referencing this definition with that of Article 2 of the Convention No. 29, we can conclude that "forced labour" for the purpose of this Regulation means "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily"[48]. As we noted above, respecting the definition of forced labour given by the ILO was a very important issue for the stakeholders consulted prior to the formulation of the Proposal. However, we can find a loophole in the Proposal: Article 2 of the Convention No. 29 lists certain situations which could constitute forced labour that the Convention does not consider included in the definition[49]. The Proposal fails to clarify if these listed situations remain exceptions for the purposes of the Regulation. Although one can deduce that the definition includes de same exceptions, it would be necessary for the final text to specify it and interesting to update them, as they were stablished almost a hundred years ago.

Article 3 of the Proposal sets out the main obligation of EU Member States: "Economic operators shall not place or make available on the Union market products that are made with forced labour, nor shall they export such products"[50]. It does not matter whether it is the final product or one of its components that benefited from forced labour. The origin of the product and the sector in which it was produced is also irrelevant to the applicability of the main prohibition.

Chapter II of the Proposal deals with the investigations and decisions of competent authorities as a decentralized enforcement mechanism. As this Proposal for a Regulation

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47 EU, *supra* n 3, at 22.

48 ILO, *supra* n. 9.

49 These situations are: "any work or service exacted in virtue of compulsory military service laws for work of a purely military character; any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country; any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations; any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population; and minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services". *Ibid*.

50 EU, *supra* n 3, at 23.

aims to prohibit products made with forced labour on the Union market, the competent authorities on every Member State shall conduct investigations in order to check if an available product on the Union market has been made with forced labour. To that end, according to Article 4, competent authorities shall follow a risk-based approach in assessing the likelihood that economic operators violated the prohibition of placing and making available on the Union market products that are made with forced labour based on all relevant information available to them[51]. If the information creates substantiated concern, competent authorities shall decide to initiate an investigation on the products and economic operators concerned[52] and economic operators shall submit the information within 15 working days from the request or make a justified request for an extension of that time limit. When deciding on the time limits, competent authorities shall consider the size and economic resources of the economic operators concerned[53]. This is an example of the flexibility announced in the Preamble of the Proposal. As mentioned above, although it is true that a certain amount of flexibility is necessary, and even more so in the case of small and medium-sized enterprises that may find it difficult to access certain types of product information quickly, the Proposal should establish more solid criteria for these temporary extensions so that future disparities do not arise between the territories of the different EU Member States. Article 6 of the Proposal provides that if the competent authorities can prove that there has been a violation of the Regulation, they shall without delay adopt a decision containing a prohibition to place or make the products concerned available on the Union market and to export them[54]. This decision, which can be review, contains a reasonable time limit for the economic operators to comply with the order, which shall not be less than 30 working days and no longer than necessary to withdraw the respective products[55]. Again, this timeframe should be more clearly defined by stablishing a maximum time period to implement the decision, because what is the necessary time to withdraw a product? The answer to this question can derivate into disparities between EU Member States, which should not be the case when implementing a Regulation. Finally, according to Article 11, the European Commission is in charge of providing an indicative, non-exhaustive, verifiable and regularly updated database of forced labour risks in specific geographic areas or with respect to specific products including with regard to forced labour imposed by state authorities[56].

Chapter III is related to the controls and information on products entering or leaving the Union market. The main important obligation for the Member States is to suspend the release for free circulation or the export of the product that may be violating the Regulation when customs authorities identify it[57].

The last Chapter of the Proposal, and the most technical one, regards to information systems, guidelines and coordinated enforcement. The most interesting provision

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51 *Ibid.*, at 24.
52 *Ibid.*, at 25.
53 *Ibid.*, at 26.
54 *Ibid.*
55 *Ibid.*, at 27.
56 *Ibid.*, at 29.
57 *Ibid.*, at 32

is contained in Article 24, which stablishes a Union Network Against Forced Labour Products in order to serve as a platform for structured coordination and cooperation between the competent authorities of the Member States and the Commission, and to streamline the practices of enforcement of the Regulation within the Union, thereby making enforcement more effective and coherent[58]. This Union, well used, can provide the link to avoid the above-mentioned possible disparities in the application of the Regulation.

(D) COMPATIBILITY OF THE PROPOSAL FOR A REGULATION ON PROHIBITING PRODUCTS MADE WITH FORCED LABOUR ON THE UNION MARKET WITH WTO LAW

International trade relations between states continue to be governed by the rules of the multilateral system of international trade, mainly the 1947 General Agreement on Tariffs and Trade (GATT) and the subsequent Marrakesh Agreement of 1994, which created the World Trade Organization (WTO). These rules include the obligation for states not to discriminate against products on the basis of their origin and to treat foreign products as they treat national products. In order to monitor compliance with the rules of the multilateral trade system, in 1994 the WTO orchestrated a dispute settlement understanding (DSU) in which expert panels (EP) and the Appellate Body (AB), through reports, declare the compliance or non-compliance of a state or group of states and, if necessary, recommend the certain measures. Unfortunately, since the Doha Round, the WTO has been dragging along an institutional crisis that has worsened with the blocking of the AB in 2021.

Unilateral measures with extraterritorial reach adopted by states, such as the Proposal for a Regulation that aims to prohibit the entry of products made with forced labour into the EU market, tend to discriminate some products against others for a certain purpose, like the protection of universal human rights[59]. In the European case, the aim is to prevent products made using forced labour from entering the EU market. A *priori*, as mentioned above, discrimination between like products is prohibited by WTO law. However, when the measures fall within the scope of Article XX GATT, on general exceptions, they are no longer considered prohibited because they have found a justification. Nonetheless, in the event of a conflict between states, it is the AB who, in the final instance, declares the discriminatory nature of the measure, its justification under the umbrella of Article XX GATT and, ultimately, its compatibility with WTO law. With the AB blocked, the rules of the multilateral trade system are weakened and the law of the strongest is imposed.

In this section we will first analyze whether the EU´s Proposal collides with the general principle of non-discrimination between like products. Secondly, we will consider the various ways in which, under an evolutionary interpretation of the GATT,

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[58] *Ibid*., at 35.

[59] L. Huici Sancho, `La Organización Internacional del Trabajo y la extraterritorialidad en orden a la aplicación de las normas internacionales del trabajo´, in J. Bonet Pérez y R. A. Alija Fernández (eds), *La extraterritorialidad y la protección de los derechos humanos respecto a conductas de los actores privados* (Marcial Pons, Madrid, 2021) 267-295, at 268.

the EU´s Proposal could be considered compatible with WTO law, despite contravening the principle of non-discrimination. Thirdly, attention will be paid to the possibility of adopting a waiver as a feasible solution in the case of incompatibility of the EU´s Proposal with WTO law declared by the DSU bodies. Finally, it is relevant to assess the WTO crisis and impasse as an impediment to a definitive declaration of compatibility or incompatibility of the EU's Proposal with the WTO law from the DSU bodies.

(1) The principle on non-discrimination between like products

Article I of the GATT contains one of the most important principles of the multilateral trade system concerning non-discrimination. Entitled as "General Most-Favoured-Nation Treatment", this article states that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"[60]. Thus, there is discrimination, and thereby a violation of the rules contained in the GATT, when two "like" products are treated differently on the basis of their origin. If it is interpreted evolutionarily — a task that should be carried out by the groups of experts and the AB —, a product manufactured using forced or compulsory labour is not similar to a product that is manufactured respecting the core labour standards, even if its final physical appearance is the same. Then, a potential restrictive measure on products manufactured in violation of this fundamental labour right coming from a third State would not be in breach of the principle of non-discrimination.

However, a review of some of the most important cases decided by the DSU bodies shows that this interpretation differs from the practice followed by the EP and the AB. For example, in 1994, in United States-Measures Regarding the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna)[61], the US Marine Mammal Protection Act of 1972 included dolphin protection measures that had to be complied with by both the US fishing fleet and countries whose vessels fished for yellowfin tuna. If a country exporting tuna to the US could not demonstrate that it had complied with the provisions of the Act, for which the US government required a certificate, the US government could seize the goods. This provision led the European Economic Community and the Netherlands, tuna-exporting states, to appeal to the DSU of the GATT in 1992, before the WTO existed, and to request the establishment of a panel. The panel found that Article III requires a comparison between the treatment accorded to like domestic and imported products, not a comparison between the policies or practices of the country of origin and those of the importing country. Thus, applying Article III of the GATT to measures relating to the processes and production methods (PPMs) that did not affect the characteristics of the final product as such constituted less favourable treatment of like products not produced in accordance with the domestic policies of the importing

60 WTO, `General Agreement on Tariffs and Trade (GATT 1947)´, 30 October 1947 (LT/UR/A-1A/1/GATT/2 of 15 April 1994).

61 WTO, `Report of the WTO Panel: United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products´ (WT/DS29/R, 16 June 1994). This report was never adopted.

country[62]. In this sense, the EP states that "like" products are those that are the same in their physical properties regardless of their PPMs, and it can be deduced that, although states have the right to determine the characteristics that a product must meet in order to be marketed in their territory, nevertheless, Article III of the GATT does not cover an extraterritorial regulation of the manner of production of that product in another state[63]. This restrictive interpretation of the concept of product from the EP has been extensively criticized by the doctrine, which states that such a distinction between the legality of restrictive measures adopted in relation to the non-similarity of two finished products by reason of their physical characteristics and the illegality of restrictive measures adopted on the occasion of the different process through which two products are manufactured is not expressly included in Article III of the GATT and, therefore, it is a jurisprudential creation with no normative basis[64]. Moreover, the existence of Article XX (e) concerning products manufactured in prisons, which does take into account the conditions under which the product is made, casts doubt on the immovability of the product-process distinction[65]. However, there are other authors[66] that defend to continue focusing the analysis of the likeness between products on physical aspects, since opening the door to the consideration of any non-product related PPMs would introduce major legal uncertainty. These authors consider that it would be difficult to determine a limit on the possible types of non-product related PPMs to be taken into account, which could give rise to undue extraterritorial interference by a country in the most diverse internal issues of other countries.

Having said that, in the subsequent case European Communities–Measures Affecting Asbestos and Asbestos–Containing Products (EC–Asbestos)[67], the AB did not reject — but did not endorse — the assertion that the PPMs are relevant for the purpose of determining the likeness of two products, holding that potential health risks should be included as a relevant factor in establishing likeness under Article III of the GATT[68], opening the door to a possible broad interpretation of the term "likeness" in Article III to include the production process as a possible difference factor between two products, even if they have the same physical characteristics, and thus allowing for unilateral restrictive measures by WTO member states[69]. With this evolutionary interpretation and the consideration of the production process to determine the similarity between two products, a product manufactured using forced labour would not be similar to a product

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62 *Ibid.*, at par. 5.8.

63 *Ibid.*, at par. 4.19.

64 R. Howse, `The World Trade Organization and the Protection of Workers´ Rights´, 3 *The Journal of Small and Emerging Business Law* (1999) 131-172, at 139; L. M. Hinojosa, *Comercio justo y derechos sociales* (Tecnos, Madrid, 2002), at 84; J. Bonet Pérez, *Mundialización y régimen jurídico internacional del trabajo. La Organización Internacional del Trabajo como referente político-jurídico universal* (Atelier, Barcelona, 2007), at 313.

65 Howse, *supra* n. 64, at 143.

66 J. H. Jackson, `Comments on Shrimp/Turtle and the Product/Process Distinction´, 11 *European Journal of International Law* (2000) 303-307, at 304; P. Low *et. al.*, *The Interface Between the Trade and Climate Change Regimes: Scoping the Issues* (WTO, Geneve, 2011), at 23.

67 WTO, `Report of the WTO AB: Measures Affecting Asbestos and Asbestos-Containing Products´ (WT/DS135/AB/R, 12 March 2001).

68 *Ibid.*, at par. 41.

69 R. Chartres and B. Mercurio, `A Call for an Agreement on Trade-Related Aspects of Labor: Why and How the WTO Should Play a Role in Upholding Core Labor Standards´, 37 *North Carolina Journal of International Law and Commercial Regulation* (2012) 665-724, at 706-707.

that in its production process does respect this core labour right, even if the physical characteristics of both finished products are the same, and a possible restrictive measure on this series of products would not incur in discrimination, not being incompatible with Articles I and III of the GATT. However, to date, there has not yet been a case in which the WTO DSU endorses a trade restrictive measure between the Contracting Parties that seeks to prohibit the importation of products with different production processes and, even less so, when the difference in the production process has its origin in the violation of internationally recognized core labour standards. At present, the idea that WTO law is concerned with "finished products" still prevails, although, as Professor Luis Miguel Hinojosa Martínez states, "it cannot be ruled out that, in the future, the growing consensus in international society on the execrable nature of certain forms of labour exploitation could evolve the interpretation of Article III, to the point that restrictive measures justified on social grounds could be considered compatible with it, provided they are not discriminatory in nature"[70]. This interpretation would also encourage the compatibility of WTO member states' trade obligations with their ILO membership obligations[71].

Apart from that, the fact that a measure based on non-product related PPMs is presumably incompatible with the basic principles of non-discrimination between like products does not prevent that the measure could ultimately be justified under one or more exceptions foreseen in Article XX of the GATT.

(2) The exceptions foreseen in article XX of the GATT

When we try to justify a given unilateral measure with extraterritorial effects that does not take into account the final appearance of the product but its PPMs in order to make it compatible with WTO law, the appropriate way to do so is to take into account the general exceptions provided for in Article XX of the GATT, which contemplate certain legitimate objectives recognized multilaterally that, under certain conditions, may justify the imposition of trade restrictions or distinctions between like products based on some non-product related PPMs. In this section, we aim to analyze Article XX of the GATT in order to prove whether the EU´s Proposal for a Regulation on prohibiting products made with forced labour on the Union market falls within the scope of this Article and, therefore, is compatible with WTO law.

(a) The chapeau of article XX of the GATT

Article XX lists exceptions from the application of the other principles and provisions contained in the GATT, as the principle of non-discrimination between like products. Nevertheless, the introductory paragraph of Article XX of the GATT specifies that these measures must not constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on

70 Hinojosa, *supra* n. 64, at 85.
71 Chartres and Mercurio, *supra* n. 69, at 705.

international trade"[72]. This condition has been baptized by the doctrine as the *chapeau* of article XX of the GATT, given its importance and its systematic position[73], and interpreted by the AB in the US–Shrimps case[74], in which it was recorded what is to be understood by "unjustifiable discrimination" on the one hand, and "arbitrary discrimination" on the other. In this case, the unilateral measure imposed by the US to protect sea turtles, although covered by Article XX (g) of the GATT, was found to constitute an unjustifiable discrimination and an arbitrary discrimination in the absence of a "transparent and predictable" procedure.

A second condition *sine qua non* for determining the legality of the exception is that the measure is "relating to" or "necessary for", which is specified in the different paragraphs of GATT Article XX. The EP and the AB of the WTO have interpreted this "necessity" requirement as implying a strict justification by States that the measures adopted are, in addition, the least restrictive, within the available measures, to international trade in order to achieve the objective pursued. *Sensu contrario*, a measure would not be "necessary" if there is a less restrictive alternative to international trade that is reasonably available to achieve the objective in question[75].

At the outset, we can question whether a possible unilateral measure whose ultimate purpose is to protect one of the core labour rights, such as the prohibition of forced or compulsory labour, would constitute, firstly, an arbitrary or unjustifiable means of discrimination or a disguised restriction on international trade, and, secondly, whether it would be really necessary.

Thus, in order for such a measure not to be in collision with the *chapeau* of Article XX of the GATT, it is first necessary to demonstrate that it is not discriminatory, in the sense of being applied differently to different WTO member states that are in the same conditions (for example, a measure aiming at the abolition of forced labour would be considered discriminatory if applied to Pakistan but not to Canada) and of being applied only to certain products and not to all products that are made in violation of this fundamental labour right, and that it does not constitute a disguised restriction on international trade, in the sense that it cannot have a protectionist intent. Secondly, it is necessary for such a measure to pass the necessity test, in the sense of demonstrating that the measure finally adopted was the least restrictive of international trade among all available alternatives. Given that many of the measures proposed for the effective protection of core labour rights advocate the use of trade restrictions on states that do not respect these rights, it seems difficult for these measures to find a shelter under GATT Article XX, as there are many other possible measures that do not require trade restrictions, such as, for example, recourse to negotiations within the ILO[76].

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72 WTO, `General Agreement on Tariffs and Trade (GATT 1947)', *supra* n. 60.

73 C. Thomas, `Should the World Trade Organization Incorporate Labor and Environmental Standards?´ 61 *Washington and Lee Law Review* (2004) 347-404, at 359.

74 WTO, `WTO Appellate Body Report: United States Import Prohibition on Certain Shrimp and Shrimp Products´ (WT/DS58/AB/R, 12 October 1998).

75 Chartres and Mercurio, *supra* n. 69, at 713.

76 *Ibid*., at 715.

Nonetheless, these difficulties have not prevented the doctrine[77] from envisaging the possibility of an evolutionary interpretation of the different paragraphs of Article XX of the GATT in order to include among this series of measures those aimed at protecting internationally recognized core labour rights. This possibility is supported by the change of paradigm in the environmental issue, around which, although GATT/WTO jurisprudence was traditionally very restrictive when admitting measures that seek to protect the environment at the cost of imposing obstacles to international trade, currently, and especially after the US-Shrimp case, the admission of this type of measures is becoming more flexible in order to comply with the objective of sustainable development set out in the preamble of the Marrakesh Agreement of 1994[78] and the latest decisions of the WTO AB seem to be inclined to maintain a balance between the rights of exporting states and the general interests that the importing state seeks to protect by adopting the measure in question[79].

(b) Article XX (a) of the GATT

When trying to justify the compatibility of the EU´s Proposal for a Regulation on prohibiting products made with forced labour on the Union market with WTO law, one of the main arguments lay down the Article XX (a) of the GATT. This article excludes from the application of general principles of international trade law, such as the principle of non-discrimination, unilateral trade restrictive measures necessary to protect public morals. The EU, adopting such a Proposal, aims to protect a maxim present in European collective morality: the complete abolition of slavery and forced or compulsory labour[80].

To date, there are few cases in which WTO jurisdictional organs have interpreted and ruled on this provision. An example is the EC–Seals case of 2014[81], in which the AB confirmed the panel’s finding that the unilateral measure adopted by the then EC for the protection of seals fell within the material scope of Article XX (a) of the GATT, considering that the main purpose of European Regulation 1007/2009 was to address EU public morals concerns relating to the welfare of seals, rather than environmental concerns[82] and that, in doing so, it took into account other interests or considerations related to Inuit communities, the management of marine resources, and seal products for the personal use of travelers, exceptions which are covered by the Regulation and the subject of the dispute[83]. Another case we can take as a reference is the US–Gambling

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[77] See Hinojosa, *supra* n.64 or Chartres and Mercurio, *supra* n. 69.

[78] R. M. Fernández Egea, *Comercio de Mercancías y Protección del Medio Ambiente en la OMC* (Marcial Pons, Madrid, 2008) at 392.

[79] Hinojosa, *supra* n. 64, at 94.

[80] Article 5 of the Charter of Fundamental Rights of the European Union (adopted 7 December 2000, entered into force 1 December 2009) DO C 202, 7.6.2016, 389-405.

[81] WTO, `Appellate Body Report: European Communities Measures Banning the Import and Marketing of Seal Products´ (WT/DS401/AB/R, 22 May 2014).

[82] E. J. Martínez Pérez, `Restricciones Comerciales por Razones Éticas: La Prohibición de la Unión Europea a la Importación de Productos derivados de las Focas´, 42 *Revista Española de Derecho Europeo* (2012) 5-48, at 36.

[83] *Ibid.*, at 37-38.

case[84], in which Antigua and Barbuda complained to the WTO DSU bodies against the US for measures on the cross-border supply of gambling and betting services that the US government justified under Article XX (a) of the GATS, equivalent to Article XX (a) of the GATT, i.e. under the need to protect the public morals of the US population. In this case, the AB agreed with the EP in stating that "the term public morals denotes standards of good and bad conduct by or on behalf of a community or nation"[85], a conception that, on the other hand, cannot be frozen in time, being imperative to adapt it to the existing reality[86].

Within this interpretation of "public morals", some authors understand that it is possible to include within the measures provided for in Article XX (a) of the GATT all those with an ethical component aimed at protecting human rights and, more specifically, core labour rights such as the abolition of forced or compulsory labour or the elimination of child labour[87], since the manufacture of products violating this series of rights would form part of what the AB has called "misconduct on the part of a community or nation". In the words of Chartres and Mercurio, "interpreting GATT Article XX (a) to permit the prohibition of the importation and sale of products manufactured in violation of the core labour rights would allow importing nations to protect their citizens from an internationally condemned practice that offends the deeply held beliefs and fundamental values of their citizens"[88]. Nevertheless, in order for the measure in question not to be incompatible with the provisions contained in the GATT, it must not entail unjustified or arbitrary discrimination, which would require the measure to be applied to all products from any state[89]. In this case, according to Professor Enrique Jesús Martínez Pérez, "there is a risk, if strict conditions of application are not established, of turning [this] justification into a catch-all that serves as an escape valve for non-compliance with GATT obligations"[90].

(c) Article XX (b) of the GATT

One can also try to justify EU´s Proposal for a Regulation on prohibiting products made with forced labour on the Union market under the scope of the Article XX (b) of the GATT, which excludes from the application of general principles of international trade law, such as the principle of non-discrimination, unilateral trade restrictive measures necessary to protect human, animal or plant life or health. The EU, adopting such a Proposal, aims to protect the lives of those workers on whom forced labour has been imposed.

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84 WTO, `Appellate Body Report: United States Measures Affecting the Cross-Border Supply of Gambling and Betting Services´ (WT/DS285/AB/R, 7 April 2005).

85 *Ibid*., at par. 296.

86 Howse, *supra* n. 64, at 172.

87 S. Charnovitz, `The Moral Exception in Trade Policy´, 38 *Virginia Journal of International Law* (1998) 689-746, at 729; R. Howse and M. Mutua, `Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization´, in H. Stokke and A. Tostensen (eds), *Human Rights in Development* (Brill Academic Publishers, Leiden, 1999) 53, at 64 and 71; Martínez, *supra* n. 78, at 48.

88 Chartres and Mercurio, *supra* n. 69, at 710.

89 *Ibid*., at 716.

90 Martínez, *supra* n. 82, at 48.

Article XX (b) of the GATT has been extensively interpreted by the different DSU bodies, but in regard to environmental issues. One of the most important cases is the US–Shrimp case[91]. In this case, the EP considered that the US unilateral measure was contrary to WTO law because, although it is true that numerous international treaties recognise the principle of conservation of exhaustible natural resources, these agreements do not specifically address the measures taken by the US. The AB, for its part, reverses the panel´s report and states that "such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply"[92]. Rather than focusing on condemning the unilateral measures taken by the US, the AB examines whether such measures constitute a means of arbitrary and unjustifiable discrimination and thus violate the so-called *chapeau* of Article XX of the GATT. This important US-Shrimp case addresses several difficulties from the point of view of the application of Article XX (b) of the GATT. The first of these is the possible extraterritorial application of the provision, i.e. the possible adoption of unilateral measures by a WTO member state to protect human, animal or plant life or health that are applied outside the territory of the state itself. In the US–Shrimp case, this difficulty was overcome by justifying the extraterritorial scope measure by the existence of a "sufficient nexus between the endangered migratory and marine populations in the case and the US"[93], thus avoiding directly pronouncing on the jurisdictional limitation of Article XX[94] and leaving unresolved the question of whether future EP will allow states to implement measures intended to protect human and animal health and life beyond their domestic jurisdiction[95]. Furthermore, in the US–Tuna case[96], the EP noted that the text of Article XX (b) "does not detail any limitation on the location of the living creatures to be protected"[97].

Justifying the extraterritoriality of a unilateral measure on the basis of the nexus of that measure with the creature affected is simpler in the case of animal species. However, this solution does not seem applicable in the case of unilateral measures intended to protect the core labour rights, such as the abolition of forced labour, since, according to Professor Luis Miguel Hinojosa Martínez, the population of the punished country (which is intended to be protected) has no direct nexus with the importing country[98]. The measure directly protects rights, not persons. Moreover, as mentioned in relation to the chapeau of Article XX of the GATT, it must also be demonstrated that the measure is "necessary", for which it must be analyzed beforehand that it constitutes the least restrictive, within the available measures, to international trade to achieve the objective

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91 WTO, *supra* n. 74.

92 *Ibid.*, at par. 121.

93 *Ibid.*, at par. 133.

94 A. H. Qureshi, `Extraterritorial Shrimps, NGOs and the WTO Appellate Body´, 48 *International and Comparative Law Quarterly* (1998) 199-206, at 204.

95 B. Simmons, `In search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body report´ 24 Columbia Journal of Environmental Law (1999) 413-454, at 440; H. F. Chang, `Toward a Greener GATT: Environmental Trade Measures and the Shrimp/Turtle Case´, 74 *Southern California Law Review* (2000) 31-47, at 34.

96 WTO, *supra*, n. 61.

97 *Ibid.*, at par. 5.31.

98 Hinojosa, *supra* n. 64, at 98.

set or the least incompatible with the provisions of the GATT[99], being difficult to justify this "necessity" in relation to a possible measure that aims to abolish forced labour, given that there are alternatives such as cooperation with the ILO or technical and financial assistance to developing countries[100]. Finally, any unilateral measure intended to protect human and animal health and life must also comply with the requirements of the *chapeau* of Article XX of GATT, i.e. not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade, which is also difficult to justify in the case of measures intended to put an end to the use of forced or compulsory labour[101].

Despite the difficulties, a significant number of authors argue that Article XX (b) of the GATT provides the right context for an eventual evolutionary interpretation that would allow the inclusion of labour provisions in WTO law[102].

(d) Article XX (e) of the GATT

Contrary to the previous cases, EU´s Proposal for a Regulation on prohibiting products made with forced labour on the Union market cannot be explicitly justified under the scope of the Article XX (e) of the GATT, as it constitutes a very limited disposition. Article XX (e) excludes from the application of general principles of international trade law, such as the principle of non-discrimination, unilateral trade restrictive measures relating to articles manufactured in prisons. This is the only mention in the GATT to working conditions.

On the one hand, the inclusion within the exceptions of Article XX of a provision related to products that are manufactured in prisons and that can create situations of unfair competition and, more importantly, of violation of the core labour rights such as the prohibition of forced labour, given that the control of activities in prisons is more complicated than the control of factories and production halls, confirms the desire of the drafters of GATT 1947 to include exceptions to the basic multilateral trade principles not only for environmental reasons, but also for labour reasons, which opens the door to a possible modification of GATT in the sense of extending the material scope of Article XX (e) to include products, not only manufactured in prisons, but also manufactured using forced labour, which would automatically make the EU's Proposal compatible with WTO law. Indeed, many authors agree that the reform of this Article XX (e) of the GATT would be "the ideal method" to introduce labour provisions into WTO law[103]. Nonetheless, as we will see in subsequent sections, the WTO is currently in a deep crisis and the reform of its multilateral agreements is not at the top of the negotiating agenda, and even less so if this reform aims to include labour provisions in WTO law.

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99 Thomas, *supra* n. 73, at 361-362.
100 Hinojosa, *supra* n. 64, at 101.
101 Howse, *supra* n. 64, at 145.
102 J. M. Diller and D. A. Levy, `Child Labor, Trade and Investment: Toward the Harmonization of International Law´, 91 *American Journal of International Law* (1997) 663-696, at 682; Chartres and Mercurio, *supra* n. 66, at 696.
103 Hinojosa, *supra* n. 64, at 104.

Given that the reform of the Article XX (e) does not seem likely in the short term, one can only appeal to a possible extensive interpretation of it[104]. However, this interpretation does not seem likely either, given the conciseness of its terms, referring only to products manufactured in prisons. This conciseness has reduced the relevance of considering Article XX (e) as one of the possible GATT articles that, with a possible evolutionary interpretation, would allow for the inclusion of labour provisions in the multilateral system of international trade, such as the abolition of forced labour. However, there are authors who argue that, despite the limitation of the terms used in Article XX (e), if a contextual interpretation is made, we can conclude that labour provisions do have a place in this article. A predecessor of GATT, the 1927 International Convention for the Abolition of Restrictions on Imports and Exports, contained a provision similar to Article XX (e) of the GATT, which was the subject of an interpretative declaration by the US at the time of ratification, according to which products manufactured using slave labour were included[105].

Be that as it may, to date there have been no trade disputes under Article XX (e) of the GATT within the WTO's DSU.

(3) **The possible adoption of a waiver**

As is well known — and criticized —, decisions in the WTO are taken by consensus, in accordance with Article IX.1 of the 1994 Marrakesh Agreement. However, in its third paragraph, Article IX provides that in exceptional situations, "the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph"[106]. It can be inferred from this paragraph that a waiver could be adopted by a three-fourths majority of the Members of the Ministerial Conference, according to which a Member State would not have to comply with the provisions of the GATT, e.g. Article XI on quantitative restrictions, and could therefore adopt measures restricting international trade[107] (Murase, 1995: 346). However, in order to comply with the requirements of Article IX.3 of the Marrakesh Agreement, in addition to the agreement of three quarters of the Ministerial Conference, a very demanding majority in the WTO, it is necessary to justify the exceptionality of the circumstances, which is difficult in relation to the abolition of forced labour and has rarely occurred within the WTO[108].

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[104] X. Ferández Pons, ` Los derechos económicos, sociales y culturales y los Acuerdos de la Organización Mundial del Comercio´, in J. Bonet Pérez and R. A. Alija Fernández (eds), *La exigibilidad de los derechos económicos, sociales y culturales en la sociedad internacional del siglo XXI: una aproximación jurídica desde el Derecho internacional* (Marcial Pons, Madrid, 2016) 263, at 292-293.

[105] Diller and Levy, *supra* n. 102, at 683-684.

[106] WTO, `Marrakesh Agreement Establishing the World Trade Organization´ (LT/UR/A/2, 15 April 1994).

[107] S. Murase, `Extraterritorial Application of Domestic Environmental Law´, in S. Murase, *Perspectives from International Economic Law on Transnational Environmental Issues* (Martinus Nijhoff, Leiden, 1995) 287-372, at 346.

[108] E. U. Petersmann, `The "Human Rights Approach" Advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: Is it Relevant for WTO Law and Policy?´, 7 *Journal of International Economic Law* (2004) 605-627, at 626 [doi: 10.1093/acprof:oso/9780199282623.003.0018].

Nevertheless, there is now a precedent that may suggest that these waivers can be justified on human rights grounds. The Kimberley Process Certification Scheme (KPCS) of 2002 is an international agreement[109] which, while not an international treaty *per se*, contains provisions that Participating states have implemented in their national legislation. The KPCS aims to eliminate from the legal diamond trade those diamonds that have been mined by non-state and terrorist groups in violation of human rights to finance armed conflicts (mainly in the African continent) and, to this end, provides that Participating states must ensure that no shipment of rough diamonds is exported to or imported from a non-Participating state[110]. In other words, KPCS Participating states can adopt measures restricting international trade in diamonds vis-à-vis non-Participants in the Process, which is clearly incompatible with Article XI of the GATT, regarding quantitative restrictions. To remedy this inconsistency, the WTO adopted a waiver under Article IX.3 of the 1994 Marrakesh Agreement and temporarily suspended the application of the principles contained in the GATT in relation to measures necessary to prohibit the import and export of rough diamonds from non-Participating states in the KPCS in May 2003[111], as last extended in 2018[112]. In Professor Joost Pauwelyn's view, the best solution in this regard would have been a subsequent agreement or interpretative decision stating that all measures prohibiting or restricting the import or export of conflict diamonds necessary for the proper implementation of the KPCS are presumed to fall under the exception provided for in Article XXI of the GATT[113].

All in all, this particular case opens the door to the consideration of waivers to the basic GATT principles relating to the prohibition of trade restrictions between WTO members states on human rights issues, such as the abolition of forced and compulsory labour, which would make the EU´s Proposal compatible with WTO law. However, once again, due to the crisis that the WTO is undergoing, these kind of solutions with a certain political feature that require a voting are not very likely to happen.

(4) The WTO impasse: A chronicle of a death foretold?

The current impasse in the WTO is the result of a combination of a series of factors that need to be analyzed, such as the proliferation of bilateral and regional free trade agreements, the role played by some countries such as China and the US within the Organization, the crisis of the DSU and the AB, and the special and differential treatment of developing countries. All these factors mean that the WTO is gradually

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[109] KPCS, `Kimberley Process Certification Scheme, Core Document´, 5 Novembre 2002.

[110] E. J. Martínez Pérez, `El Comercio de Diamantes Conflictivos ante el Derecho internacional´, in A. Embid Irujo (coord), *Comercio internacional y derechos humanos* (Thomson Reuters Aranzadi, Pamplona, 2007) 247-264; Martínez San Millán, C., `The Different Initiatives on Due Diligence for Responsible Mineral Supply Chains from Conflict-Affected and High-Risk Areas: Are there More Effective Alternatives?´, 9 *Paix et Sécurité Internationales* (2021) 1-39 [doi: 10.25267/Paix_secur_int.2021.i9.1201].

[111] WTO, `Waiver concerning Kimberley Process Certification Scheme´ (WT/L/518, 27 May 2003).

[112] WTO, `Extension of waiver concerning Kimberley Process Certification Scheme´ (WT/L/1039, 30 July 2018).

[113] J. Pauwelyn, `WTO Compassion or Superiority Complex: What to Make of the WTO Waiver for Conflict Diamonds´, 24 *Michigan Journal of International Law* (2003) 1177-1207, at 1204.

losing its capacity and legitimacy to regulate multilateral international trade relations[114]. Moreover, in our case study, a WTO whose DSU bodies are on stand-by means that it will be difficult for the bodies that are genuinely responsible for doing so to declare the compatibility or incompatibility of the EU's Proposal for a Regulation on prohibiting products made with forced labour on the Union market with WTO law.

Firstly, as mentioned above, over the last three decades or so we have witnessed an exponential growth in the number of international free trade agreements concluded bilaterally and regionally by states and trading blocs. These international treaties represent an exception to the principle of non-discrimination, as they seek to reduce trade barriers only between a small group of states, which is, however, permitted by Article XXIV of the GATT on Customs Unions and Free Trade Areas. The problem is that what was conceived as an exception has become the rule. We have gone, as Professor Ana Manero Salvador rightly says, from a more or less predictable multilateral trade framework to an atomization of trade relations through free trade agreements, many of them bilateral[115], thus giving rise to a fragmentation of world trade. Within the doctrine, there are mixed views on this increase in free trade agreements. On the one hand, some authors argue that these types of agreements are like "termites" that undermine legitimacy and pose a threat to the continuity of the multilateral system of international trade and its basic principles[116]. On the other hand, other authors argue that, although it is true that the nature of these agreements is discriminatory, free trade agreements are a very important instrument for states wishing to advance in the process of international trade liberalization[117].

Secondly, the role played by some world powers within the WTO, principally China and the US, has also contributed to exacerbating the crisis that the Organization is going through. On the one hand, China, which acceded to WTO membership in December 2001, was considered a non-market economy state, a status that was due to expire after 15 years. Today, China claims to be a market economy, but most WTO member states disagree, given evidence of increased state intervention in the Chinese economy and financial institutions, the number of state-owned enterprises, subsidies and aid granted by the government, and government intervention in various sectors[118]. The government's interventionism in China's economy is reflected in the number of disputes brought before the WTO DSU bodies against China, most of them concerning intellectual and industrial property[119]. The rapid transformation of China's economy and its astonishing export capacity have made it one of the world's factories alongside other

[114] C. Martínez San Millán, `La crisis de la COVID-19 y la Organización Mundial del Comercio: ¿Una oportunidad?´, 3125 Boletín Económico de ICE (2020), 43-53, at 43 [doi: 10.32796/bice.2020.3125.7057].

[115] A. Manero Salvador, *Los Tratados de Libre Comercio de Estados Unidos y de la Unión Europea* (Bosch Editor, Barcelona, 2018) at 29.

[116] J. Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford University Press, Oxford, 2008).

[117] G. P. Sampson, `Challenges Facing the World Trade Organization: An Overview´, 51 *Australian Economic Review* (2018) 453-473, at 457 [doi: 10.1111/1467-8462.12301].

[118] W. Jannace and P. Tiffany, `A New World Order: The Rule of Law, or the Law of Rulers´, 42 Fordham International Law Journal (2019) 1379-1418, at 1390.

[119] As of August 2023, 49 disputes have been brought against China before the WTO. WTO, `Disputes involving or involving China´, accessed 16 August 2023.

countries such as India. However, its behaviour in world trade represents, in the words of Professor Andrés González Martín, a "serious pathology" that will end up damaging the globalization process. In this context, "the only alternative is to economically — and commercially — discipline the Asian giant"[120]. On the other hand, the US and, more than the US, its former president Donald Trump, have seriously wounded the WTO and the multilateral international trading system after his term in office. An important event, especially for the functioning of the WTO, was the blocking of its DSU by the refusal to renew the judges that make up the AB. When Democrat Joe Biden was elected as the new US president in November 2020, it was expected that the US approach to international trade relations would be turned on its head. However, while Biden publicly professes sympathy for his traditional allies in Europe and Asia and a preference for the multilateral system of international trade and a rule-based international order, there is far more continuity between the foreign policy of the current president and that of the former president than is usually recognized[121]. "Buy American" and "America First" remain the slogans of reference in his domestic and foreign policy and have materialized, for example, in the limitation of exports of COVID-19 vaccines, despite the fact that supply exceeds demand in the country[122]. As for the WTO, the Biden administration has shown little interest in strengthening it and pulling it out of its current crisis[123].

Thirdly, the issue of special and differential treatment for developing countries is another factor keeping the WTO in a serious institutional crisis. The Preamble of the 1994 Marrakesh Agreement recognizes that there is a need for "positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development"[124]. These efforts have resulted in 148 special and differential treatment provisions for developing countries in the WTO Agreements, all of which are designed to provide legal flexibility in trade for the least developed states[125]. Despite this formal recognition of their unequal situation, however, the reality is that developing countries continue to have innumerable problems in asserting their interests within the WTO. Furthermore, the fact that the category of "developing country" is not homogeneous within the WTO means that it is not possible to efficiently differentiate between countries according to their level of development in order to grant them the aid they are entitled to. In the opinion of Professor Carmen López-Jurado, this fact "points to the need to elaborate a particular commercial legal status for each of them and, from a much broader perspective, to the need to reformulate the international development aid system"[126], as one of the main reasons for the lack of effectiveness of many of the "legally

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[120] A. González Martín, `La Globalización está en Cuarentena´, 11 *Documento de Análisis IEEE* (2020), 1-27, at 1.

[121] R. Haass, `The Age of America First: Washington's Flawed New Foreign Policy Consensus´, 100 *Foreign Affairs* (2020) 85-98, at 85.

[122] *Ibid.*, at 90.

[123] *Ibid.*, at 92.

[124] WTO, `Marrakesh Agreement Establishing the World Trade Organization´, *supra* n. 106.

[125] Sampson, *supra* n. 117, at 461.

[126] C. López-Jurado, `El Tratamiento de los Países en Vías de Desarrollo en la OMC y las Iniciativas Unilaterales de la Comunidad Europea´, 3 *Revista Electrónica de Estudios Internacionales* (2001) 1-38, at 2.

flexible" provisions in favour of developing countries is precisely that these are generic for all of them and forget their specificities[127].

Last but not least, another of the WTO's major problems is the aforementioned blockage of the WTO DSU due to the impossibility of renewing the membership of the AB. According to the WTO's own website, "the Appellate Body is currently unable to consider appeals because of unfilled vacancies. The term of office of the last active AB Member expired on 30 November 2020"[128]. This blockage in the renewal of AB Members and the termination of their functions poses a major systemic risk, as, in the absence of an impartial report and recommendations, the party affected by the dispute may decide to resort to unilaterally determined retaliation without any checks and balances[129]. But why is this body blocked? The fundamental reason is that the renewal of these judges is done by consensus of all WTO Members and, at present, the US opposes such renewal for several reasons. The first reason is its disagreement with "Rule 15" adopted by the AB itself and included in the Working Procedures for Appellate Review[130], since the US considers that, in any case, it should be the Dispute Settlement Body that approves extensions of the terms of office of AB judges[131]. Moreover, according to the US, Rule 15 is not part of the Agreement on the Dispute Settlement Understanding and therefore does not constitute a rule approved by WTO member states. The second reason for US opposition to the DSU is the slowness of the process and the delay in resolving disputes. The third and final reason is that the US considers that the Appellate Body includes interpretations in its reports that are not necessary for the settlement of the dispute and that even affect the domestic law of the states. According to the US, these interpretations are forming a body of law that has not been negotiated or agreed upon by WTO member states[132]. Nonetheless it is worth mentioning that some states have reached a multi-party interim appellate arbitration agreement to solve disputes in which all WTO member states that wish to participate are invited to do so[133].

All of the factors discussed above have meant that the WTO, in barely 29 years of existence, has been plunged into a serious crisis, not only institutionally but also in terms of legitimacy. Regardless of what may happen in the coming years on the international scene, if one thing is clear it is that the WTO urgently needs a reform of its institutional and regulatory structure to ensure that the multilateral system of international trade survives beyond 2030. Some authors point to the reform of the decision-making system and of the DSU rules as the only possible solutions to overcome the crisis[134]. However,

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[127] Sampson, *supra* n. 117, at 461.

[128] WTO, `Appellate Body´, accessed 16 August 2023.

[129] C. Martínez San Millán, `Trabajo decente y crecimiento económico: la necesaria reforma institucional de la Organización Mundial del Comercio para su adaptación a la Agenda 2030´, 57 *Con-Texto* (2022) 17-62, at 26 [doi: 10.18601/01236458.n57.03].

[130] WTO, `Working Procedures for Appeal Review´ (WT/AB/WP/6, 16 August 2010).

[131] R. Arredondo and L. M. A. Godio, `La Crisis del Órgano de Apelación de la Organización Mundial de Comercio´, 7 *Revista Da Secretaria Do Tribunal Permanente de Revisão* (2019) 163-179, at 172 [doi: 10.16890/rstpr.a7.n13.p163].

[132] A. Sanz Serrano, `Estados Unidos y el Sistema Multilateral de Comercio´, 3110 *Boletín Económico de ICE* (2019) 75-84, at 77 [doi: DOI: 10.32796/bice.2019.3110.6789].

[133] EU, `International trade dispute settlement WTO: Appellate Body crisis and the multiparty interim appeal arrangement´(European Parliament Briefing 690.521, April 2021).

[134] Martínez San Millán, `Trabajo decente..., *supra* n. 129.

given the complicated landscape of international relations between states in a multipolar scenario, such solutions do not seem possible in the short term.

Be that as it may, the blocking of the AB means that the body ultimately responsible for declaring the EU's Proposal for a Regulation on prohibiting products made with forced labour on the Union market compatibility or incompatibility with WTO law will not be able to do so, and, should the Proposal constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, no State would be able to sue it and see its interests protected, thus international trade being left to the strongest powers.

(E) FINAL REMARKS

In the context of an increasingly fragmented international legal order, the norms and principles underlying international public morality need to be present in all international normative sub-systems. The manufacture of products using forced labour is a despicable practice to which the entire international community is opposed. The EU, a strong advocate of human rights, including the abolition of forced or compulsory labour, is committed to ending this scourge. To this end, it has adopted a series of measures, the most recent of which is the EU's Proposal or a Regulation on prohibiting products made with forced labour on the Union market. Under this measure, the EU´s Commission aims to prohibit economic operators from placing and making available on the Union market or exporting from the Union market products made with forced labour. This prohibition includes domestically produced and imported products.

It is not the first time that the EU has used its advantageous position in international trade, its market access power and its market size to integrate standards related to human rights, core labour rights and environmental protection into this regime in order to increase their compliance. This is what the doctrine has called "govern through trade". We have seen it before in EU´s free trade agreements, and now we see it in this Proposal and in many other unilateral measures that the EU has been adopting in recent years.

Having said that, just as free trade agreements are negotiated between two or more States, unilateral measures sometimes contain extraterritorial effects that third States have not expressly consented to, which may ultimately clash with other domestic or international rules. In our study, as we have had the opportunity to see, the EU's Proposal clashes head-on with the principle of non-discrimination contained in the GATT 1947, which means that, *a priori*, this measure is incompatible with the multilateral rules of international trade. However, a possible extensive interpretation of Article XX of the same text opens the door to a possible formal declaration of compatibility of the Proposal with WTO law, as one can justify that the EU´s measure tends to protect the public moral.

Those in charge of declaring the compatibility or incompatibility of a unilateral measure with extraterritorial effects with WTO law are the bodies of the DSU, a system currently in crisis given the AB bloc. The blockage of this body, of the DSU and of the WTO itself is evidence of a systemic risk that could lead to the collapse of the multilateral system of international trade as we know it, and to international trade relations being

governed by the rules imposed by the strongest powers. Although in this case the EU's intentions with its proposal are impeccable, any measure adopted by a state or trading bloc has to respect minimum rules agreed at the multilateral level in order to provide the whole system with predictability and legal certainty.

Although it does not seem possible in the short term, the only solution is the institutional reform of the WTO and the updating of all its agreements to the current commercial reality. Furthermore, an eventual amendment of the GATT would be the appropriate occasion to normatively integrate fundamental norms of other subsystems of international law related to the protection of human rights in order to improve their enforcement, to increase the legitimacy of the multilateral system of international trade and, ultimately, to provide formal and material unity to the entire international legal order.

SYbIL | Spanish Yearbook of International Law

The legal value of the decisions given by the United Nations Human Rights Treaty Bodies in light of the Judgments of the Spanish Supreme Court of 13 June 2023 (STS 786/2023) and of 29 November 2023 (STS 1597/2023): End of Story?

Eduardo Jiménez Pineda*

Abstract: this paper studies the legal value of the decisions given by the United Nations Human Rights Treaty Bodies considering mainly the Judgments 786/2023 and 1597/2023 of the Spanish Supreme Court, recently delivered on 13 June 2023 and 29 November 2023. The first judgment does not recognise a decision of the Committee against Torture as a valid premise to lead to the State liability. Although, the second judgment, on the effects of a decision given by the Committee on the Rights of Persons with Disabilities, confirms the 2018 decision by the same court regarding a ruling by the Committee on the Elimination of Discrimination against Women, which was a turning point for the jurisprudence in this field. In this sense, the paper provides an overview of the varying types of decisions issued by different human rights treaty bodies and scrutinizes their legal value from both international law and Spanish domestic law perspectives. In addition, it considers the different approaches of the Spanish legal scholarship to this issue. Notably, the paper conducts a thorough analysis of how the Supreme Court interprets its doctrine in light of the 2023 judgments. In essence, it concludes the establishment of a jurisprudence by the Supreme Court on the legal value of these decisions consisting of its condition of valid premise to seek the State liability, as such having a binding effect, confirming the doctrine started five years ago. Nevertheless, the author criticizes this doctrine as he believes it does not align accurately with both international law and the Spanish domestic legal framework.

Keywords: United Nations Human Rights Treaty Bodies, Supreme Court's Judgment of 13 June 2023, Supreme Court's Judgment of 29 November 2023, human rights enforcement, Committee on the Rights of Persons with Disabilities

(A) INTRODUCTION

Contrary to the mandatory nature of the judgments rendered by the regional international tribunals, the legal value of the decisions given by the United Nations Human Rights Treaty Bodies remains as a disputed question. As the International Law Commission has pointed out, "regional human rights courts and bodies have also used pronouncements of expert treaty bodies as an aid for the interpretation of treaties that they are called on to apply" and "various domestic courts have considered that pronouncements of expert

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treaty bodies under human rights treaties, while not being legally binding on them as such, nevertheless 'deserve to be given considerable weight in determining the meaning of a relevant right and the determination of a violation.'"[1]

The enforcement of the different decisions given by the distinct committees of independent experts that monitor implementation of the core international human rights treaties depends on the legal system of each State Party on every treaty. Thus, there are different kinds of internal enforcement mechanisms, either of an administrative or judicial nature, either these mechanisms have been legally developed or their development has been carried out by the domestic case law.[2]

As it is known and as explained below, in Spain there is a legal gap with regards to the adoption of an internal enforcement mechanism of these decisions. As such, the Spanish domestic courts have been in charge of its development, although there was a turning point, i.e., the Judgment 1263/2018 rendered by the Spanish Supreme Court on 17 July 2018 in the famous case of Ángeles González Carreño, to which I will refer later. In fact, this judgment constituted a turning point in the sense that prior to this decision there were few cases related to the value of the decisions of the United Nations organs considering that before the aforementioned judgment the domestic decisions were unequivocal: the human rights treaty bodies are not jurisdictional organs and as a result their decisions have just an interpretative value and are not final and binding.[3] However, after the 2018 Supreme Court Judgment, numerous cases were brought before the Spanish courts and tribunals seeking a remedy for a human right violation from the State liability, thus asking the recognition of compulsory legal value in the domestic legal order of the decisions given by the United Nations human rights treaty bodies.

In view of the above, in this article my goal is to pursue the study the legal value in Spain of the decisions given by the United Nations Human Rights Treaty Bodies, in particular in light of two recent judgments given by the Spanish Supreme Court, namely: the Judgment 786/2023 of 13 June 2023 and the Judgment 1597/2023 of 29 November 2023. To this end, I will firstly address succinctly the legal nature of the different decisions rendered by these United Nations organs from an international and domestic legal perspective. Secondly, I will analyse these latest judgment of 2023 in which the Supreme Court clarifies its previous jurisprudence and settles its doctrine by cassation for the future. Finally, I will try to expose some conclusions with a particular focus on the potential consequences of this latest judgment for the legal value of the decisions of the United Nations treaty bodies in Spain, taking into account that from this point and until a new judicial criterion would be given, this value has been established by the Supreme Court since 2023.

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1 International Law Commission, *Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018)*, doc. A/73/10, p. 114, para. 22.

2 E. J. Martínez Pérez, 'Los órganos de tratados de las Naciones Unidas como alternativa limitada para la salvaguarda de los derechos humanos en España' 15 (1) *Cuadernos de Derecho Transnacional* 517-548, at 518 [doi: 10.20318/cdt.2023.7552].

3 Ibid.

B) SOME INITIAL CONSIDERATIONS ABOUT THE UNITED NATIONS HUMAN RIGHTS TREATY BODIES AND THE LEGAL VALUE OF THEIR DECISIONS FROM AN INTERNATIONAL AND A DOMESTIC LEGAL PERSPECTIVES

In order to apply the international human rights treaties, States receive support and assistance in fulfilling their international obligations by the human rights treaty bodies (also known as human rights committees or expert organs), whose main competence is monitoring such application by States parties of those human rights treaties. Nowadays these committees are ten: the Committee on the Elimination of Racial Discrimination;[4] the Committee on Economic, Social and Cultural Rights;[5] the Human Rights Committee;[6] the Committee on the Elimination of Discrimination against Women;[7] the Committee against Torture;[8] the Subcommittee on Prevention of Torture;[9] the Committee on the Rights of the Child;[10] the Committee on Migrant Workers;[11] the Committee on the Rights of Persons with Disabilities;[12] and the Committee on Enforced Disappearances.[13] It is important to note that not every universal conventions for the protection of human rights have established their own committees and that not all of these committees have the same competences and procedures.

However, international treaty bodies, except for the Subcommittee on Prevention of Torture, have a mandate to receive and review reports periodically submitted by State parties.[14] These reports detail how these nations are applying the provisions of international treaties within their own borders. The treaty bodies offer guidance to help States in preparing their reports, produce general comments to provide interpretations of treaty provisions, and organize discussions on topics related to these treaties. Some

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[4] It was the first committee to be created in 1969 and it is in charge of monitoring the application of the International Convention on the Elimination of All Forms of Racial Discrimination.

[5] It was established in 1985 and it handles the application of the International Covenant on Economic, Social and Cultural Rights.

[6] This committee was established in 1976 in order to review the application of the International Covenant on Civil and Political Rights.

[7] Since its establishment in 1981 it is in charge of monitoring the application of the Convention on the Elimination of All Forms of Discrimination against Women.

[8] The Committee against Torture, that was created in 1987, handles the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This committee will be relevant in this article since the value of one of its decisions was analysed by the Spanish Supreme Court in its judgment given on 13 June 2023.

[9] This Subcommittee started its work in 2007 and it has two main mandates: to visit all places of detention in State parties; and to provide assistance and advice to both States parties and their independent national bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment, the national preventive mechanism (see Office of the High Commissioner of the United Nations for Human Rights, *The United Nations Human Rights Treaty System*, nº 30 (1) (2012) 1-68, at 20.

[10] Since 1991 it has been monitoring the application of the Convention on the Rights of the Child, as well as its Optional Protocols related.

[11] It reviews the application of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

[12] This committee (created in 2008) monitors the implementation of the Convention on the Rights of Persons with Disabilities.

[13] This committee was the latest to be established and it is in charge of monitoring the application of the international Convention for the Protection of All Persons from Enforced.

[14] Office of the High Commissioner of the United Nations for Human Rights, *The United Nations Human Rights Treaty System*, *supra* n. 9, 21.

treaty bodies also undertake various activities to enhance the implementation of the treaties by State parties, although not all of them do. Most treaty bodies can examine complaints or communications from individuals alleging that their rights have been violated by a State party, but this is contingent on the State's voluntary participation in this process. Some of these bodies may also conduct investigations and evaluate complaints between States.

Although the committees develop their functions by means of different procedures, three main mechanisms are common in the development of their activity by most of these committees, namely: firstly, the consideration of State parties' reports; secondly, the adoption of concluding observations; and, thirdly, the publication of general comments.[15]

Importantly, the principal mandate of all committees, save for the Subcommittee on Prevention of Torture, is the systematic review of the periodic submissions of reports by State parties, in accordance with the stipulations of the respective human rights treaties. Within this foundational remit, the treaty bodies have cultivated procedural practices that have proven notably efficacious in the meticulous evaluation of the degree to which States have discharged their obligations under the human rights accords to which they are parties.[16] Thus, these committees serve as catalysts for the advancement and sustained enforcement of the human rights protected under these treaties.

Concerning the adoption of concluding observations (also named as 'concluding comment'), these concluding observations comprehend the determinations and recommendations issued by a treaty body subsequent to its review of a State party's report. These observations include both the positive facets of a State's adherence to the treaty and areas where the treaty body prescribes further action to be taken by the State. The treaty bodies are endeavoured in their commitment to rendering concluding observations that are precise, focused, and practically actionable. Furthermore, there is a growing emphasis on measures designed to monitor the effective follow-up and implementation of their concluding observations.[17]

With regards to the general comments (named as 'general recommendations' by the Committee on the Elimination of Discrimination against Women and by the Committee on the Elimination of Racial Discrimination), they cover the interpretations by each committee of the provisions of each human rights treaty. As such, the general comments deal with both the comprehensive interpretation of substantive provisions prescribed by human rights treaties and general guidance on the information that should be submitted in State reports.[18] In this regard, these general comments that are public and available have been defined sometimes as jurisprudence taking into account that they mostly

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[15] A, Marrero Salvador, 'El valor jurídico de las decisiones de los órganos basados en los tratados en materia de derechos humanos de Naciones Unidas y sus efectos en el ordenamiento español', 39 Anuario Español de Derecho Internacional (2023) 265-287 [doi: 10.15581/010.39.265-287].

[16] See W. Kälin, 'Examination of state reports', in H. Keller, G. Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, Cambridge, 2012) 16-72.

[17] In this regard see J. Cardona Llorens, 'Hacia la configuración de un 'sistema' de protección de los derechos humanos de las Naciones Unidas', 1 *Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz* (2015) 135-172.

[18] H. Keller, L. Grover, 'General Comments of the Human Rights Committee and their legitimacy', in H. Keller, G. Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy, supra* n. 16, 116-198.

contain interpretations of international treaties and that contribute to precise the sense, the scope and the application of these rules. In my opinion, the term jurisprudence would not be incorrect concerning the general comments given by the human rights committees inasmuch as these compilations of resolutions are helpful to the better interpretation and application of human rights, although it should not be used as an argument to justify the legal value of such decisions.[19]

Moreover, all the committees are entitled to address individual complaints submitted by any individual who considers that his or her rights under one of the respective treaty have been violated by a State party to that treaty, although the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families cannot exercise this competence yet since its treaty has not received the number of declarations required to entry into force.[20] In such a case and whether the State has agreed to recognize the competence of the committee to receive such complaints, the individual is able to bring the complaint before the committee once exhausted the local remedies. Importantly, the legal value of the answers by the committees to the individual by means of decisions is the question at hand in this article.

It is clear that this is the most advanced, perfected, and protective mechanism for the individuals seeking for the protection of their human rights.[21] Nonetheless, this is a facultative system that requires from the State either the ratification of the optative protocol or a declaration accepting the competence of the committee in order to receive communications from individual under its jurisdiction.[22]

(1) The legal value of the committees' decisions from an International Law perspective

Much has been written and discussed regarding the legal value of these human rights committees' communications at the international and domestic levels. Concerning the nature of these decisions from an International Law perspective, it is interesting to consider the two main approaches to this question by the International Court of Justice. In this sense, the principal judicial organ of the United Nations had the opportunity to make statements on this question in two different judgments given in two distinct disputes.

On the first case, the International Court of Justice addressed this issue along the dispute *Ahmadou Sadio Diallo*, between Republic of Guinea and Democratic Republic of the Congo. In that case, the Court declared that "the interpretation above is fully

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[19] As explained below, even the International Court of Justice has used the term jurisprudence, mentioning in one of its judgments "the jurisprudence of the Human Rights Committee", in *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), fond, arrêt, C.I.J. Recueil 2010*, para. 66.

[20] See E. J. Martínez Pérez, 'Más allá del tradicional enfoque del control efectivo: los renovados vínculos jurisdiccionales que justifican la aplicación extraterritorial de los tratados internacionales de derechos humanos', 46 Revista Electrónica de Estudios Internacionales (2023), 171-194, at 184.

[21] C. Escobar Hernández, 'La protección internacional de los derechos humanos', in M. Diez De Velasco, *Instituciones de Derecho Internacional Público* (Tecnos, Madrid, 2013) 663-696, at 685.

[22] E. J. Martínez Pérez, 'Los órganos de tratados de las Naciones Unidas como alternativa limitada para la salvaguarda de los derechos humanos en España'..., *supra* n. 2, at 523.

corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties."[23] The Court further recalled that "since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its "General Comments."[24] Remarkably, the International Court of Justice stated that, "*although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty*.

The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled."[25] Interestingly, the Court analysed in the two following paragraphs of that judgment — in a different manner — the decision given, on the one hand, by an independent body created within the framework of a regional instrument for the protection of human right (i.e. the African Commission on Human and Peoples' Rights) and, on the other hand, by regional tribunals (such as European Court of Human Rights and the Inter-American Court of Human Rights).[26]

On the second case, the one concerning the questions relating to the Obligation to Prosecute or Extradite between Belgium and Senegal, the International Court of Justice on its judgment of 2012 pronounced itself in a much more indirect manner about the nature of these decisions. However, one should not lose sight of the fact that the Court embraced in that case the interpretation by the Committee against Torture of the term "torture", declaring that this committee emphasized that "'torture' for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention."[27]

Thus, from the analysis of the limited jurisprudence developed by the principal judicial organ of the United Nations it can be concluded that the Court —affirming that it is obliged to follow the interpretations by these committees— in fact has recognized a value (great weight) to the interpretations carried out by the committees, even receiving in one of its judgments the interpretation made by one of the committees.

In this line, even the Human Rights Committee upheld in a well-known General Comment that, "*while the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body*, the Views issued by the Committee

[23] *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), fond, arrêt, C.I.J. Recueil 2010*, para. 66.

[24] Ibid.

[25] Ibid. Emphasis added.

[26] Ibid, paras. 67-68. In particular, along the paragraph 67 the Court declared that: "likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question".

[27] *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012*, para. 101.

under the Optional Protocol exhibit some of the principal characteristics of a judicial decision" and that "they are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions."[28]

Therefore, the issue is whether and to what degree must a State conform to an interpretation issued by a human rights treaty monitoring body. This is not a secondary matter, and deserves consideration, because international law scholarship tends to place the emphasis firmly upon the role of international courts and comparable bodies as tools for promoting international law itself.[29]

To sum up and prior to consider on the legal value of the committees' decisions from the Spanish legal perspective, I agree with Borlini and Crema when the affirm that, "while their non-binding nature is now undisputed, granting a treaty body the power to make determinations on questions of breach and reparation, even if non-binding, is difficult to reconcile with the freedom of a State to entirely ignore its findings."[30] Besides, these authors understand that, "as far as interpretation is concerned, the work of treaty bodies provides a secondary, and not primary, source for defining treaty terms", that they do not implement the treaty, and they cannot be understood as 'practice,' which shapes the meaning of a treaty under Article 31(3)(b).[31] Nevertheless, I do not fully share this latest view because, as it will be explained below, in my opinion it is in the interpretation of the treaties where the committees find their authentic *raison d'être*.

(2) The legal value of the committees' decisions from a Spanish domestic law perspective

At the domestic level, it is clear that the human rights treaties (as the treaties that establish these committees) as well as the international treaties are part, according

[28] Human Rights Committee, General Comment No. 33, 25 June 2009 *Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, CCPR/C/GC/33, para. 11.

[29] F. Zarbiyev, *Le discours interprétatif en droit international contemporain* (Bruylant, Bruxelles 2015), at 162.

[30] L. Borlini, L. Crema, 'The Legal Status of Decisions by Human Rights Treaty Bodies: Authoritative Interpretations or mission éducatrice?', *The Global Community Yearbook of International Law and Jurisprudence* (2019) 129-158, at 157 [doi: 10.1093/oso/9780197513552.001.0001]. These authors further argue that "it seems that each state party to the underlying treaties does, indeed, have a procedural obligation to examine such pronouncements and present detailed counter-arguments in case of disagreement, but *only* where it results from individual complaints against the same state regarding the same subject matter" (emphasis in original), ibid at 157.

[31] Ibid, at 157. As it is known, article 31 of the Viena Convention on the Law of the Treaties establishes that: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

to article 96 of the Spanish Constitution, of the Spanish legal system and have, in accordance with article 95 of the Spanish Constitution, a special and privileged position within this internal legal system.[32] In an important judgment given by the Constitutional Court in 2018, the Court has declared that article 96 "does not give a higher hierarchical position to the treaties with respect to the domestic laws, but it establishes, on the one hand, a rule for the displacement by the treaty of the previous domestic law, without its abrogation, and, on the other hand, it defines the resistance of the treaty to be derogated by domestic laws adopted later."[33]

Moreover, the human rights treaties ratified by Spain has a special value as an interpretative parameter following article 10.2 of the Spanish Constitution. It foresees that "the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain."[34] Consequently, the Constitutional Court has declared in different judgments that the committees' decisions, even though they do not meet the requirements to be considered judicial decisions, have some significance at the internal level and, as such, the interpretations included thereof must be considered.[35]

In addition, although their value cannot be compared to the interpretations made by the Constitutional Court mentioned above, other internal documents dealing with the value of the committees' decisions may be referred. For instance, in a note (*circular*) published by the State Attorney in 2020 about the "legal nature of the decisions adopted by the committees competent to monitor the United Nations Human Rights Treaties", the State Attorney concluded that "the decisions do not have binding legal value", but they "have an interpretative value of the Human Rights Treaty and they are arguments of authority that must guide the interpretation and application of the treaties by the States parties."[36] Besides, the State Attorney concluded that the "States Parties have undertaken to behave in accordance with the due diligence principles in taking into consideration the recommendations of the decisions", despite the fact that "the committees do not have jurisdiction to adopt provisional measures."[37] However, the committees "have

[32] Article 96 of the Spanish Constitution establishes that: "1. Validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order. Their provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law. 2. The same procedure shall be used for denouncing international treaties and agreements as that, provided in Article 94, for entering into them." On its part, article 95 of the Spanish Constitution prescribes that: "1. The conclusion of any international treaty containing stipulations contrary to the Constitution shall require prior Constitutional amendment. 2. The Government, or either of the Houses may request the Constitutional Court to declare whether or not there is a contradiction."

[33] See in this regard the STC 140/2018, 20 December 2018, at 7062.

[34] Article 10.2 of the Spanish Constitution.

[35] See S. Ripol Carulla, "Las decisiones de los órganos de tratados de derechos humanos de las Naciones Unidas en el derecho español", in C. FERNÁNDEZ DE CASADEVANTE ROMANÍ (ed.), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de Derechos Humanos de naturaleza no jurisdiccional* (Dykinson, Madrid, 2020) 201-233. This autor mentions, among other, the STC 116/2006, 24 April 2006.

[36] Circular 1/2020 of the State Attorney, delivering the note about the 'legal nature of the decisions adopted by the committees competent to monitor the United Nations Human Rights Treaties' , *Anales de la Abogacía General del Estado 2020* (BOE, Madrid, 2021) 292-304, at 292.

[37] Ibid, at 293.

jurisdiction to request the urgent exam of a provisional measure by the State parties", the State parties "have the obligation to carry out this exam according to the due diligence rules" and the "States parties would not comply with their international obligations whether they do not give due consideration to the recommendations and requests of the different committees."[38]

In this vein, the Spanish Attorney Foundation published in September 2022 a practical guide for attorneys about the "effects of the decisions given by the Human Rights International Committees in the Spanish legal system."[39] After deep research on the topic, the practical guide comes up with some interesting conclusions. Firstly, it highlights the "relevant role of Spain in the system of the United Nations concerning the procedures of individual complaints before the different treaties' committees" being "one the States that receives more complaints and the one receiving the higher number of condemning decisions" by some of the committees (for instance, the Committee on the Rights of the Child).[40] In spite of the important overrepresentation of procedures against Spain before these committees, "the enforcement of the decisions by the distinct powers of the State", even though "it is not an exclusive problem of Spain."[41] After highlighting that the "lack of the due consideration of the decisions is based on the traditional doctrine of not being compulsory and the inexistence of appropriate procedures to that effect", the practical guide emphasises the "big step" mad by means of the *famous* judgment of the Supreme Court given on 17 July 2018 (to which we will refer below).[42] In conclusion, this interesting document points out the "absolutely necessary adoption of measures both by the executive power and by the legislative power departing from its compulsory and binding character" (*sic*).[43] In this regard, the Spanish Attorney Foundation proposes to follow the Colombian model (established by its Law 288/1996) and to foresee the possibility of "reviewing final and decisive administrative and judicial resolutions."[44] To that effect, it suggest the amendment of the Organic Law on Judicial Power and of the Law 25/2014 on treaties and other international agreements.[45]

Having said that, the Spanish legal scholarship has had different approaches to the work of the committees and particularly to the value of their decisions. In addition, one could say that this topic received a renewed interest as a result of the Spanish Supreme Court judgment 1263/2018 of 17 July 2018 and its impact, that in my opinion has been so far an authentic turning point on this issue.[46]

Accordingly, some authors has supported the view that the decisions of the committees are binding since "the recognition of legal effects in the Spanish legal order of a binding act of an international body with judicial functions is not a new issue in Spain" and due to the fact that the considerations asserted in relation to the judgments

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[38] Ibid.

[39] Spanish Attorney Foundation, 'Practical Guide for Attorneys', September 2022.

[40] Ibid, first conclusion, at 89.

[41] Ibid, second conclusion, at 90.

[42] Ibid, sixth and seventh conclusions, at 91.

[43] Ibid, eighth conclusion, at 91.

[44] Ibid, nineth and tenth conclusions, at 91.

[45] Ibid, tenth conclusion, at 91.

[46] This term of "turning point" ('punto de inflexión') was launched by professor Cesáreo Gutiérrez Espada in an article mentioned just below.

of the European Court of Human Rights "should be predicable in relation to the views and interim measures of human rights treaty bodies."[47] Likewise, professor Gutiérrez Espada has upheld that these organs work as "quasi-judicial organs", with respect to the principles of contradiction, with a founded and public decision.[48] In such a manner, these decisions develop "'a kind of jurisprudence' or a 'guide' about the specific content of the related rights, constituting references of a huge interest for the States parties and their organs."[49]

Other authors like professor Escobar Hernández have a different approach to this legal value and do not consider these decisions as the judgment given by the human rights regional tribunals.[50] This author understand that, "even though as a rule the human rights treaties do not expressly declare the interpretative power of the control and monitoring organs, the affirmation of this implicit competence is generally admitted", and adds that "this interpretation is a qualified interpretation because the States have conferred to the expert organs, even implicitly, the competence to interpret the treaty", a competence that is "inherent to the guidance function and it has a special significance in this field."[51] Personally I agree with professor Escobar Hernández in the attachment of the value of these decisions to an authoritative and qualified interpretation of the treaties instead of considering these views as final and binding decisions similar to the human rights regional courts' judgments. In my opinion, the Supreme Court in some way confirms this position along its interpretation carried out in the 13 June 2023 judgment, commented below.

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[47] J. Cardona Llorens, "The Legal Value of the Views and Interim Measures Adopted by United Nations Treaty Bodies (A response to the opinions of E. Jiménez Pineda, C. Jiménez Sánchez and B. Vázquez Rodríguez)", 23 *Spanish Yearbook of International Law* (2019) 146-165, at 162-163 [doi: 10.17103/sybil.23.7]. This article was part of an agora included in that volume of this very journal together with the following articles: C. Jiménez Sánchez, 'Human Rights Committees: Their nature and legal relevance in Spain', 23 *Spanish Yearbook of International Law* (2019) 104-128 [doi: 10.17103/sybil.23.5]; and, E. Jiménez Pineda, 'A commentary on the Supreme Court's Judgment of 17 July 2018 (STS 1263/2018) and its supposed impact for a legally binding value of the decisions adopted by the Committee on the Elimination of Discrimination against Women (CEDAW)', 23 *Spanish Yearbook of International Law* (2019) 129-145 [doi: 10.17103/sybil.23.6].
This author, professor Cardona Llorens, has thoroughly researched on this topic, so other of his publications can be mentioned such as J. Cardona Llorens, 'El valor jurídico de los actos adoptados por los órganos de tratados de derechos humanos: la necesidad de distinguir entre los distintos actos y entre los efectos jurídicos internacionales e internos", in E. Martínez Pérez (ed.), *Cuestiones actuales en torno a la aplicación de normas y obligaciones en materia de derechos humanos: diálogo con la práctica y otras disciplinas jurídicas* (Tirant lo Blanch, Valencia, 2022) 117-140.

[48] C. Gutiérrez Espada, 'La aplicación en España de los dictámenes de comités internacionales: la STS 1263/2018, un importante punto de inflexión', 10 (2) *Cuadernos de Derecho Transnacional* 2018, 836-851, at 845 [doi: 10.20318/cdt.2018.44406]. Professor Gutiérrez Espada also published more recently the following article in book: C. Gutiérrez Espada, 'Reflexiones sobre la ejecución en España de los dictámenes de los comités de control creador por los tratados sobre derechos humanos', in C. Fernández de Casadevante Romaní (ed.), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de Derechos Humanos de naturaleza no jurisdiccional* (Dykinson, Madrid, 2020) 279-297.

[49] Ibid.

[50] C. Escobar Hernández, 'Sobre la problemática determinación de los efectos jurídicos internos de los "dictámenes" adoptados por comités de derechos humanos. Algunas reflexiones a la luz de la STS 1263/2018, de 17 de julio', 71 (1) Revista Española de Derecho Internacional (2019) 241-250, at 249 [doi:10.17103/redi.71.1.2019.3.01].

[51] Ibid, at 249.

The Spanish legal scholarships have been plentiful and rich on the topic at hand. Very interesting papers, without being exhaustive, have been published by different authors. Among them professors Sánchez Legido,[52] Vázquez Rodríguez,[53] Bou Franch,[54] Faleh Pérez,[55] Fernández de Casadavante Romaní,[56] Jimena,[57] López Martín,[58] or Ripol Carulla[59] can be mentioned. Among these significant contributions, a short reference to the Council of State's doctrine is brought here. As highlighted by professor López Martín, the doctrine developed by the Spanish Council of State is based on two main arguments, namely, the views given by the committees are not binding and they do not even constitute an authentic interpretation of the conventions, since the committees are not organs of judicial nature.[60]

(3) The turning point: the STS 1263/2018 of 17 July 2018

As explained above, the was a turning point in Spain aimed at achieving a binding legal value of the views and decisions of the human rights committees. This decisive moment in this procedural history took place in July 2018 by the publication of the STS 1263/2018.[61] Considering that much has been written and said about this judgment by the previously mentioned doctrine (and other authors also abroad Spain), along the following lines I will just point out the exact paragraphs declared by the Supreme Court

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52 A. Sánchez Legido, 'Las relaciones entre el Derecho internacional y el Derecho interno en la práctica española y de la Unión Europea', in J. Alcaide Fernández and E. W. Petit De Gabriel (eds.), *España y la Unión Europea en el orden internacional* (Tirant lo Blanch, Valencia, 2017) 467-498.

53 B. Vázquez Rodríguez, 'La STS (Sala Especial) 1/2020, de 12 de febrero: ¿es el recurso de revisión una vía útil para dotar de efectividad a los dictámenes adoptados por los comités de derechos humanos?' 13 (1) *Revista Española de Derecho Internacional* (2021) 353-359 [doi: 10.17103/redi.73.1.2021.3a.01].

54 V. Bou Franch, "Las comunicaciones individuales contra España presentadas en el Comité de Derechos Humanos y su incidencia en el derecho español", in C. Fernández de Casadevante Romaní (ed.), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de Derechos Humanos de naturaleza no jurisdiccional…supra* n. 47, 17-64.

55 C. Faleh Pérez, 'Los dictámenes del Comité de Derechos Económicos, Sociales y Culturales y sus efectos jurídicos en España', in C. Fernández de Casadevante Romaní (ed.), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de Derechos Humanos de naturaleza no jurisdiccional…supra* n. 47, 65-97.

56 C. Fernández de Casadevante Romaní, 'La obligación del Estado de reconocer y aceptar los efectos jurídicos de las decisiones de los órganos internacionales de control en materia de derechos humanos', in C. Fernández de Casadevante Romaní (ed.), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de Derechos Humanos de naturaleza no jurisdiccional…supra* n. 47, 237-277.

57 L. Jimena, 'La efectividad de las resoluciones del Comité Europeo de Derechos Sociales', in C. Fernández de Casadevante Romaní (ed.), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de Derechos Humanos de naturaleza no jurisdiccional…supra* n. 47, 125-167.

58 A. López Martín, 'La doctrina del Consejo de Estado sobre los efectos jurídicos de los dictámenes de los Comités de Derechos Humanos de Naciones Unidas', in C. Fernández de Casadevante Romaní (ed.), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de Derechos Humanos de naturaleza no jurisdiccional…supra* n. 47, 171-200.

59 S. Ripol Carulla, 'La interpretación del Tribunal Constitucional', in C. Fernández de Casadevante Romaní (ed.), *Los efectos jurídicos en España de las decisiones de los órganos internacionales de control en materia de Derechos Humanos de naturaleza no jurisdiccional…supra* n. 47, 201-233.

60 A. López Martín, 'La doctrina del Consejo de Estado sobre los efectos jurídicos de los dictámenes de los Comités de Derechos Humanos de Naciones Unidas' …*supra* n. 57, at 198.

61 STS 1263/2018, 17 July 2018.

in order to contextualize the interpretation of its doctrine in the subsequent judgment of June 2023 about the value of a decision given by the Committee Against Torture.

The Fourth Section of the Contentious-Administrative Chamber of the Supreme Court analysed several aspects along the merits of this judgment. As main questions of cassations' interest, the Supreme Court stated that "there cannot be doubt that they will have binding/obligatory value for the State party which recognized the Convention and the Protocol since article 24 of the Convention stipulates that 'States Parties undertake to adopt all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the present Convention.'"[62] Moreover, the Supreme Court declared that "body created within the international legislation that, by express stipulation in article 9.6 of the Spanish Constitution, belongs to our domestic legal system" and, besides, "as a result of article 10.2 of our Constitution, the norms related to fundamental rights will be interpreted in accordance with the Universal Declaration of Human Rights and the treaties and international agreements about those subjects ratified by Spain."[63]

Furthermore, according to the Supreme Court in this judgment a human rights committee's declaration is "binding for Spain as a State party which has recognized [...] the competence of the Committee ex article 1 of the Optional Protocol [...]" and such "*decision must be considered, in this case and with its particularities, as a valid prerequisite in order to lodge a State liability request regardless of the previously denied one*."[64] In this case, the Supreme Court declared that the lack of a specific process to enforce the decisions of the Committee "in itself as a breach of a legal and constitutional obligation", highlighting the special relevance of dealing with a special process for the protection of fundamental rights.[65] As a result, the Supreme Court affirmed that the Administration violated the fundamental rights of the appellant and did not implement the CEDAW's decision, to which it was obliged under the terms set out in the Convention and in the Optional Protocol.[66]

In fact, this judgment has been a turning point, at least for the Spanish courts and tribunals, since after June 2018 a huge number of actions have been filed before them seeking compensations for violations allegedly made by Spain of human rights protected by the treaties in which the State is Party. Among the judgments answering some of those applications, decisions from different Spanish tribunals can be mentioned, such as: 1) judgments given by the National Hugh Court;[67] 2) judgments given by the Constitutional Court;[68] and, even prior to the judgments of 2023, 3) judgments given by the Supreme

62 Ibid, seventh legal basis, third question.
63 Ibid.
64 Ibid. Emphasis added.
65 Ibid.
66 Ibid. In light of these and other arguments, the Supreme Court declared that: (1) the inexistence of a specific and autonomous process to enforce into the Spanish legal system the recommendations of a CEDAW's decision hampers the autonomous request of the enforcement of those decisions; (2) despite the lack of an appropriate process, it is possible to admit this decision as an enabling premise to lodge a State liability's request; and (3) the Administration violated the appellant's fundamental rights (ibid, eight legal basis).
67 For instance, the SAN 5/2020, 12 May 2021 or the SAN 3080/2021, 1 July 2021.
68 Among them STC 23/2020, 13 February 2020 or STC 46/2022, 24 march 2022..

Court.[69] Between the latest subgroup, the ruling STS 1/2020, 12 February 2020, deserves a special attention because the Supreme Court (by means of a Special Chamber) upheld a different criterion to the one developed in 2018. In particular, it declared that "it does not proceed to put on the same level the judgments of the ECHR [European Court of Human Rights] and the recommendations or views of the distinct committees belonging to the international organizations that make statements about the enforcement of the obligations committed by Spain in the field of human rights."[70] Hence, according to this Special Chamber of the Supreme Court "the Spanish law just confer to the ECHR' judgments, and under certain circumstances, the condition of valid premise to file an application for review of a final judicial decision."[71]

In the light of the above, along the following section of this paper the judgment given in June 2023 by the Supreme Court will be analysed. Thus, after such analysis the reader will be able to confirm —together with the judgment of November 2023— that these judgments are a precision and a better interpretation of the Supreme Court's previous doctrine that began in 2018.

(C) THE STS 786/2023 OF 13 JUNE 2023: AN ANALYSIS OF THE INTERPRETATION BY THE SUPREME COURT OF ITS OWN DOCTRINE

On 13 June 2023 the Fourth Section of the Contentious-Administrative Chamber of the Supreme Court —the very Chamber that delivered the already known judgment of 17 July 2018— rendered its judgment 786/2023 dealing with a cassation appeal nº 5269/2022 issued by the State Attorney against the 27 April 2022 judgment given by the National High Court.

(1) Factual and procedural background

The aforementioned judgment of the National High Court admitted partially the previous appeal and recognized a reparation of 3.000 euros to the appellant as a result of the State liability.[72] Against this National High Court the State Attorney filed an appeal before the Supreme Court seeking from the court to "declare and establish the jurisprudence in the seventh legal basis of the appeal" and, "on the basis of this doctrine, to set aside the judgment appealed and, on its place, to render a new judgment fully dismissing the appeal."[73]

In the origin of the case at hand, the appellant was arrested by the police in the city of Córdoba on 27 January 2013.[74] In the course of this detention, the appellant (Ms.

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[69] In this regard, the STS 1/2020, 12 February 2020 must be mentioned.

[70] Ibid, sixth legal basis.

[71] Ibid. The original wording in Spanish of this *obiter dictum* of the Supreme Court is as follows: "La ley española sólo atribuye a las sentencias del TEDH, y en determinadas condiciones, la condición de título habilitante para un recurso de revisión contra una resolución judicial firme."

[72] STS 786/2023, 13 June 2023, first pleas of facts (*antecedente de hecho*).

[73] Ibid, fifth pleas of facts.

[74] Ibid, first legal basis (*fundamento de Derecho*).

Noelia) allegedly was bodily injured and suffered a deviation of her nasal septum and, consequently, asked an economic compensation.[75]

Subsequently, the currently appealed part filed a lawsuit against the four police officers as a result of the injuries suffered before the Court of first instance (*Juzgado de Instrucción*) nº 1 of Córdoba, that declared the stay in proceedings concerning this criminal offence.[76] Later on, the third section of the Córdoba's regional court (*Audiencia Provincial*) rendered a writ on 10 July 2014 dismissing the appeal and stated that "it deem inexorable in this case the stay of the proceedings, even considering the existence of a potential false complaint."[77]

Moreover, an appeal for constitutional protection (*recurso de amparo*) before the Constitutional Court was refused by means of a ruling given on 16 March 2015 in which the court highlighted "the clear inexistence of violation of a fundamental right able to be protected in this manner."[78]

Subsequently, on 23 March 2016 the appellant submitted a complaint before the Committee against Torture on the basis of the facts that took place on 27 January 2013 in Córdoba.[79] On 15 January 2020, this Committee published its individual communication in accordance with article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[80] In this decision, the Committee recalled that, "when complainants are in a situation where they cannot elaborate on their case, such as when they have demonstrated that they have no possibility of obtaining documentation relating to their allegation of torture or have been deprived of their liberty, *the burden of proof is reversed, and the State party concerned must investigate the allegations and verify the information on which the communication is based*."[81]

In addition, the committee added that, "in line with the State party's obligation to investigate ex officio any allegation of torture or ill-treatment, it is the State authorities who bear the burden of providing the information to prove that they are not responsible for the allegations against them, as it cannot be expected that persons deprived of their liberty will be able to gather the necessary evidence in relation to the deprivation of their liberty."[82] Therefore, the committee was of the view "that, given the circumstances of the case, the State party did not provide information sufficient to conclude that the complainant's injuries were not caused while she was in detention."[83]

Besides, the committee, due to the absence of information from the State party on this point, found that "the State party has failed to comply with its obligations to provide medical assistance as one of the guarantees required under articles 2 (1) and 11 of the

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75 Ibid.
76 Ibid, fourth legal basis.
77 Ibid fourth legal basis, point 2.
78 Ibid.
79 Ibid fourth legal basis, point 3.
80 Decision adopted by the Committee against Torture under article 22 of the Convention, concerning communication No. 818/2017, 15 January 2023.
81 Ibid, consideration of the merits, 8.4. Emphasis added.
82 Ibid.
83 Ibid.

Convention, the latter read alone and in conjunction with article 2."[84] In light of these and further considerations, the committee, acting according to article 22 (7) of the convention, concluded that "*the facts before it disclose a violation of article 2 (1) of the Convention, read in conjunction with article 16; article 11, read alone and in conjunction with article 2; and article 16*" and urged the State party to "(a) provide the complainant with full and adequate redress for the suffering inflicted on her, including compensation for material and moral damages and means of rehabilitation; and (b) take the necessary measures, including the adoption of administrative measures against those responsible, and give precise instructions to police officers at police stations, to prevent the commission of similar offences in the future."[85]

Following this decision, the appellant firstly submitted a request of information to the Ministry of Internal Affairs on 23 October 2020 asking information about the steps developed in application of the Committee's decision. Secondly, on 23 February 2021, her legal representation submitted, also before the Ministry of internal Affairs, a request of State liability as a result of an abnormal functioning of the police that caused the injuries of the appellant, request that was dismissed, too.[86]

Finally, a contentious-administrative appeal, following the procedures for the protection of fundamental rights, was filed on her behalf against the dismissal of the request of State liability.[87] The appellant argued as relevant the "violation of articles 15, 17 and 20 of the Spanish Constitution as well as articles 1, 3, 8 and 13 of the European Convention on Human Rights" and seek the "enforcement of the 15 January 2020 CAT decision by paying a compensation of 8.931 euros."[88]

The appealed judgment was given by the National High Court on 27 April 2022 and it declared, in light of the facts, that "'it is possible to admit in this case that the views [given by the Committee against Torture] is a valid prerequisite to lodge a State liability request due to an abnormal functioning of the Administration (…) as the latest resource to obtain a compensation.'"[89] Besides, in the wording of the National High Court' judgment, "'the relevant fact in this case is that until a full and appropriate reparation of the damages is satisfied in execution of the CAT' decision, the violation of human rights is maintained declared by that decision, in which accordance no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment ex article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, being its correlative the right to physical integrity protected under article 15 of our Constitution.'"[90]

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84 Ibid. Consideration of the merits, 8.6.

85 Ibid. Consideration of the merits, points 9 and 10. Emphasis added.
Finally, at the point 10 the Committee, pursuant to rule 118.5 of its rules of procedure, invited "the State party to inform it, within 90 days of the date of the transmittal of the present decision, of the steps it has taken to respond thereto."

86 STS 786/2023, 13 June 2023, fourth legal basis, points 4 and 5.

87 Ibid.

88 Ibid.

89 Ibid.

90 Ibid.

Thus, "'once declared the violation of the right in the decision of the CAT, its lack of enforcement perpetuates such violation, maintaining its effects.'"[91] Moreover, "'as it was upheld in the STS, also in this case is this 'undoubtful' the prospect of the lawsuit, inasmuch as 'it not only should receive an express consideration by the State General Administration, obligation prescribed in article 42 of the law 30/1992, enforcing its international and domestic obligation,' current article 21 of the Law 39/2015, but also 'it is the latest effective remedy to control the alleged continuous breach of human rights that was not repaired after the conclusion of the CEDAW Committee,' here the decision of the CAT."[92]

(2) The merits of this case

The main question of this judgment and the reason why it is thoroughly analysed in this point is the question of cassation's interest, i.e., "'to determine if, in the cases of the decisions of the united Nations Committee against Torture that conclude finding a violation of some rights established in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, those decisions are binding for the administration and for the Spanish jurisdictional organs in the sense of considering them as an evidence of the existence of the State liability without the possibility of analysis of its existence.'"[93]

In this sense, the Court identified the laws that, in principle, should be object of interpretation in this case, namely: article 15 of the Constitution, article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in New York on 10 December 1984, together with articles 32 and 34 of the Law 40//2015 of the legal framework of the Public Administrations and the article 30 of the Law 25/2015 of 27 November on treaties and other international agreements.[94]

Concerning the positions of the parties, the State Attorney's view must be considered. According to the State Attorney, "the recommendations included in the views of the committees created by virtue of the Pacts and Conventions adopted within the framework of the United Nations, related to the rights recognized in each pact or convention, do not have executive value and do not preclude the effect of material *res judicata* of the domestic judicial judgments and resolutions, as it happens in this case with the judicial writs adopted by the criminal jurisdiction. The Committee against Torture's decisions, in short, cannot be considered a sufficient prerequisite lead to the State liability."[95]

On the other hand, the legal representation of the appealed part (Ms. Noelia) upheld the binding character, for the effects of the State liability, of the decision of the United Nations Committee against Torture and, for that purpose, it mentioned the 17 July 2018 judgment.[96] Finally, the Public Prosecutor deemed that the cassation appeal should

[91] Ibid.
[92] Ibid.
[93] Ibid, second legal basis. See the Supreme Court order of 27 October 2022.
[94] Ibid.
[95] Ibid, third legal basis.
[96] Ibid.

be accepted because "the United Nations Committee against Torture's decisions do not entail neither the public administrations nor Spanish tribunals in the sense of considering those decisions as a proof of the existence of the State liability."[97]

Importantly, the most two interesting and relevant legal basis of the Supreme Court judgments are the fifth —untitled *the decisions of views of the United Nations Human Rights Committees*— and the sixth —untitled *our judgment of 17 July 2018*—.

(a) The interpretation of the Supreme Court of the decisions of the views of the United Nations Human Rights Committees

Along the crucial fifth legal basis of this judgment, the Fourth Section of the Supreme Court's Contentious-Administrative Chamber declared that the United Nations Human Rights Committees "deliver decisions or views, depending on the kind of Committee. Thus, these resolutions resolve the complaints submitted before each committee about the violation of the rights protected in the International Covenant on Civil and Political Rights and those decisions or views include observations, recommendations or declarations at the same time that propose measures to avoid future violations of the rights. Thus, *the decision of the Committee against Torture of 15 January 2020*, in application of the Convention against Torture and other cruel, inhuman or degrading treatment or punishment, when it deals with the issue of the merits of the facts happened in Córdoba, *includes references like the 'Committee observes', the 'Committee recalls', the 'Committee notes' or the Committee 'recommending the State party', which is revealing*."[98]

In this regard, the "characterization and effects of these decisions and views of the United Nations Committees have been object of analysis by this Chamber *stating repeatedly that these decisions or views do not have binding nature in the terms that is invoked since they do not have direct executory nature in order to determine the annulment of the final judicial resolutions* from national judges and tribunals."[99] Moreover, the International Covenant on Civil and Political Rights "does not include any clause or specific provision that establish this executive effect of the Committees' resolutions."[100] What is more, "our domestic legal system has not established a concrete and specific legal procedure to allow judges and tribunals to review the final criminal writs or judgments as a result of a Committee's decision or views."[101]

As such, according to the Supreme Court "*the legal value of the decisions or views of the Committee is not binding for these effects, they do not impose an obligation and they do not have executive nature, although it does not mean that they do not entail any legal consequence*. Thus, these decisions must be taken into account as relevant indicators of the enforcement of the rights foreseen in the Covenant, that through the suggested measures could limit or reduce the violations of such rights and contribute to their better protection. Likewise, they must be taken into consideration by States in order to guide its legislative action in

[97] Ibid.
[98] Ibid, fifth legal basis. Emphasis added.
[99] Ibid. Emphasis added.
[100] Ibid.
[101] Ibid.

a such a manner that the requirements from the interpretation made by the Committee of the Covenant's rules."[102]

Having said that, the Supreme Court logically admits that the "International Covenant on Civil and Political Rights is part of our internal law in accordance with article 96.1 of the Spanish Constitution, since the fact that the international treaties ratified by Spain are part of our legal system is undoubtful. However, it does not mean that a fact arising from its application, such as the Committee's decision, should have an identic legally binding nature that it is not recognized neither regulated by the Treaty itself."[103]

Consequently, according to the Supreme Court, these are two different levels: on the one hand, there is an obligation of the State to comply with the rights regulated in the Covenant, to which it is bound conventionally; and, on the other, "it is the nature of the Committee's decisions, its legally compulsory character, binding or not, that not necessarily has the same legal effect than the normative obligations established by the Treaty."[104]

Recalling the 12 February 2020 Supreme Court's judgment, pointed out above, the tribunal declared that the "rules concerning the fundamental rights and the public freedoms recognised by our Constitution shall be interpretated, ex article 10.2 of the Spanish Constitution, in accordance with the treaties and other international agreements ratified by Spain, *which cannot be translated in the fact that the Committee's decisions may become, by the jurisprudence, in a title to determine without further elements the State liability as a mean of enforcement of the decisions or views of the Committee*."[105] In other words, the lack of a legal provision about a specific path that must be follow for the application and enforcement of the CAT's decisions cannot be understood as the need to resource to the State liability.[106]

In a nutshell, according to the Supreme Court, "even though the decisions and views have neither a legally binding nature nor executive force automatically because the treaty and our international legal system do not contain any rule establishing its compulsory character and enforceability", this "does not mean that the decisions lack any effect, since they include recommendations that must be addressed, and they establish useful measures."[107] In addition, these decisions "are helpful as a guidance to confirm, always together with the other circumstances of the case, the determination of a violation of a fundamental right that may have triggered a damage attributable to the Administration", as it occurred in the 17 July 2018 judgment.[108]

(b) The clarification by the Supreme Court of its judgment of 17 July 2018

A special attention also deserves the sixth legal basis of the judgment of 2023 in which the Supreme Court tries to clarify and precise the content of its previous judgment

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[102] Ibid. Emphasis added.
[103] Ibid. Emphasis added.
[104] Ibid.
[105] Ibid. Emphasis added.
[106] Ibid.
[107] Ibid.
[108] Ibid.

rendered on 17 July 2018, previously commented as the turning point in this issue. In this regard, the Supreme Court affirmed that the Committee against Torture's decision of 15 January 2020 "*cannot be considered itself as a sufficient title of attribution to lead to the State liability*" and, importantly, "*the previous assertion does not contradict out judgment of 17 July 2018.*"[109]

As the Supreme Court recalled, in the origin of that appeal there was also a view from the United Nations Committee, in particular from the Committee on the Elimination of Discrimination against Women, that declare that the "State Party has infringed the rights of the author and her deceased daughter." Nonetheless, looking at the *ratio decidendi* of this judgment, it is important to note that the judgment "took into consideration the other circumstances of the case that were decisive, in a more relevant way than the decision itself, in order to establish the State liability, in that particular case, as a result of the abnormal functioning of the Administration of Justice."[110]

In this judgment of the Supreme Court, unsurprisingly the 2018 judgment included references to that very case, using the expression "in this case."[111] Besides, when it declared that there is no specific path for requiring automatically the enforcement of the Committees' views, it added that "it is possible to admit *in this case* that this views is the valid prerequisite in order to lodge a State liability."[112] The Supreme Court, in brief, affirmed that "*the 2018 judgment is not different in the essence to our previous jurisprudence and that decision does not establish a jurisprudential specific procedure* to enforce, generally, the decisions or the views of the United Nations Committees in light of the lack of a conventional norm or of domestic law in this regard."[113]

Concerning the State liability, the court did not appreciate the "State liability's requirements in the examined case as a result of the lack of the second requirement that entails that the patrimonial damage is a direct consequence of the police officer's actions."[114] In a significant declaration of the Supreme Court, it upheld that it is not admissible that, "even in this kind of State liability proceedings triggered after a decision of the Committee against Torture, the State liability institution loses its reparation nature constitutionally established to transmute itself, blurring its nature and goal, in a kind of a general system of automatic execution of the CAT's decisions."[115] Moreover, the Supreme Court further elaborated on this question adding that, "even though those decisions do not have binding nature in the sense of its mandatory nature and direct executive power, that are not established by international rules and our domestic legal system, they can have some legal effects as previously explained."[116]

Accordingly, the Supreme Court annulled the appealed judgment since "it has turned a State liability case into a direct and automatic execution of a decision of the Committee that declares the violation of a fundamental right, without examining each

[109] Ibid. Emphasis added.
[110] Ibid.
[111] Ibid.
[112] Ibid. Emphasis in original.
[113] Ibid. Emphasis added.
[114] Ibid, seventh legal basis.
[115] Ibid.
[116] Ibid.

of the requirements to be met." As such, it developed "an inappropriate interpretation of our 2018 judgment because it linked the CAT's decision declaring a violation of a fundamental tight to the admission, without any further consideration, of the State liability."[117] In light of the above, the Supreme Court concluded admitting the cassation appeal filed by the State Attorney, dismissing the appeal on behalf of Ms. Noelia, and it did not to assign the cost of the appeal.[118] In addition, the separate opinion of the judge Pablo Lucas Murillo de la Cueva agrees with the finding consisting of the lack of binding nature of the decisions of the United Nations Committees.[119]

(D) THE STS 1597/2023 OF 29 NOVEMBER 2023: THE DEFINITIVE ESTABLISHMENT OF THE SUPREME COURT DOCTRINE

Five months later, on 29 November 2023, the same fourth section of the contentious-administrative chamber of the Spanish Supreme Court delivered a definitive judgment for the legal value of the decisions given by the United Nations Human Rights Treaty Bodies. By means of the STS 1597/2023, it admitted the cassation appeal filed by the legal representation of the family of Rubén, a child with Down syndrome that did not receive an inclusive education, on the basis of a decision given by the Committee on the Rights of Persons with Disabilities.[120] Whether the judgment of 2018 was a turning point, this 29 November 2023 can be defined as a point of arrival, since it establishes in cassation a jurisprudential criterion confirming the interpretation started in 2018 and, doubtfully, arguing that this line does not go against the judgment of 13 June 2023.

In order to explain this highly relevant doctrine of the Supreme Court, firstly the factual context of the case will be succinctly pointed out and secondly the jurisprudential criterion on the topic will be studied.

(1) **An introduction of the factual and procedural background of this case**

This judgment answers a cassation appeal filed against the 17 November 2022 National High Court judgment that dismissed the contentious-administrative appeal against the denial by silence of a reparation by the Spanish Ministry of Justice.[121] By the 23 March 2023 writ, the Supreme Court admitted the cassation appeal issued by Rubén's attorneys and by the Public Prosecutor since there was an objective cassation interest in order to settle jurisprudence regarding two questions, namely: 1) "the suitable procedural path to seek before the Spanish State the fulfilment of the decision given by the Committee

[117] Ibid.
[118] Ibid, decision (*fallo*).
[119] See the separate opinion of the judge Pablo Lucas Murillo de la Cueva (joined by José Luis Requeiro Ibáñez). In particular, they declare that they agree "that the resolutions of the United Nations Organization Committees, created by virtue of the International Covenant on Civil and Political Rights, do not have by themselves biding character. It explains correctly that in the judgment nº 1263/2018, of 17 July (cassation nº 1002/2017), we considered the circumstances of the case and, precisely, taking them into consideration, we agree with the view of the CEDAW."
[120] STS 1597/2023, 29 November 2023, first pleas of facts (*antecedente de hecho*).
[121] Ibid.

on the Rights of Persons with Disabilities, delivered in the terms and by the proceeding foreseen in the Optional Protocol of the Convention —ratified by Spain—, when those decision include recommendations aimed at out authorities in order to repair the damages arising out the breach of the rights protected by the Convention;" and 2) "whether that reparation and the fulfilment of the Decision's prescriptions is a revision of final judicial decisions since the request of the State liability is founded in a different title."[122]

It is important to note that the Committee on the Rights of Persons with Disabilities published on 18 September 2020 a decision in accordance with article 5 of the Optional Protocol to the Convention on the Rights of Persons with Disabilities.[123] Along that decision, the committee declared that Spain breached its obligations following the articles 7, 15, 17, 23 and 24 of the Convention on the Rights of Persons with Disabilities.[124] The appellant requested the economic reparation from the Spanish State as a mean to comply with the aforementioned committee decision. Having made these initial considerations about the case at hand, along the following section the main findings of the Supreme Court in this relevant judgment will be developed.

(2) The merits of the case

The Supreme Court firstly and remarkably declared, recalling its previous 17 July 2018 judgment, that "the inexistence of a specific and autonomous mechanism to enforce in the Spanish legal order the recommendations of a decision of the Committee of the Rights of Persons with Disabilities by means of a breach of human rights foreseen in the Convention by the Spanish State makes impossible to seek autonomously the enforcement of those decisions."[125] Moreover, "since the existence of an efficient and suitable path to ensure the acceptance of a fundamental rights' breach before the Spanish courts and tribunals has to do directly with the respect and observance by the Spanish public authorities, *it is possible to admit that this decision is a valid premise to request the State liability by the abnormal functioning of the Administration of Justice as the last resource to obtain a reparation.*"[126]

After this mention of its previous jurisprudence, the Supreme Court clarified further this line of interpretation in this landmark judgment by adding that, "even though neither the Convention nor the Optional Protocol establish the executive nature of the decisions of the Committee, *there cannot be doubt that they will have a binding/compulsory character for the State party that is linked by the Convention and the Protocol in the article 4.1 of the aforementioned*."[127] According to the Supreme Court, this fact "is reinforced by the

[122] Ibid, third pleas of facts.
[123] Ibid, first legal basis.
[124] Ibid.
[125] Ibid, seventh legal basis.
[126] Ibid, empahsis added.
[127] Ibid, emphasis added. This article 4.1 of the Convention, untitled *general obligations*, establishes: "States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this

express admission of the Committee's jurisdiction by means of article 1 of the Optional Protocol, voluntarily accepted by Spain."[128]

Remarkably, the Supreme Court declared that this "decision is adopted by an organ established in the framework of an international norm that, by express provision in article 96 of the Spanish Constitution, is part of our legal system after its ratification and official publication" and that "the rules related to the fundamental rights must be interpreted in accordance with the Universal Declaration of Human Rights and the international treaties and agreements on those fields ratified by Spain."[129]

What is more, it is "an allegation of a breach of the fundamental rights that is founded in a declaration of an international organism recognized by Spain and that has upheld that the Spanish State has violated specific rights", the declaration "has been made in the framework of a proceeding expressly regulated, with guarantees and full participation of Spain", that article 9.3 of the Spanish Constitution affirms that the Constitution "protects, among other, the principle of legality and the hierarchy of legal provisions, and accordingly the international obligations related to the enforcement of the decisions of the international control organs whose competence has been accepted by Spain that are part of our legal system."[130] As a result, "*the effect of the Committee decision cannot be ignored by contrast to the binding effect of the Convention because it could, either leave it without effect or limit its value and effective and real application.*"[131] Indeed, for the Supreme Court, it is an accepted fact that Spain has not proved the adoption of measures aimed to repair the right not to suffer discrimination that was declared as breached due to the State's actions.

Probably one of the most important and surprising declarations upheld in this judgment is the clarification by the Supreme Court that "*it is important to note that the doctrine that is being applied, declared by the Chamber in its judgment 1263/2018, of 17 July (appeal 1002/2017), cannot be understood as abandoned by the subsequent judgment 786/2023, of 13 June (appeal 5269/2022)*."[132] Both judgments have been previously explained in this article, and together with this judgment settles hereinafter the doctrine of the Spanish Supreme Court with regards to the interpretation of the legal value of the decisions adopted by the human rights treaty bodies in which Spain is party, i.e., they must be considered as a valid premise to seek the State liability.

In other words, this judgment confirm the line started in 2018 —and, in my opinion, clearly modified in June 2023— and opens the door for the application of this jurisprudential path for the future in order to enforce in Spain the decisions of the human rights committees of the United Nations. This situation happened in the case at hand since the Supreme Court annulled the National High Court's judgment because

end, States Parties undertake: To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention."

[128] Ibid.

[129] Ibid.

[130] Ibid.

[131] Ibid, emphasis added.

[132] Ibid, emphasis added.

it denied “all effect to the decision” and, as such, it “violated the legal order and our jurisprudence.”[133]

Concerning the second question of cassation interest, the Supreme Court declared that this interpretation “does not violate the principle of res judicata” and, importantly, that “the cases in which the State liability is sought on the basis of the conclusions and obligations imposed to the State by a decision of the Committee on the Rights of Persons with Disabilities do not review final judicial decisions.”[134] Furthermore, “the judicial decisions on the violation of a fundamental right” “is not object of review by a reclamation of State liability.”[135] Nevertheless, always according to this Supreme Court’s interpretation, “this fact does not hamper that the administrative actions prior to the judicial decision may constitute an inappropriate treatment of the minor with disabilities.”[136] In light of the above, applying this doctrine, the Chamber of the Supreme Court found the necessary admission of the cassation appeal and the annulment of the appealed judgment, sending back the case to the National High Court.[137]

(E) CONCLUDING REMARKS

This paper has tried to analyse the legal value of the decisions of the United Nations Human Rights Committees considering their effects in the Spanish domestic legal order in light of the two judgments of the Spanish Supreme Court given recently, firstly on 13 June 2023 and secondly on 29 November 2023, being the latest one much more important. Indeed, these judgments come to conclude a line of the case law that began with the famous Supreme Court’s judgment 1263/2018 of 17 July 2018, that was an authentic turning point (a *point de départ*) in the understanding of the legal nature of the committees’ decisions in Spain. In fact, the 29 November 2023 judgment is an arrival point (a *point d’arrivée*) that settles this doctrine for the future, establishing the jurisprudence on this crucial matter.

Prior to the 2018 judgment, the Spanish case law did not recognise a legally binding nature to the decisions and views of the different human rights treaty bodies of the United Nations. However, that judgment started an incipient jurisprudence that has been followed by other judgments of the National High Court and even the Supreme Court itself, although by a different chamber.

In my opinion, as I tried to explain in a previous paper in this very journal, the interpretation developed by the Supreme Court in the 2018 judgment —basically, that a CEDAW’s view was a valid premise to file a request of State liability leading to a compensation for the violation of the fundamental rights— was unadjusted since it recognised, by the jurisprudential line, legally binding effects to the decisions of the United Nations Human Rights Committees that, in accordance with the treaties that create those committees, do not have that nature. On the contrary, in my view the legal

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133 Ibid.

134 Ibid, eighth legal basis.

135 Ibid.

136 Ibid.

137 Ibid, nineth legal basis.

value of those decisions must be circumscribed to the interpretation of the substantive provisions prescribed by human rights treaties. In this regard, the main effect of the committees' decisions is to contribute as a general guidance in the interpretation of the human rights treaties or, in other words, they are very relevant hermeneutic instruments for the precision and better understanding of the rights protected by the treaties that establish those committees.

In the 13 June 2023 judgment, the Supreme Court clarified that "characterization and effects of these decisions and views of the United Nations Committees have been object of analysis by this Chamber stating repeatedly that these decisions or views do not have binding nature in the terms that is invoked since they do not have direct executory nature in order to determine the annulment of the final judicial resolutions from national judges and tribunals." Besides, the Supreme Court added that "our domestic legal system has not established a concrete and specific legal procedure to allow judges and tribunals to review the final criminal writs or judgments as a result of a Committee's decision or views" and, thus, "the legal value of the decisions or views of the Committee is not binding for these effects, they do not impose an obligation and they do not have executive nature, although it does not mean that they do not entail any legal consequence."

Nonetheless, in the more recent judgment, the one delivered on 29 November 2023, the Supreme Court upholds that "the inexistence of a specific and autonomous to enforce in the Spanish legal order the recommendations of a decision of the Committee of the Rights of Persons with Disabilities by means of a breach of human rights foreseen in the Convention by the Spanish State makes impossible to seek autonomously the enforcement of those decisions." In this sense, the Supreme Court affirmed that "it is possible to admit that this decision is a valid premise to request the State liability by the abnormal functioning of the Administration of Justice as the last way to obtain a reparation". In addition, the Spanish highest tribunal clarifies that this newest judgment is not different in its line of interpretation to the one of June and that it confirms, settles and establishes its doctrine on the legal value of the decisions adopted by the United Nations Human Rights Treaty Bodies started in 2018.

As a result, since the judgment of November 2023, there is an established and unequivocal doctrine of the Supreme Court about the legal nature of these committees' decisions, whose effects are legally binding and mandatory for the Spanish authorities according to this judicial interpretation. It can be summarized as follows: since there is not a legal proceeding in Spain to enforce in Spain these committees' decisions, to which the State is obliged to accomplish in accordance with the international treaties, the individuals can request the State liability on the basis of these decisions that are valid premise in the domestic legal order for that purpose.

Having said that, in my opinion there is a clear opposition between the two judgments given in 2023, regardless of the attempts of justification made by the Supreme Court. In addition, being clear hereinafter the legal effect of these decisions in Spain until there would be either a change of this doctrine or the establishment of a legal proceeding aimed to enforce them, I still refuse to consider that a decision of one of these committee that declares a breach of the State's international obligations could be a valid premise to trigger the State liability for the abnormal functioning of the Administration of Justice.

However, it does not mean that these decisions have not legal relevance. On the contrary, these decisions must be taken into account as relevant criterions of the enforcement of the rights foreseen in the Covenant, that through the suggested measures could limit or reduce the violations of such rights and contribute to their better protection. In addition, the committees' decisions must be taken into consideration by States in order to guide their legislative action in order to fulfil the requirements from the interpretation made by the Committee of the Covenant's rules.

In my view, it could be even admissible than in a particular case the Supreme Court (or another Spanish judge or tribunal) would assume the legal reasoning —the interpretation— of the human rights treaties' provisions carried out by these committees. However, that legal possibility does not mean that the Spanish judges and tribunals are obliged to necessarily follow not only the interpretations by the human rights committees but also their findings of a particular violation of a human right and their consideration of the merits in each individual case.

In this line one could deemed the 13 June 2023 judgment when it declared that "the legal value of the decisions or views of the Committee is not binding for these effects, they do not impose an obligation and they do not have executive nature, although it does not mean that they do not entail any legal consequence". A different approach, in the words of the Supreme Court, would be "an inappropriate interpretation of out 2018 judgment because it linked the CAT's decision declaring a violation of a fundamental tight to the admission, without any further consideration, of the State liability." Nonetheless, as stated above, in the 29 November 2023 judgment the Supreme Court makes a complicated effort in order to argue that this judgment is not in opposition to the previous one and that it confirms the line started in 2018 crystalizing its doctrine and jurisprudence on the topic in the meaning of the Civil Code.

From the point of view of the material justice, this consolidated jurisprudence must be welcome since it is effective in the enforcement and better protection of human rights, giving a renewed sense to the United Nations human rights system. However, in my opinion the judgment is not founded because the international organizations' acts do not have automatically legal binding nature in the Spanish legal system. Indeed, I agree with the judge Luis María Díez-Picazo Giménez when he points out in his dissenting opinion to the 29 November 2023 judgment that the fact that the international treaty "that creates an international organization, defines its competences and rules its proceedings is part of the international legal order in Spain does not mean, neither from the logical perspective nor considering the practice, that the international organizations' acts also automatically receive the condition of domestic law."[138]

[138] Ibid, dissenting opinion of Luis María Díez-Picazo Giménez. In order to develop this opinion, this judge argues several examples. For instance, the direct efficacy of some acts of the European Union as a result of the article 288 of the Treaty on the Functioning of the European Union or the European Convention on Human Rights and the European Court of Human Rights, whose judgments only are applicable if they are recognized by each domestic legal order. Moreover, this judge adds that, due to the fact that the Committee's acts are not binding in the Spanish legal order, its declarations "on specific situations cannot modify the findings of judicial judgments and other final resolutions given by the Spanish courts and tribunals." (ibid)

In a nutshell, following this judgment of the Supreme Court it seems clear what are the effects of the United Nations human rights committees' decisions in the Spanish domestic legal system, that —on top of a hermeneutic value— are a valid premise to seek State liability by the abnormal functioning of the Administration of Justice. From this point forward, the jurisprudential path that was started by the 2018 judgment is confirmed, giving answer to reasons of justice needed in a particular case. In any case, and taking into account that a potential appeal before the Constitutional Court cannot be discarded, I keep considering that it is not a legally sound solution since it enlarges the State's obligations further than the ones initially consented by the State through the ratification of these international treaties.

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Agora

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AGORA: "Youth Visions on Arctic Sustainability"

Elena Conde Pérez

Global climate change has launched intense speculation on Arctic resources. As a result, the Arctic is experiencing a marked increase in human activity in a myriad of economic sectors from fossil fuel and mineral extraction to transport or tourism. Although this situation has been accompanied by an increase in economic prosperity, it also leads to the emergence of significant environmental and social challenges. In the push for the green transition, decisions about economic development are usually made through utilitarian ethical principles. However, while sustainable development is a popular buzzword for policy, significant practice and regulatory gaps remain in the deployment of Arctic economic activities — which have resulted in development that is unsustainable. In order to chart a pathway towards a genuinely sustainable Arctic development, questions such as the plural perspectives and values of Arctic stakeholders, issues of justice, or the respect and maintenance of traditional livelihoods and Indigenous rights must be taken into account.

These challenges have been at the heart of the H2020 research project "JUSTNORTH– Toward Just, Ethical and Sustainable Arctic Economies, Environments and Societies".[1] It is within the context of one of JUSTNORTH's key events that the following articles were born.[2] The present collection brings together Early Stage Researchers (PhD candidates or recent doctors) from a variety of nationalities and located in multiple disciplines (albeit with a predominant orientation towards International Relations). As intergenerational justice is a key issue in the future of the Arctic and of sustainable development, it is our explicit intention to give voice to the perspectives of young scholars and Arctic stakeholders. In the following pages, seven of them will address issues of sustainability under the light of energy extraction, Arctic geopolitics, Indigenous rights, environmental governance, youth participation, or maritime activities.

[1] This project has received funding from the European's Union Horizon 2020 research and innovation programme under grant agreement N. 869327.

[2] The early stage researchers event entitled "Youth Visions on Arctic Sustainability" was held on Wednesday 14th June 2023 as part of the overall JUSTNORTH General Assembly (14-16 June 2023), hosted by the Universidad Complutense of Madrid (UCM) and organized by JUSTNORTH Work Package 6 "Legal and Regulatory Pathways", led by UCM Professor Elena Conde and composed by UCM researchers Belén Requena and Valentín Clavé-Mercier.

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Running out of excuses? Norwegian political and policy discourses justifying oil and gas development in the Arctic

M. Ballo Bjørn
Berit Kristoffersen
Roman Sidortsov

Abstract: In this article, we analyse how energy security are woven into political discourses among Norwegian policymakers after the Russian invasion of Ukraine and the consequences of this for intergenerational justice and environmental concerns more broadly. Preceding justifications centred on state revenue and domestic economic growth, the current discourse focuses on the European need for security of supply, and energy commodities in particular. The recent development has established a discourse we call "Drilling for European Energy Security". Through a securitized narrative building on Russian aggression, European needs are constructed as arguments for increasing the tempo of Norwegian oil and gas production, as well as intensifying exploration. By employing the intergenerational justice lens, the article exposes this approach as disconnected from the needs of domestic and European consumers, i.e., energy services. Furthermore, we analyse narratives regarding the recently approved electrification of the Snøhvit field in the Barents Sea, and how policymakers have co-opted what was initially regional counterarguments against the electrification. We argue that this exposes the policymakers dedication to continue the long-standing narrative based on 'clean oil and gas', perceived as contributing to secure both civil legitimacy and competitiveness in the international oil and gas market.

Keywords: Norway, Barents Sea, intergenerational justice, oil, gas, petroleum.

(A) INTRODUCTION

When Norway first found oil, there were substantial parliamentarian discussions on which policy direction to follow. The result of these negotiations can be found in the 1974 White Paper *The Role of Petroleum Activities in Norwegian Society*.[1] Several principles and policy goals were set. One important discussion was the pace of extraction; it was decided that moderation was the main approach, which translated into the policy of not exceeding 90 million barrels of oil equivalents per year to avoid a "swift and uncontrolled growth in the use of material resources" (p. 6). Furthermore, this was anchored in the norm that "economic growth must [...] be given a new meaning and new composition so that it contributes to a reasonable use of resources and do not destroy the basic balance in nature".[2] In addition, in anticipation of what kind of dilemmas petroleum development might bring, the white paper contained language that outlined both Norway's responsibilities to other countries and future generations:

[1] Ministry of Finance, 'St. meld. nr. 25 (1973 - 1974)', 1974.
[2] *Ibid.*

> Despite unresolved tasks, Norway is among the countries with the highest standard of living in the world. The discoveries of oil will raise our standard of living even further. We have a particular responsibility in a world that is characterized by fundamental economic and social inequality. We should therefore give the countries that need it the most, part of the increased revenues.[3]

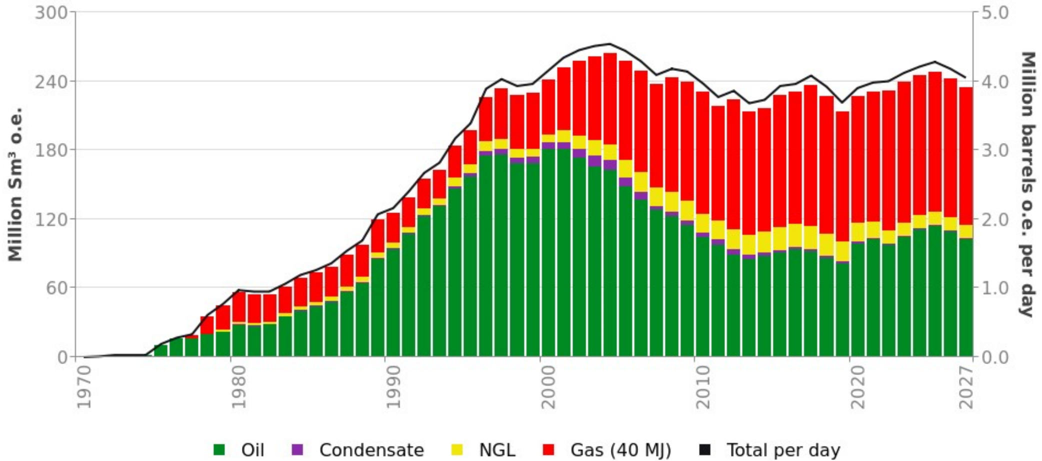

Figure 1: Historic and projected production (Norwegian petroleum Directorate 2023).[4]

As depicted in Figure 1, Norway deviated from the self-imposed policy of a moderate pace of extraction in the late 1980s and overall production peaked in the mid 2000s. The figure also shows that around 2010, the extraction pace of natural gas and oil were about equal. These shifts have been accompanied by changes in the official policy discourse and the establishment of the Norwegian Oil Fund in the early 1990s. The fund allowed a free flow of investments and production in the petroleum sector and was rebranded as the Government Pension Fund Global in 2006. In 2023, the fund accounted for 1.4 trillion dollars, the highest value among sovereign wealth funds in the world.

In this paper, we report and synthesize the results of a study intended to shed light on the political activity related to the recent political decision to electrify the oldest of the oil and gas installations in the Barents Sea, namely Snøhvit. In sum, our research indicates that the Norwegian energy policymakers present the narrative of European energy security as the principal justification for Norwegian natural gas development. They also present the interventions required for electrifying Snøhvit as measures aimed at developing Finnmark and fostering regional economic growth, which has co-opted the main regional objections against the electrification. However, this framing falls apart when scrutinized through the lens of intergenerational justice. These narratives are not only constructed on a notion of energy security that is incompatible with the ongoing decarbonisation effort, they effectively narrow possible economic development options temporally and sectorally. We open the paper with a brief historic background of the

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[3] *Ibid.*, at 15.

[4] Norwegianpetroleum.no, downloaded September 23, 2023.

aforementioned discourse. We continue with the analysis of Norwegian discourse on European energy security before we switch to an analysis of alleged environmental and economic benefits of oil and gas developments in Norway by using the electrification of the Snøhvit natural gas field and Melkøya liquefied natural gas (LNG) processing plant as an example.

Norwegian policy and political discourses reflect how society's relation to petroleum has also changed over time. A number of studies have highlighted how Norwegian policymakers, through their use of particular narratives, have played a crucial role in shaping power dynamics and social realities in the development of oil and gas policies in Norway over the past thirty years.[5, 6, 7] Here we argue that this can be attributed to two factors: (1) the critical role of state imperatives in directing Norwegian oil and gas policy,[8] and (2) continuous discourse co-optation – the adoption and manipulation of counterarguments by policy-makers to support points that counter-arguments were originally intended to undermine. Such co-optation is possible through the use of discourses that influence how individuals perceive and engage with the world, thereby either reproducing existing social norms and power structures, or instigating transformative shifts in societal understandings and action.[9, 10] Particular interpretations of language can constrain how people perceive phenomena and policy decisions, thus shaping the understanding of what is possible and acceptable to do in any specific situation.[11]

In the larger study underlying this paper, discourse is understood as a coherent set of texts and their production practices, dissemination, and reception that enable an object to emerge.[12] We apply the 'critical realist' framework by Scrase and Ockwell, [13, 14] rooted in the core state imperatives of economic growth, civil legitimacy, revenue, state survival, and domestic order. We find Handeland and Langhelles' definition of 'state survival'

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5 L. C. Jensen, 'Boring som miljøargument? Norske petroleumsdiskurser i nordområdene' 64(3): *Internasjonal Politikk* (2006), pages 295-309. https://doi.org/10.18261/ISSN1891-1757-2006-03-02

6 L. C. Jensen., 'Seduced and surrounded by security: A post-structuralist take on Norwegian High North securitizing discourses' 48(1): *Cooperation and Conflict* (2013), pages 80-99. https://doi.org/10.1177/0010836712461482

7 B. Kristoffersen, 'Opportunistic Adaptation: New Discourses on Oil, Equity and Environmental Security' in K. O. Brien and E. Selboe (eds) *The adaptive challenge of climate change* (2015), pages 140-159. (Cambridge University Press, Cambridge) https://doi.org/10.1017/CBO9781139149389.009

8 T. S. Handeland, and O. Langhelle, 'A Petrostate's Outlook on Low-Carbon Transitions: The Discursive Frames of Petroleum Policy in Norway' 14(17): *Energies* (2021), 5411. https://doi.org/10.3390/en14175411

9 I. Scrase, and D. G. Ockwell, 'Energy Issues: Framing and Policy Change', in I. Scrase, and D. G. Ockwell (eds) *Energy for the Future: A New Agenda* (2009), pages 35-53. (Palgrave Macmillan, London). https://doi.org/10.1057/9780230235441_3

10 Ø. H. Skånland, '"Norway is a peace nation": A discourse analytic reading of the Norwegian peace engagement' 45(1): Cooperation and Conflict (2010), pages 34-54. https://doi.org/10.1177/0010836709347212

11 I. B. Neumann, 'Discourse Analysis' in A. Klotz and D. Prakash (eds), *Qualitative Methods in International Relations: A Pluralist Guide* (2008), pages 61-77. (Palgrave Macmillan: London) https://doi.org/10.1057/9780230584129_5

12 I. Parker, 'Discourse dynamics: Critical analysis for social and individual psychology' (1992) (Routledge, London and New York). https://doi.org/10.4324/9781315888590

13 I. Scrase and D. G Ockwell, op. cit.

14 I. Scrase, and D. G. Ockwell, 'The role of discourse and linguistic framing effects in sustaining high carbon energy policy An accessible introduction' 38(5): *Energy Policy* (2010), pages 2225-2233. https://doi.org/10.1016/j.enpol.2009.12.010

as relevant in our analysis as "the ability to compete internationally in supplying the world with petroleum in an increasingly carbon-constrained world" – in other words, maintaining competitiveness in the international oil and gas market.[15] According to Scrase & Ockwell, the state prioritizes solutions aligning with these imperatives, with other issues (such as environmental concerns) receiving lower priority unless connected to the imperatives. The authors also specify four energy policy goals (EPG) that most states pursue, namely access, security, efficiency, and environment. 'Environment' and 'efficiency' focus on sustainable energy production, economic efficiency, and resource conservation. 'Access' and 'security' address energy availability for a decent standard of living and dependable supply.

The data collection for the underlying study took place between November 2022 and March 2023, with an explicit focus on white papers published after the Russian invasion, along with relevant parliamentarian debates. This follows from a primary focus towards how the official Norwegian oil and gas discourse changed after the outbreak of the war. For this article, the data collection occurred between May and August 2023, encompassing white papers, parliamentarian debates and regional newspaper debates in Finnmark. Newspaper data was gathered from the Retriever database, focusing on electrification debates regarding Snow White. Official documents were sourced from the Norwegian parliament (Stortinget) and government (Regjeringen) websites. The selection was done manually, based on the 'cultural competence'[16] of the authors.

(B) HISTORICAL BACKGROUND

The historical backdrop of discourse co-optation exposes three factors that play a role when policymakers today argue for what can be termed *drilling for European energy security*[17] The first reflects how the Kyoto Protocol in 1990s and 2000s allowed for Norway to continue to produce oil and gas while paying other countries for lowering emissions (through carbon trading or offsets). Instead of aiming for 'national action', the discourse changed to 'global action' through carbon trading.[18] Secondly, as exploration intensified into Arctic territories during the 2000s, and especially when the first gas field in the Barents Sea was developed (Snøhvit), the discourse "drilling for the environment" evolved.[19] Here, it was not only important to get a head start on Russia in order to 'set an example' in terms of environmental risks and standards. The discourse also entailed a story about the positive environmental attributes of petroleum development in the

[15] T. S. Handeland and O. Langhelle, op. cit., at 4.

[16] I. B. Neumann, op. cit., at 63.

[17] B. M. Ballo, 'Drilling for European energy security? Changes in Norwegian petroleum discourses after the outbreak of the Ukraine war'. Master thesis at *UiT The Arctic University of Norway*: https://munin.uit.no/handle/10037/29689.

[18] E. Hovden, and G. Lindseth, 'Discourses in Norwegian Climate Policy: National Action or Thinking Globally?' 52(1): *Political studies* (2004), 63-81. https://doi.org/10.1111/j.1467-9248.2004.00464.x

[19] L. C. Jensen, 'Petroleum discourse in the European Arctic: the Norwegian case' 43(3): *Polar Record* (2007), pages 247-254. https://doi.org/10.1017/S0032247407006559

Barents Sea on the Norwegian side. This was in part enabled by co-opting the counter discourse of refraining from petroleum development in the name of conservation.[20]

The Kyoto mechanisms also allowed flexible interpretations of climate policy options. The official oil and gas policy discourse reflected that developing fields in the north was a positive climate measure, as it was argued that Norway had less emissions per produced barrel than other oil producing states, thus possessing the 'cleanest' oil and gas in the world. Although this was statistically proven wrong, an argument of 'drilling for climate change' were established amongst Norwegian political elites, and even the changing geography of the Arctic landscape was seen as an opportunity for more oil and gas development, as the polar ice cap was retreating.[21] Further, increased production in Norway was framed as a prerequisite for economic development in the Global South through the discourse 'drilling for global development', framing Norway's task as ensuring a steady flow of oil and gas into world markets. In this discourse, the burden-sharing aspects relating to creating carbon headroom for the developing world were co-opted by the argument of reducing the gap between the rich and the poor through energy interdependencies.[22] With these discourses established, the road towards drilling in the Barents Sea was seen as the natural next step for Norwegian petroleum industry.

(C) DRILLING FOR EUROPEAN ENERGY SECURITY

Between 2011 and 2018, the official Norwegian oil and gas policy narratives were discursively constructed around the state imperatives of revenue and in particular economic growth, along with EPG environment. The attention to financial matters is evident in a 2011 white paper from the Ministry of Petroleum and Energy (MPE) titled *An Industry for the Future – Norway's Petroleum Activities*, where it is stated that "The primary objective of petroleum policy is to facilitate the profitable production of oil and gas within a long-term perspective".[23] This is a clear discursive link between oil and gas production, state revenue, economic growth and the resource-making practices of the Norwegian government that is set to build policy around these imperatives. As the White paper clearly states, revenue and economic growth "depends on how much of the remaining resources are exploited", and the governments hold a "commitment to existing fields, to new profitable field developments and exploration [that] will provide a basis for a high and stable activity level in the future as well" [ibid]. A high level of production and exploration of new areas is clearly framed as a necessity to fulfil the imperatives of revenue and economic growth. These imperatives in turn contribute to securing the legitimation imperative, which is reinforced by the focus on environmental concerns through EPG resource efficiency and EPG environment. For example,

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[20] L. C. Jensen, 'Norwegian petroleum extraction in Arctic waters to save the environment: introducing "discourse co-optation" as a new analytical term' 9(1): *Critical Discourse Studies* (2012), pages 29-38. https://doi.org/10.1017/S0032247407006559

[21] B. Kristoffersen, op. cit.

[22] At the core of this conflict is the argument of developing countries, where they claim that the industrialized countries in the Global North have a moral responsibility to reduce their emissions substantially prior to developed countries, where many of the world's poorer nations have fought hard for their right to develop. See Kristoffersen, op. cit., at 151.

[23] Ministry of Petroleum and Energy, 'An Industry for the Future Norway's Petroleum Activities'. 2011, at 6.

arguments framing Norway's production methods as yielding the world's cleanest oil and gas were "an integral component for a competitive Norwegian petroleum sector and one important justification for its continuation".[24] In this situation, the counter-discourse was not able to restructure the official discourse in relation to economic and environmental issues, and consequently, the core framings in the official petroleum policy discourse were generally stable between 2011 and 2018.

The economic conditions also entail a focus on how to be competitive in the international oil and gas markets. In the White Paper that laid the groundwork for opening the Northeast Barents Sea for petroleum extraction in 2013, the MPE stated that:

> The increasing demand for more environmentally friendly and cleaner energy, for oil and gas as well as a strong emphasis on energy security, indicates favourable prospects for Norway's oil and gas exports. Norway has consistently upheld its reputation as a reliable and predictable supplier of oil and gas. Irrespective of all conceivable scenarios regarding future energy consumption, this factor will continue to provide Norway with a competitive advantage as an energy provider.[25]

In this excerpt, which is clearly formulated in economic terms, it is evident that the MPE believes that other states' energy security needs, combined with stronger demands for an acceptable environmental impact, justifies and legitimizes Norwegian petroleum exports. Thus, Norway's self-perceived image as a stable and predictable supplier is held as a competitive advantage in a market with "a strong emphasis on energy security". According to the MPE, this will contribute to a sustained high level of Norwegian petroleum exports, thereby ensuring the imperatives of survival, revenue, and economic growth.

However, since the outbreak of the war, the Norwegian reputation "as a reliable and predictable supplier of oil and gas" has been reframed. It is no longer a trait that is valuable mainly in terms of domestic revenue and economic growth, instead it is framed as a trait that is valuable in relation to the insufficient energy access and safety in Europe, here demonstrated by Prime Minister Jonas Gahr Støre speaking in parliament: "High and stable production on the Norwegian continental shelf is our most significant contribution to European energy security and stability at present. I perceive that this is understood and acknowledged in Europe. We are considered a reliable partner."[26]

The PM states that for Norway, it has become most important to ensure a constant flow of petroleum to Europe to provide our partners with sufficient energy access, rather than focusing on Norwegian revenues. This excerpt places European needs at the centre of attention, which was clearly shown not only here, but in the overall content of Støre's many speeches in parliament during the first nine months of the war, as well as the general activity in both the government and the parliament during the same time.

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[24] T. S. Handeland and O. Langhelle, op. cit., at 12.

[25] Ministry of Petroleum and Energy, 'New opportunities for Northern Norway opening of the Barents Sea to the south-east for petroleum activities'. 2013, at 7.

[26] Stortinget, *Stortingstidende Nr. 11*, 2022-2023, page 406.

In the MPE's statement from 2013, being 'reliable' is coupled with a 'competitive advantage', which is inextricably linked to economic features. Yet, since the outbreak of the war, it is the needs of "our allies, neighbours, and trading partners"[27] which makes the Norwegian reliability such an important trait. European needs serve as a direct justification for "maximum utilization of the capacity on the Norwegian continental shelf", with an explicit focus towards that this has "been of great importance in Europe".[28] References to the domestic dimensions of economic growth or revenue are not present in the official narrative during the first nine months or so after the Russian invasion. As these imperatives constituted the main justifications before the war, this is an important shift. It clearly changes who the benefits arising from the Norwegian petroleum industry accrue to, and it is obvious in a MPE white paper from 2022: "The government will [...] facilitate the Norwegian continental shelf to continue being a stable and long-term supplier of oil and gas to Europe in a demanding time."[29]

This new discourse based on European energy access is further reinforced through references to changes in the relationship between energy and security, as seen from the Minister of Foreign Affairs, Anniken Huitfeldt, in May 2022: "Europe has a significant task ahead in becoming independent from Russian gas. Energy policy has now become a matter of security policy. For Norway, this means that maintaining stable and predictable Norwegian gas deliveries is not just about our economy. It also concerns the security of Europe."[30]

Huitfeldt makes a clear connection between Norwegian gas exports and European security, stating that energy policy now must be considered as security policy. In this regard, it is crucial that Europe become independent of Russian gas. This was quickly followed up the following month by a joint statement by Norway and the EU, declaring a strengthening of cooperation regarding energy:

> Norway is the biggest producer of oil and gas in Europe with a production contributing significantly to European energy security [...] the importance of Norway's oil and gas production for European energy security has increased [...] Norway has significant remaining oil and gas resources and can, through continued exploration, new discoveries and field developments, continue to be a large supplier to Europe also in the longer term beyond 2030. The EU supports Norway's continued exploration and investments to bring oil and gas to the European market.[31]

The statement draws a clear line from the security implications of the increased energy needs of Europe to the remaining oil *and* gas resources on the Norwegian continental shelf. It also clearly reflects how the pre-war discourse as a commitment to extensive exploration and investments are explicitly coupled with the European call

[27] J. G. Støre, 'Statsministerens redegjørelse for Stortinget om krigen i Ukraina og den sikkerhetspolitiske situasjonen'. 2022b.

[28] Stortinget, *Stortingstidende Nr. 11*, 2022-2023, at 405-406.

[29] Ministry of Petroleum and Energy, 'Meld. St. 11 (2021-2022) - Additional notice to Meld. St. 36 (2020-2021)'. 2022, at 14.

[30] A. Huitfeldt, 'Speech on security policy and the High North'. 2022; Available from: https://www.regjeringen.no/no/aktuelt/tale_sikkpol_nord/id2912154/.

[31] Ministry of Petroleum and Energy, 'Increased energy cooperation between the EU and Norway'. 2022, at 1-2.

for increased supplies. Despite the predominant European demand for natural gas, the joint statement consistently employ oil *and* gas.

Five months later, in May 2023, this was followed up by the MPE:

> As the largest petroleum producer in Europe, Norway's most significant contribution to European energy security is to maintain high gas deliveries to the market. […] To maintain high oil and gas deliveries in the future, ongoing production must be continued, and new resources brought into production. For new resources to be put into production, further discoveries must be made through exploration.[32]

As evident, the new narratives based on the link between Norwegian oil and gas, European security and energy needs is now presented as important arguments for further exploration and development of both oil *and* gas fields. Even when European demand is mainly natural gas, policymakers persistently use the collective terms *petroleum* or *oil and gas*. As such, European energy needs have been successfully linked to the image of Norway as a stable and long-term supplier to Europe, which has led to demands for new licensing rounds and development plans that include both oil and gas. Combined with the perception that Russia is waging an "energy war"[33] on Europe, this imposes significant constraints on both discourse and policy regarding oil and gas in Norway. These narratives have significantly impeded the breakthrough of competing considerations in Norwegian oil and gas policymaking, such as climate and environmental concerns.[34]

(D) DRILLING FOR THE ENVIRONMENT AND LOCAL VALUE CREATION

Discovered in 1984 and approved for development in 2002, the Snøhvit gas field was the first field to be developed in the Barents Sea. Situated outside Hammerfest city in Finnmark county, the construction of the Melkøya production plant started in 2003, and production commenced in 2007. The gas is transported through a 145 km long pipeline to the production facility on Melkøya, where it is converted into LNG and loaded onto ships. The electrification reduces annual emissions by up to 850,000 tons and increases the total gas volume for export. This will require 3.6 TWh from the grid annually, which necessitate a substantial grid expansion.[35, 36] Critically, the project includes an onshore compressor that is expected to prolong production by approximately 20 years.[37] As such, the electrification of the processing plant at Melkøya is the direct reason for expanding the power grid.[38]

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32 Ministry of Petroleum and Energy, 'Prop. 97 S. 2022-2023'. 2023, at 34-35.

33 This expression has been commonplace in Norwegian energy policy matters since the Russian invasion, both in parliamentarian and media debates.

34 B. M. Ballo, op. cit.

35 The Office of the Prime Minister, 'Power and industry boost for Finnmark'. 2023. Available in Norwegian from: https://www.regjeringen.no/no/aktuelt/kraft-og-industriloft-for-finnmark/id2990581/

36 Minimum 54 km (Skaidi-Hammerfest), but the government's stated goal is 265 km (Skaidi-Hammerfest-Varangerbotn).

37 Equinor, 'Snøhvit-feltet'. 2023; Available from: https://www.equinor.com/no/energi/snohvit. Cited 13/09/23.

38 Stortinget, 'Dokument nr. 15:1417 (2022-2023)'. 2023.

Electrification of Snøhvit has long been a highly debated topic in Finnmark. Both before and after the government announced the decision to electrify, there were significant opposition towards the project among the population in Finnmark. This question dominated the regional political debates in the lead-up to the local and regional elections in September 2023. Based on the media debate, two factors stand out as particularly important for the resistance. First, Norwegian authorities have reserved the necessary power output in the electricity grid until the project is completed, at the earliest in 2030. This is widely perceived as socially unjust by regional actors, hindering the development of other businesses and industries in the area. Secondly, there are worries that the increased demand from Melkøya may contribute to rising electricity prices.

In August 2023, the government held a press conference at the production facility at Melkøya in Hammerfest. During this, PM Støre emphasized that half of the additional gas production Norway was able to initiate "during this war year" came from Melkøya, and "Because of that, this day is important also outside our own country".[39] By alluding to Russian aggression and warfare by employing the word *war*, Støre discursively establishes a direct link between the electrification and European needs. Hence, Putin's aggressive war on Ukraine makes up parts of the backdrop for the course of LNG production and associated energy expansions in Finnmark.

Up until this point, the regional resistance was not directly addressed in the official narratives. However, at this press conference the electrification was pitched as a "power and industrial boost for Finnmark", promising that Snøhvit will not be connected to the grid until 3.6 TWh of new annual production have been developed in the region. The most applicable method within the time frame of 2030 is area intensive wind farms, which will interfere with the indigenous Sami reindeer herding territory and wider ecological values present in the landscapes of Finnmark. This established a new narrative based on the infrastructure yielded by prolonging LNG production, arguing that this development addresses important needs regarding the economic development of the region. We see this as the most recent example of co-optation in the official Norwegian oil and gas discourse.

As electrification requires more power generation in the region and an upgraded electricity grid to Hammerfest, it will affect the landscapes in Finnmark. This is framed as unavoidable through the three-pronged framing of Norwegian oil and gas as both *clean* and *necessary* for alleviating European challenges in dealing with Russian aggression, all the while "creating value and giv[ing] possibilities in all of Finnmark" [ibid.]. The speech of PM Støre clearly aspires to address regional concerns related to economic growth and simultaneously establish Finnmark as a space for electricity production earmarked the petroleum industry: "This initiative includes measures that will make an impact, generate value, and provide opportunities throughout Finnmark, and indeed, throughout Northern Norway. (...) It will be a project where we're not going to end

[39] Office of the Prime Minister, 'The Prime Minister's Opening Statement at the Press Conference on Power and Industrial Boost for Finnmark'. 2023. Available in Norwegian from: https://www.regjeringen.no/no/aktuelt/statsministerens-innledning-pa-pressekonferansen-om-kraft-og-industriloft-for-finnmark/id2990595/

up with winners and losers. It's good for people, industry, and activity."[40] This excerpt succeeds connections between Norwegian oil and gas and European needs, and as such it is visibly an attempt to align 'drilling for European energy security' with regional value creation, thus constructing the electrification of Snow White as a sensible national policy.

The previous governmental narrative focused on local, national, and European effects (respectively jobs, revenue/economic growth, and energy security). Through the new-born narrative of petroleum-driven power grids and production as a pre-requisite for providing economic growth "throughout Northern Norway", the regional dimension is now clearly addressed in the governmental discourse. This indicates that regional energy policy is largely built to answer national energy policy goals, which expose the policymakers' dedication to sustaining a high level of petroleum exports, and thereby, their dedication to narratives like 'drilling for European energy security' and 'clean oil and gas'.

(E) INTERGENERATIONAL JUSTICE AND ENERGY SECURITY

The 1974 White Paper that we cite in the introduction to this paper outlines Norway's responsibilities to future generations. It also *states* that oil and gas are simply means of achieving what the paper deems as the end – a high standard of living. Thus, capitalising on 'the discoveries of oil' is only desired as long as it leads to achieving the end. Sovacool et al. define energy security as "equitably providing available, affordable, reliable, efficient, environmentally benign, proactively governed and socially acceptable energy services to end-users".[41] This definition puts the concept of energy services, such as thermal comfort, industrial process heat, personal mobility, and many others, as the principal unit of analysis for energy security. Energy services are the benefits that primary energy, energy carriers, and end-use energy produce for human well-being. Sovacool et al. contrast their energy services security approach to the conventional understanding of energy security as security of supply.[42]

Defining energy security as the physical availability and economic affordability of energy commodity has been the go-to approach of a majority of energy *policymakers* around the world, including those of Norway. Sovacool et al. diverge from the tried and tested conventional approach to energy security because they aim to examine energy systems not just from security but also from justice and equity perspectives. This includes the concept of intergenerational justice that they utilise to identify and describe temporal inequities created by energy systems [ibid.]. Because energy services are a human-centric concept, it allows for a direct connection between what both present and future recipients of the well-being secured by energy and present and future communities impacted by the provision of energy services desire. This, in turn, allows

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[40] *Ibid.*

[41] B. K. Sovacool, R. V. Sidortsov, and B. R. Jones, 'Energy Security, Equality and Justice' (2013), at 235. (Routledge, Oxon and New York). https://doi.org/10.4324/9780203066348

[42] Sovacool, B.K., 'Conceptualizing urban household energy use: Climbing the "Energy Services Ladder' 39(3): *Energy Policy* (2011), pages 1659-1668. https://doi.org/10.1016/j.enpol.2010.12.041

for a much wider range of options of the type of energy development, its priorities, timelines, and other important considerations that are essential for thoughtful energy *policymaking*. As a result, oil and gas development might no longer be the best means of achieving what the 1974 White Paper sees as the ultimate end.

In contrast, the Norwegian state interprets its intergenerational obligations in a narrow manner effectively tying them to the aforementioned Oil Fund, whose purpose is to "ensure responsible and long-term management of revenue from Norway's oil and gas resources, so that this wealth benefits both current and future generations".[43] This is frequently iterated by the Norwegian government, for example by MPE Aasland at the aforementioned press conference in front of Melkøya in August 2023: "Thanks to all of you who contribute every day to increased energy security in Europe, while ensuring a safety net for future generations in Norway, providing us with security and opportunities that few others enjoy."[44]

Aasland makes a clear discursive connection between increasing European energy security and "ensuring a safety net" for future generations through the oil fund. Not only is Norwegian oil and gas framed as a means to mitigate the negative effects of 'Putin's energy war' on our 'friends and allies' in Europe, but it also simultaneously contributes to the next generations through the revenues from present petroleum exports. This temporal monetized framing of future security takes a calculated risk of the fund losing its value that may come in many forms e.g., economic recessions, war, and climate risk.[45] When revisiting the past through the lens of policymakers in 1974, the risks associated with oil were quite the opposite: The expected economic growth had to be given a new content which included understanding the potential uneven distribution of risks and benefits in time and space. The white paper called for a "reasonable" use of resources and making sure that nature was in balance, acknowledging that the impacts were severe, even without a clear picture of the looming threat of climate change in the future. In the context of reading this white paper fifty years later, from before Norway became a petroleum dependent country, it not only shows concern regarding the distribution of goods and burdens between generations, it even warns 'us' against exploring for more oil than what we needed at a given time, as it would be too tempting to exploit them once they were found.[46]

Taking this into consideration today we see how intergenerational justice exposes the understanding of the security of supply employed by the policymakers as lacking a direct connection with what domestic and European consumers need, i.e., energy services. Secondly, keeping intergenerational justice as a premise for energy services security-centric decision-making allows for greater flexibility of the economic development options. Thirdly, anticipating intergenerational justice concerns ensures the temporal sustainability of energy development because it helps to legitimise such development beyond short-term challenges (e.g., the loss of Russian natural gas supply).

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43 Norges Bank, 'About the fund'. 2023; Available from: https://www.nbim.no/en/.

44 Ministry of Petroleum and Energy, 'The speech by the Minister of Oil and Energy at the press conference on the power and industrial development plan for Finnmark'. 2023.

45 M. Takle, 'The Norwegian Petroleum Fund: Savings for Future Generations?' 30(2): *Environmental Value* (2021) pages 147-167. https://doi.org/10.3197/096327120X15868540131305

46 Ministry of Finance, 'St. meld. nr. 25 (1973 - 1974)', 1974; at 6.

(F) CONCLUSION

In this paper, we do not attempt to provide a comprehensive critique of the conventional understanding of energy security as a security of supply. However, we expose the foundational weaknesses of this approach to energy security by illustrating how it failed to provide any guardrails for the political and policy discourse of Europe's major energy producer. Subjecting the recent discursive changes to the scrutiny of intergenerational justice deflates the justification and legitimisation narratives of this co-opted discourse. We also show that using energy services and not energy commodities as the starting point and unit of analysis can help to avoid the co-opted discourse problem. The energy services concept provides a direct link to what present and future European customers need and what present and future Norwegian communities would like to avoid when the services are delivered. Simply put, Norway is running out of excuses for not recognising the deficiency of the current energy policy-making tools and ignoring the co-opted discourse problem. This is something that the current and future generations cannot afford.

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SYbIL | Spanish Yearbook of International Law

Arctic Energy Development and China's Engagement

Chuan Chen[*]

Abstract: Climate warming has drawn increasing attention to Arctic energy development. In view of the important strategic significance of Arctic energy resources to China, China has also been actively participating in the development and utilization of Arctic energy resources in recent years. Currently, Russia, which is subject to Western sanctions, is vigorously promoting the eastward shift of Arctic energy cooperation and further deepening Arctic energy cooperation with China. Faced with Russia's enthusiastic cooperation, this is undoubtedly a good opportunity for China. But at the same time, Arctic oil and gas development is difficult and costly, and it is under long-term environmental pressure. Coupled with the cooling of international cooperation, these have added many uncertainties and risks to China's Arctic energy development. Therefore, on the one hand, China needs to seek synergy between Arctic energy science and technology research and energy cooperation, and pay attention to environmental protection and the interests of local Arctic people. On the other hand, while strengthening energy cooperation with Russia in the Arctic, China also needs to actively maintain dialogue with the Arctic 7 and explore energy cooperation paths to better promote China's energy security and long-term interests.

Keywords: Arctic energy   energy cooperation   China   Russia

(A) ARCTIC ENERGY RESOUCES: A NEW ENERGY FOCUS FOR COUNTRIES

The Arctic region is rich in energy resources. However, since the Cold War, the Arctic has been a remote and neglected region internationally. It was not until 2007, when Russia planted its flag on the seabed of the Arctic to declare its sovereignty, that the long-term peace in the Arctic region was broken and a new wave of strong competition for the Arctic was set off. After the Russian flag-planting incident, other Arctic countries have taken various measures to actively compete for the Arctic. The U.S. Coast Guard sent its medium-sized polar icebreaker "Healy" to Alaska to survey the nearby seafloor terrain. Canada's then Prime Minister Stephen Joseph Harper announced that the Canadian government would build a new military training base and a deep-water military dock in the Arctic to consolidate Canada's sovereignty in the Arctic territorial waters. The Danish government also announced that it will send a scientific research vessel to the Arctic to collect geological data, hoping to emphasize its sovereignty over the Arctic.

In May 2008, the U.S. Geological Survey (USGS) released an assessment report on oil and gas resources in the Arctic region, which aroused people's interest in Arctic energy resources and attracted the attention of many oil companies, politicians and media around the world. It was also at this time that countries around the world began to pay

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attention to Arctic energy resources.[1] Undiscovered oil and gas resources in the Arctic are estimated to be as high as 20.5% and 27.6% of global resources respectively. If total proven and undiscovered reserves are taken into account, Arctic oil and natural gas resources account for approximately 13% and 25% of the world's reserves respectively.[2] The oil and gas resources that have been discovered in the Arctic are mainly concentrated in a few basins, of which the West Siberian Basin has the largest reserves, followed by Northern Alaska (North Slope).[3] In terms of the distribution of undiscovered oil resources in the Arctic, Northern Alaska has the largest amount of undiscovered oil, followed by the Amerasian Basin, and the East Greenland Basin ranks third. As for the distribution of undiscovered natural gas resources, the West Siberian Basin has the largest number of undiscovered natural gas resources.[4]

In addition to non-renewable energy sources such as oil and gas, the Arctic region is also rich in renewable energy sources such as rare earth elements, hydropower, wind power, and geothermal energy, and its development potential cannot be underestimated.[5] Regarding renewable energy, the U.S. Arctic Research Council established a group specifically responsible for promoting renewable energy research in the Arctic region, the Arctic Renewable Energy Working Group (ARWG). For Europeans, renewable energy is seen as an opportunity for the European Arctic.[6]

As global climate change intensifies, especially climate warming in the Arctic, and the melting of Arctic sea ice and the freezing and thawing of permafrost accelerate,[7] the accessibility and exploitability of energy in the Arctic have greatly improved. This has made competition for the development of Arctic energy resources increasingly fierce. Countries inside and outside the Arctic region have introduced or adjusted their own Arctic strategies and formulated oil and gas development strategies. For example, the Basic Principles of the State Policy of the Russian Federation in the Arctic Zone Until 2035 and the Energy Strategy to 2035 promulgated by Russia in 2020 once again emphasized that the Russian Arctic region will be used as a strategic resource base to promote the accelerated development of the national economy.[8] In recent years, Norway has also begun to intentionally shift the focus of oil and gas exploration to the Arctic.[9] Greenland is also continuing to relax restrictions on energy development and regards the energy economy as an important pillar in achieving economic and political independence.[10] The EU has also recently stated that it will deepen its role in the Arctic

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1 A. Moe, D. Hamilton, & K. Spohr, 'Russia and the Development of Arctic Energy Resources in the Context of Domestic Policy and International Markets', *The Arctic and world order* (2020) 119-142.

2 Arctic Council Sustainable Development Working Group, 'SDWG Report on Arctic Energy', (2009), 1-36.

3 L.Jingmei, et al., 'Potential analysis of Arctic oil and gas resources', *Resources and industry*, (2010) 29-33.

4 X. Qing & H. Maixiu, 'Analysis of Spatial Distribution and Characteristics of Oil and Gas Resources in Arctic Region', *Ocean Development and Management*, (2022) 17-23.

5 G. Arruda, Renewable energy for the Arctic: new perspectives', (Routledge, London, 2018).

6 F. Doris, 'Renewable energy seen as an opportunity for the European Arctic', The New Humanitarian, published on 21 November 2016, accessed 28 July 2023

7 H. O. Pörtner, et al. 'IPCC special report on the ocean and cryosphere in a changing climate', *IPCC Intergovernmental Panel on Climate Change: Geneva, Switzerland* (2019) 1-755.

8 H. R. Liu, Report on Arctic Region Development 2017 (Social Sciences Academic Press, Beijing, 2018)

9 J. Henderson, & J. Loe, '*The prospects and challenges for Arctic oil development*', (The Oxford Institute for Energy Studies, Oxford, 2014).

10 B. Poppel, 'Arctic oil & gas development: the case of Arctic', *Arctic Yearbook 2018* (2018), 328.

region and ensure a stable supply of energy from Northern Europe.[11] In addition, South Korea[12], Japan[13], India,[14] and other countries have also put forward many ideas about energy development in their Arctic strategies. The importance of the Arctic in the global energy map has become increasingly prominent, and countries around the world are actively positioning themselves in relation to Arctic energy development.

(B) THE IMPORTANCE OF ARCTIC ENERGY TO CHINA

As an important stakeholder in Arctic affairs, China attaches great importance to the development of Arctic energy and has listed the development and utilization of Arctic energy resources as its main policy proposition for China's participation in Arctic affairs.[15] Paralleling China's rapid economic development, China's energy consumption is huge on a global scale. Recent economic slowdown notwithstanding, China's energy demand means that its energy security faces substantial challenges. China is thus looking for new opportunities for oil, gas, and other natural resources imports.[16] The Arctic is very rich in natural resources, especially traditional oil and natural gas resources. Oil and natural gas are the important guarantee of China's national economic development, and its security is always the core issue of national sustainable development. For China, the exploration and utilization of oil and gas resources in the Arctic will greatly alleviate its energy tensions.[17]

In 2016, China listed oil and gas as strategic minerals, as the key object of macro-control and supervision and management of energy resources.[18] Although China is not an oil and natural gas resource-poor region, due to China's vast population, the per capita recoverable resource reserves of oil and gas minerals are far below the world average, and the resource base is relatively weak. China is still in the mid-stage of industrialization; its energy consumption structure has been continuously improved and the total demand for oil and natural gas resources is in a rapid growth phase.[19] In 2017, oil consumption increased by 5.2%, and natural gas consumption increased by 14.8%. However, the newly discovered geological reserves of oil and natural gas fell to the

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[11] European Commission, European Political Strategy Centre, '*Walking on thin ice: A balanced arctic strategy for the EU*', Publications office of the European Union, published on 2019, accessed 29 July 2023

[12] R. Guo, & T. Y. Sun, 'The Arctic Strategy under ROK's "New Northern Policy": Process and constraints', *Journal of International Relations* (2020) 136-153.

[13] X. Zou, 'An analysis of the new situation of Japan's Arctic strategy', *International Data Information* (2019) 15-20

[14] V. Pronina, et al., 'The Arctic policy of India', IOP Conference Series: Earth and Environmental Science (2020) 012047.

[15] The State Council Information Office of the People's Republic of China (2018). 'China's Arctic Policy', published on 26 January 2018, accessed 5 August 2023.

[16] S. Kopra, "China's Arctic Interest', in Lassi Heininen (eds), *Arctic Yearbook 2013* (Northern Research Forum, Akureyri) 107-124.

[17] Z. J. Yang, et al., "The impact of Arctic ecological security on China's national security and its response strategies', *Marine Environmental Science* (2013) 34-35.

[18] Ministry of Land and Resources, 'Ministry of Land and Resources: China has identified 24 minerals as strategic minerals', published on 30 November 2016, accessed 5 August 2023.

[19] Ministry of Natural Resources of the People's Republic of China, 'National mineral resources planning (2016-2020)', published on 15 November 2016, accessed 8 August 2023.

lowest levels in nearly 10 years, and the total registered area of oil and gas exploration rights in China also decreased from 3539.9 thousand km2 in 2016 to 3284.6 thousand km2, showing a decrease of 255.3 thousand km2 and 7.2% decrease year-on-year.[20]

China is alarmed at this prospect. For a long time, China's oil and gas heavily relied on imports, and the oil and gas resources imported from abroad play an increasingly vital role in the sustained and stable growth of its national economy. In 2019, China imported 505.72 million tons of oil, an increase of 9.5%, and its dependence on foreign oil reached 70.8%; imports of natural gas was 96.6 million tons, an increase of 6.9% year-on-year, and its dependence on foreign natural gas imports reached 43%.[21] This dependence on imported oil and natural gas is likely to continue to increase, and after 2030, more than 80% of crude oil and 50% of natural gas will need to be imported, and the supply situation increasingly tight. China's dependency on foreign oil will exceed 80% by 2030.[22]

The degree of its dependence on imported oil and natural gas determines the magnitude of the impact of any imported supply interruption and directly affects the safety of energy or even the economy. China's oil and natural gas imports are mainly dependent on the Middle East and Africa, and its oil and natural overseas investments are also concentrated in Middle East and Africa. Though these areas are extremely rich in resources, both the Middle East and Africa have long been in political instability, social turmoil as well as insecurity, and face the intervention of powerful countries led by the United States. In these regions, China does not have enough political and diplomatic capacity to ensure a long-term and stable energy supply, nor does it have enough military force to protect China's oil and gas supply at source.[23]

In addition, the transportation of oil from Middle East and Africa needs to pass through the Malacca Strait, a strait which is seen as an energy resource lifeline for China. At present, about 70% of China's oil imports need to pass through the Strait of Malacca.[24] Furthermore, China's natural gas imports from Qatar, Malaysia, Indonesia, Australia and other countries also need to be transported through the Malacca Strait. Apart from the risks of piracy, terrorism and transportation accidents, China also faces the potential risks of military blockade and oil embargo by major powers in the Malacca Strait. In terms of China's energy imports, both the import source and transportation, China is facing great risks, and its energy safety is in a perilous state and possibly on the brink of disaster.[25] After former China President Hu Jintao proposed the Malacca

[20] Ministry of Natural Resources of the People's Republic of China, China Mineral Resources (Geological Publishing House, Beijing, 2019).

[21] China Petroleum Enterprises Association, 'China Oil and Gas Industry Development Analysis and Prospect Report Blue Book (2019-2020)', People.cn, published on 30 March 2022, accessed 9 August 2023.

[22] Y. Y. Wang, et al., 'Analysis of domestic and international oil and gas resources situation in 2018', *China Mining Magazine* (2018) 1-6.

[23] Z.R. Hu, & Z. Q. He, 'Looking at China's oil and gas security from the world and China's oil and gas supply and demand situation', *Journal of Changchun Normal University (Humanities and Social Sciences)* (2013) 8-12.

[24] D. Peng, 'Research on the Security Problems and Countermeasures for China'S Oil', *Energy of China* (2023) 56-63.

[25] R. P. Singh, & S. K. Singh, 'CHINESE BLUFF IN MALACCA The Future Security Architecture of the Region and China's Indian Ocean Strategy', *EPRA International Journal of Multidisciplinary Research (IJMR)* (2023) 135-139.

dilemma, from Building Maritime Power to One Belt One Road, China has been actively seeking to diversify oil and natural gas routes to reduce its energy risks.

Due to abundant oil and natural gas resources in the Arctic, China keeps an eye on Arctic resources development. As climate warming intensifies, China can potentially transport Arctic oil and natural gas by the Arctic shipping routes. When excluding the natural environmental risks, Arctic shipping routes are more in line with China's interests and are safer for its oil and natural gas imports from the perspective of energy security. Indeed, China has great expectations in the Arctic shipping routes and regards them as an alternative to the predicament of the Malacca Strait.[26] In that case, Arctic oil and natural gas would be an indispensable part for China's energy import. The development and utilization of Arctic energy is thus not only related to China's energy supply, but also related to China's ability to resist energy risks, promote the strategic adjustment of the national energy structure, and ensure national energy security and sustainable economic development.

(C) CHINA'S ARCTIC ENERGY COOPERATION

Since joining the Arctic Council, China has actively participated in the development of Arctic energy resources and has extensively cooperated with various countries. However, due to the unclear rules for international revenue sharing on the outer continental shelf and the limited international seabed area in the Arctic region, the main path for China to participate in Arctic energy development is through investment and project participation by Chinese energy companies.[27] Currently, Chinese energy companies have participated in several energy and mineral development projects in the Arctic region, as described below.

Greenland has a large amount of resources such as oil and gas, iron, zinc, rare earth elements, and even uranium. The Greenland government also hopes to develop its economy through energy resource development and achieve economic independence. For Greenland, China is a deep-locked investor,[28] and the Greenland government has visited China multiple times to seek energy investment and cooperation, believing that Chinese investment could provide a boost for Greenland's efforts towards political autonomy from Denmark.[29] In Greenland, Chinese company General Nice fully acquired the Isua Project of London Mining Company in 2014, becoming the first Arctic project entirely owned by a Chinese company.[30] However, General Nice's iron ore mining license was later revoked by the Greenlandic government. In 2016, Chinese rare earth giant

[26] C. W. Pang, 'China's Resolution to the Malacca Strait Predicament', *Journal of Xinjiang Normal University (Philosophy and Social Sciences)* (2018) 11.

[27] S. J. Chen, 'Joint Development Cases and Chinese Participation in Energy Exploitation in Arctic,' *Resource Development & Market* (2018) 1099-1104.

[28] C. Chen, 'China's engagement in Greenland: mutual economic benefits and political non-interference', *Polar Research* (2022) 41.

[29] E. Wishnick, China's Interests and Goals in the Arctic: Implications for the United States, (CreateSpace, South Carolina,2017).

[30] M. Volpe, '*The tortuous path of China's win-win strategy in Greenland*', The Arctic Institute, published on 24 March 2020, accessed 12 August 2023.

Shenghe Resources acquired 12.5% of the shares of Greenland Mineral Energy Co., Ltd., obtaining the development rights of the rare earth mine Kvanefjeld. In the future, Shenghe Resources can hold up to 60% of the shares. However, due to environmental and other factors, all projects of Chinese companies in Greenland have been stagnant in the initial stage without any progress.[31]

China also has interests in Alaska. Alaska has abundant oil and gas reserves, and the development of oil and gas resources is also Alaska's main industry. According to the study conducted by the McDowell Group, nearly one-quarter of all wage and salary jobs in Alaska in 2018 are supported by the oil and gas industry.[32] Taxes from the oil and gas industry also constitute a very important source of tax revenue for Alaska. Given the importance of the oil and gas resource industry, the Alaska government has been actively encouraging and supporting the development of oil and gas industry resources. The Alaska government has even developed an Exploration Licensing Program to encourage energy companies to explore undeveloped areas. In September 2017, the Alaska State Natural Gas Development Corporation expressed strong interest in the Chinese market. Taking this opportunity, Chinese energy companies are also actively seeking cooperation with the Alaska state government and Alaska Natural Gas Development Company.

In November 2017, the Alaska state government, Alaska Natural Gas Development Company (AGDC) signed a non-binding joint development agreement with Sinopec, China Investment Corporation, and Bank of China. At that time, China planned to invest US$43 billion to develop LNG in Alaska and purchase 75 % of the project's mining volume in exchange for equal shares and the provision of necessary financing. This was one of the big deals signed during Trump's visit to China that year. However, with the outbreak of the "trade war" between China and the United States, both countries included oil, natural gas, and chemical products in the second round of tax lists, and energy cooperation between China and Alaska has also been affected. In July 2019, the president of Alaska Natural Gas Development confirmed that the project was no longer proceeding.

In addition to the aforementioned regions, the presence of Chinese energy companies is also evident in other Arctic regions, such as via the purchase of geological data from the Barents Sea by CNOOC, and the exploration cooperation between CNOOC and Eykon Energy of Iceland in the waters near Jan Mayen Island.[32] However, so far, in terms of Arctic energy cooperation, China has not had a significant impact on regions outside the Russian Arctic region.[33] The energy cooperation projects that China has truly operated and produced results in the Arctic region are all energy cooperation projects with Russia, such as the Yamal liquefied natural gas project.

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31 S.J.V. Brunnersum, 'China failed its Arctic ambitions in Greenland', Politico, Published on 22 October 2022, accessed 16 August 2023.

32 Y. Rosen, 'Oil and gas companies have outsized economic impact on Alaska, says industry study', Alaska Beacon, Published on August 31, 2023, accessed September 17 2023.

32 G. Beth, 'Iceland Aims to Seine Opportunities in oil Exploration', The New York Times, published on 1 October 2013, accessed 20 August 2023.

33 S.J.V. Brunnersum, 'China failed its Arctic ambitions in Greenland', Politico, Published on 22 October 2022, accessed 16 August 2023.

As referred to above, Russia attaches great importance to the development of Arctic energy resources. After Russia invaded Crimea in 2014, the West imposed economic sanctions on Russia, and many Western international companies suspended cooperation with Russia on Arctic energy projects, resulting in a significant decrease in cash flow to Russia's Arctic energy projects.[34] At the same time, the enormous economic pressure brought about by Western sanctions has also made it difficult for Russian companies to cope alone with the huge funding gap required for Arctic energy projects.[35] In order to overcome this difficult situation, Russia has begun to turn more to China to seek Arctic energy cooperation, and the Yamal Liquefied Natural Gas (LNG) project between China and Russia is under this background of cooperation. After China National Petroleum Corporation (CNPC) acquired a 20% stake in Yamal LNG, China's Silk Road Fund (SRF) spent 1.087 billion euros to complete the acquisition of a 9.9% stake in Yamal LNG in 2016. In the end, China collectively held 29.9% of the equity shares of the Yamal LNG project, while Novatek and Total held 50.1% and 20% respectively.[36] A significant part of the project financing for Yamal LNG (44%) was provided by China, and the participation of Chinese companies in the fulfillment of orders for a contract project could reach US$140 billion.[37] Besides, China also provided loans, technology and other support. With China's help, the Yamal LNG project was able to overcome difficulties and advance smoothly.[38]

After Russia invaded Ukraine in 2022, Russia's Arctic energy development faced a much worse situation than during Russia's annexation of Crimea in 2014. Western countries have interrupted the supply of advanced technology and equipment for Russia's Arctic activities, divested energy projects, restricted Russian payment methods, closed the doors to Western markets, and even excluded Russia from Arctic cooperation by seven other Arctic countries (Arctic 7). The implementation difficulty of Russian Arctic oil and gas resource development projects has significantly increased. Considering the enormous external restrictions and pressures faced by Russia, Russia has decided to shift its positioning in the energy export supply market from the West to the East, and is more actively engaging in Arctic cooperation with countries and organizations outside the Arctic region, especially China.[39] Russia greatly welcomes the joint development of the Arctic and cooperation in various fields between China and Russia,[40] and publicly lauds China's participation in the implementation of the Arctic project. It expresses optimism about the prospects of cooperation in the Arctic region with China.[41] China

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34 A. Gabuev, 'Did Western Sanctions Affect Sino-Russian Economic Ties?', Carnegie, published on 20 February, 2013, accessed 17 August 2023.

35 C. T. N. Sørensen, & E. Klimenko, 'Emerging Chinese-Russian Cooperation in the Arctic: Possibilities and Constraints', *SIPRI Policy Paper* (2017) 1-43.

36 V. Spivak & A. Gabuev, 'The ice age: Russia and China's energy cooperation in the Arctic', Carnegie Endowment for International Peace, published on 31 December 2021, accessed 26 August 2023.

37 M. Kobzeva, & R. G. Bertelsen, 'European-Russian-Chinese arctic energy system', in L. Xing (Ed.). China-EU Relations in a New Era of Global Transformation (Routledge. London, 2021), 11, at 1-25.

38 CNPC. ' Special Report: Yamal LNG Project Completed and Put into Operation', CNPC, published 2018,accessed 28 August 2023.

39 L. Zhao, 'Russia's Energy Strategy Adjustment and the Update of the Sino-Russian Energy Cooperation Agenda under the Dual Impact', *Northeast Asia Forum* (2023) 86-97.

40 The Arctic, 'Think Arctic conference participants to discuss Russia-China cooperation in the Arctic', The Arctic published on 26 May 2022, accessed 21 August 2023.

41 The Arctic, 'Russian ambassador to China: Beijing attaches great significance to the Arctic', The Arctic, published on 10 February 2023, accessed 21 August 2023.

has also responded positively to the attitude of the Russian side, not only strengthening its energy cooperation with Russia, but also signing a series of agreements with Russia to deepen Arctic cooperation, opening up cooperation in various new fields, including the Arctic shipping routes.

(D) POTENTIAL RISKS ASSOCIATED WITH CHINA'S PARTICIPATION IN ARCTIC ENERGY DEVELOPMENT

(1) Geopolitical risks

With Russia's increasing emphasis on the Arctic, the United States has also significantly adjusted its Arctic strategy. In October 2022, the US government released a new version of the Arctic Strategy, namely, its *national strategy for the Arctic region*[42]. The report assesses the increasing strategic competition in the Arctic region and claims that the United States, as an Arctic state, bears responsibility for the management and protection of the region against the backdrop of intensified competition in the Arctic region by countries such as Russia. The United States will enhance its ability to defend Arctic interests, contain threats faced by its homeland and allies, and reduce the risk of accidental escalation. The report particularly emphasizes the security issues of the United States' interests in the Arctic, making security the first pillar of its four pillars. To ensure security, the United States will strengthen its military presence in the Arctic region and take security measures with allies and partners to protect common interests.[43]

Therefore, the Biden administration has engaged its allies and partners in regularly holding joint military exercises in the Arctic region, expanding NATO's influence in the region. The future confrontation between Russia and the United States in the Arctic will continue, and geopolitical risks will gradually increase. In addition, once Sweden successfully joins NATO, a new geopolitical alliance will emerge among the Arctic countries, with seven out of eight Arctic countries forming an alliance with NATO, forming a situation where the Arctic 7 of NATO confront Russia.[44] The internal rift between Arctic countries seems to be growing, and the NATO oriented Arctic countries will also cause Russia to be more vigilant and even resistant, thus posing greater uncertainty for the stability and peace of the Arctic region.

(2) Changes in Arctic cooperation

Currently, Western countries have interrupted almost all bilateral and multilateral cooperation with Russia in Arctic affairs. Not only has Russia been excluded from the Arctic Council, but the previously well-developed offshore oil exploration cooperation between Russia and Norway has also been forcibly suspended. Germany's Siemens,

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[42] The White House, 'National Strategy for The Arctic Region', published on October 2022, accessed on 23 August 2023.

[43] Ibid.

[44] L. W. Brigham, 'Ten ways Russia's invasion of Ukraine impacts the Arctic and the world', The Hill, published on 15 November 2022, accessed 24 August 2023.

France's Total and Technip, as well as Japan's Mitsubishi Corporation, have also withdrawn from Russia's Arctic LNG 2 Project due to enormous pressure.[45] Russia has currently shifted its Arctic cooperation direction to China. Taking into account the strong willingness of both China and Russia to cooperate in energy, the future energy cooperation between China and Russia will continue to deepen.

At the same time, China's energy cooperation with other Arctic countries has not made breakthrough progress. Under such circumstances, China is likely to form a model of participation in Arctic energy resource development that focuses on cooperation with Russia in the future. However, this mode of participation that focuses on cooperation with Russia may continue as Russia's isolation situation continues, causing China to face the problem of being forced to bind Russia and lacking the participation of other international forces.[46] This will not only make China more dependent on Russia for energy, but will also make China's Arctic energy cooperation have to bear more risks.

(3) The high cost and difficulty of Arctic energy development

The development of Arctic energy depends significantly on its profitability. The harsh natural environment and extreme weather in the Arctic region often require special equipment to ensure the safety and sustainability of energy extraction in the Arctic. Taking oil and gas as an example, the Arctic still experiences very low temperatures despite the warming trend, making it difficult for ordinary oil and gas extraction equipment to operate normally. Oil and gas extraction equipment needs to be specially designed to withstand severe cold temperatures. The soil conditions in the Arctic region are harsh, and additional site preparation is also required to prevent equipment and structures from sinking.

Due to the complexity of technology and environment involved in development, there is also a high risk of project delays and cost overruns. In addition, the Arctic region is located in a remote and sparsely populated area, with relatively backward transportation infrastructure and high transportation costs for oil and gas. The use of ice breakers also increases transportation costs, making the transportation of oil and natural gas to the final market a major challenge. At the same time, the labor force in the Arctic region is scarce and limited by harsh environments, resulting in higher salary requirements for employees, which also increases the cost of energy development.

(4) Strict environmental requirements

The ecological environment in the Arctic has extremely weak self-repair and regulation capabilities. In order to reduce the impact of energy development on the environment, Arctic countries have formulated strict environmental laws and regulations. In the process of energy development, in the event of accidents such as oil and gas leaks, not

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[45] M. Humpert, 'France's Technip To Complete Exit From Arctic LNG 2 Project in First Half of 2023', published on 25 October 2022, accessed 24 August 2023.

[46] Y. A. Jing, 'China's participation in oil and gas cooperation in the Arctic: progress, challenges, and countermeasures', *International Petroleum Economics* (2022) 12-17.

only is the cost of cleaning very expensive, but it will also cause serious damage to the flora and fauna of the region, threatening the Arctic biodiversity, including tundra vegetation, reindeer, polar bears, seals, whales, and other Arctic marine organisms, causing a devastating blow and irreparable impact.

Secondly, the shipping industry in the Arctic also has an impact on the natural environment and ecosystems due to greenhouse gas emissions. Currently, Arctic countries such as Finland and Russia have developed large transport ships and ice breakers powered by natural gas or nuclear energy, with the aim of reducing their impact on the Arctic ecosystem. Even so, resource development in the Arctic region has been facing opposition from environmental organizations and indigenous peoples, with protests continuing. Affected by environmental protection, China's energy extraction will face greater pressure.

(E) THE FUTURE PATH OF CHINA'S PARTICIPATION IN ARCTIC ENERGY DEVELOPMENT

The geopolitical situation in the Arctic region is clearly warming up. Although China does not want to see the escalation of confrontation between the United States and Russia in the Arctic, the politicization of development in the Arctic region is inevitable, and maintaining a low level of conflict in the Arctic region will be a more realistic choice.[47] In promoting the resolution of the Arctic issue, China should have a clear stance: stand on the position that the global destiny is connected, actively coordinate with all parties in the Arctic to calmly resolve conflicts, unite with more countries to improve multilateral international governance in the Arctic, and promote the opposite direction of the Arctic issue towards dependable legal regimes and justice. Moreover, the current close cooperative relationship between China and Russia has raised concerns among other Arctic countries.[48] China needs to pay close attention to the dynamic changes in other Arctic countries' perception of China in the Arctic. While deepening energy cooperation with Russia, China needs to pay more attention to the dynamic changes in other Arctic regions' perception of China in the Arctic, and strengthen cooperation with Nordic countries and Europe in the Arctic region, striving to develop friendly and cooperative relations with more countries.

Secondly, the harsh natural environment in the Arctic region poses very strict technical requirements for energy extraction and transportation. In order to save costs and better develop Arctic energy resources, China needs to strengthen the promotion of scientific and technological development and cooperation. The Chinese government can increase funding for scientific, technological, and equipment research and development, introduce measures to encourage enterprises to participate in the research and development of Arctic energy science and technology, and actively strengthen scientific and technological cooperation with countries around the world, such as in the fields of technical equipment such as ice breakers, anti-ice tankers, and search and rescue

47 Y. Wei, & W. H. Chen, 'Research on energy issues in the arctic region', *Globalization* (2021) 97-109.

48 A. P. MacDonald, 'China-Russian cooperation in the Arctic: A cause for concern for the Western Arctic States?', *Canadian Foreign Policy Journal* (2021) 194-210.

equipment, and Finland, Norway, Russia, etc., to enhance technological capabilities. At the corporate level, Chinese energy companies can actively learn from international energy companies, learn from their rich technical experience, and learn from their advanced management models. On the other hand, China can also promote exchanges between scientific research institutions among countries, improve the talent training system, increase talent training, and provide more talents for energy development.

In addition, China needs to pay attention to the issue of energy equity. The Arctic has a strong focus on energy equity, which is giving indigenous peoples and local communities access to safe, affordable and sustainable energy while protecting the environment.[49] In terms of Arctic energy development, China not only needs to effectively protect the fragile natural environment of the Arctic and reduce environmental pollution, but also protect the historical and cultural traditions of local indigenous peoples and respect the rights of Arctic indigenous peoples. Before carrying out relevant economic development activities, China must investigate and understand these rights in detail. In the process of energy development, the Chinese government should provide standardized guidance and national review for corporate investment processes to reduce the adverse impact of economic development activities on indigenous peoples. At the same time, Chinese companies must always maintain communication and exchanges with Arctic indigenous communities, pay close attention to the interests and needs of local indigenous peoples, and actively fulfill corporate social responsibilities to help establish a good national image internationally.

(F) CONCLUSION

China is currently in a period of economic transformation and massive energy consumption, and its demand for energy is huge. For a long time, China has had to import large amounts of oil and natural gas from other countries. Taking into account factors such as energy transportation security, energy source security, and energy pattern security, China has been trying to enrich its imported oil and natural gas energy sources. As climate change makes it possible to exploit Arctic oil and gas resources, China has also set its sights on the Arctic. In recent years, China has been actively carrying out energy cooperation projects in the Arctic region. Unfortunately, most of China's energy cooperation projects in the Arctic have failed to achieve expected goals, and in particular, none of the energy projects in Greenland have achieved actual output. Currently, the most well-operated and productive project in the Arctic that China has is the Yamal LNG project in cooperation with Russia. After Russia was sanctioned and ostracized by the West for its invasion of Ukraine, Russia chose to further strengthen Arctic energy cooperation with non-Western countries, especially China. Faced with Russia's enthusiasm for cooperation, China has also chosen to further deepen energy cooperation with Russia.

However, this does not mean that China's Arctic energy development will be smooth sailing. In fact, the current development of Arctic energy resources is faced

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49 D. McCauley, et al, 'Energy justice in the Arctic: Implications for energy infrastructural development in the Arctic', *Energy Research & Social Science* (2016) 141-146.

with two major long-term problems. First, the special natural environment of the Arctic makes development very costly, difficult, and technically demanding. Second, due to the fragile ecological environment of the Arctic, the Arctic's Energy development faces great environmental pressure. In addition, coupled with the current low period of international cooperation in the Arctic and the increasingly complex geopolitics of the Arctic, these have greatly hindered Arctic energy cooperation between China and Russia. If China wants to better promote China-Russia Arctic energy development, it must increase investment in talent training and technology updates, resolve technical pressures, cost pressures, and environmental pressures, and coordinate relations with various stakeholders. Finally, considering China's long-term interests, while deepening energy cooperation with Russia, China can also actively seek to strengthen energy cooperation with Nordic countries in the Arctic region, strive to expand the scope of energy cooperation partners, and always adhere to the principle of economic efficiency and environmental justice in the process of energy cooperation.

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International cooperation in the Arctic region: a tool to defuse tensions?

Irene Ballesteros[*]

Abstract: The current war in Ukraine and the subsequent tensions between NATO and Russia have become the focus of global attention and understandable concern. Simultaneously and unbeknownst to many, this armed conflict is quickly turning the Arctic into a hot spot, thus threatening one of the most sensitive and relevant regions in the world. Plenty has been written about how the war in Ukraine is impacting international relations in the Arctic, to the point that the so-called "Arctic exceptionalism" may be coming to an end. However, it is perhaps time to ask ourselves what the Arctic can do for Ukraine and the global situation. What the Arctic equilibrium achieved hitherto could offer to de-escalate tensions in Ukraine and to defuse current global threats? If the Arctic nations have been able to maintain until recently a unique model for diplomatic, economic, environmental and social cooperation through the unparalleled body that is the Arctic Council, could it be possible for dialogue between all Arctic states (including the Russian Federation) to resume around an issue of common interest to them all in the Arctic region? Could this eventually help preventing the menacing tensions in the Arctic while also serving to de-escalate the conflict in Ukraine? The answer could be what the author of this paper refers to as "the Arctic Model" [1], a proposal for tension defusing and conflict transformation tailored made tool based on the successful cooperative dynamics in different fields chiefly in the science diplomacy sphere , followed, for decades and until very recently, by the States, indigenous communities and governing institutions of the Arctic region.

Keywords: geopolitics Russia Arctic exceptionalism Ukraine war Arctic Model Arctic cooperation science diplomacy

(A) INTRODUCTION

A set of events took place in Ukraine from late 2013 to early 2014 that opened Pandora's box in Europe. These included Ukrainian President Viktor Yanukovych's refusal to sign the EU Association Agreement in Vilnius (Lithuania) in November 2013, the subsequent "Maidan Revolution" in Kyiv and Russia´s annexation of Crimea in March 2014. These were followed by the uprising of Moscow-backed separatists in Donetsk and Luhansk regions, the Ukrainian secret service Anti-Terrorist Operation (ATO) declared in Donbas turned later into Ukrainian Military Joint Forces Operation under the Ukrainian Ministry of Defense, plus the change in Ukrainian leadership in 2019, leading all to a dangerous raise in tensions between the Russian Federation and NATO-backed Ukraine. On 24 February 2022, Russia invaded Ukraine sparking a dreadful, bloody, armed conflict. The

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[1] The "Arctic Model" as a tool for conflict management/transformation is part of the author´s doctoral research work which is currently under development and will yield results in the coming future.

repercussions of this war at many levels worldwide are countless, greatly aggravating a global food crisis that extended with the COVID-19 pandemic and is growing into a magnitude still difficult to assess fully.[2]

A place of particular importance and where the Ukrainian conflict is reshaping the fragile system of relations that has allowed maintaining —until very recent times— a model of *Entente Cordiale*, is the Arctic region. For years, the Arctic has been an oasis in the international panorama thanks to the so-called "Arctic exceptionalism" that has long been the normative concept outlining the Arctic region as a unique space enjoying a sort of immunity from many of the world's main geopolitical struggles.[3] However, this status is being seriously challenged now to the point that experts in Arctic law, science, security, and cooperation wonder whether the effects of the conflict in Ukraine have brought the mentioned Arctic exceptionalism to an end.[4] This paper will explore different scenarios to answer this open question.

(B) THE SITUATION IN THE ARCTIC REGION

It is essential to outline a general picture of the Arctic region before entering into the main analysis of this question.

(1) The Arctic region: What are we talking about?

As the European Environment Agency defines it, the geopolitical "Arctic is formed by the partly ice-covered Arctic Ocean and land areas of the surrounding eight Arctic States: the "Arctic Five"–Canada, Denmark (i.e. the Faroe Islands and Greenland), Norway, the Russian Federation, and the US (Alaska) — plus Finland, Iceland, and Sweden, as well as their shallow sub-regional seas".[5] All these States have their capitals located well outside of what is considered the Arctic region geographically. This frozen part of the world is populated by four million people, most of whom settled in northern Scandinavia and Russia. This includes over forty indigenous peoples with the Sami, the Inuit, and the Nenets among them.

The strategic importance of this region has grown due to increased access to natural resources through new transport routes, as sea ice blocks melt sooner and snow conditions undergo rapid change. Economic developments are as well accelerating dramatically. Some would celebrate these developments as beneficial for the region and the world, while others vigorously wave a red flag arguing that if this changing scenario

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[2] Infographic "How the Russian invasion of Ukraine has further aggravated the global food crisis" https://www.consilium.europa.eu/en/infographics/how-the-russian-invasion-of-ukraine-has-further-aggravated-the-global-food-crisis/s

[3] Transatlantic relations. Arctic and world order

[4] Tomasz BRAŃKA Uniwersytet im. Adama Mickiewicza w Poznaniu https://orcid.org/0000-0002-0011-1240. DOI : 10.14746/ps.2022.1.22

[5] Eee.europa.eu.publications. The arctic environment. Framing the European Arctic.

is not managed carefully, the repercussions for the Arctic's fragile environment could be the beginning of the end for the planet as we know it today.[6]

Since Mikhail Gorbachev's 1987 Murmansk speech referring to the Arctic as a "zone of peace", this region "has been considered an exceptional 'area' of peace and cooperation in security studies" hitherto.[7] However, as Exner-Pirot suggests, the Arctic exceptionalism is not a static idea[8], but rather the result of the efforts by the Arctic international society to form an order aimed at promoting norms and institutions rarely seen before: a sort of "negotiated exceptionalism"[9]. The main piece of this game of implausible juggling is a body of unparalleled nature: The Arctic Council. This was established in Ottawa on September 19, 1996, as a high-level intergovernmental forum to enhance cooperation, coordination, and interaction among the Arctic States "with the active involvement of Arctic Indigenous Peoples and other Arctic inhabitants on common Arctic issues"[10]. It is important to remark again that this body has been a model for diplomatic, economic, environmental, and social cooperation ever since. But the consequences of the conflict on Ukraine have dramatically changed this outlook.

In order for us to understand better the situation in the Arctic we can refer to the words of Professor Klaus Dodds[11], who stated that "Geopolitics of the Arctic is not the same as Arctic geopolitics". According to him it is important to make this distinction, because the first one is determined by geographical and/or political criteria; while the second owes much of its impact to what he calls: the "narrative power". According to Professor Dodds, this "narrative power" speaks to us of two clearly identifiable lines: the so-called "Arctic exceptionalism" on one hand, and the geopolitics of the great powers, on the other. Authors like Pavel Devyatkin point out to the open clash of both concepts

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6 The distant dream of fully navigable routes across the North Pole is fast becoming a reality. The Northern Route that borders the Russian coasts is the most realistic, and actually the most used one. It is followed by the Northwest Route that goes from Alaska to Canada. In the future, with a completely thawed North Pole, the Central Route that would go from the Bering Strait to Iceland and from there to Europe, thus offering another option that could transform world trade in the near future. The struggle to dominate the maritime trade routes in the Arctic, together with the possibilities of exploiting energy resources that open up with the rapid thaw are two of the reasons for the growing international tensions in this region. It is estimated that the Arctic region could house up to 22% of the world's oil reserves, half of which would be in Russian territory. As for gas, it is estimated that 30% of the world's reserves would be found under the Arctic ice, 80% of all these resources being found offshore, on the continental shelves or on the seabed. Minerals such as gold, lead, nickel, platinum, silver, tin, molybdenum and diamonds are also found in the seabed or in Arctic mines, but they are still very difficult to access. Fishing must be added to the list, with current catches accounting for nearly 4% of world fishing and with an exponential increase once the Arctic ice melts. Following these developments, some experts warn of a potential Arctic Gold Rush, "with states competing against one another to exploit oil and gas reserves and to claim the natural resources in sea areas by expanding the legal definition of the outer limits of their continental shelves".

7 Gunhild Hoogensen Gjørv, Kara K. Hodgson. "Arctic exceptionalism or 'comprehensive security'? Understanding security in the Arctic". 2019.

8 The Arctic Institute. Regional Order Arctic Negotiated exceptionalism

9 Exner-Pirot, H., & Murray, R.W. (2017). "Regional Order in the Arctic: Negotiated Exceptionalism". Politik, 20(3).

10 The Arctic Council History. Arctic-council.org

11 Klaus Dodds, "La Geopolítica del Ártico". CIDOB International Yearbook, ISSN 1133-2743, No. 1, 2021, pp. 144-145

nowadays.[12] Some would argue against that reflection. But, what seems clear to all is that the Arctic is a vibrant chessboard, on which some of the most improbable geostrategic, environmental, economic, legal and international cooperation games have started being played.

(2) Since the Ukraine conflict started

On top of over 6 million refugees having fled Ukraine (UNHCR reports),[13] and 5.1 million of internally displaced people in the country (IOM reports)[14], the consequences of the Ukraine conflict have affected an estimated 1.5 billion people in need of food supply and fertilizers worldwide. Their access to these was interrupted by the conflict in Ukraine, also driving up the prices of gas, oil and other raw materials everywhere as well as leading to a global inflation of uncertain proportions.

As far as the consequences of the war in Ukraine on the Arctic region is concerned, we are currently witnessing one of the deepest rifts in circumpolar relations and in the cooperation in the northern region since the Cold War. Finland entered NATO and Sweden requested to join too. In addition, Russian so-called "hybrid tactics" have raised the level of alarm in NATO members like Norway and nearby states[15].

Furthermore, the Arctic Council´s functioning has been strongly shaken. Even though this body has no authority to make binding decisions, since its foundation it has evolved into the cornerstone of the Arctic institutional panorama, the major producer of knowledge about the environmental changes in the Arctic and a platform for Arctic science-policy dialogue, and the biennial meeting place for Arctic ministers of foreign affairs. The Arctic Council have never dealt with military matters and its main focus have been the environmental protection and sustainable development in the region. However, on June 2022, the Arctic Council issued a joint statement on 3 March 2022 —as a response to the Russian invasion of Ukraine— calling for a strategic pause in the works of the Council and its subsidiary bodies as "modalities for future cooperation in the Council are being considered". Three other Arctic diplomatic institutions have followed suit: The Nordic Council of Ministers, the Council of the Baltic Maritime States and the Euro-Arctic Council of the Barents Sea. A limited resumption of the Arctic Council´s works in projects that do not involve Russia´s participation was announced later on. But with Russia out of the game, "Technically speaking, there's no 'Arctic Council' as it is reminded by Svein Vigeland Rottem, senior research fellow at the Norwegian Fridtjof Nansen Institute.[16]

Under this situation, Professor of International Law Luis Valentín Ferrada, wonders to what extent the effects of the war in Ukraine are making the end of the Arctic exceptionalism a reality and whether we must now "choose carefully our partners when making decisions

[12] Pavel Devyatkin (2023) "Arctic exceptionalism: a narrative of cooperation and conflict from Gorbachev to Medvedev and Putin", The Polar Journal, DOI: 10.1080/2154896X.2023.2258658

[13] Ukraine Refugee Situation. Operational Data. UNHCR

[14] Migration Portal Data. Internal Displaced People. Ukraine Crisis Movements

[15] The Russian Arctic Threat: Consequences of the war in Ukraine . Center for Strategic and International Studies

[16] Rottem, S.V. (2020). "The Arctic Council: From Environmental Protection to Geopolitics". In: The Arctic Council. Palgrave Pivot, Singapore. https://doi.org/10.1007/978-981-13-9290-0_1

about Polar governance”[17]. This question is not a trivial one, given the situation of polarization and growing tension that Europe, and by extension the world, is experiencing.

Despite the current state of affairs, the Arctic Council should be still considered an exceptional benchmark with a clear goal.[18] Its exceptionalism differs from the one of the Antarctic Treaty System (ATS) and the Antarctic Treaty Consultative Meetings (ATCMs) in the fact that in the Arctic region the national law of the Arctic States prevail. There is no “Arctic Treaty” to legally regulate in a comprehensive manner the interaction of the Arctic actors. Despite that, the Arctic international community, through the Arctic Council overall, has successfully managed all this time to articulate a peaceful, somehow organized interaction of the Arctic States and actors in the region. This is indeed exceptional. So the Arctic Council is a real referent; albeit perhaps a too passive one nowadays. The Norwegian presidency of the Arctic Council has ascertained that its top goal is to ensure that “the Arctic Council survives”. This body, as well as the Arctic International community, is no stranger to the hazardous international reality and, like any international and multidisciplinary body that lends itself, proves its ability to react in moments of danger, be it true or perceived.

(C) EXPLORING FUTURE SCENARIOS IN THE ARCTIC COUNCIL

As a simile with the human body and the animal world in general, the body we have been referring to (the Arctic Council) should adopt a response to an unexpected situation that can change its reality in a sudden and irreversible manner. The fight or flight reaction is a physiological response to the perception of harm, attack, or threat to survival. It was first described by Walter Bradford Cannon,[19] stating that animals react with a general discharge from the sympathetic nervous system, preparing them to freeze, flee or fight.

What will be the Arctic community’s reaction, through its flagship the Arctic Council, to the current state of affairs? Will it freeze, flee or fight?

(1) **Freeze: Maintaining the status quo**

The world´s main powers have their eyes on the Arctic Council. Its movements could set the course in that region. Worryingly so, it seems that the path of schism is prevailing. However, a successful management of the Arctic challenges does not seem possible without Russia. An efficient and sustainable governance of the Arctic is essential, and this must necessarily be based on cooperation. It has been the cooperative and peaceful environment in the hostile lands of the North Pole that allows efficient management of the environment and its resources. However, the negative effects of the Ukraine conflict on Arctic governance, research, diplomatic, scientific and economic activity will only dramatically increase over time. So far, the fact that the remaining seven Arctic States

[17] Luis Valentín Ferrada Walker. Lawyer and International Law Professor. University of Chile. “Emails exchange with the cited Professor”

[18] About the Arctic Council. Arctic Council .org

[19] Brown TM, Fee E. Walter Bradford Cannon: Pioneer Physiologist of Human Emotions. Am J Public Health. 2002 Oct;92(10):1594 5. PMCID: PMC1447286.

denouncing Russia have suspended all activities related to the Arctic Council indicates a rapid change that seriously challenges Arctic governance.

The decision of the Arctic Council to keep a low profile by minimizing or even avoiding any kind of cooperation with Russia could be well interpreted as a freezing strategy that could in fact work. It is perhaps a way to maintain the current status quo: to continue functioning but without engaging Russia (or not too much, *a priori*, although the Central Arctic Ocean (CAO) fisheries agreement in late November 2022 was adopted by consensus by all Arctic States, including Russia, as it is reminded by Timo Koivurova and Akiho Shibata).[20]

At the moment it seems plausible, but for how long? Freezing, not moving, is an action in itself. A reaction of sorts that helps setting the path. This perspective could be effective with the aim of gaining some time though time is precisely what we are short of if we want to prevent an escalation of the conflict in the Arctic region.

(2) **Flee: Can the Arctic Council survive?**

The loss of human lives in the conflict in Ukraine is increasing. The images of massive destruction and unbearable suffering of civilians follow one another in the Western public opinion. Under this panorama, re-evaluating the situation and considering options for cooperation becomes more difficult every day. In this scenario, can the Arctic Council survive? And if so, which role will it be able to play?

As tension grows, some authors believe this will bring back the Cold War dynamics, when "the Arctic was divided into two armed camps and regarded largely as a theater of operations for advanced weapons systems"[21]. Indeed, there is a growing tendency to look at the Arctic as a field to exercising power politics. The Arctic Council is compelled to reduce its activity to a minimum or even stop existing as we know it today. Perhaps the dissolution of the Arctic Council could be contemplated as a flee response. The Arctic would again be a space without a common system to operate under. Some may want to build cooperation without Russia, though realistically speaking, Moscow controls more than 50% of the Arctic landmass and waters so, how can any being survive being stripped of half of its own self? Without half of the Arctic territory, the risk of militarization of the area could be exponential and could also lead to the infeasibility of fair, efficient and effective management of the new maritime routes that are opening up and of mineral and fishing resources, not to speak about the impossibility to share key data for preserving environment and biodiversity in the Arctic Ocean.

(3) **Fight: From Armed Conflict to Cooperation**

Gunhild Hoogensen Gjørv and Kara K. Hodgson highlight that, from the security perspective, considering the Arctic as an exceptional region could imply a risk in itself.[22]

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[20] Timo Koivurova and Akiho Shibata. "After Russia's invasion of Ukraine in 2022: Can we still cooperate with Russia in the Arctic?" March 17 2023. Cambridge University Press.

[21] Ran Young. "Can the Arctic Council Survive the Impact of the Ukraine Crisis?" December 2022

[22] Gunhild Hoogensen Gjørv and Kara K. Hodgson, "'Arctic Exceptionalism' or 'comprehensive security'? Understanding security in the Arctic"

The Arctic States sharing this privileged region are interconnected in a way that expose them directly to the potential menace of aggression by one of the neighboring nations in the Arctic region, should the Ukraine conflict dynamics reproduce themselves there, while at the same time preventing them from promptly implementing a well-designed military response. Military offensive-defensive actions in the Arctic scenario would ultimately be the literal expression for the "fight reaction".

Western countries agree on branding the Russian Federation and its allies as the common enemy, but, in the Arctic region, does the fighting reaction necessarily have to be a literal battle against Russia in Arctic forums?, or should the fight be aimed at the survival of the Arctic? Perhaps it is time to recalculate the battlefield and the objective and begin to join efforts to protect the environment of peace and cooperation in this unique polar space. Interestingly enough, Michael T. Bravo reminds us that scholars treat the Arctic "as a regional security complex with its own, independent, political calculus that is poorly explained by conventional realist theories of international relations"[23] adding Exner-Pirot that "the Arctic is exceptional in that the environmental sector dominates circumpolar relations," making it, indeed, a regional environmental security complex.[24]

The *fighting reaction* can also encompass seeking solutions that do not imply military force but rather prevent conflict through cooperation. Opting for this option as the most plausible one, again several positions can be deployed:

(a) Rethinking the Arctic legal framework

The Arctic is essentially a maritime, frozen space, ruled by International Law, being the UN Convention on the Law of the Sea (UNCLOS) of 1982 the main foundation of legal order. In addition, it is regulated by different regional systems, as Elena Conde explains, (particularly the Law of the European Union in some Arctic States), and the internal law of the Arctic States together with the aboriginal customary law of the indigenous populations of the Arctic[25].

As established by UNCLOS, the five Polar States that border the Arctic Ocean have the right to establish their territorial sea up to 12 nautical miles and an exclusive economic zone up to 200 nautical miles. This regulation assures the said Arctic States sovereign rights to exploit the resources of the sea and the oceanic floor, including the subsoil.

This implies that, unlike the system of the Antarctic Treaty that regulates the antagonistic polar space, there is no single legal regime for the Arctic region, but rather a plurality of regulations. This amalgamation of disparate standards makes it difficult to articulate legally binding decisions on an area generating new needs for governance, what has been called the "new Arctic" and the increasing need to explore the prospects for

[23] Michael Bravo, "The Postcolonial Arctic" (2015).

[24] Heather Exner-Pirot, "What is the Arctic a Case of? The Arctic as a Regional Environmental Security Complex and the Implications for Policy" Polar Journal 3, 1 (2013): 121-22.

[25] Elena Conde, (2017) pag 410. Instrumentos y regímenes de cooperación internacional / coord. por Carmen Pérez González, Alicia Cebada Romero; Fernando M. Mariño Menéndez (dir.), 2017, ISBN 978-84-9879-718-3, págs. 407-426

the development of an "Arctic regime complex" that encompasses a sizeable collection of individual elements not related to one another in any hierarchical fashion and likely to increase during the coming years.[26]

(b) Back to Cooperation

The current panorama of open warfare, although geolocated for the moment in Ukraine, extends its tentacles to almost every corner of the socio-economic, political, diplomatic, and virtual world that we know. International research and scientific cooperation spheres are no stranger to this either. In fact, one could say that more than collateral damage, scientific cooperation and environmental protection is a clear victim in this armed conflict, as we have witnessed on the Black Sea since Russia's annexation of Crimea in March 2014 and to present (i.e, Kakhovka dam).

Professor Lassi Heininen, a prominent defender of the Arctic exceptionalist thinking, reminds us that, like in the Arctic, in every tensioned area or conflict scenario there are always common interests. In this sense, He states that "there are other regions that share common interests and cooperate between major powers that, in other instances, behave more belligerently towards each other. In this light, the Arctic is just one of many political contexts in which such cooperation in common interests exist."[27] The exceptionalism of the Arctic region is not rooted in politico-military relations ongoing in the area, but rather on the ecological, environmental, resource-like value hidden on and under its frozen waters and territory. In fact, apart from the Antarctic, no other region in the world has the capacity to influence so dramatically on the marine streams through the rapid Arctic ice melting falling into the ocean waters, with the potential for climate disaster worldwide. Therefore, in this very region, how and for how long can the Arctic International Community (through its main body the Arctic Council) sustain the current and previously mentioned disruptive cooperation policy? In this sense, it is worth highlighting the key finding mentioned in the JUSTNORTH Arctic Governance Policy Brief when it says that "institutions within which decision-making takes place — both democratic/representative and technical/expert— are among the most important avenues for conflict resolution".[28]

Nowadays, environmental protection continues to be a powerful tool for academics, scientists, researchers, diplomats and experts in peace negotiations when trying to articulate a reset of international relations. In particular, the effort to seek solutions to bitter political conflicts through science and the environment is framed within disciplines such as the so-called Environmental Peacebuilding or Science Diplomacy, a direct support of diplomatic processes combining science, technology and international relations in order to meet global interests, increase prosperity and promote understanding between countries, regions, societies and parties to a conflict.

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[26] Oran R. Young (2012) "Building an international regime complex for the Arctic: current status and next steps". The Polar Journal, 2:2, 391-407, DOI: 10.1080/2154896X.2012.735047

[27] *Supra note 22*, p.225.

[28] https://justnorth.eu/wp-content/uploads/2023/03/JUSTNORTH_POLICYBRIEF-6_FINAL.pdf

"Science Diplomacy has proven functional to balance global and common interests, encouraging scientific collaboration, and preventing conflicts even in the Cold War period"[29], reminds us Ebru Caymaz. Therefore, Science Diplomacy could be an answer. Tim Flink however advises "science diplomacy actors from democratic states and institutions, from both academic research and public policy, to stop dreaming about soft power influence on authoritarian states and regimes but rather face new geopolitical realities".[30] But perhaps we could recall Exner-Pirot previously mentioned thesis and argue that the Arctic is not only about geopolitics, but about science and global environment much more than anywhere else (amen the Antarctic region), therefore Science diplomacy may still be a relevant mediator to re-establish or redesign constructive relations in the Arctic region.

In fact, exploring conflict prevention and resolution modalities based mostly on the environment seems rather sensible and could help to allow the Arctic to continue being a model of reference, potentially serving as a guide in situations when disruption of effective channels for dialogue between neighboring powers occurs in other parts of the world bordering conflict or already turned into scenarios of active armed conflict. Such reference would entail what I call in this study "the Arctic Model".

(D) WHAT CAN THE ARCTIC DO FOR UKRAINE?

From High North News and the Center for Strategic Analysis to the EU External Action and the Arctic Institute, among others, plenty has been written on how war affects neighborly relations in the Arctic.[31] But maybe it's time to ponder ourselves what the Arctic can do to defuse the conflict in Ukraine and potentially calm the global situation.

If the Arctic, with its remarkable Arctic Council, has successfully functioned as a superb model for diplomatic, economic, environmental and social cooperation until very recently, why not using it as an opportunity to rethink global international relations in a holistic manner? Could we redirect communication between the seven NATO Arctic States and Russia around a key issue that would require cooperation from all of them? Could we still activate a new *détente* that begins in the Arctic and whose ramifications reach out to the very core of the conflict in Ukraine?

(1) **Shaping "the Arctic Model"**

As international relations in the Arctic after Russia invaded Ukraine deteriorate, the room for dialogue and cooperation narrows.[32] However, there are always common interests

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29 Ebru Caymaz.Canakkale Onsekiz Mart University, Turkey. "Science Diplomacy as a New Form of Arctic Governance". Journal of US-China Public Administration, Jan.-Feb. 2021, Vol. 18, No. 1, 16-20 doi: 10.17265/1548-6591/2021.01.002

30 Tim Flink. "Taking the pulse of science diplomacy and developing practices of valuation". Science and Public Policy, Volume 49, Issue 2, April 2022, Pages 191 200, https://doi.org/10.1093/scipol/scab074

31 https://www.highnorthnews.com/en/what-effects-has-ukraine-war-had-arctic-council

32 https://ras-nsa.ca/wp-content/uploads/2023/04/Report-on-the-consequences-of-the-war-in-Ukraine-in-the-Arctic.pdf

worth protecting in any situation of tension or conflict between parties and this is the *leitmotiv* of "the Arctic Model", which in itself is a conflict management tool, a proposal for what could be an Arctic Council´s fight reaction. Again, "fighting" understood in terms of advancing conflict prevention/management through constructive dialogue and cooperation over the aforementioned common interests, linked to environmental protection and Science Diplomacy efforts. The identification of these common interests worth protecting, requires an analysis at a higher level, thus taking a step back (zooming out) from the cause(s) that created the tension/conflict. This analysis should comprise an assessment of a range of dimensions or potential fields of cooperation such as human resources, democratic governance, policy-making, transportation, education, infrastructure building, commerce and business, environment and culture (including art and sports).

A combination of some of these fields of cooperation can likely be identified and implemented shaping a transboundary environmental initiative, potentially leading to a just, win-win framework for all actors implied. This should lead to a renewed cooperation between all Arctic States, paving the way to a restoration of the original spirit of the Arctic "savoir faire".

When carrying out the combination of dimensions, "the Arctic Model" would focus on initiatives aiming at transitioning towards climate-friendly forms of energy (now stopped due to the conflict in Ukraine) for different modes of transport, centring the attention on the socio-economic benefits for governmental actors as well as the Arctic local communities. In this sense, in the Arctic scenario, the Arctic Model would combine the environmental dimension with the field of transport, chiefly, maritime transportation as the main mean to transit the Arctic region. This would focus on biofuels and dual fuels for ships navigating the area.

Policy could be another field of cooperation taken into consideration in this scenario, to regulate initiatives for production of sustainable fuels at regional and local level. "The Arctic Model" is currently under development and will be structured following a given methodology. Such methodology comprises data collection, through interviews in situ/remote, technical reports and the analysis of different business models (e.g. Norway); dialogue, through the organization of track two modes, including stakeholders (Arctic Council, Industry, Research institutes, Indigenous representatives, among others), and development of a win-win/just framework of environmental protection for peace-preserving in the Arctic.

If, following this framework, the cooperation between all Arctic States in the Arctic region were to be resumed and the trust somehow restored, the same actors could be inclined to address the issue of environmental protection in Ukraine (e.g. the nuclear plant of Zaporizhzhia). This could ultimately lead to contributing to peacebuilding in Ukraine.

The objective of this exploratory study is to actively apply the concept —"the Arctic Model"— to other conflict scenarios. That is to say, how can a conflict in a certain region be eased through a framework applied in another region where the same actors have common interests? The Arctic Model is not limited to a closed number of dimensions but its application could be explored only in conflicts or conflictive scenarios with

certain characteristics: multidimensional conflicts where science and environment play a key role, requiring the involvement of the parties at regional level and with an active presence of the international community, as well as with the potential for economic benefits for government-level actors and local communities.

This model aims to resume dialogue and cooperation between actors to maximize resource management in natural areas where political dynamics are conflictive. Conflict and cooperation often coexist and the Arctic Model seeks to create space for such hybrid contexts when the circumstances make cooperation efforts appear *a priori* impossible.

(E) CONCLUSIONS

The war in Ukraine is impacting the Arctic region at many levels, specially reshaping the fragile power balance that existed in the region hitherto. In that sense, the challenge that Arctic governance is enduring leads to rethinking the traditional dynamics in the region. Questioning the survival of the "Arctic Exceptionalism" —envisioning the region as an "oasis of peace and cooperation" difficult to find elsewhere in the world—, is one of the first consequences that the impact of the war in Ukraine is having on international relations. The main body being affected is the Arctic Council which is currently being forced to play a different role, still to be determined.

Deriving from that, different reactions to the current state of affairs can be observed, and the question that this paper considers is what will the Arctic International Community do before the impending perceived danger: will it freeze, flee or fight? This paper has explored different scenarios that could serve as an answer to the proposed question.

Among the alternatives to face the current dilemma, a singular model is proposed: The Arctic Model that could serve as a potential instrument to redirect communication between NATO and pro-NATO Arctic States and the Russian Federation (as another Arctic State) around a common interest. The focus is the protection of the Arctic environment through the combination of different proposed fields of cooperation.

Should this model be successful, it could also be transferred to other tensioned or conflicted scenarios in different parts of the world-starting from Ukraine-, where same actors would have common interests thus allowing them to return to the negotiation table.

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Arctic governance: An analysis of a treaty-based cooperation hypothesis

Elena Kavanagh*

Abstract: This commentary focuses on the method for enhancing cooperation in the Arctic region amidst the challenges posed by global climate change, declining collaboration with Russia, and the growing influence of non-Arctic states such as China.[1] Arctic cooperation can potentially be strengthened by further developing the hypothesis by Timo Koivurova and Akiho Shibata: "Arctic cooperation based on treaties [is] more resilient than that on soft law."[2] Treaty-based cooperation has the potential to foster productive intergovernmental dialogue and ensure procedural justice for all stakeholders, even in the event of conflict escalation within and beyond the Arctic region. Negotiation and adoption of new treaties in the Arctic appear decidedly remote in the short-term future, given geopolitical tensions and mistrust among Arctic states. Nonetheless, the prioritization of treaty-based cooperation should be considered for the future models of Arctic Governance.

Keywords: Arctic indigenous Arctic cooperation Russia governance justice BRICS.

(A) INTRODUCTION

The Arctic region is undergoing rapid and substantial transformations in relation to its environmental, economic, and geopolitical aspects. This rapid change is due to increased globalization and climate warming, four times the global average.[3] The signs of climate change have increasingly become evident in recent decades, significantly impacting the lives of Arctic inhabitants and altering both ocean and terrestrial ecosystems. The melting of ice, changing snowfall, and thawing of permafrost due to climate change will likely bring a surge of economic activity in the High North.[4] The Arctic has become a zone of geopolitical tension and increased interest for both Arctic and non-Arctic entities due to the environmental changes and ongoing conflicts in other parts of the world. The Arctic Council, as the main forum for Arctic cooperation, has long opposed any proposed treaties.[5] It is now struggling to function normally without Russian participation.

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1 M. Kobzeva, 'New Arctic Seaways and the Role of China in Regime Formation', in M. Finger & G. Rekvig (eds), Global Arctic (Springer, 2022) at 315 330, [https://doi.org/10.1007/978-3-030-81253-9_16].

2 T. Koivurova & A. Shibata, 'After Russia's invasion of Ukraine in 2022: Can we still cooperate with Russia in the Arctic?' *59 Polar Record*, 2023, E12, [https://doi.org/10.1017/S0032247423000049].

3 M. Rantanen, A.Y. Karpechko, A. Lipponen, K. Nordling, O. Hyvärinen, K. Ruosteenoja, T. Vihma, and A. Laaksonen, 'The Arctic has warmed nearly four times faster than the globe since 1979', *3 Communications Earth & Environment*, 2022, [https://doi.org/10.1038/s43247-022-00498-3]; B. Wang, X. Zhou, Q. Ding & J. Liu, 'Increasing confidence in projecting the Arctic ice-free year with emergent constraints', *16 Environmental Research Letters 9*, [https://doe.org/10.1088/1748-9326/ac0b17].

4 J. Alvarez, D. Yumashev, G. Whiteman, 'A framework for assessing the economic impacts of Arctic change', *49 Ambio 2*, 2020, 407-418, [https://doi.org/10.1007%2Fs13280-019-01211-z].

5 T. Koivurova, 'Limits and possibilities of the Arctic Council in a rapidly changing scene of Arctic governance', *46 The Polar Record 2*, 2010, 146-156, [https://doi.org/10.1017/S0032247409008365].

Despite that, Russia consistently views the Arctic as "a territory of peace, stability, and mutually beneficial cooperation."[6] The desecuritization of interstate relations in the Arctic was achieved towards the conclusion of the Cold War by 1987 Gorbachev's Murmansk Speech.[7] In his speech, Mikhail Gorbachev encouraged peaceful cooperation on topics such as resource extraction, scientific exploration, issues of Indigenous peoples, environmental protection, and northern shipping routes, establishing Artic 'exceptionalism'. The main points of the Murmansk approach were a nuclear-free zone in Northern Europe, limitation of naval activity in areas adjacent to the Northern Europe seas, peaceful cooperation on the rational development of the resources of the North and the Arctic, scientific cooperation in the Arctic, environmental protection of the North, and opening of the Northern Sea Route. The commendable efforts of Michail Gorbachev have contributed to establishing the 'Arctic Peace Zone' to maintain a peaceful state of military tension in the Arctic.

(B) ARCTIC GOVERNANCE SYSTEM

The formation of the Arctic Governance system can be traced back to the inception of the Arctic Environmental Protection Strategy (AEPS) in 1991. This strategy relied on a soft-law mechanism and was designed to address the pressing environmental issues in the Arctic region, such as climate change, pollution, and habitat destruction. The AEPS was a pivotal step in establishing a framework for regulating human activities in the Arctic, and it laid the foundation for further international cooperation in this area.

Since the AEPS, there have been significant developments in the Arctic Governance system, including establishing the Arctic Council, a forum for the eight Arctic states to collaborate on issues related to the region. The other Arctic-specific forums include the Arctic Economic Council, the Arctic Coast Guard Forum, the Barents Euro-Arctic Council, the Conference of Arctic Parliamentarians, and the Nordic Council.[8] Overall, the Arctic Governance system is a "web of relations".[9] It is a "plethora of layered rules, both tacit and codified"[10], and a complex network of organizations, policies, and agreements to protect the fragile Arctic environment and ensure sustainable development in the region. As the effects of climate change continue to impact the Arctic, this system will play an increasingly important role in promoting responsible governance and safeguarding the interests of all stakeholders in the region.

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6 P. Zhuravel 'Russia's Chairmanship in the Arctic Council: Programme and First Results', *233 Research Works of the Free Economical Society of the Russian Federation [Научные Труды ВЭО России]*, 2022, 160, [https://doi.org/10.38197/2072-2060-2022-233-1-147-167].

7 Mikhail Gorbachev, *Murmansk Speech: Presentation of the Order of Lenin and the Gold Star to the City of Murmansk* (translated October 1, 1987, Novosti Press Agency, 1987), 23 31.

8 N. Jouan, T. Ogden, J. Black, C. Wood-Donnelly, and S. Coulson, 'UK Strategy for the High North: Navigating a changing environment out to 2050', RAND Corporation (Santa Monica, 2022), https://www.rand.org/pubs/research_briefs/RBA1091-1.html.

9 Hannes Hansen-Magnusson, 'The web of responsibility in and for the Arctic', *32 Cambridge Review of International Affairs 2*, 2019, 132-158, [https://doi.org/10.1080/09557571.2019.1573805].

10 C. Wood-Donnelly, 'Responsibility of and for Structural (In)Justice in Arctic Governance', in C. Wood-Donnelly, J. Ohlsson (eds) Arctic Justice, (Bristol, UK: Bristol University Press, 2023, p. 23, [https://doi.org/10.51952/9781529224832.ch002].

(C) SUSPENSION OF THE CONSTRUCTIVE DIALOGUE WITH RUSSIA

Presently, the complex regional governance of the Arctic poses significant challenges when it comes to the two key forums: The Arctic Council and the Barents Euro-Arctic Council. In March 2022, following Russia's invasion of Ukraine, cooperation in the Arctic among Western nations was suspended, leading to a loss of opportunities for international collaboration and causing procedural injustice for Indigenous peoples. [11] As a part of procedural justice, "participatory approaches as a means for just procedures in decision making thus play an important role".[12] Therefore, the suspension of cooperation has had far-reaching unjust consequences for all stakeholders in the Arctic.

The seven nations of the Arctic have decided to boycott Russia's membership in the Arctic Council, which is the main forum for dialogue in the region. This boycott has paralyzed Arctic cooperation and undermined the responsibilities of these states in many areas. It is worth noting that the Ottawa Declaration of 1996 does not contain recommendations regulating this unprecedented situation. Even if it did, this document is not a treaty and holds no legal binding.

Russia's recently implemented Arctic Policy amendments[13], set to remain in effect until 2035, demonstrate the country's prioritization of national interests and state security. As part of these changes, the Arctic Council and Barents Euro-Arctic region have been deleted from the policy's scope. Instead, Section 16 of the Arctic Policy states that increasing international economic, scientific, technological, cultural, and cross-border cooperation in the Arctic is necessary, including the qualifying requirement: "taking into account the national interests of the Russian Federation." This was followed by a subsequent withdrawal of Russia from the Barents Euro-Arctic Council with the following statement: "the responsibility for breaking down the architecture of Barents cooperation rests entirely with our 'partners'".[14] It was supplemented by a reassurance of openness to dialogue: "[w]e remain open to cooperation with anyone who is committed to constructive engagement".[15]

On May 11, 2023, Norway assumed the Chairship of the Arctic Council, succeeding Russia, and on June 8, 2023, the limited cooperation within the Arctic Council was resumed.[16] The pause in the work of the Arctic Council has been "[f]rom Norway's perspective, absolutely necessary, but it has no doubt impacted the work of the Council".[17]

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11 *Ibid*, 28.

12 A. Deplazes-Zemp, 'Challenges of justice in the context of plant genetic resources', *10 Frontiers in Plant Science*, 2019, 1266, [https://doi.org/10.3389/fpls.2019.01266].

13 Decree of the President of the Russian Federation dated February 21, 2023, No. 112 'On amendments to the Fundamentals of State Policy of the Russian Federation in the Arctic for the period until 2035'.

14 Foreign Ministry's statement on Russia's withdrawal from the Barents Euro-Arctic Council, 18 September 2023, [https://mid.ru/en/foreign_policy/rso/1904899/].

15 *Ibid*.

16 Swedish Ministry of Foreign Affairs, 'Joint Statement on the Limited Resumption of Arctic Council Co-operation' 8 June, 2022, [https://www.government.se/statements/2022/06/joint-statement-on-the-limited-resumption-of-arctic-council-cooperation/].

17 Arctic Council, An update on the Arctic Council and ambitions during the Norwegian Chairship, 15 May 2023, [https://arctic-council.org/news/q-a-with-morten-hoglund-chair-of-the-senior-arctic-officials/].

The current Norwegian Chairship presents an opportunity for the Arctic Council to reinstate cooperation for the betterment of the people in the region, with a particular focus on the youth and Indigenous peoples, and to involve them more meaningfully in the governance of the Arctic. The Arctic Council website states, "[t]he overall objective for Norway's Chairship of the Arctic Council will be to promote stability and constructive cooperation in the Arctic".[18]

It remains to be seen if Norway will be able to fulfil those objectives. At the time of this writing, Russia continues to be excluded from the spirit of constructive cooperation. In 2023, Russian representatives were not invited to the Arctic Circle Assembly in Iceland.[19] As the geopolitical situation in the world is not improving, there is a developing anxiety that Russia and East-Asian countries will establish their own form of Arctic cooperation, and NATO Arctic states remain in the Arctic Council.[20]

(D) PROCEDURAL INJUSTICE AGAINST INDIGENOUS PEOPLES

The absence of a forum for cooperation has resulted in a lack of representation and a voice for Indigenous communities, which have historically been marginalized and underrepresented. The argument for procedural injustice towards Indigenous peoples is that they were not consulted as Permanent Participants before the boycott of Council meetings. As JUSTNORTH project's Policy Brief stated, the Arctic Governance institutions "can be both facilitators/spaces and barriers for resolving conflicts".[21] Indigenous peoples are currently deprived of those spaces in the Arctic, especially the Russian Indigenous communities. As the Arctic Athabaskan Council Chair, Chief Bill Erasmus, elaborated: "[w]e want to remind all governments that the Arctic Council is the world's only forum where we, as Indigenous People have inclusion at a global level".[22] The impact of the decision to silence Indigenous peoples without asking their opinion cannot be overstated. Opting out of multilateral cooperation with Russia has severe implications on multiple fronts. The rejection to cooperate is the road back to the spirit of the Cold War but with an even higher risk of nuclear conflict.

There are 40 officially recognized Indigenous peoples in Russia; they inhabit a vast territory, covering a notable 53% of the Arctic coastline[23], which is practically equivalent

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[18] Arctic Council, Norway's Chairship 2023-2025, [https://arctic-council.org/about/norway-chair-2/].

[19] Arctic Circle Assembly, 'The 2023 Assembly Programme', [https://www.arcticcircle.org/assemblies/arctic-circle-assembly-2023].

[20] Paul, Michael, 'Arctic repercussions of Russia's invasion: council on pause, research on ice and Russia frozen out', *39 SWP Comment*, 2022, 4, [https://doi.org/10.18449/2022C39]; S. Kirchner, "Enduring Value': Preserving the Arctic Council in the Second Cold War', 5 November, 2022), [http://dx.doi.org/10.2139/ssrn.4269326]; Oxford Analytica, 'Arctic Council faces uncertain future without Russia', Expert Briefings, 2022, [https://doi.org/10.1108/OXAN-ES270735].

[21] A. Stępień, E. Conde, T. Joona & C. Wood-Donnelly, *'JUSTNORTH Policy Brief 6: Arctic Governance Institutions as Enablers and Barriers of Justice'*, 2022, [https://justnorth.eu/wp-content/uploads/2023/03/JUSTNORTH_POLICYBRIEF-6_FINAL.pdf.].

[22] Arctic Athabaskan Council, 'Press Release: Conflict Continues in the Crimean Peninsula, Ukraine', *ArcticAthabaskanCouncil.com*, February 14, 2022 (March 1, 2022), [https://arcticathabaskancouncil.com/conflict-in-the-crimean-peninsula/].

[23] Arctic Council, 'Russia and the Arctic region', [https://arctic-council.org/about/states/russian-federation/].

to half of the Arctic. Sustainable development of the Arctic and its communities is impossible without the coordinated actions of all stakeholders and the engagement of the scientific community and civil society, despite the whole range of existing contradictions. Losing years of cooperation is counterproductive, given that global efforts to combat climate change require the participation of all nations, including Russia.

To effectively tackle the multifaceted challenges encountered in this area, it is imperative to implement a holistic approach that encompasses two interdependent yet distinct strands. Indigenous peoples are highly capable of serving as mediators, negotiators, and custodians of traditional knowledge in fostering cooperation between the Arctic Seven states. Arctic governance is a multifaceted concept encompassing a range of interconnected components, including global, regional, and local institutions, agreements, and non-state actors. Indigenous actors are crucial to the process of starting the debate, building trust, and establishing sustainable cooperation. They occupy a critical position in Arctic governance, although they are often relegated to a secondary role in relation to the member states.

Nevertheless, indigenous peoples' collaboration and initiatives can potentially shape the future of Arctic cooperation. They have long advocated through the UN Permanent Forum on Indigenous Issues and worked together as Permanent Participants in the Arctic Council to foster collaboration among nations and address pressing issues such as pollution and climate change. [24] Moreover, Indigenous peoples across the Arctic share cultural connections, including traditional livelihoods, languages, and worship practices. Their holistic worldview is less influenced by political realities but rather by family, religious, and cultural ties between intertwined indigenous communities of the High North.[25]

(E) DEVELOPING SINO-RUSSIAN AND BRICS COOPERATION IN THE ARCTIC

While Russia was excluded from cooperation with the Arctic Seven, the events centered around Russian priorities continued during the Russian Chairship of the Arctic Council 2021-2023. Russia hosted 116 events in its Arctic region.[26] Participants from the Western hemisphere have elected to refrain from participating in the scheduled activities. Even though some Russian and international scholars continue to discuss the importance of the international situation around the Arctic Council[27], calling for cooperation, the

[24] 7th session of the United Nations Permanent Forum on Indigenous Issues, 21.04-2.05.2008, New York, 'Climate change, bio-cultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges'.

[25] S. Chatwood, Francois Paulette, G. Ross Baker, Astrid M. A. Eriksen, Ketil Lenert Hansen, Heidi Eriksen, Vanessa Hiratsuka, Josée Lavoie, Wendy Lou, Ian Mauro, and et al. 'Indigenous Values and Health Systems Stewardship in Circumpolar Countries', *14 International Journal of Environmental Research and Public Health 12*, [https://doi.org/10.3390/ijerph14121462].

[26] Russia's Chairmanship of the Arctic Council 2021-2023, [www.arctic-council-russia.ru].

[27] Bhagwat Jawahar Vishnu, I.V. Rogachev 'Cooperation Between Russia and Norway: Strengthening Dialogue in the Arctic' [Вестник Волгоградского Государственного Университета] *28 Science Journal of Volgograd State University. History. Area Studies. International Relations 3*, 2023, 128-136 [https://doi.org/10.15688/jvolsu4.2023.3.12]; M. Petrova, A. Shumilov, O. Shumilova, 'Geopolitical Aspects of the Redevelopment of

paradigm shift is apparent through the latest publications by Russian and Chinese scholars who continue to explore themes of developing Sino-Russian cooperation.[28] This increasing tendency intensified with the adoption of the first Chinese Arctic Strategy.[29]

In the context of the weakening activities of the Arctic Council, other forums are becoming more important. The BRICS are increasing the Arctic focus as these countries agree that isolationism can impede scientific endeavors and be detrimental to everyone.[30] The Russian side seeks prospects for Arctic cooperation within BRICS on economic development, transport, science, inter-university interaction, global climate change, and the development of Indigenous peoples and nationalities. The upcoming BRICS summit in Kazan is set to take place in 2024 under the auspices of the Russian Federation. Meanwhile, China, as the primary beneficiary of Russian economic activity in the Arctic, plays a critical role in mapping the future of the Arctic without much needed meaningful global debate. This is not an advantageous situation for any of the participants.

(F) TREATY-BASED COOPERATION IN THE ARCTIC

The hypothesis that a treaty-based regime might ensure long-term stability is essential to explore further in a more comprehensive study. Koivurova's and Shibata's preliminary study on the consequences of the recent paralysis of the Arctic Council demonstrated that the stable framework is potentially capable of ensuring ongoing collaboration and effective conflict resolution. [31] A similar strategy was offered by Finland back in 2013: "Finland supports the plan to establish the Council as an international treaty-based organization".[32] The soft-law framework in the Arctic was widely criticized by the research community for years[33], even though there were studies proving that, at the

the Russian Arctic: From Cooperation Towards Expansion', *4 Politbook*, 2022, 74-97; A. Sergunin, 'Russia and the arctic council: Toward a new cooperative agenda?' in M. Lebedeva, V. Morozov, '*Turning Points of World Transformation: New Trends, Challenges and Actors*', (Singapore: Springer Nature Singapore, 2022), 117-138, [https://doi.org/10.1007/978-981-19-1758-5_8].

[28] L. Filippova, 'Bilateral Cooperation Between Russia and China in the Arctic Against the Weakening Institutions for Regional Cooperation', *13 Russia and China: History, Future and Cooperation* [Россия и Китай: История, Перспективы, Сотрудничество], Institute of China and Modern Asia of the Russian Academy of Sciences, 2023, 473-477; S.N. Leonov, E.A. Zaostrovskikh, 'Possible Benefits and Potential Risks in Terms of Cooperation Between Russia and China in the Arctic', *13 Asia-Pacific Journal of Marine Science & Education 1*, 2023, 87-97; Zhou Geer [*ЧжоуГээр*], 'Development of the Northern Sea Route: prerequisites and factors for cooperation between Russia and the countries of North-East Asia using the example of China, Japan and South Korea [Развитие Северного морского пути: предпосылки и факторы сотрудничества России со странами Северо-Восточной Азии на примере Китая, Японии и Южной Кореи], *13 Issues of national and federal relations 1(94) [Вопросы национальных и федеративных отношений]*, 2023. V. Pryakhin, 'Russia and China in the Arctic [Россия и Китай в Арктике]', [https://russiancouncil.ru/blogs/vpryahin/rossiya-i-kitay-v-arktike/].

[29] White Paper 'China's Arctic Policy', the State Council Information Office of the People's Republic of China, Jan. 2018, First Edition 2018.

[30] Yaxin Wang, 'International Scientific Cooperation in the Arctic among the BRICS Countries' 3 Administrative Consulting, Russian Presidential Academy of National Economy and Public Administration. North-West Institute of Management, 2023.

[31] T. Koivurova, A. Shibata, *supra* note 2.

[32] Finland's Strategy for the Arctic Region 2013, Government resolution on 23 August 2013, Prime Minister's Office Publications, 16/2013, 14.

[33] T. Koivurova, and D.L. Vanderzwaag, 'The Arctic Council at 10 years: retrospect and prospects', *40 UBCL Rev.*, 2007, 121; Paula Kankaanpää & Oran R. Young, 'The effectiveness of the Arctic Council', *Polar Re-*

time, the soft-law approach was the only possible form to combat climate change in the Arctic. [34] Moreover, the soft law mechanisms, while not necessarily binding, play an integral role in the process of negotiating treaties. These agreements serve as a means of establishing a foundation for further negotiations and facilitating discussion and compromise between parties. [35] As such, soft-law mechanisms should be considered a vital component of any treaty negotiation process.

In accordance with customary international law and the 2011 Draft Articles on the Effects of Armed Conflicts on Treaties adopted by the International Law Commission[36], it is generally understood that international treaties should not be invalidated due to conflict. Article 54 of the Vienna Convention on the Law of Treaties requires the explicit provision of the treaty or consent of all the parties before termination of or withdrawal from a treaty. [37] No such internationally recognized legal justifications were engaged under the Arctic binding agreements. Therefore, if the cooperation in the Arctic was predicated on a treaty, it would have persisted despite the military conflict in Ukraine. Given that cooperation with Russia is in the best interest of the Arctic region, it is interesting to consider a theory of Mitranian functionalism[38] and draw inspiration from Russian-Japanese relations regarding the significance and nature of cooperation.[39]

After three decades, Arctic Governance soft-law mechanisms prove to be less resilient than a cooperative framework based on treaties. Even though soft-law cooperation promised to be more flexible and adaptable[40], the reality has shown a different picture. The soft-law-based cooperation within the Arctic Council was easily paused. According to T. Koivurova and A. Shibata, "if the Arctic Council were treaty-based, policy-makers and scholars would have considered it as an Arctic cooperative framework that could continue despite the Russian aggression".[41] Even though "it is not necessarily so that hard law is more effective for ensuring implementation than soft law"[42], it is noteworthy that legally binding or treaty-based frameworks are less susceptible to the Western-Russian fallout. The multiple treaties that continue being implemented in the Arctic, according to Koivuriva and Shibata, are the Polar Code 2017, the Svalbard Treaty 1920, the Central

search 31 (2012) [https://doi.org/10.3402/polar.v31i0.17176]; T. Koivurova and E.J. Molenaar, 'International governance and regulation of the marine Arctic', *Oslo: WWF International Arctic Programme*, 2009.

34 For example, W. Hasanat, 'Soft-Law Cooperation in International Law: The Arctic Council's Efforts to Address Climate Change' (PhD thesis, Lapland University Press: Rovaniemi, 2013), pp. 306+XV.

35 W. Hasanat, 'Definitional constraints regarding soft law', *AALCO Quarterly Bulletin 1& 2*, 2007, 18.

36 United Nations, 'Draft articles on the effects of armed conflicts on treaties, with commentaries', *Yearbook of the International Law Commission*, 2011.

37 Vienna Convention on the Law of Treaties, 23 May 1969, entered into force on 27 January 1980, United Nations Treaty Series 1155, 331.

38 R.I. McLaren, 'Mitranian Functionalism: Possible or Impossible?' *11 Review of International Studies 2*, 1985, 139 52, [https://doi.org/10.1017/S0260210500114275].

39 G.F. Ishkineeva, F.F. Ishkineeva 'Functionalist Approach to Explain Russian-Japanese Relations under Abe and Putin Administrations', *5 Russian Japanology Review 1*, 2022, 49-75 [https://doi.org/10.55105/2658-6444-2022-1-49-75].

40 H. Nadarajah, 'Fewer treaties, more soft law: what does it mean for the arctic and climate change', *Arctic yearbook*, 2020, 1-14.

41 T. Koivurova, A. Shibata, *supra* note 2.

42 I.F. Soltvedt, 'Soft law, solid implementation? The influence of precision, monitoring and stakeholder involvement on Norwegian implementation of Arctic Council recommendations', *8 Arctic Review on Law and Politics*, 2017, 88 [https://doi.org/10.23865/arctic.v8.639].

Arctic Ocean Fisheries Agreement (CAOFA) 2021, the Arctic Council's Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic 2011, Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic 2013, Agreement on Enhancing International Arctic Scientific Cooperation 2017, and Bilateral treaties with Russia concluded by Finland and Norway.

The Arctic region's sustainable development initiatives should be anchored on binding agreements, such as the International Maritime Organization (IMO) Polar Code. These agreements offer a more predictable future, remaining operational even during uncertain times. According to T. Koivuriva and A. Shibata, "Russia continues to participate in relevant IMO Polar Code meetings".[43] L. Brigham and J. Gamble presented 12 key strategic goals that could protect the Arctic Ocean and ensure sustainable development in the region in the study published shortly after February 2022. The authors center their argument around implementing the existing legal measures in the Arctic, developing integrated policy approaches, and expanding infrastructure investment.[44] However, most of the 12 goals are connected with implementing binding agreements that continue working despite geopolitical tensions.[45]

One possible scenario of the treaty-based regime could be the creation of the Arctic Military Code of Conduct (AMCC). With the view to continue keeping tensions under control, in the 2019 Arctic Yearbook, Boulègue and Depledge suggested adopting an AMCC as a treaty preserving the Arctic as a low-tension security environment. The nature of the AMCC was offered to be two-fold. Firstly, the instrument will define the borders of military activities in the northern high latitudes. Secondly, it will assist in creating conditions for dialogue and "lay the ground for less conflict-prone relationship between NATO and Russia in the region".[46] This could be supplemented by the "Arctic-specific agreement on nuclear safety and security"[47] that does not yet exist. However, nuclear safety was discussed in the Arctic Council's Working Group on Emergency Prevention, Preparedness, and Response, which resulted in establishing the Radiation Expert Group in 2019.

(G) CONCLUSIONS

In conclusion, climate change has brought about significant changes to the ecosystems and vulnerable biodiversity, affecting the lives of Arctic peoples, flora, and fauna. The fragmented and soft-law structure of Arctic Governance has led to procedural injustice, particularly with regard to the representation of Indigenous peoples, resulting in their invisibility. A potential solution to address the current challenges in the Arctic is to

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[43] T. Koivurova, A. Shibata, *supra* note 2.

[44] L.W. Brigham and J.T. Gamble, "Strategy for protecting the future Arctic Ocean", 35 *Oceanography* 3/4, 2022, 167 77, [https://doi.org/10.5670/oceanog.2022.131], 169.

[45] Koivurova, A. Shibata, *supra* note 2.

[46] D. Depledge, M. Boulègue, A. Foxall, and D. Tulupov, 'Why we need to talk about military activity in the Arctic: Towards an Arctic Military Code of Conduct', *4 Arctic Yearbook*, 2019, 85.

[47] M.N. Lysenko, A.N. Vylegzhanin, and O.R. Young, 'Nuclear Safety and Security in the Arctic', *Arctic Review on Law and Politics*, *13*, 2022, 191-212 [https://doi.org/10.23865/arctic.v13.3820].

strengthen the existing system of the Arctic Council through a treaty-based regime based potentially on the idea of the Military Code of Conduct.

Furthermore, the incorporation of traditional indigenous knowledge is a vital element of starting the dialogue, as the Arctic has been "home to Indigenous peoples from time immemorial".[48] Reestablishing cooperation among the Arctic states is a crucial task that demands time and effort. However, this initiative could bring about groundbreaking concepts into the realm of Arctic international law. Climate change and security concerns in the region are the primary factors driving the need for cooperation.

On the other hand, the tensions due to the conflict in Ukraine and subsequent sanctions would likely make restoring cooperation with Russia impossible due to mistrust. In that case, the Arctic Seven alone or including non-Arctic member states might consider cooperating based on a binding agreement. In predicting future scenarios of Arctic cooperation[49], whether it be a restoration of constructive dialogue among the Arctic Eight or a split into two halves, the primary focus should be environmental and scientific cooperation (Arctic science diplomacy) and addressing global climate change.

[48] E. Yua, J. Raymond-Yakoubian, R. Daniel & C. Behe 'A framework for co-production of knowledge in the context of Arctic research', *27 Ecology and Society 1*, 2022, [https://doi.org/10.5751/es-12960-270134].

[49] L. Kauppila, and S. Kopra, 'The War in Ukraine as a Critical Juncture: China, Russia, and the Arctic Collaboration up to 2035', *Arctic yearbook*, *2022*, 233-248.

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How young people would like to shape the Arctic's future and what is the policymakers' answer.

Marco Dordoni*

Abstract: Climate change impacts are of great concern to the younger generations around the world. Different global youth movements have highlighted the needs and desires of young people for an active role in decision-making for future climate resilience processes. Nonetheless, the engagement of youth in climate action plans is often marginal without any concrete support and resources.[1] This is particularly visible in the Arctic, one of the main climate change hotspots, where young people have begun to have an increasingly influential role in political decisions. This paper aims to highlight the importance of youth participation in policy-making discussions and the different means by which policymakers can support and foment this, nowadays lacking, inclusion. The study focuses on the main formal documents written by the younger generation and their role in political decision-making.

Keywords: youth   Arctic   climate change   policy-making.

(A) INTRODUCTION

The Arctic is a complex geo-political region with nearly four million inhabitants distributed over 30 million square kilometers spanning three continents and eight States. Additionally, the Arctic is home to over 40 different ethnic groups, representing 10 percent of the total Arctic population.[2] With increasing climate change impacts, Arctic governance and Indigenous engagement in the "political life of the nation states" have become international issues.[3] On one hand, the Arctic ecosystem is fundamental to the balance of all other ecosystems, both from a climatic and scientific point of view. On the other hand, the rights of Indigenous people and safeguarding their traditions are fundamental to the crystallization and respect of international law.[4]

This work focuses on young people's perspectives on the future of the Arctic emphasizing the importance of both its ecosystem and the rights of Indigenous people. In doing so, it advocates for a critical reading of the current decision-making processes which often overlook the younger generation's points of view. Therefore, this work sheds light on the perspectives of today's younger generations and future leaders, discussing

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1 United Nations Development Programme. 'Elevating Meaningful Youth Engagement for Climate Action. March 2022 text available electronically at <https://www.undp.org/sites/g/files/zskgke326/files/2022-05/UNDP-Elevating-Meaningful-Youth-Engagement-for-Climate-Action-2.pdf>

2 B.B. Michealsen *Signs of Civilisation: How punctuation changed history* (Sceptre Press, Tromsø 2022)

3 V N Snetkov et al (2020) "The Rights of Indigenous People of the Arctic and Their Implementation Challenges" IOP Conference Series: Earth Environmental Science [doi:10.1088/1755-1315/539/1/012184]

4 Arctic Centre. Arctic Indigenous People text available electronically at <https://www.arcticcentre.org/EN/arcticregion/Arctic-Indigenous-People>, accessed 12 September 2023

the need for their inclusion in current decision-making for a sustainable and resilient future.

(B) YOUTH VISIONS TO IMPROVE THE PRESENT AND FUTURE OF THE ARCTIC

The visions for the Arctic proposed by the younger Arctic generations have been analyzed in some of the main and most recent policy papers. Nonetheless, climate change impacts in the Arctic have a widespread effect on global climate.[5]

Among indigenous Arctic communities, the Yukon First Nation has always fought for involvement in Canada's national political dialogue. In 1982, they achieved equal rights to the rest of the population, including right to vote and participate in political life, through Section 35 Part II of the Canadian Constitution Act.[6] First Nations are considered to be specially advanced due to the inclusion of several generations into their political institutions. Their main organ is the Assembly of First Nations, which is the successor of the National Indian Brotherhood. In line with the systems used in the past, the Assembly of First Nations is led by the elders and sages but with a profound commitment and space dedicated to the younger generation.[7]

In 2023, the Yukon First Nation's leadership published *The Reconnection Vision,* a document establishing a climate action plan led by people under 30 years old. It lays out a vision that focuses on health, housing, food, energy, and mining as well as economics, governance structures, and education. It highlights the need to recognize the crucial role of indigenous people in restoring ecosystem diversity and in ensuring a sustainable future in face of a climate crisis.[8] The document asserts that the commitment of young members of all indigenous communities is fundamental in this transition, establishing a bridge between older and future generations and combining indigenous knowledge with modern technologies and practices.[9] Moreover, the *Vision* criticizes policymakers for focusing on greenhouse emissions as the only climate change trigger. Instead, it highlights disconnection as a key social climate change cause. More specifically, it focuses on disconnection in all spheres from the social, ideological, political, cultural, and identity. Therefore, investments in electric vehicles and solar panels are not enough.

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5 NATO Parliamentary Assembly, "*What happens in the Arctic, does not stay in the Arctic" – climate change in the Arctic will have global consequences and cannot be ignored*." < https://www.nato-pa.int/news/what-happens-arctic-does-not-stay-arctic-climate-change-arctic-will-have-global-consequences >

6 The Canadian Encyclopedia. *First Nations in Canada*. Published Online February 7, 2006 Last Edited April 5, 2023 text available electronically at <https://www.thecanadianencyclopedia.ca/en/article/first-nations>; Rights of the Aboriginal People of Canada. Constitution Act 1982 (adopted and entered into force on 17 April 1982) text available electronically at <https://caid.ca/ConstAct010208.pdf> accessed on 11 September 2023

7 Commitment to the environment and the new generations that the First Nation had since their origins in fact in 1973, a delegation went to Ottawa to meet with then-prime minister Pierre Trudeau, holding a document called *Together Today For Our Children Tomorrow*, which outlined their grievances and demands for a settlement.

8 Sachs, J.D.; Warner, A.D. *Natural resources and economic development: The curse of natural resources.* Eur. Econ. Rev. No 45/2001, 45, 827 838. [http://dx.doi.org/10.1016/S0014-2921(01)00125-8]

9 The Narwal. *'We're going to make things better': Yukon First Nations adopt youth climate plan*. 13 July 2023 text available electronically at <https://thenarwhal.ca/yukon-youth-climate-plan/>

In the face of climate change, indigenous young leaders highlight the need to implement social practices that weave together indigenous and non-indigenous knowledge and face not only the economics of climate but its profound social aspect.[10]

The union of indigenous and non-indigenous practices is also highlighted by the policy-oriented paper *An Arctic policy for young people*, published in 2020 by a government-appointed panel of Norwegian youth. This panel, composed of people between 16 to 28 years old from Nordland, Troms, and Finnmark, was tasked to provide advice and insight on a Norwegian white paper on Arctic issues and policy. This document does not only present the youth's position on different policy topics but also provides policy proposals that can be easily communicated to policymakers. The main addressed topic is the participation of young people in political life and policy-making processes, urging policymakers to facilitate a greater participation of young people: "Politicians must involve young people actively in debates, meetings and earlier stage of processes to have the chance to influence decisions [...] and ensure that proposals presented by youth movements do not just disappear under piles of papers in offices."[11] Additionally, the authors highlight the need for an active and influencing role of young people in the decision-making and political processes. The document proposes concrete actions such as mandatory inclusion of young people in the Government minister's visit to the North, resource allocation to youth councils for their participation in Arctic policy regional forums, or ensuring the involvement of youth in the preparation of future papers on the Arctic.[12] This approach would secure increased participation of youth, especially in issues of sustainability and climate change and the safeguarding of natural resources. As in the case of the *Reconnection Vision*, the position of the Norwegian youth strongly criticizes the policies proposed so far by the political deciders. However, both documents differ in that the Norwegian authors regard the social aspect of climate change as important but not essential, and instead highlight the reduction of mining and oil and gas production as the key challenge. Contrary to current policy that encourages the opening of local resources to international industries, the authors suggest a national and regional management of resources and the increment of renewable energies to counteract climate change and benefit local economies.[13]

Furthermore, the authors highlight additional major problems that affect the Arctic youth but that is also common to young generations in other parts of the world. International cooperation among younger generations, quality of life, education, and infrastructure are other topics that the authors want to emphasize as well as suggesting

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[10] "We believe quick fixes that respond to these symptoms that are rooted in consumption, such as electric vehicles and solar panels, don't go deep enough. We want to treat the root cause of climate change: disconnection." A passage based on Reconnection Vision (published 30 June 2023) text available electronically at <https://reconnection.vision/#vision> accessed 12 September 2023

[11] Members of the youth panel, An Arctic policy for young people: The youth panel's input to the Government's white paper on the Arctic, (published 2 November 2021) North Norway p. 10-11. text available electronically at <https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/nord/arctic_young.pdf> last accessed 10 September 2023.

[12] An Arctic policy for young people, p. 10-15

[13] An Arctic policy for young people, p. 6, 28; Innovation News Network, Norwegian Mineral Strategy to ramp up production of materials crucial to global industry, (published 7 September 2023) <https://www.innovationnewsnetwork.com/norwegian-mineral-strategy-to-ramp-up-production-of-critical-materials/37070/>

solutions to the political world. *An Arctic policy for young people* also includes extensively the point of view of the Sámi indigenous population. The document addresses the problems that the indigenous Norwegian population faces as their survival is at risk due to climate change effects and it proposes solutions.[14] The authors highlight the role of Sámi life and culture in Norwegian identity and urge the authorities to empower this population and widespread their knowledge to revert past policies of Norwegianization.[15] Finally, the authors also stress the importance of mental health, the inclusion of Sámi youth in the activities of other young Norwegians, and the provision of logistical and financial support to achieve this.[16]

Once we have analyzed the documents drafted by the young people organized at the national and local levels, this article moves on to the analysis of the initiatives promoted by international actors. The body most involved in youth Arctic projects is The Conservation of Arctic Flora and Fauna (CAFF). It is a working group of the Arctic Council with the mandate to address the conservation of Arctic biodiversity and to communicate its findings to Arctic governments and residents, promoting Arctic sustainability.[17] CAFF has worked for many years with young generations to create a stable platform where youth present their work directly to Environment Ministers and other authorities. Additionally, the CAFF aims to connect Arctic youth with global international youth. In May 2021, the CAFF's Youth Advisory team and CAFF's Steering Committee published the *Arctic Youth Engagement Strategy: 2021-2026*.[18] Unlike the first two documents analyzed which focus on analyzing the problems faced by the younger generations and try to provide guidelines to the authorities, this paper aims to inform

[14] T. Koivurova et al., Legal Protection of Sami Traditional Livelihoods from the Adverse Impacts of Mining: A Comparison of the Level of Protection Enjoyed by Sami in Their Four Home States. *Arctic Review on Law and Politics* (2015) text available electronically at [http://dx.doi.org/10.17585/arctic.v6.76]

[15] T.Falch, P. Selle & K. Strømsnes, The Sámi: 25 Years of Indigenous Authority in Norway, *Ethnopolitics* (2016), 15:1, p. 125-143, Text available electronally on [https://doi.org/10.1080/17449057.2015.1101846]; *Fornorsking*, is the word to indicate the «Norwegianization». It was for a long time synonymous with a policy of assimilation of the Sami minority. This policy stretches from about 1850 up to roughly 1980. Both in Norway and Sweden the Samis appeared in this period as clearly distinct people who lived in certain places in such concentrated communities that their existence was considered a problem which called for a special national policy. For this reason the authorities for more than a century implemented policies to erase this culture, eliminating all traces of this culture from schools, from the registers of the registry and forcing the Sami population to move to urban centers. It officially ended in 1997 with the Statement on the Sami People's Day. Taken from H. Minde, Assimilation of the Sami Implementation and Consequences *Journal of indigenous people rights* (2005) No. 3/2005, p. 6-13; Statement on the Sami People's Day (Delivered by Ambassador Steffen Kongstad to the Permanent Council Vienna, 6 February 2020) text available electronically on https://www.norway.no/globalassets/2-world/osce/statements/2020-02-06-statement-on-the-sami-people-day.pdf) accessed August 2023

[16] An Arctic policy for young people, p. 31.

[17] The Arctic Council is the leading intergovernmental forum promoting cooperation in the Arctic. It is composed by eight Arctic States that implement the policies in the region, six permanent participants represent the indigenous people of the Arctic, six working groups carry out the Council's activities and thirty-eight observers that share their expertise. Arctic Council official site see on https://arctic-council.org accessed 12 August 2023. E. Wilson, What is Benefit Sharing? Respecting Indigenous Rights and Addressing Inequities in Arctic Resource Projects *Mdpi Journal Resources* (2019), p. 8, 74; text available electronically at [https://doi:10.3390/resources8020074]

[18] Arctic Council & Conservation of Arctic Flora and Fauna, Arctic Youth Engagement Strategy: 2021-2026, (published May 2021) text available electronically at https://oaarchive.arctic-council.org/server/api/core/bitstreams/8110b480-4dc8-41aa-a883-b657bf8fcff0/content accessed August 2023.

the younger generation of the CAFF's commitment and position on these specific issues. While the key terms of the first two analyzed documents were "connection" for *Reconnection Vision* and "participation" for *An Arctic policy for young people*, this document focuses on "leadership".[19] Throughout the text, the authors focus on the cultivation of the next generation of Arctic leaders and policymakers capable of participating in all the phases of decision-making and in the complex scenario of diplomacy.[20]

(C) THE INSTITUTIONS' ATTEMPTS TO INCLUDE YOUNG PEOPLE IN POLITICAL DIALOGUE

This section investigates the progress made by institutions on youth issues and how policymakers are trying to create spaces for young people. Compared to the past when young generations were relegated to tasks of lesser importance and were often not given much space in international conferences and meetings, youth inclusion nowadays has been elevated both in quantity and quality. On one hand, more and more panels at international conferences are dedicated to or led directly by early-career scientists and practitioners. Additionally, international bodies have increased tools and resource allocation for young people. The European Union has historically been engaged in promoting youth mobility programs (e.g. Erasmus and Youth for Europe) and more recently tried to reshape its policies towards young people along to the results of their periodic feedback. One of the most profound criticisms raised by the younger generations towards the institutions is their lack of direct contact with young people. For instance, *An Arctic policy for young people* emphasized the role of "participation" and the lack of opportunities for youth involvement.

Direct interactive action with young people is one of the objectives of The European Union Youth Strategy 2019-2027 and The Council of Europe Youth Sector Strategy 2030.[21] These documents highlight recent problems and difficulties for the younger generations, particularly the challenges regarding mental health, youth participation in decision-making, capacity building, and social inclusion. Both strategies emphasize the importance of the inclusion of young people in general. Additionally, the documents stress that "different needs, backgrounds, life situations, and interests should lead to different activities and policies".[22] Even without a direct reference, this can be extended to indigenous people, particularly young indigenous generations. In this regard, on

[19] Arctic Youth Engagement Strategy p. 4-6.

[20] Arctic Youth Engagement Strategy p. 8-10

[21] The Council of Europe is not an EU body but it is the continent's leading human rights organization. It includes 46 member states, 27 of which are members of the European Union; EU Resolution of the Council of the European Union and the Representatives of the Governments of the Member States meeting within the council on a framework for European cooperation in the youth field: The European Union youth strategy 2019-2027 (2018/C 456/01). (Resolution 12 December 2018) text available electronically at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2018:456:FULL&from=EN Last accessed on 1 September 2023 Council of Europe youth sector strategy 2030. Engaging young people with the Council of Europe´s values (CM/Res(2020)2). text available electronically at https://rm.coe.int/background-document-youth-sector-strategy-2030-english/1680a0 bb33

[22] F. Hofmann-van de Poll, H. Williamson, *European Youth Strategies – A reflection and analysis* text available electronically at https://pjp-eu.coe.int/documents/42128013/101043895/European+Youth+Strategies+-+reflection+paper.pdf/ba2cb002-9705-620d-3ddb-bc4939c6d3b4)

the International Day of the World's Indigenous People on 9 August 2023, the High Representative on behalf of the European Union Josep Borrell dedicated a particular mention to indigenous youth as agents of change for self-determination using these words:

> "Indigenous youth stand at the frontline of some of the most pressing crises humanity faces today, such as the loss of biodiversity and climate change. At the same time, they lack avenues for full participation in political and public life, to address challenges such as loss of territories, livelihoods, and resources, or to advocate for self-determination and defend their rights. The EU continues to promote the participation of indigenous leaders and indigenous human rights defenders, including indigenous youth, in development processes and key global decision-making fora. [...] This year the EU has for example invested €2.3 million in a new Arctic Youth Dialogues initiative to involve Arctic and European youth, including indigenous youth, in policy and decision-making, for a peaceful, sustainable, and prosperous future for the region, in line with the EU's Arctic Policy and the Youth Action Plan in EU external relations".[23]

The European Union strongly promoted the adoption of the UN Declaration on the Rights of Indigenous People (UNDRIP) adopted by the UN General Assembly in 2007.[24] In the last years, the UN has been committed to following the guidelines of young people and including young indigenous people in its decision-making processes. The involvement of young people and their preparation as future leaders and politicians is crucial for the achievement of the long-term objectives set by the United Nations.[25] Nonetheless, there is no direct reference to youth in the UN Sustainable Development Goals, although the role of future generations can be directly linked to SDG4 "Quality education", SDG5 "Gender equality", SDG10 "Reduced inequalities" and SDG17 "Partnership for the goals".[26] Another important initiative led by the UN, in particular by the United Nations Institute for Training and Research, was the Global Indigenous Youth Summit on Climate Change, a web-based event held on 9 August 2023. It was a

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[23] Statement by the High Representative on behalf of the European Union (8 August 2023) text available electronically at https://www.consilium.europa.eu/en/press/press-releases/2023/08/08/international-day-of-the-world-s-indigenous-people-statement-by-the-high-representative-on-behalf-of-the-european-union/ Last accessed 14 September 2023

[24] UN Declaration on the Rights of Indigenous People (UNDRIP) (adopted 13 September 2007) text available electronically at https://www.un.org/development/desa/indigenouspeople/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf Last accessed 14 September 2023 ;
Favel, B.; Coates, K.S., Understanding UNDRIP: Choosing Action on Priorities over Sweeping Claims about UNDRIP"; *Macdonald-Laurier Institute, Aboriginal Canada and the Natural Resource Economy Series*, (2016) No. 10/2016;.

[25] Official page UN Youth, available electronically at https://www.un.org/sustainabledevelopment/youth/ Last accessed 14 September 2023

[26] "Young people want to and already contribute to the resilience of their communities, proposing innovative solutions, driving social progress, and inspiring political change. They are also agents of change, mobilizing to advance the Sustainable Development Goals to improve the lives of people and the health of the planet. Youth-led organizations need to be encouraged and empowered to participate in translating the 2030 Agenda into local, national and regional policy. They play a significant role in the implementation, monitoring and review of the Agenda as well as in holding governments accountable. With political commitment and adequate resources, young people have the potential to make the most effective transformation of the world into a better place for all." Available electronically at https://www.un.org/sustainabledevelopment/youth/

great opportunity for all the young generations of the participating indigenous people and for the other stakeholders to know better and more thoroughly the richness of these cultures and the value of the younger generations.[27]

Finally, it is essential to highlight the role of young people and indigenous people in Norway's Chairship of the Arctic Council, 2023-2025. It defines Arctic youth and Indigenous People as cross-cutting priorities putting them at the forefront for the achievement of the objectives in the four identified pillars: "The Oceans", "Climate and Environment", "Sustainable economic Development" and "People in the North". [28]

(C) CONCLUSIONS

This paper presented an overview of the current policy discussions which address the pressing need to include the younger generations in present and future policymaking. Recent times have witnessed the mobilization of younger generations with the aim to influence national and international policies. These movements have created a shift not only in current and future policy-making but also in international relations study programs which now are being pressed to include the increasing driving force of young people.

Climate change effects and impacts are a pressing challenge for all generations, one that requires profound structural changes by our societies to provide a voice for future generations who will be facing the most severe climate change effects. The current climate crisis is urging governments to shift away from the "traditional logic" and to instead include different voices in policymaking, particularly those of younger people who have the main responsibility of creating a resilient and sustainable future.

This crisis is pushing young people to have a more influential role, greater self-esteem, and awareness of their key role. However, there is still a strong asymmetry between the societies that give more space to young people and invest time and resources in the younger generation and their suggestions. The Arctic and Northern Europe, as we have seen in this article, can be models to draw inspiration from in terms of youth investment and influence in society. However, there are still many conservative states where the voice of young people is attenuated and investment in future generations is lacking. In the past, it might have seemed impossible that Greta Thunberg, a 15-year-old girl with only a sign and her lunch could influence world leaders and after a few years become the leader of a movement that every Friday pours millions of young people into the squares of the world. In line with this political scenario in which the action of every human being counts, this paper has stressed the need for the inclusion of younger generations, and tomorrow's leaders, in the policymaking relative to our current climate crisis.

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[27] Official page of the event see on (https://event.unitar.org/full-catalog/global-indigenous-youth-summit-climate-change)

[28] Norway's Chairship Arctic Council, 2023-2025 (available electronically at https://www.regjeringen.no/contentassets/034e4c4d49a44684b5fb59568103702e/230322_ud_ac_programbrosjyre_en_web.pdf Last accessed on 14 September 2023.

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Restoring lands and reclaiming rights: the interaction between Rewilding and the Environmentalism of the poor in the European High North

Thomas Pauvret*

Abstract: To address the collapse of biodiversity and mitigate climate change, nature-based solutions such as rewilding are becoming more popular. Rewilding involves a dramatic shift in the uses of the landscape, yet its social impacts are little discussed in the literature. Rewilding projects are usually top-down initiatives, involving international activists collaborating with locals. However, in the Arctic, especially the European High North, local population are active agents in redefining what rewilding can be. This article aims to understand bottom-up, community-based Rewilding projects through the lens of the Environmentalism of the poor. It does so by arguing that the definition of "rewilding" has changed since the 1990's and now focuses on the role of people within rewilding. This change of definition made it compatible with the Environmentalism of the poor, creating a new strand of rewilding, a "rewilding of the poor and the indigenous", or "decolonial rewilding". This movement challenges land-use regimes and is a tool for indigenous Sami people to reclaim their land while repairing the damages done by extractive industries, thus ensuring a sustainable future in a warming world.

Keywords: rewilding Environmentalism of the poor decolonial Sami Rewilding Europe.

"Opportunities, like tomatoes, do not ripen simultaneously."[1]
Michael E. Soulé

(A) INTRODUCTION

The concept of Rewilding has been much discussed in the last decade, both in the scientific field and amongst activists. An explosion of use of the term, associated with a plurality of different practices, has given the Rewilding movements an increased visibility, albeit at the cost of some bad press.[2] Most publications regarding Rewilding discuss the various methods and ecosystem interactions needed to achieve its goal. Fewer publications have targeted the social impact of Rewilding, and its potential to empower rural marginalized communities. Rewilding projects in the European High North feature a more substantial activist discourse and a greater emphasis on protecting indigenous livelihood and rights, alongside the more common elements regarding environmental protection and restoration. This resonates with a concept traditionally used to analyze environmental struggle by marginalized people in the Global South: the

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1 M. Soulé, 'An Unflinching Vision: Networks of People for Networks of Wildland', 9(4) Wild Earth (1999) 39-46, at 44.

2 N. Pettorelli, et al., *Rewilding*. (1st éd., Cambridge University Press, London, 2019)

Environmentalism of the poor. In this article, I argue that Rewilding has the potential to become a specific manifestation of the Environmentalism of the poor, and a tool to empower marginalized and indigenous communities. The intersection between these two types of Environmentalism has given birth to a new type of Rewilding, a "Rewilding of the poor and the indigenous", which I refer to as "Decolonial Rewilding". Decolonial Rewilding combines ecosystem restoration with social struggle in a social and environmental justice movement that aims to restore the land and to reclaim rights.

This paper is a conceptual and theoretical journey investigating two forms of Environmentalism: Rewilding, and the Environmentalism of the poor, to better understand community-based rewilding projects in the Arctic. What made Rewilding compatible with marginalized people's struggle? And why rewilding project in the Arctic constitute a new type of "Decolonial Rewilding"? The data for this study comes from secondary literature and information gathered from documents published by Rewilding Europe and Snowchange Cooperative, as well as media interventions from people involved with these organizations. Ecological restoration is deemed crucial in the latest IPCC reports to mitigate climate change and improve ecosystem resilience in a warming world. By raising awareness about this development of the Rewilding concept, this article aims to create a conversation about the importance of giving rural and indigenous people in the High North more agency on restoration projects, thus moving towards a greater environmental justice.

This article is divided in two sections. The first section addresses the most common criticisms against the rewilding movement and how its definition evolved from its North American inception in the 1990's, to its current use in the European Rewilding Network, which influenced rewilding projects in Sweden and Finland. The second part investigates the relevance of "Decolonial Rewilding" for the European High North with two examples from Sweden and Finland, focusing on Rewilding Lapland and Snowchange Cooperative.

(B) REWILDING, A FUGITIVE CONCEPT

It can be surprising to think of Rewilding as a tool for the rural and marginalized, considering that one of its recurrent criticisms is its potential for severing the link between local inhabitants and their environment by creating a wilderness without people. D. Jørgensen summarized this in these terms: "Rewilders want to re-create a wild without people and are oblivious to the problematic nature of the wilderness construct". [3] If this was true, Rewilding would be an adversary more than an ally for marginalized and indigenous people, akin to the Wilderness preservation movements described by W.Cronon and creating a "place for the white man to enjoy, where the indigenous are displaced".[4] However, I would argue that fortunately, since the late 2010's, the rewilding movement has distanced itself from the discourse of "wilderness"

3 D. Jørgensen, 'Rethinking Rewilding', 65 *Geoforum* (2015) 482 88. [https://doi.org/10.1016/j.geoforum.2014.11.016]

4 W. Cronon, 'The Trouble with Wilderness: Or, Getting Back to the Wrong Nature', 1 *Environmental History* (1996): 7 28. [https://doi.org/10.2307/3985059]

and increasingly emphasized the role of Rewilding as an agent to create both human and natural prosperity, which made it compatible with indigenous struggle and the "Environmentalism of the poor".[5] This was tentatively formulated in the first rewilding texts from the 1990's in North America[6], and then the concept was adapted to various contexts through scientific and activist endeavors in the following decades, giving rise to the flexible definition of the term that is promoted by the European Rewilding Network.

(1) What is Rewilding?

Rewilding, in its simplest acceptance, is a form of ecosystem restoration that promotes the autonomy of natural spaces ("non-human autonomy") and believes that they can thrive with minimal human management.[7] It fosters the safeguarding or reintroduction of keystone animal and vegetal species to improve ecosystem resilience, biodiversity, habitat connectivity, carbon capture and ecosystem services. The term was popularized in a remarked paper by Soulé and Noss in 1998, following a broader intellectual movement regarding ecosystem management and restoration in the 1980's in North America.[8] This earlier form of Rewilding emphasized heavily, and polemically, the positive impact of carnivores on ecosystems and the need to help spreading them to more areas. In the absence of surviving megafauna in North America, other species such as wolves, lynx and other predators would serve as a replacement to control all other animal species, and by extension, the distribution of vegetal life and fungi.[9] To accommodate these predators, core conservation areas (like national parks) are preserved from human influence, turned into "wilderness" at the mercy of the local fauna and reintroduced wild-doers.[10] Soulé and Noss also emphasize the importance of connectivity, as a way to achieve the restoration of the population dynamics, interchange, and migrations in the natural, pre-agricultural, and pre-industrial landscape. To allow this planned wilderness to navigate between core areas, they advocate for "corridors" to link areas of high biodiversity together. This type of Rewilding was then summarized with the three "C' " : Core, Corridor, and Carnivores.

In the decades following Soulé and Noss' article, a plurality of ecological restoration movements has claimed the legacy of "Rewilding", considerably enriching the scope of what a rewilding project can be. Johns counted four main strands, while Jorgensen lists six movements.[11] These movements generally distanced themselves from the "three C' "and instead took different approaches towards creating wild nature, whether by

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[5] J. Martinez-Aliez, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* (1st ed, Northhampton, Edward Elgar Publishing, 2002.)

[6] For example: *An Unflinching Vision: Networks of People for Networks of Wildlands*, published in 1999 by Michael. E. Soulé, puts in perspective the loss of human connection and wellbeing with the loss of biodiversity.

[7] Pettorelli, *supra* n.2; J. Prior, K.J. Ward. 'Rethinking Rewilding: A Response to Jørgensen', 69 *Geoforum* (2016) 13235 [https://doi.org/10.1016/j.geoforum.2015.12.003].

[8] D. Johns, 'History of Rewilding: Ideas and Practice', in N. Pettorelli, et al., *Rewilding*. (1re éd., Cambridge University Press, London, 2019) 12-33.

[9] M. Soulé, R. Noss, 'Rewilding and Biodiversity: Complementary Goals for Continental Conservation', 8(3) *Wild Earth* (1998) 18-8.

[10] Johns, *supra n.* 8

[11] Johns, *supra n.* 8; Jørgensen, *supra* n.3.

introducing lions and elephants to North America (supported by some proponents of Pleistocene Rewilding), or through the conversion of abandoned agricultural land.[12] However, it can be argued that despite this diversity of definition and application, rewilding remains consistent by promoting the "Autonomy of nature".[13]

Rewilding gained increased visibility in Europe with the creation of Rewilding Europe in 2011. This organization adapted the Northern American concept of Rewilding to the European context and shifted its focus away from the polemical reintroduction of carnivores towards the importance of large herbivores.[14] Accounting for the specificities of European geography and history, Rewilding in Europe is also marked by generally smaller rewilding zones, emphasizing natural and cultural heritage.[15] The practice gained in popularity, but its experimental nature as well as problematic links to the concept of "Wilderness" triggered a backlash from environmentalists and researchers alike.[16] Following this, Rewilding Europe has slowly phased out "Wilderness" and now emphasizes more than ever that Rewilding is not about sacrificing a zone to the wild but creating a connection between people and their environment. This is reflected in statements such as this: "[Rewilding] helps us reconnect with the wonders of Europe's spectacular wild nature. It is our best hope for a future where people and nature not only co-exist, but flourish" or "Rewilding also offers a wide range of new prospects, stronger social coherence and an enhanced sense of identity and pride"[17].

(2) Tailored natural autonomy, the benefits of a flexible definition

The changing definition of Rewilding and the relative "fuzziness" regarding its practice has been discussed by Jørgensen, and by Prior and Ward in a response to Jørgensen's article.[18] Jørgensen remarks that "Rewilding" is used by scientists and activists alike, covering a wide variety of projects, and is thus "full of sound and fury, signifying nothing". Ward does not believe that Rewilding lost its meaning, instead arguing that it is the core of Rewilding, the "non-human autonomy", which lends itself to a variety of practice. Rewilding has thus a set of core values that can be applied in diverse ways to different environments. This can be an obstacle when proponents of Rewilding discuss with policymakers, but it is also instrumental in the success of community-based Rewilding projects. The flexibility and experimental nature of Rewilding allows local non-state actors to start Rewilding projects at their scale independently, and then connect through

12 C. Josh Donlan, et al. 'Pleistocene rewilding: an optimistic agenda for twenty-first century conservation.' 168(5)*The American naturalist* (2006) 660-81 [doi:10.1086/508027]; L. Wang, P.B.M. Pedersen. & JC. Svenning. 'Rewilding abandoned farmland has greater sustainability benefits than afforestation', 2(5) *npj biodivers* ity (2023) [https://doi.org/10.1038/s44185-022-00009-9].

13 Prior & Ward, *supra* n.7.

14 S. Carver et al, 'Guiding Principles for Rewilding ». 35(6) *Conservation Biology* (2021) [doi: 188293.https://doi.org/10.1111/cobi.13730].

15 S. Carver, 'Rewilding through land abandonment', in N. Pettorelli, et al., *Rewilding*. (1re éd., Cambridge University Press, London, 2019) 99 122.

16 D. Nogués-Bravo et al, 'Rewilding is the new Pandora's box in conservation', *26*(3) *Current biology* (2016) 87 91 [https://doi.org/10.1016/j.cub.2015.12.044].

17 See the website of Rewilding Eutope : Nature For People, accessed the 16th of November 2023. https://rewildingeurope.com/rewilding-in-action/

18 Jørgensen, *supra* n.3; Prior & Ward, supra n.7.

the European Rewilding Network. By sharing a common structure, values and discourse, local actors can dialogue over what "non-human autonomy" means in their context. Through this diversification, Rewilding has emerged as a people-driven movement of ecological restoration. The "fuzziness" thus holds the potential for creating connections, something that Jørgensen also recognizes.[19]

The definition of Rewilding is thus flexible, and it is through decades of trial and error that the term has changed from a Northern American method for ecological restoration to a movement for reconciling people with nature. By escaping the milieu of conservation ecologists, the term Rewilding has been redefined by activists through practice and experimentation.[20] The importance of people and their cultural heritage in Rewilding is a step towards what Kim Ward describes as a move from "Wilderness" to "Wilding", in a process of decolonization of the Rewilding movement.[21] Reed Noss himself has acknowledged this shift from "Wilderness" to "Wilding" and towards a greater justice for both people and nature. However, rather than deploring this change to his initial idea, Noss celebrates it as a natural and necessary evolution.[22] The definition and practice of Rewilding have thus evolved to include people, both by emphasizing the role of local communities in large NGO's like Rewilding Europe, and by creating a term flexible enough that independent actors can adapt it to their local context while keeping to the movement's core values.

(3) **Towards Decolonial Rewilding?**

The flexibility of rewilding has made it compatible with the concerns of rural people regarding the healthiness of their environment. In the European High North, organizations like Snowchange Cooperative create rewilding projects to ensure a less polluted and more biodiverse environment, with healthier land and water, and to repair the damage created by the forestry and mining industry. In the case of the restoration of the Linnunsuo peatland, two acidic discharge emanating from the peat extraction site killed large numbers of fish in the adjacent rivers, endangering the wellbeing and means of subsistence of the inhabitants of the village of Selkie. It is after repeated complaint, mediatization campaigns and sampling of the water by the inhabitants that the company VAPO discontinued its operation and financed the restoration of the wetland as compensation.[23] This example illustrates the compatibility between rewilding and marginalized communities, as it intersects with the concept of the "Environmentalism of the poor". This concept allows us to dive into the role of ecosystem restoration as a practice of resistance against state and market pressure on rural and traditional livelihood.

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19 Jørgensen, *supra* n.3, at 486.

20 Ibid.; Johns, supra n.8.

21 K. Ward, 'For wilderness or wildness? Decolonising rewilding', in N. Pettorelli, et al., *Rewilding*. (1re éd., Cambridge University Press, London, 2019) 34 54 [DOI: https://doi.org/10.1017/9781108560962.003]

22 R. Noss, 'The Spectrum of Wildness and Rewilding: Justice for All', in H. Kopnina, H. Washington (eds) *Conservation : Integrating Social and Ecological Justice* (Springer International Publishing, 2020) 167-182 [https://doi.org/10.1007/978-3-030-13905-6_12]

23 T. Mustonen. 'Power Discourses of Fish Death: Case of Linnunsuo Peat Production', 43(2) *Ambio* (2014) 23443. [https://doi.org/10.1007/s13280-013-0425-3].

"Environmentalism of the poor" is a concept synthesized by Joan Martinez Alier in his 2002 book *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation*.[24] It is a specific type of Environmentalism that distinguishes itself from traditional environmental conservation movements (or "Cult of the wilderness") and movements that combine economic development and sustainability, such as by "internalizing the externalities" (or "Gospel of Eco-efficiency"). The Environmentalism of the poor is a bottom-up movement, usually led by farming or indigenous communities in the Global South against projects of deforestation, monoculture plantations, mines, or any types of activity that would endanger their livelihood by damaging their environment. By showing that marginalized "poor" that were historically perceived as "too poor to care for the environment" do care when their health and livelihood are on the line, the "environmentalism of the poor" gives a theoretical framework to analyze grassroot environmental movements emanating from historically poor or marginalized communities (whether on a social, class or racial basis).[25]

A healthy ecosystem is central for the livelihood of many marginalized, rural and indigenous people. Ecosystem restoration has been central to land reform movements in Brazil such as the Landless Worker's Movement In Scotland, the Rewilding movements is initiated by wealthy, middle class and impoverished communities, creating a debate around land ownership and who benefits from wild nature. Whereas in the Arctic, projects piloted by Rewilding Lapland or Snowchange Cooperative demonstrate that indigenous welfare and rewilding are compatible, in opposition to the landscape management envisioned by the forestry and mining industry. Rewilding is a political endeavor in all these cases, challenging the unequal land-use regimes produced by colonial, capitalistic and industrial expansion. While these projects differ and show a different understanding of "wildness", the flexible definition of Rewilding allow marginalized communities to engage with ecosystem restoration and dialogue with policy-makers over what kind of environment they want to inhabit.

This type of Rewilding, by addressing the needs of the local communities or being initiated by themselves, is a different and new type of Rewilding that aligns with the Environmentalism of the poor. A Rewilding that addresses both environmental and social degradation by promoting a more resilient environment to sustain local livelihood. This type of Rewilding could be qualified as "Rewilding of the poor". However, since its inception in 2002, the relevance of a term as negatively connoted as "poor" has been reconsidered, leading some scholars to use the term "Environmentalism of the poor and the Indigenous", to highlight the specific struggles of indigenous peoples. No matter what term is used ("marginalized" or "subaltern"), the core definition of a population at the periphery of economic and political power remains. Researchers familiar with this type of environmentalism have proposed to emphasize the proximity between the Environmentalism of the poor and the indigenous, and environmental justice movements, using instead the term "decolonial environmental justice movement" [26],

[24] J. Martinez Alier, *The Environmentalism of the Poor: A Study of Ecological Conflicts and Valuation* (1st ed , Northhampton, Edward Elgar Publishing, 2002)

[25] Ibid.

[26] B. Roy & K. Hanaček, 'From the Environmentalism of the Poor and the Indigenous Toward Decolonial Environmental Justice', in S. Villamayor-Tomas, R. Muradian (eds), *The Barcelona School of Ecological Eco-*

which is also the term favored in this article. While calling the emerging movement of rewilding by marginalized populations a "Rewilding of the poor and the indigenous" has the advantage of conceptual clarity by simply juxtaposing the two terms, I reckon that "Decolonial rewilding" has a better potential to connect with other scholars and indigenous people themselves. Moreover, people like rural and indigenous farmers in Brazil, highland communities in Scotland or Ainu people in Hokkaido have been framed at the receiving end of coloniality, which also qualifies them as "the poor" for Joan Martinez Alliez. It is also the case of the Sami people in the High North, as discussed in the following part.

To put it simply, "Decolonial Rewilding" is a community-based movement of ecosystem restoration that seeks to establish spaces of non-human autonomy in order to provide enhanced ecosystem services to the local population. It is an experimental and context-dependent attempt to protect rural livelihood, prevent environmental damage and create sustainable development, and it is initiated by marginalized populations to remedy the degradation of their environment.

(C) DECOLONIAL REWILDING IN AN ARCTIC CONTEXT

(1) Do rural and indigenous people in the Nordic countries qualify as colonized?

The Nordic countries are often praised for their redistribution systems and environmental commitments, so can the indigenous people of Finland or Sweden be qualified as "poor" or "colonized"? Moreover, can a concept such as "the environmentalism of the poor", generally used to describe environmental and class struggle in the Global South, be applied to Europe and specifically to the European High North? The definition of "the poor" in Joan Allier's book addresses diverse categories. The "poor" is "context dependent", it is often "indigenous" or "farmer" from the Global South, but ultimately is a member of a marginalized group that is affected by "distribution conflicts caused by economic growth and social inequalities".[27]

Therefore, the "poor" is a marginalized group that suffers negatively from state or international pressure, and who suffers disproportionally from industrial development compared to regions occupied by non-marginalized.[28] Due to historical factors and the economic development of the Arctic as a resource frontier, I would argue that the Sami fit the definition of colonized (or the "poor" for Martinez Alier) within the Nordic context.

The European High North is a region currently shared between Norway, Sweden, Finland and Russia. The Sami people live across the borders of these countries, as indigenous people whose land has been colonized for centuries between the Low

nomics and Political Ecology (Springer Cham, 2023) 305-31 5 [https://doi.org/10.1007/978-3-031-22566-6_26]

[27] Martinez Alier, *supra* n.24, at 14.

[28] I. Anguelovski, J.Martínez Alier, 'The 'Environmentalism of the Poor' revisited: Territory and place in disconnected glocal struggles', 102 Ecological Economics (2014) 167-176 [https://doi.org/10.1016/j.ecolecon.2014.04.005]

Middle Ages to present days.[29] Nowadays, the Sami parliaments allow the Sami to retain some kind of political control over their homeland and people, but, as proven by the recent history of contestations over dams or windfarms, national governments do not always prioritize Sami interests[30]. Centuries of oppression, including cultural genocide, evangelization and forced sterilization have fragilized this population and endangered its lifestyle.[31] Various Sami communities commonly practice fishing and hunting to provide a part of their subsistence, while an estimated 10 to 15% practice reindeer herding with a semi-nomadic lifestyle (numbers from a 2003 study).[32] This relation to the land is crucial as an increasing number of industrial projects related to mining, forestry, and renewable energy generation are fragmenting the ecosystems, grazing areas and migration pathways of reindeers, while polluting the land and rivers in which rural people fish and hunt. To protect their communities from this wave of projects, deemed "green Colonialism", Sami people reach out to the media, block machines and construction, and stage protest in front of official buildings.[33]

This ongoing colonization process of Sami territories by Norway, Sweden, Finland and Russia is reflected in their economic development. Whether it is pelts and antlers in the 15th century, or pulp and critical minerals in today's time, their wealth of natural resources is extracted to feed larger urban centers or international markets. The status of the European High North as an extractive resource frontier effectively blurs its status between the "Global North" and the "Global South": "The increased resource extraction in the Arctic region suggests rather the claim that commodity frontiers move globally, leading to the peripheralization and damaging of regions around the world. There are many pockets now in the Arctic and other parts of the assumed "Global North" that increasingly fulfil the role of supplier of raw materials at cheap prices but with a heavy socio-environmental cost."[34] The Environmentalism of the poor generally applies to the Global South, but the specificities of the Arctic region make it a relevant concept to analyze and understand environmental struggle by the indigenous and rural population.

The consequence of the status of an extractive frontier, combined with historical marginalization and low population density, is that indigenous people and rural communities in the High North are disproportionally impacted by the "Green Transition". To feed the green transition, Nordic countries and the broader economy need a range of minerals for batteries, wood, pulp, dams for electricity, nuclear waste disposal sites

29 N. Kent, The Sámi Peoples of the North: A Social and Cultural History (1st ed, London: Hurst, 2014).

30 F. Buhre, et B.Collin, 'Braiding Time: Sami Temporalities for Indigenous Justice', 51(3) Rhetoric Society Quarterly (2021) 22736 [https://doi.org/10.1080/02773945.2021.1918515].

31 S. Errico, B. Ann Hocking, 'Reparations for Indigenous Peoples in Europe: The Case of the Sámi People', in F. Lenzerini(ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford, Oxford Academic, 2012) 363 388 [https://doi.org/10.1093/acprof:oso/9780199235605.003.0014]; Kent, *supra* n.29.

32 S.M .Williams, ' Tradition and Change in the Sub-Arctic: Sámi Reindeer Herding in the Modern Era'. 75(2) *Scandinavian Studies* (2003): 22956.

33 S. Normann, 'Green Colonialism in the Nordic Context: Exploring Southern Saami Representations of Wind Energy Development.' 49(1) *Journal of Community Psychology* (2021) 77 94 [https://doi.org/10.1002/jcop.22422].

34 K. Hanaček , 'On thin ice The Arctic commodity extraction frontier and environmental conflicts', 191 *Ecological Economics* (2022), *at 9,* [https://doi.org/10.1016/j.ecolecon.2021.107247]

and waste disposal in general.[35] These projects are overwhelmingly featured in the Arctic frontier, on indigenous land, rather than in the more populous south of the Nordic countries.[36] Most of these projects are damaging the environment on which indigenous livelihood is based. Mines, and especially mountaintop removal mining pollutes a large area, including rivers and water basins. Tree monoculture plantations are extended deep into old-growth forests, leading to the loss of biodiversity and essential carbon sinks.[37] Overall, the multiplication of these projects in Sami territories fractures the space and makes it unable to sustain reindeer herding, fishing and hunting. Heavily polluted areas are called "sacrificed zones", sterile environmental areas which are exploited for the greater benefit of the industrial economy, and they are often placed closer to marginalized populations rather than where the dominant population lives.[38] While these are deemed necessary for the transition to a green society, most indigenous and rural communities perceive the unequal distribution of risks and benefits as unjust. They see it as "Green Colonialism" and as the ongoing colonialization of indigenous land.

(2) Rewilding Lapland, alliance and compromise between indigenous communities and Rewilding Europe

Several rewilding projects have been implemented in the Nordic countries, including in the High North. In Sweden, Rewilding Lapland (later renamed Rewilding Sweden in 2018) has been established in 2015 as one of the largest areas covered by a Rewilding Europe initiative. This project is the first where Rewilding Europe worked with indigenous people, which significantly altered the nature of the project.

Research on this project shows that compromise is a key element in the co-construction of what a rewilded Lapland is.[39] Moreover, the dialogue between activists from Rewilding Europe and the Sami communities shows that Rewilding in the High North takes a strong political dimension. Critics of rewilding fear that it could separate people from their environment and expel people from their land, but the case of the Lapland rewilding project shows a much more nuanced and intricate process. Overall, the Sami communities inhabiting the area support the Rewilding project, as long as it is co-managed with them and not imposed top-down.[40] The Sami in Sweden have struggled with the Swedish state to obtain the recognition that Lapland was co-managed

[35] B. Skorstad, ' Sacrifice Zones: A Conceptual Framework for Arctic Justice Studies? ', in C. Wood-Donnelly, J. Ohlsson (eds), *Arctic Justice, Environment, Society and Governance (*Bristol University Press, 2023) 96-109 [https://doi.org/10.56687/9781529224832-012]

[36] E.M. Fjellheim, 'You Can Kill Us with Dialogue: Critical Perspectives on Wind Energy Development in a Nordic-Saami Green Colonial Context.' 24*Hum Rights Rev* (2023) 25 51. [https://doi.org/10.1007/s12142-023-00678-4]; Normann, *supra* n.33.

[37] For general effects of monoculture, see M.E. Iezzi et al, 'Tree monocultures in a biodiversity hotspot: Impact of pine plantations on mammal and bird assemblages in the Atlantic Forest', 424 Forest Ecology and Management (2018) 216-227.

[38] S. Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (Cambridge London: The MIT Press, 2012).

[39] J. Rouet-Leduc and E. von Essen, 'The Compromises of Rewilding in Swedish Laponia: Implications for Nature Reconciliation' 17(1) *Journal of Transdisciplinary Environmental Studies* (2019) 38 54.

[40] Ibid.; I. Gordon et al, 'Domestic Livestock and Rewilding: Are They Mutually Exclusive?' 5 *Frontiers in Sustainable Food Systems* (2021) [DOI:10.3389/fsufs.2021.550410].

between them and the state, and the Rewilding project would not have gone through if it was only a top-down process. The fact that the project went on with the approval of the Sami shows that they also had an interest in it.

Managing the land, and who is legitimate to do what on the land is a central political issue. Through the dialogue with Rewilding Europe, the Sami communities seem to have identified several key aspects of Rewilding that could strengthen their legitimacy on the land while improving the ecosystem services that sustain their livelihood. For example, rewilded areas are generally conservation areas and thus exempt from clear cutting, while old-growth forest sees increased protection. These older forested areas are essential for Sami reindeer herders, since they can support the growth of lichen that feeds the reindeers during winter.[41] The management of these forests has been a central element of conflict with Swedish forestry companies (including state-owned companies) that prioritize clear cuts and plantations, which cannot sustain high biodiversity.[42] Allying with Rewilding Europe was thus identified as something that could benefit the Sami in their fight for the protection of their livelihood.

The compromises have shaped a unique type of High North Rewilding that exemplifies how rewilding can constitute an Environmentalism of the poor when marginalized communities support it. The reintroduction of predators has been ruled out as to not damage the interests of the herders, and the project proceeded with an emphasis on forestry protection and herbivore management. This shows, as remarked by Carver et al., that rewilding can be a scale that is adapted to local contexts.[43] A second compromise is ecotourism. Ecotourism occupies an important place in the strategy of Rewilding Europe, but the terms and nature of this ecotourism have been a source of conflict between Rewilding Europe activists and Sami villages.[44] The rural inhabitants of the High North are seeking other ways to develop their regions than environmentally damaging activities such as mining and tree plantations. Through Rewilding they might be able to diversify their activities, moving from being an extraction frontier towards a less exploitative kind of economic development. Ecotourism can be a part of this, but this is to be decided on their terms.

Another aspect of Rewilding that is impacted by the High North context is the concept of "reconciliation". Rewilding Europe presents their work as a way to reconciliate people and nature. But, as Rouet-Leduc and von Essen highlight, the Sami do not need reconciliation with nature, but with the Swedish state.[45] By contributing to the co-management of Lapland by indigenous people, incorporating Traditional Ecological Knowledge to fine-tune the ideal rewilding project for the locals and the ecosystem, and improving the livelihood prospects of the reindeer herders, Rewilding becomes

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41 S. Roturier, M.Roué, 'Of Forest, Snow and Lichen: Sámi Reindeer Herders' Knowledge of Winter Pastures in Northern Sweden', 258(9) *Forest Ecology and Management* (2009) 196067. [https://doi.org/10.1016/j.foreco.2009.07.045]; S. Kivinen, J. Moen, A.Berg, A. Eriksson, 'Effects of modern forest management on winter grazing resources for reindeer in Sweden', 39(4)Ambio (2010) 269-78 [doi: 10.1007/s13280-010-0044-1].

42 Ibid.

43 S. Carver et al., *supra* n.14.

44 F. Koninx, 'Ecotourism and rewilding: the case of Swedish Lapland', 18(4) Journal of Ecotourism (2019) 332-347 [DOI: 10.1080/14724049.2018.1538227].

45 Rouet-Leduc and von Essen, *supra* n.39.

more than a movement of ecological conservation. It becomes a "decolonial rewilding", a movement of ecological restoration that is also a movement for colonial reparation and the reclamation of lost lands.

(3) Snowchange Cooperative, community-based rewilding for rural welfare

Snowchange Cooperative was created in the late 2000, and describes itself as a non-profit organization that "document climate and environmental change in the North and work with local and Indigenous communities of the Northern regions".[46] While the environment had been an integral part of Snowchange's work since its inception, the concept of Rewilding was only introduced in the late 2017 after contact with Rewilding Europe. At this time, Snowchange received a loan from Rewilding Europe that allowed it to rewild the Linnunsuo peatland by purchasing the land from the company VAPO.[47] Subsequently, Snowchange deepened its involvement with rewilding organizations. The history timeline on Snowchange website starts mentioning "Rewilding" in 2018, when four of its restoration projects joined the European Rewilding Network. In this case, indigenous and rural people are initiating these restoration projects. They are allying with Rewilding Europe, which brings part of the funding and general knowledge on Rewilding, while Snowchange brings the experience of its own rewilding projects and the integration of local Traditional Ecological Knowledge.

Snowchange originates from an initiative bringing together scientists, rural and indigenous people. It is a cooperative concerned with safeguarding the livelihood of its members, and creating a diverse environment capable of capturing carbon and delivering enhanced ecosystem services is an integral part of this. The fact that the Arctic is warming up four times faster than the rest of the world, putting pressures on northern ecosystems, increases the urgency of creating resilient and diverse ecosystems.[48] The cooperative has an activist outlook, highlighting the damage that industrial activities such as peat extraction have done to the environment that sustains their livelihood. Snowchange is a prime example of the intersection between Rewilding and the Environmentalism of the poor. It is a bottom-up movement that later allied with a large European NGO, while fostering its own network of indigenous-led organizations.

For its president and founder, Tero Mustonen, Snowchange embodies a specific type of Rewilding, the "northern Rewilding" : "We have been propagating and advancing the notion of Northern Rewilding [...], it is specific, it is always specific".[49] This aligns with the notion of the compromise and what Rewilding becomes when it is adapted

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[46] Snowchange Landscape Rewilding, accessed 16th of November 2023 https://www.landscaperewilding.org/

[47] Historical Timeline of Snowchange, accessed 16th of November 2023 http://www.snowchange.org/historical-timeline-of-snowchange/; Finland's Snowchange purchases wetland with its first Rewilding Europe Capital loan , accessed 16th of November 2023 https://rewildingeurope.com/news/finlands-snowchange-purchases-wetland-with-its-first-rewilding-europe-capital-loan/

[48] M.Rantanen et al, 'The Arctic has warmed nearly four times faster than the globe since 1979', 3 *Commun Earth Environ* (2022) [https://doi.org/10.1038/s43247-022-00498-3].

[49] Online interview of Tero Mustonen by Rewilding Europe, June 2023. Snowchange Cooperative and the Rewilding Network, accessed the 16th of November 2023, https://www.youtube.com/watch?app=desktop&v=7ggRimz-Nkk

to the European High North, with its complex relations of state, indigenous and rural actors. This is not about creating a "wilderness" without people, but about creating diverse ecosystems that benefit the human and the non-human. The network of projects managed by Snowchange has a high biodiversity, they serve as haven for many bird species, and captures carbon with a network of wetlands and peatlands. Via the Rewilding Network, Snowchange can obtain loans, and exchange around biodiversity conservation with other organizations in Romania or Portugal. While the autonomy of nature is always central, there is not "one solution fits all" and each context has its own vision of Rewilding. While some scholars fear that the diversity of Rewilding can lessen its impact[50], the practice hints that a flexible definition allows local movements to adopt it more easily, thus spreading the movement and creating dialogue around its core values.

To conduct its rewilding projects, Snowchange Cooperative can proceed in different ways, either by engaging with local villages, having landowners become part of the cooperative, or by directly buying lands. The fund can come from local people, from large NGOs such as Rewilding Europe, or from international donors. The discourse of Snowchage is that, by safeguarding carbon sinks, they fight climate change on a local and global scale. Locally, Snowchange Cooperative also brings a greater autonomy to rural communities by increasing their legitimacy to govern their lands. For Snowchange members, by buying the land, negotiating concessions, or joining the cooperative, rewilding projects improve the locals' control on their lands and brings a greater confidence in the future because state companies are less likely to conduct extractive operations on rewilded lands. For Snowchange Cooperative, rewilding is very much social and political, the restoration of the ecosystem by locals and for locals have far-reaching social and political effects that contribute to sustainable development while bringing an increase of status to rural people who are often marginalized.[51]

(D) CONCLUSION

In this article, I have discussed the theoretical basis for the intersection between Rewilding and the Environmentalism of the poor, a type of "Decolonial Rewilding" that benefits local communities. This type of Rewilding has become possible via the diversification of the meanings and applications of "Rewilding" in Europe, which increased its emphasis on people rather than solely on the problematic concept of "Wilderness". The flexibility of the term "Rewilding" allows local actors to adapt it to their local context while keeping to its core values regarding non-human autonomy. While some worry that this could water down this concept of Rewilding, the advantages of compromises and perceiving rewilding as a scale have been instrumental in its adoption by local communities. And by being adopted by rural, marginalized or indigenous people, Rewilding becomes a political concept that challenges land use regimes by companies and states, putting more importance on the defense of local livelihood, local sovereignty and climate change

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[50] H. Schulte To Bühne, N. Pettorelli, et M. Hoffmann. 'The Policy Consequences of Defining Rewilding'. 51-1) *Ambio* (2022) 93102 [https://doi.org/10.1007/s13280-021-01560-8].

[51] For reference, see the online interview of Tero Mustonen by Rewilding Europe, *supra* n.49.

mitigation. Joan Martinez Alier has remarked that environmental movements can be promoted by marginalized communities when the defense of the environment aligns with the defense of their livelihood, which is precisely the function of rewilding for organizations like Snowchange. This type of bottom-up, community-based rewilding is different from rewilding projects in the Carpathians or Portugal, and thus qualifies as a new strand, a “decolonial rewilding”.

Rewilding projects in the High North demonstrate what decolonial rewilding can be. Projects in Sweden and Finland show that local communities perceive the advantages of rewilding and its discourse. Compromises, ecotourism, traditional ecological knowledge and the creation of alliances with large NGOs are part of a larger movement in which restoring the land allows to reclaim rights, and the control over a land lost to colonization. Rewilding in this High North context is an Environmentalism of the poor, aiming to repair the damages of the forestry and extraction industry to create biodiversity hotspots that can sustain local people’s livelihood while mitigating climate change through the maintenance of carbon sinks. Through this evolution of the Rewilding movement, it seems that rewilders have avoided the creation of “a wilderness devoid of people” and instead created a wild for the people, and for marginalized people to seek environmental and social justice in a warming world. Such a sustainable development benefiting the human and the non-human alike, mitigating environmental damage on a local and global scale, and oriented towards a more equal and just society is undoubtedly key for Arctic sustainability.

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Questions of justice and sustainability: The case of submarine cables in the Arctic

Daria Shvets*

Abstract: Submarine cables, as the backbone of the world's increasing connectivity, are gradually reaching the North. Compared to resource extraction sectors like mining, oil, and gas, the laying and maintenance of submarine cables are less harmful to nature and have a lower impact on soil, air, and sea. This activity has positive environmental aspects. However, it may also bring negative consequences due to a lack of scientific knowledge and the increased presence of cable ships in the Arctic. On the social side, submarine cables, when extended by land-based infrastructure, tend to provide a more reliable internet connection, enhance Arctic connectivity with the rest of the world, and ensure the Northern regions' involvement in global affairs. Simultaneously, it interferes with the livelihoods and traditional ways of life of Northern communities, involving younger generations in technology development, impacting indigenous people, local producers, and endangering domestic traditions and habits. Therefore, this relatively new economic activity is worth analyzing from both environmental and social justice perspectives in the context of integrated sustainable development of the Arctic. This article aims to raise awareness regarding submarine cables, providing an Arctic legal framework for them, followed by recent updates on submarine cable activities. It offers an overview of the environmental and social impacts of submarine cables and concludes with preliminary proposals for their sustainable development in the Arctic.

Keywords: submarine cables Arctic justice Arctic communities sustainability connectivity.

(A) THE LEGAL FRAMEWORK OF SUBMARINE CABLES IN THE ARCTIC

It is estimated that 95% to 98% of all international communications are currently carried by submarine fiber optic cables.[1] There are more than five hundred cables laid on the international seabed, and this number continues to grow every year.[2] Submarine cables are not only planned for the most populated areas of the world but also extend to remote areas, including the Arctic. The increasing number and volume of data coming through submarine cables highlight their tremendous importance as critical infrastructures for modern connectivity.

Submarine cables in the Arctic are not subject to specific regulations through a separate international treaty or bilateral agreements among Arctic states. Instead, all

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[1] D. Burnett, T. Davenport, R. Beckman, Submarine cables: *The Handbook of Law and Policy*, Leiden: Martinus Nijhoff, 2014 p. 3; E. Perez-Alvaro, "Unconsidered Threats to Underwater Cultural Heritage: Laying Submarine Cables", *Rosetta*, vol. 14, 2013, pp. 54-70, p. 54, available at http://www.rosetta.bham.ac.uk/issue14/perezalvaro.pdf.

[2] See free and regularly updated submarine cable map by Telegeography, an online resource available at http://www.submarinecablemap.com/submarine-cable/polar-express.

submarine cables are governed by the general norms of the United Nations Convention on the Law of the Sea (UNCLOS).[3] All Arctic states, except for the United States, are members of UNCLOS and are considered coastal states according to its provisions.[4] Despite the United States not being a party to UNCLOS, it is still bound to respect its provisions since the majority of the Convention's rules are considered customary international law. UNCLOS applies to the Arctic Ocean in the same manner as it does to any other ocean globally, but it differentiates the Arctic's unique and vulnerable environment from other parts of the ocean by making a reference to ice-covered areas.[5] As the Convention primarily establishes a general framework that requires further implementation, the Arctic states have developed their own national legislation concerning submarine cables while implementing the Convention. Consequently, a significant portion of the regulations pertaining to submarine cables exists at the domestic level, within the national laws of Arctic states.[6]

For instance, in Finland, the installation of submarine cables within its territorial sea follows standard regulations governing network construction and maintenance. Given that submarine cables serve as vital public communication infrastructure, introducing a new cable necessitates undergoing both an environmental assessment and a series of public hearings. Specifically, environmental permits are mandatory for submarine cables that have an impact on the seabed, while appropriation regulations come into play concerning private property.[7]

In Sweden, constructing submarine cables entails a comprehensive process regulated by multiple legal documents, the involvement of various authorities, and the requirement to secure diverse permits issued by the Swedish government. To establish the route for a new submarine cable within Swedish public waters, approval from the Legal, Financial, and Administrative Services Agency is mandatory, and a project must undergo an environmental assessment in accordance with the Swedish Environmental Code.[8] Additionally, matters concerning damage inflicted on existing submarine cables are governed by the Swedish Act on Liability to Pay Compensation for Damage Caused

[3] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 397.

[4] The updated list of members of the UNCLOS is available at the United Nations Treaty Collection website at https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en.

[5] See Article 234 of the UNCLOS according to which coastal states are granted "the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas", United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 397.

[6] In this article Finland, Sweden, and Norway were chosen merely as examples of domestic regulation implemented by Arctic states. For more complete overview including all Arctic states see D. Shvets, "The Legal Regime Governing Submarine Telecommunications Cables in the Arctic: Present State and Challenges", in M. Salminen, G. Zojer, K. Hossain (eds.), *Digitalization and Human Security, A Multi-Disciplinary Approach to Cybersecurity in the European High North*, Switzerland: Palgrave Macmillan, pp.180-185.

[7] International Cable Protection Committee Members Database, The Act on the Protection of Certain Submarine Cables and Pipelines 145/1965, Finland, available at https://www.iscpc.org/.

[8] Swedish Environmental Code 2000:61, available at https://www.government.se/legal-documents/2000/08/ds-200061/.

to Existing Submarine Cables and Pipes.[9] Broadly speaking, the Swedish regulatory framework encompasses several legislative acts that govern the laying of submarine cables in various maritime areas. Notably, the Swedish government underscores the significance of open and accessible broadband infrastructure for all citizens.

Norway has a dedicated legal framework specifically addressing submarine cables, known as the Act on the Protection of Submarine Cables and Pipelines.[10] This legislation primarily focuses on safeguarding submarine cables against various forms of damage and establishes the potential for compensation from vessel owners. Furthermore, the regulations concerning the fixed installations to which submarine cables are affixed fall under the purview of the 2008 Planning and Building Act No. 71, in addition to those contained within the Electronic Communications Act No. 83. It is worth noting that the Norwegian government possesses the authority to make decisions or grant consent for the compulsory acquisition of property titles or usage rights for the installation of electronic communications networks and related equipment.[11] The Norwegian Post and Telecommunications Authority, an autonomous agency of the Ministry of Transport and Communications, is responsible for supervising telecommunications services, including those provided by submarine cables.

Besides the broad framework provided by UNCLOS and the fragmented domestic laws of Arctic states, there have been limited initiatives in the region aimed at regulating submarine cables on a regional level regarding issues of equity and sustainability. Any legal norms addressing environmental and social concerns, if they do exist, tend to be isolated and disconnected from a justice-based approach. Some notable efforts to comprehensively address submarine cables fall under the Arctic Council's Task Force on Improved Connectivity in the Arctic[12] and Task Force on Telecommunications in the Arctic.[13] It could be argued that these Task Forces might have played a more active role in addressing submarine cable matters in the Arctic, including the promotion and assurance of justice. In particular, employing various forms of justice (substantive, procedural, distributive, retributive and recognition justice)[14] in the law-making process.

Addressing justice considerations during the installation and maintenance of submarine cables within the legal framework is a multifaceted issue that necessitates a comprehensive approach and common effort from all Arctic stakeholders. However, thus far, it remains uncertain whether robust and productive cooperation among all

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9 Swedish Act on Liability to Pay Compensation for Damage Caused to Existing Submarine Cables and Pipes 1996:518, available at https://www.government.se/legal-documents/2000/08/ds-200061/.

10 Opperud, H. (2010). Telecommunications regulation Norway. *Lex Mundi*. Available at http://www.lexmundi.com/Document.asp?DocID=1871.

11 Ibid.

12 See Final Report: Improving Connectivity in the Arctic by Task Force on Improved Connectivity in the Arctic, *Arctic Council*, 2019, available at https://oaarchive.arctic-council.org/server/api/core/bitstreams/1c7f2761-77cc-40f7-9995-9f1f36a6dee9/content.

13 See Report on Telecommunications Infrastructure in the Artcic. A circumpolar assessment, *Arctic Council*, 2017, available at https://oaarchive.arctic-council.org/server/api/core/bitstreams/08f2791c-5157-48f2-a340-917d1ec3cfd6/content.

14 See more on the forms of justice (substantive, procedural, distributive, retributive, recognition) in Factsheet "JUSTNORTH: Conceptualizing Justice for a Sustainable Arctic", available on the website of JUSTNORTH project https://justnorth.eu/wp-content/uploads/2023/03/Factsheet-for-JUSTNORTH.pdf.

Arctic states within the framework of the Arctic Council can be fully reestablished in the near future.[15]

(B) SUBMARINE CABLES AS AN ECONOMIC ACTIVITY IN THE ARCTIC

After providing the background regarding the legal regime of submarine cables in the Arctic, this section is dedicated to the latest updates on submarine cables projects in the Arctic and assesses the potential environmental and social impacts of cable activity. The installation of submarine cables is a relatively recent activity in the Arctic. When compared to long-established activities like fishing, navigation, and marine scientific research that have been conducted in the Arctic for many years, the introduction of telecommunications infrastructure to the region is a more recent occurrence. As of now, several submarine cable projects have been completed successfully in the Arctic, some are currently underway, and there is the potential for more to be deployed in the future. The first project completed in the Arctic was the Svalbard Undersea Cable System laid down in 2004, aimed at connecting Svalbard with the mainland of Norway. [16] Another project, undertaken in 2009, was the Greenland Connect cable system, which linked Canada, Greenland, and Iceland.[17] In 2017, the Greenland Connect North cable project was implemented. This particular route is situated along the west coast of Greenland connecting various small towns in the region.

In addition to regional connections, various efforts have been made to establish a transarctic cable network. One such initiative is ROTACS (Russian Optical Transarctic Cable System) which emerged in the early 2000s with the aim of linking Tokyo and London crossing the Arctic.[18] Another endeavor was the Polarnet Cable Project.[19] As part of this project, comprehensive marine survey operations were carried out, shedding light on the feasibility of installing an extensive cable line in the Arctic. The Arctic Connect Project, a cable system initiated by the Finnish company Cinia and the Russian telecom company Megafon, aimed to establish a connection between Norway and Japan. [20] While the development phase of the project has advanced as scheduled, and funding for this phase has been secured, stakeholders have collectively decided to temporarily halt the development of the project. The Quintillion Submarine Cable System was initially envisioned as a lengthy line connecting Tokyo to London via the Arctic. However, the

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[15] See more about the future of Arctic governance in D. Shvets, K. Hossain, "The Future of the Arctic Governance: Broken hopes for Arctic exceptionalism?", *Current developments in Arctic law*, vol. 10, 2022, pp.49-63, available at https://lauda.ulapland.fi/handle/10024/65260.

[16] Arctic Economic Council. (2016). *Arctic broadband, recommendations for an interconnected Arctic*, available at https://arcticeconomiccouncil.com/wp-content/uploads/2017/02/AEC-Report_Final-LR-1.pdf.

[17] Ibid.

[18] Juha Saunavaara, "Connecting the Arctic While Installing Submarine Data Cables Between East Asia, North America and Europe", in M. Salminen, G. Zojer, K. Hossain (eds.), *Digitalization and Human Security; A Multi-Disciplinary Approach to Cybersecurity in the European High North*, Switzerland: Palgrave Macmillan, pp.205-227, p.210.

[19] Titarenko, E., "Polarnet Proekt zaruchilsya podderzkoi" [Polarnet project was granted support]. *ComNews*, 2017, available in Russian at https://www.comnews.ru/content/108946/2017-07-31/polarnet-proekt-zaruchilsya-podderzhkoy.

[20] Saunavaara, J., "Arctic subsea communications cables and the regional development of northern peripheries", *Arctic and North*, *32*, 2017, available at https://doi.org/10.17238/issn2221-2698.2018.32.63.

project's full implementation did not materialize according to the initial plan, and only the first phase was completed. As a result, a cable line was established, linking small towns along the west coast of Alaska.[21]

So far, only the cable Polar Express entered an actual construction phase in the Arctic.[22] This project stands out as a unique endeavor, involving the creation of a transarctic submarine fiber-optic communication line spanning a total length of 12,650 kilometers. The primary objective is to connect Murmansk to Vladivostok via the shortest route linking Europe to Asia. Currently, construction work is underway, with the project slated for completion in 2026. The Polar Express cable's primary goal is to establish the geographically shortest telecommunications route between Europe, Asia, and America, thereby minimizing data transmission delays. Additionally, it seeks to advance the development of port infrastructure along the Northern Sea Route, foster the growth of the region's digital ecosystem, and expand the international backbone fiber-optic communication network. In the following two sub-sections, the potential environmental and social consequences stemming from submarine cables as an economic endeavor in the Arctic are examined. It aims to provide a deeper insight into how justice can be more effectively ensured and promoted in the region.

(1) **Environmental impacts**

Deploying submarine cables in the Arctic presents an exceptionally formidable undertaking due to the region's distinct climatic conditions and the absence of established protocols. There is a dearth of scientific knowledge regarding the precise short and long-term impacts on the Arctic marine environment. It is noteworthy that the installation of cables in the Arctic necessitates the use of specialized cable ships capable of navigating and laying cables in the frigid Arctic waters, rendering project implementation considerably more intricate than cable installations in other areas.[23] The Arctic Council has once expressed concerns about the necessity for cable providers to meticulously select their submarine cable routes, given the risk of ice scour in certain regions, and to establish dependable service backup plans for end-users.[24] The submarine cables activity brings with it both advantages and disadvantages concerning justice.

Among the advantages, the first one is the provision of a high-quality internet connectivity to remote Arctic communities that currently rely on satellites. For instance, the ability to conduct video conferences instead of traveling to distant cities or even

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[21] D. Shvets, "The Legal Regime Governing Submarine Telecommunications Cables in the Arctic: Present State and Challenges", in M. Salminen, G. Zojer, K. Hossain (eds.), *Digitalization and Human Security; A Multi-Disciplinary Approach to Cybersecurity in the European High North*, Switzerland: Palgrave Macmillan, p. 187, pp. 175-203.

[22] See updated information on the Polar Express submarine cable official website, available at https://xn--e1ahdckegffejda6k5a1a.xn--p1ai/.

[23] According to standards established by the Polar Code (IMO's International Code for Ships Operating in Polar Waters), IMO Doc. MSC.385(94).

[24] Report on Telecommunications Infrastructure in the Arctic. A circumpolar assessment, *Arctic Council*, 2017, available at http://library.arcticportal.org/1947/1/2017-04-28-ACS_Telecoms_REPORT_WEB-2.pdf.

other countries contributes to a reduction in carbon dioxide (CO_2) emissions.[25] This aligns with the pursuit of intergenerational justice by preserving the Arctic as an area for future generations. The second advantage lies in the comparatively non-invasive nature of submarine cable projects when contrasted with long-standing activities in the Arctic such as drilling, mining, and carbon extraction. Due to the relatively small size of submarine cables, their installation process minimizes contact with the seabed. Typically, the cables are not buried except in limited areas near ports and onshore installations, where they might be vulnerable to damage from fishing vessels, their anchors, or trails. This matter was explicitly addressed in a joint report by the United Nations Environment Programme and the International Cable Protection Committee, emphasizing that "the small physical size of a telecommunications cable implies that its environmental footprint is likely to be small and local [...] a suggestion that is borne out by several studies".[26] The third significant benefit is the reduced likelihood of environmental catastrophes associated with submarine cables when compared to other economic activities in the Arctic. In the event of a submarine cable break, there are no consequences such as oil spills or other environmentally harmful incidents. The primary outcome of a cable break is limited harm in the vicinity of the breakage point. Generally, submarine cables are recognized for their environmentally friendly characteristics.[27]

Simultaneously, certain researchers argue that submarine cables could potentially have adverse effects on the Arctic marine environment justifying it by uncertainty regarding the impact of electromagnetic fields and thermal radiation on organisms that may be sensitive to these factors.[28] As a result, the potential for a noteworthy negative impact from submarine cables cannot be entirely dismissed. While the impact is minimized and confined, it is a factor that may warrant concern, especially in particularly fragile areas like the Arctic.[29] Furthermore, it is contended that a cable ship involved in the installation of submarine cables, as well as any other vessel traversing Arctic waters, faces the potential danger of colliding with icebergs or other ships. This elevates the likelihood of environmental repercussions stemming from such incidents, including but not limited to hazardous liquid spills, maritime accidents, or harm to the local flora and fauna. Lastly, the activities of a cable ship during the laying of submarine cables and subsequent cable maintenance procedures generate both noise and vibration affecting

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25 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*; New York, Juris, pp. 147-184, p. 162.

26 Carter, L., Burnett, D., & Davenport, T. (2014). The relationship between submarine cables and the marine environment. In D. R. Burnett, R. C. Beckman, & T. M. Davenport (Eds.), *Submarine cables: The handbook of law and policy* (pp. 179 212). Leiden and Boston: Martinus Nijhoff Publishers, p. 9.

27 B. Heezen, G. Johnson, Alaskan submarine cables: A struggle with a harsh environment. *Arctic, 22*(4), 1969, pp. 413 424.; E. Perez-Alvaro, "Unconsidered Threats to Underwater Cultural Heritage: Laying Submarine Cables", *Rosetta*, vol. 14, 2013, pp. 54-70, p. 54, available at: http://www.rosetta.bham.ac.uk/issue14/perezalvaro.pdf

28 T. Worzyk, *Submarine power cables: Design, installation, repair, environmental aspects*. Berlin: Springer-Verlag, 2009.

29 OSPAR Commission. (2009). *Assessment of the environmental impacts of cables*. Biodiversity Series 1, available at https://qsr2010.ospar.org/media/assessments/p00437_Cables.pdf.

marine biodiversity, as well as having the potential to disrupt coastal birdlife and wildlife in nearby regions.

(2) Social impacts

In the context of the social impacts of submarine cables, there are both advantages and disadvantages to their presence and active development in the Arctic as submarine cables connect this region with its remote communities to the rest of the world.

On the positive side, telecommunications create opportunities for local manufacturers and traders to promote and sell their products, contribute to the growth of tourism, attract investments to the northern regions, and generally support the sustainable development of the area.[30] Another benefit brought about by the Internet, facilitated by submarine fiber-optic cables, is access to high-quality distance learning. Through online platforms and courses, residents of the High North can enhance their knowledge, acquire new skills, and formalize their education. This is particularly valuable for remote Arctic villages where commuting to the nearest educational institution is time-consuming. Such broadband communication proves to be invaluable, especially when individuals need to balance their education with traditional practices like reindeer herding. Furthermore, submarine cables offer the advantage of creating online high-income employment opportunities for the local population. This can be especially relevant for retaining the younger generation in local villages, preventing them from leaving the Arctic. Beyond addressing individual concerns of the youth, it can also contribute to supporting domestic businesses and the local economy by promoting local products and facilitating business communication. Looking ahead, submarine cables also provide local Arctic communities with the potential for telemedicine. Accessing quality medical treatment on-site can be challenging for some northern communities due to a shortage of healthcare professionals and the long distances to the nearest hospital. Online medical consultations can serve as preliminary medical advice, potentially reducing the need for patients to travel to a hospital, saving time and money, and ensuring timely attention to health issues.

Simultaneously, there are certain disadvantages and even risks associated with the increasing presence of submarine cables in the Arctic. One noticeable trend is the growing dependence of Arctic communities on telecommunications, which is a cause for concern. While it offers opportunities, it can also exacerbate the social issue of eroding traditional practices, which are being replaced by modern technologies. The intrusion of telecommunications into traditional ways of life can lead to a loss of generational knowledge and increase the reliance of local communities on it. Furthermore, the availability of telecommunications and the option to order goods online pose challenges for the local economy, especially when competing with well-established, large brands. If major corporations can now deliver products to remote Arctic villages at lower

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[30] N. Filimonova, M. Portugal-Ramirez, "The New Frontier for Human Cybersecurity: Russia's Cybersecurity Policies in the Arctic" in M. Salminen, G. Zojer, K. Hossain (eds.), *Digitalization and Human Security; A Multi-Disciplinary Approach to Cybersecurity in the European High North*, Switzerland: Palgrave Macmillan, p. 65, pp. 57-81.

prices, there may be less incentive to purchase locally produced goods, which are often more expensive and have a limited range of options. Finally, increased dependency on telecommunications is of concern in case of system's failure which has severe consequences if occurs.

(C) SUSTAINABLE SUBMARINE CABLES DEVELOPMENT IN THE ARCTIC

Developing sustainable submarine cables activity in the Arctic is essential for enabling better connectivity in the region while considering environmental and social impacts from cables. This section considers some preliminary proposals regarding sustainable submarine cables development in the Arctic and aspects to be considered while exercising decision-making. The Chairmanship of Norway in the Arctic Council (2023-2025) currently provides this country with an opportunity to increase global awareness regarding submarine cables and establish goals for their sustainable development in the Arctic region. In the framework of its Chairmanship, Norway as well as all future chairmanships to come shall advocate for international cooperation and agreements, policies and initiatives that prioritize justice, equity, and sustainability in the Arctic. Given the international nature of submarine cables, resumed cooperation among Arctic Council member states, indigenous communities, and industry stakeholders is paramount for fostering multilateral dialogues and agreements to ensure the sustainable development of submarine cables in the Arctic. Following carefully elaborated strategies of balancing social needs (*distributive justice*) and environmental knowledge (*substantive justice*) with governance (*procedural justice*) in the region may promote overall justice-based development of telecommunications in the Arctic.

First, there is a need for a stronger role of the Task Force on Telecommunications Infrastructure and Task Force on Improved Connectivity within the Arctic Council. They may take ownership of issuing recommendations to use the latest technologies to minimize disruptions to the seabed and marine life during installation. They may also advise on best practices on planning cable routes to avoid ecologically sensitive areas, migratory routes of marine mammals, and known nesting or feeding grounds of Arctic wildlife. The procedure of establishing regular monitoring and maintenance programs to ensure the long-term integrity and functionality of the cables may also be invoked by these bodies. Finally, policies and training of local personnel to participate in cable maintenance activities as well as creating local job opportunities in submarine cables industry is also one of possible sustainable development scenarios in the form of *procedural justice* for submarine cables in the Arctic.

Second, in the conversation about promoting and ensuring *recognition justice* in the Arctic in relation to submarine cables, involvement of indigenous peoples into the increasing digitalization of the North is required. Collaboration with local Arctic communities and environmental organizations to gather valuable insights and ensure their concerns are addressed constitute a form of a recognition justice and might become one of the ways of sustainable development of submarine cables in the Arctic. That may include, for instance, transparent and timely sharing of data on cable installation, maintenance, and environmental as well as social impact with relevant stakeholders. Local authorities shall ensure that Arctic communities have equitable

access to the connectivity provided by submarine cables harmoniously coexisting with their traditional values.

Third, there is a place for a public-private partnership in sustainable development of submarine cables in the Arctic in the form of *retributive justice*. Mostly to ensure long-term sustainability. Public partners can enforce sustainability standards in submarine cable projects, ensuring that they meet environmental and social objectives over their lifecycle. This might include regular environmental assessments, adherence to international norms, and responsible cable disposal practices and relevant liabilities for noncompliance. On the other side, private partners can develop robust and resilient cable designs that can withstand Arctic conditions, including ice, extreme cold, and shifting icebergs. Use ice-class vessels specifically designed for Arctic conditions to lay and maintain the cables is also on a private sector's responsibility. Public-private partnership can also support research initiatives to better understand the potential environmental and social impacts of submarine cable projects. This research can form sustainable development practices of submarine cables activity in the Arctic. This forms a *distributive justice* approach that ensures fair allocation and distribution of pros and cons raising from submarine cables activities.

Finally, the role of law in sustainable submarine cable development in the Arctic is crucial for ensuring that such projects are conducted in an environmentally responsible and socially equitable manner. Substantive justice-based assessment in the regulatory field on the local level of Arctic states is the way towards social and environmental sustainability of submarine cables in the Arctic.

(D) CONCLUSION

The deployment of economic activities in the Arctic, particularly the installation of submarine cables, presents a multifaceted challenge that requires a delicate balance between promoting various forms of justice, ensuring social well-being, and safeguarding the environment. As it has been explored in this article, submarine cables in the Arctic offer both opportunities and challenges.

On the positive side, submarine cables bring high-quality internet connectivity to remote Arctic communities, fostering economic development, tourism, and educational opportunities. They create the potential for online employment and telemedicine, offering solutions to longstanding challenges in the region. However, the potential downsides were also examined, including the risk of disrupting traditional ways of life, the dependency on technology, and the challenges faced by local businesses.

By prioritizing justice in its various forms (substantive, procedural, distributive, retributive, and recognition), by considering social well-being of the subjects of justice (Arctic inhabitants), and environmental sustainability of the object of justice (the Arctic nature) in submarine cables deployment in the Arctic, this paper contends that it is possible to strike a balance between advancing connectivity and preserving the region's unique ecosystems and traditions.

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Book's review

ABEGÓN NOVELLA, Marta, *Los efectos de los conflictos armados en los tratados de protección del medio ambiente,* (Atelier, Barcelona, 2022, 270 pp.)

An old Latin phrase goes "*inter armas, silent leges*," which is usually translated into English as "in times of war, the law falls silent." This was largely true under the most classical international law, when States concluded only a few treaties that were usually bilateral and sought to address their own particular reciprocal interests. At that time, it was understood that the outbreak of an armed conflict between State parties automatically led to the termination or suspension of their treaties. Under contemporary international law, however, this approach has been changing. On the one hand, the international law of armed conflicts, including international humanitarian law, has been designed and developed precisely to govern in times of war. On the other hand, States currently conclude numerous bilateral and multilateral treaties on the most diverse subjects and these treaties are intended, on many occasions, to protect the general public interests of the international community as a whole, such as the so-called multilateral law-making treaties. In the current context, therefore, what effects does the outbreak of an armed conflict in one or more State parties have for international treaties of such diverse nature? The 1969 Vienna Convention on the Law of Treaties (VCLT) did not delve into this thorny issue. In 2004, however, the International Law Commission (ILC) did begin to address the issue, and in 2011, on second reading, it approved its Draft Articles on the Effects of Armed Conflicts on Treaties, which include provisions in favor of the operation of treaties in the event of armed conflicts, but do still leave ambiguities or uncertainties on the issue.

With this book, Dr. Marta Abegón Novella, currently Serra Húnter Lecturer in Public International Law at the University of Barcelona, delves into this complex aspect in the law of treaties, analyzing the legal effects of armed conflicts on the operation of a specific type of international treaties, treaties for the protection of the environment and, in particular, multilateral law-making treaties in the area.

The book begins with a prologue by Dr. Ángel J. Rodrigo, Associate Professor of Public International Law at Pompeu Fabra University (UPF) of Barcelona, who recalls that the monograph originated in research initiated by the author with her doctoral thesis, which was supervised by Dr. Rodrigo himself and defended at the UPF, earning the highest qualification from a jury made up of the following doctors: Oriol Casanovas, Professor of Public International Law at the UPF; Jorge Cardona, Professor of Public International Law at the University of Valencia; and Jean-Marc Sorel, Professor of Public International Law at the University of Paris I (Panthéon-Sorbonne).

Building on and updating her thesis research, the book follows a rigorous legal methodology and masterfully handles very diverse primary sources (international treaties, soft law texts, documents of international organizations, documents on vacillating State practice, jurisprudence, etc.) and numerous secondary sources, including a good many doctrinal references on treaty law, the various types of international legal obligations and the main international environmental treaties. At the same time, it is important to

stress the originality of the book, which deals with an issue on which specific doctrine is still scarce.

After the general introduction, the book is divided into three parts, each made up of an introduction and two chapters. The first part addresses the codification of international norms relating to the effects of armed conflicts on treaties in general. After observing that the outbreak of an armed conflict has traditionally been seen as an autonomous cause of termination or suspension of the operation of treaties, Chapter I takes a historical tour of the process by which the issue was codified, identifying the first doctrinal approaches, the resolution of the Institute of International Law (IIL) approved in Christiania in 1912, the exclusion of the issue from the VCLT, the resolution of the IIL approved in Helsinki in 1985, and the ILC's preparation of the previously noted Draft Articles of 2011. Chapter II focuses on the ILC Draft Articles, examining their substantive principles and procedural rules. In particular, the author analyzes the general principle according to which "the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties" (Art. 3) and the provision regarding the "continued operation of treaties resulting from their subject-matter" (Art. 7). Specifically, Art. 7 is configured as a presumption of the continuity of certain types of treaties, such as those incorporated in the Annex with an indicative list of twelve categories, including, for example, "multilateral law-making treaties" and "treaties relating to the international protection of the environment". As the author observes, this presumption has been formulated as a "rebuttable" presumption (*iuris tantum*), since the fact that "a treaty can be subsumed within one of these categories does not necessarily and automatically entail its continuity" (p. 72).

The second part of the book delves into the specific case of multilateral law-making treaties for the protection of the environment. Chapter III identifies the characteristics derived from their condition as treaties for the protection of general interests of the international community, such as the incorporation of collective obligations, which are not separable in bundles of bilateral relations and are assumed *erga omnespartes*. It also evaluates the particular characteristics of these treaties that derive from the environment being their object of protection. Next, it presents a selection of such treaties, including the International Convention for the Prevention of Pollution from Ships of 1973/1978; the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973/1979; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989; the United Nations Framework Convention on Climate Change of 1992; and the set of treaties that establish the Antarctic Treaty System. Chapter IV evaluates the state of the matter regarding the operation of treaties for the protection of the environment in the event of armed conflicts, observing the existence of a certain doctrinal consensus, but also the practice of States, which the author considers "incipient and heterogeneous" (p. 139), and international jurisprudence, where, according to the author, there is still no "clear statement" (p. 156) on the issue.

The third part analyzes the effects of armed conflicts on multilateral law-making treaties for the protection of the environment in light of the norms codified in the ILC Draft Articles of 2011. Chapter V analyzes the "continuity in operation" of such treaties in the event of armed conflicts, which should, in principle, be the most common situation, thanks to the general rules of the Draft Articles and the indicated *iuris tantum*

presumptionof continuity established by Art. 7 and the Annex with its indicative list of certain types of treaties. In any event, Chapter VI analyzes the possible cases in which, exceptionally, there could be a termination, withdrawal or suspension of the operation of multilateral law-making treaties for the protection of the environment. Some of these cases may be clear (if, for example, there are express provisions contained in the treaty), but others raise questions of great legal complexity, which the author addresses in light of the "rules of interpretation of treaties" (p. 204) or "contextual factors related to the treaty and the armed conflict", depending on the subject matter and other particularities of the treaty and the characteristics of the conflict (p. 209). The author also specifies the limits to the termination, withdrawal or suspension of the treaty, referring to the requirements of the *pacta sunt servanda* principle(which prepends suspension before termination and partial suspension before total suspension) and those conventional obligations that constitute, at the same time, obligations imposed by general international law (p. 218).

In the book's final conclusions, the author evaluates the Draft Articles of 2011 in a positive light overall, since the ILC's works have been in line with the evolution of the international community and its legal order, and reaffirm, in accordance with the doctrine and majority practice in the area, that "treaties for the protection of the environment are not automatically terminated or suspended in times of armed conflict" (p. 225). At the same time, the author is also critical of various aspects of the Draft Articles, observing, for example, the weaknesses of the "rebuttable" presumption of operability and defending the convenience of strengthening such presumption in order to bring it closer to what would be an irrefutable presumption (*iuris et de iure*)(p. 227). In any case, the author regrets that, for the moment, the Draft Articles of 2011 have not been reflected in a convention or formal declaration, although this is becoming quite common in the recent works of the ILC. The author does not discard that, in the future, an advisory opinion on the issue may be requested from the International Court of Justice in order to strengthen the *auctoritas* of the Draft Articles (p. 229).

Certainly, the consolidation of the general principle that armed conflicts do not affect the operation of environmental treaties will not prevent the environment from being one of the victims of many conflicts in practice. It is sadly well-known, for example, that there is rarely an armed conflict in which violations of peremptory norms of international humanitarian law do not occur. In any case, such possible attacks on the environment must be considered as internationally wrongful acts, violating, among others, collective obligations arising from international treaties that will generally remain in force.

In short, this book is an excellent legal analysis of an issue of great complexity and relevance in contemporary international law and it will stand as an unavoidable reference for anyone who wants to delve into the subject in the future.

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BLANC ALTEMIR, Antonio (Director), COS SÁNCHEZ, Pilar and ORTIZ HERNÁNDEZ, Eimys (Coordinators), *The Trade Relations of the European Union with the rest of the World an Analysis after the Pandemic and the Russian Invasion of Ukraine*, (Aranzadi, Pamplona, 2023, 533 pp.)

The purpose of this book is "to analyse the EU's trade relations with the rest of the world, in the framework of its trade policy and the main agreements signed with other countries and economic blocs, at a time marked by a pandemic that refuses to disappear completely and, in particular, by the Russian invasion of Ukraine" (back book cover). The Director, coordinators and authors have successfully achieved these goals. Indeed, while several publications have analysed the EU's trade policy and legal framework, the book under review stands out for several reasons. Firstly, the book provides a complete overview of the Union's trade relations across the world with a particular emphasis on the impact that the recent pandemic and the war in Ukraine holds in those relations. In this regard, most chapters include helpful annexes that are very useful to better comprehend the extent of the individual trade relations with the different partners and their evolution. Secondly, the edited book includes country cases that are particularly relevant for the EU such as those covering the relationship with the United Kingdom, China, the United States, Switzerland or Japan, to name but a few. Thirdly, the book goes beyond the immediate impact of recent crises on particular trade agreements and navigates the reader into the broader context in which those agreements were entered into (or rejected such as in the case of the Institutional Agreement with Switzerland). Fourthly, the monograph benefits from the long experience of many of the authors and from a robust legal theoretical background complemented with some chapters that analyse trade relations from an economics viewpoint (e.g., the chapter on the relationship with the UK post-Brexit). Lastly, while the theme of trade relations after the COVID-19 and Ukrainian crises permeates throughout the book, the Director and coordinators have succeeded in avoiding repetitions and overlaps between the different chapters and Parts.

The book is structured in six parts and an introductory chapter on the Union's trade relations after the COVID and Ukrainian crises based on discussions held in the context of the seminars organised by the Jean Monnet Chair held by the Director of the book, where 25 academics from 14 institutions participated. While the first part is devoted to the analysis of the EU and multilateralism, the remaining five parts are divided along geographical lines, making it appealing to the reader, and more accessible for the non-initiated in the world of trade relations. Notwithstanding, perhaps the introductory chapter and the two chapters on multilateralism could have also been merged under a general Introductory part on the EU in a multilateral context. My comments will focus on some of the most salient features of the introductory chapter and each of the six parts.

The first chapter (by Professor Blanc Altemir) introduces the reader into the book's topic and provides very valuable background on the impact of the two abovementioned

crises on EU trade policy, on the Union's new trade strategy and on the position of the European Union in World Trade. The chapter shows how recent shocks have altered the context in which EU trade policy has developed and how the EU has reacted to those challenges, trying to combine, through the new Open Strategic Autonomy its multilateral soul with an increased need for pragmatism.

Part I analyses the interplay between *The European Union and Multilateralism*, the first chapter of this Part (by Professor De Castro Ruano) studies the conceptualization of Multilateralism and the impact of the pandemic and the Ukrainian crisis on Multilateralism, notably in its application in relation to the European Union. The chapter underlines, rightly in my view, that the Union's interest might not always converge with those of the United States, and therefore that the latter should not be followed in all instances. The second chapter of this Part (by Professor Alcaide Fernández) provides another lens to the relationship of the Union with Multilateralism, notably through the focus on prevention and resolution of international conflicts after the adoption and subsequent revision of the 2016 Global Strategy.

Part II provides a rich analysis of *the trade relations of the EU with the rest of Europe*. This Part starts with an analysis of the relationship with the United Kingdom (by Professors Podadera and Garashchuk), that includes an interesting proposal to establish a strategic partnership between the EU and this country to create a third pole, beyond the United States and China, in the international system. The second chapter (by Professor Gestri) deals with the European Economic Area. The author notes that, despite some references to the EFTA countries as "rule-takers", the EEA agreements have led the countries involved to benefit from access to the Single Market without accession and the overall assessment is thus positive. By contrast, the third chapter of this part, by Professor Bermejo García, analyses the relationship with Switzerland and shows how important for trade relations is a deep understanding of internal politics, as well as of the economic and financial situation of a trade partner in order to explain (or avoid) the rejection of an agreement (the Institutional Agreement in this case). The next chapter, by Professor Bou Franch, studies the relationship of the EU with European microstates, an often-overseen subject that is liable to have significant repercussions, particularly in the financial regulation area. A different but also timely issue is the relationship between the EU and Western Balkans, analysed by Professor Cisneros Cristóbal that alerts about the importance to act beyond the current Union's economic sphere and of the risk of "losing" these states if the right choices are not made. Finally, this Part concludes with an analysis of the relationship with Türkiye (by Professor Aldaz Ibáñez) which interestingly shows that the prospect of accession (or rather lack thereof) has complicated the needed update of an economic and trade relationship that has been overall positive.

Part III examines the EU's *trade relations with the Eastern and Southern neighbourhood*. The first chapter of this Part, by Professor Rodríguez Prieto, studies the Union's relations with Eastern countries and shows how it has been characterized by different speeds, being globally positive for Moldova, Georgia and Ukraine, somewhat less so for Armenia, mixed with Azerbaijan, notably conditioned by Russian realpolitik according to the author, and negative with Belarus, for reasons linked to the political system followed by this neighbouring country. The second, and last, chapter of this Part, by Professor Pérez Salom, examines the Euro-mediterranean agreements and attractively observes that the

EU has sometimes failed to adopt a comprehensive approach towards this region. In this regard, the author also notes that the bilateral approach followed by the Union has failed to foster regional cooperation between med-countries. The author also criticizes the non-effective implementation mechanism devised.

Part IV covers the *relationship between the Union and North Central and South America*. This Part opens with a chapter by Professor Cos Sánchez, one of the book coordinators, which shows how the recent pandemic has put a halt to an overall positive tendency in the trade exchanges between Canada and the Union, which could resume in the current post-pandemic context. The second chapter of this Part, drafted by Professor Manero Salvador, analyses the relationship with the United States and explains that, despite the overall agreement in many global issues, the Biden administration has not shown a significant interest in reopening bilateral trade agreement talks. The focus lately, and understandably, has been on security cooperation. However, the situation is not satisfactory, notably for United States companies, which are put at a disadvantage when compared with others from Canada or the United Kingdom, which can rely on an ambitious trade agreement with the EU. Also in this Part, Professor Colom Gorges studies the relationship with Mexico and Professor Díaz Galán the European Union Central-América agreement. In both cases the overall assessment is positive, with Professor Colom interestingly underlying that the agreement with Mexico provides for ambitious environmental and labour goals and Professor Díaz that the cooperation in the support for International Law has provided a fruitful basis for entering into the agreement with Central American countries. By contrast, the analysis in the last two chapters of this Part by Dr. Presta Novello concerning the trade relations with Colombia, Peru and Ecuador, and by Professor Coppelli Ortiz, concerning the relations with Chile and MERCOSUR, highlight that while the balance of the relationship is positive, the impact of the trade relation is rather limited. In the case of Colombia, Peru and Ecuador, despite the fact that trade agreements are in place, there remain several social and environmental concerns. In the case of Chile, the author notes that the new Chilean Government decided to hold the signature of the new trade agreement for further study, although this has recently changed. Notably on 13 December 2023 the EU and Chile signed an Advanced Framework Agreement and an Interim Trade Agreement.

Part V analyses the *EU trade relations with Asia*. In particular, the first chapter of this Part, by Professor Tirado Robles, examines the EU-Japan economic partnership agreement. This author highlights that the agreement can be considered a success in light of the experience of the last years. Significantly, the author also underlines that the agreement with Japan has not only facilitated business exchanges but also a firm commitment to rules and principles, something very important in the current multipolar context. Equally interesting is the next chapter, by Professor Salinas Alcega, on the relationship between the EU and China. The author shows that the relation with the Asian giant represents a dilemma for the Union between economic gains and the observance of the values on which the Union is based. Interestingly, the author also explains that an investment agreement with China would ultimately be more beneficial for the EU. It should be noted that an agreement in principle was reached in December 2020. The third chapter of this Part, by Professor Martínez Pérez, examines the less-known relationship with India and includes a relevant proposal to set up a Trade and Technology Council with this partner, as the one in place with the United States, in

order to overcome the current difficulties in the trade relations between the two trade players. Subsequently, Professor Ortíz Hernández, one of the book coordinators, studies the relations with South Korea and concludes that, while positive in economic benefits, broader issues have not been covered and, as such, it lacks a certain ambition in terms of multilateralism. Finally, Professor Moltó Aribau, analyses the trade relations with Singapore and Vietnam, and interestingly highlights that, while it might be too early to assess in-depth the impact of the recent agreements, these agreements could provide a template for a future deal with ASEAN.

The last part of the book takes the reader to the *Union's trade relations with Africa and Oceania*. To this extent, the first chapter, by Professor Esteve Moltó, examines the relations with ACP countries in the post-Cotonou context and finds that the balance sheet is rather modest, with China displacing the EU in terms of influence. The author also notes that the Union has not been able to provide a viable alternative to the ill-reputed Washington Consensus. The second chapter of this Part, by Dr. Florensa Guiu, studies the trade relations with South Africa, and notes, as does Professor Escardibul Ferrá concerning the relations with Australia and New Zealand in the last chapter of the book, that the relationship of the EU with these jurisdictions has improved over the last years although the trade agreements, particularly with Australia and New Zealand, are very recent to have a complete overview of their impact.

In light of the foregoing, I definitively recommend this monograph to practitioners, researchers and academics interested in the trade relations of the European Union, but also more generally for students of European Union Law. They will benefit from an overarching work that provides not only a detailed account of the Union's trade relations, but also a rich understanding of the context that underpins them. The Director, coordinators and authors of this work should thus be commended.

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CELIS AGUILAR, María Mayela, ***Sustracción Internacional de menores. Estudio jurisprudencial, doctrinal y crítico del Convenio de La Haya de 1980. Aspectos clave y soluciones a los problemas de aplicación*****, (Dykinson, Madrid, 2023, 604 pp.)**

The purpose of the book is to carry out a case-law and critical study of the interpretation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter 1980 Hague Convention).

International child abduction is a paradigmatic example of the complexity of family disputes with a cross-border element, as it has been widely stated by the diverse and excellent doctrinal works on the subject. In this context, this research presents an original and rigorous analysis of the 1980 Hague Convention based on two premises.

The first refers to the criticisms made by a sector of the doctrine according to which the 1980 Hague Convention is outdated today. Therefore, it no longer provides an adequate response to the phenomenon of international child abduction. Mainly due to legal modifications in family law; as well as sociological changes with respect to the primary cares, usually mothers, who are nowadays the main protagonists in the abduction of their children; or the growing awareness of society of violence in the family context.

The second factor is the absence of a supranational court to harmonize the interpretation of the key concepts of the 1980 Hague Convention and to resolve conflicts of interpretation of the Convention's provisions. In this regard, the author identifies such a uniform interpretation as one of the great challenges of the Convention, although she highlights the great work done at the regional level by the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECHR).

In this sense, the author argues that in order to overcome the criticisms of the Convention it is necessary to promote a better understanding of the Convention from different perspectives, so as to ensure, as far as possible, an evolutionary interpretation. To tackle this ambitious purpose, the book is structured in three clearly differentiated parts, consisting of a total of eight chapters, which are a reflection of the rigorous work done by the author, with a praiseworthy selection of a variety of treated problems in-depth.

The First Part analyzes comprehensively the phenomenon of international child abduction, focusing mainly on three angles. The first perspective is the so-called multidisciplinary one, and examines the phenomenon under study from sociology, law and the media, among others. Secondly, the legal perspective, analyzing the sources of regulatory production at different levels and their proposed legal solutions. Thirdly, the author wisely chooses to analyze the phenomenon of international child abduction from the Human Rights perspective.

The Second Part studies the impact of case law on the understanding of the 1980 Hague Convention. It includes a wide range of decisions not only from Contracting States,

but also the ECtHR and the CJEU, and even other international or regional bodies, such as the Inter-American Court of Human Rights or the Committee on the Rights of the Child. To this end, the author has rightly opted for a selection of problems in relation to three axes that are identified as "key" for a correct application of the Convention. First, issues related to the title, philosophy, nature, purpose and constitutionality of the Convention are analyzed, and then the decisions issued in relation to the notions of "habitual residence" and "right of custody".

Thirdly, from a more practical approach, the last part is devoted to the most relevant exceptions to the return of the child of the 1980 Hague Convention: the exceptions of Articles 13(1)(b) and 13(2) of the 1980 Hague Convention, namely the grave risk exception and the child's objection exception. In addition to an in-depth analysis of the problems arising from these exceptions, the author aims to clarify the existing doubts about the number of exceptions to the child's return and their identification.

As stated in the Prologue, the reading of this work reflects the rich academic background and extensive professional experience of the author in the field of Private International Law. She has made an excellent and ambitious selection of problems that are supported by one of the fundamental values of this research. The compilation and systematizing of nearly 600 judgments and decisions from 46 countries, as well as resolutions of a total of seven international or regional courts or bodies. Moreover, another fundamental point of this book is the aim to build bridges between the legal traditions of civil law States and common law States. Together with the emphasis on the necessary connection between the 1980 Hague Convention and Human Rights.

Undoubtedly, a work of great interest that will provide clarity on the subject for which Dr. María Mayela Celis Aguilar deserves high praise, as well as her PhD Director Dr. Marina Vargas Gómez-Urrutia and the International Doctoral School of the Universidad Nacional de Educación a Distancia.

María González Marimón

ESPLUGUES MOTA, Carlos, *El control de las inversiones extranjeras en la Unión Europea*, (Tirant lo Blanch, Valencia, 2022, 458 pp.)

Building on his previous contributions in the field, the author provides a valuable overview of the evolution of the Union's regulatory framework for foreign investment. The book discusses the recent developments on how the traditional EU openness to foreign investment has evolved to address new concerns, particularly those arising from the activities of foreign state-owned enterprises as investors in strategic sectors in the EU market.

Three main parts can be identified in the book. Sections I to V discuss the interplay between free trade and the free flow of investments from a global perspective, with a focus on the limited role that the World Trade Organization plays on the international regulation of foreign investments and the increasing significance of regional and national provisions in the field. Special attention is devoted to the interpretation of the security exceptions under Article XX of GATT and the meaning of the main terms influencing the scope of that provision, in particular, the definitions applicable to "essential security interests" and "actions" that can be considered "necessary" for the protection of such interests. Additionally, the potential risks to a State's national security generated by foreign investment and the relevant factors for the assessment of such risks are considered, stressing the significance in that context of state-owned enterprises as investors and the position of China. This part concludes with an examination of the compatibility of foreign investment screening systems with WTO obligations and the basic principles on which such systems should be built.

The core of the book presents an overall analysis of the EU comprehensive framework for the screening of foreign direct investments on the grounds of security or public order, laid down in Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. Section VI of the book scrutinizes the reasons for the establishment of the new common framework on how the Member States, and in certain cases the Commission, are to screen foreign direct investments. Additionally, such common framework allows Member States to take into account their individual situations and national circumstances. In Section VII Carlos Esplugues examines in detail the central provisions of Regulation (EU) 2019/452, especially those on the factors that may be taken into consideration by Member States or the Commission in determining whether a foreign direct investment is likely to affect security or public order and the cooperation mechanisms in relation to foreign direct investments undergoing screening and not undergoing screening.

The third and final part of the book focuses on the Spanish framework for the control of foreign investment on national security grounds. The traditional fragmentary model based on the principle of freedom of movement of capital and foreign investment is discussed, with the focus on Royal Decree 664/1999 and Law 19/2003 on the legal regime of capital movements and foreign economic transactions, as amended in 2020.

As a result of the dynamism of this field in recent years, it is to be noted that new instruments have been adopted since the book was published, particularly, Royal Decree-law 20/2022 and Royal Decree 571/2023 of July 4, 2023, which repeals Royal Decree 664/1999. Notwithstanding that, the discussion in the book remains highly significant, as illustrated by the fact that one of the basic goals of Royal Decree 571/2023 is to further adapt the Spanish foreign investment regime to Regulation (EU) 2019/452, which is analysed in detailed in Sections VI and VII.

Pedro De Miguel Asensio

SYbIL | Spanish Yearbook of International Law

ESTRADA TRANK, Dorothy, *Nuevos horizontes en la protección internacional de los derechos económicos y sociales* (Tirant lo Blanch, Valencia, 2022, 218 pp.)

The book under review, *Nuevos horizontes en la protección internacional de los derechos económicos y sociales*, deals with a classic topic in international human rights law. It adds to the long list of academic works on the international protection of economic, social and cultural rights. It introduces, however, some novel issues, which have so far hardly been subject of interest in the doctrine: the practice of the ESCR Committee and the case of Spain as a prototypical case study.

Before analyzing these issues, it is striking that the title of the book only mentions economic and social rights, when precisely one of its novelties is the specific study of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. Its justification is found in some introductory words of the author, when she stresses that her objective is to study a category of discrimination based on socioeconomic status. In her opinion "poverty and socioeconomic inequality, by themselves, are forms of structural vulnerability that place people at a higher risk of experiencing human rights violations" (p.18). The thoughts contained in the book are the result of a rigorous and critical analysis endorsed by Dorothy Estrada' research.

The work is divided into six supposed chapters which follow a logical structure. Moreover, it contents an extensive bibliographic and documentary list and presents two final annexes, that graphically show the status of ratifications of bothe legal instruments, the International Covenant on Economic, Social and Cultural Rights and its Optional Protocol.

The first chapter is a general introduction to the topic, its methodology and brings special attention to economic and social rights during the Covid-Pandemic (pp. 15-26). The second chapter analyses the historical and institutional context of international human rights law (pp.72-50). The third chapter focusses in the economics, social and cultural rights as human rights within United Nations Law in comparison with regional systems, that is European, Inter.-American and African law (pp. 51-100).

The fourth chapter is the central theme of the book (pp. 101-171). On the one hand, it studies the negotiation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and its specific protection of ESC rights. In analyzing the system of individual communications that the Protocol introduces, the author gathers the main lines and interpretative contributions of the Committee on the scope of the rights guaranteed in the Covenant. On the other, the author decided to analyses the case study of Spain because of two reasons: 1) Spain is the State against which the majority of individual communications have been submitted to the Committee in relation to the right to housing and 2) Spain it is the first EU Member State committed to the effectiveness of the Covenant and the system of individual communications (pp. 156-171).

The case study of Spain is based on the idea that certain economic and social rights derive directly from certain fundamental rights recognized in the Spanish Constitution, even though they are not expressly recognized as such in our constitutional norm. Furthermore, Article 10.2 of the Spanish Constitution obliges all national authorities to interpret human rights in accordance with international human rights treaties signed by Spain. This obligation therefore affects all rights guaranteed in the International Covenant on Economic, Social and Cultural Rights.

The key is to be found, however, in certain national jurisprudence, which states that the difficulties in complying with the recommendations of the decisions of the United Nations bodies on the protection of rights, as in the case of the CESC, and consequently establishes that such recommendations may serve as a basis for filing a claim against the State for negligence or for not having established a national mechanism to give effect to such rights. Undoubtedly, this interpretation appeals to the legislator for the establishment of the national mechanism for the implementation of economic, social and cultural rights, as understood in the International Covenant on Economic, Social and Cultural Rights.

Under the heading of "cross-cutting themes and future challenges" (Temas tranversales y retos prospectivos), the fifth chapter focuses on gender equality and women's socio-economic rights. Undoubtedly this chapter reflects once again Professor Estrada's professional and personal commitment to defending the rights of women and girls against all types of discrimination. After a detailed analysis of the difficult situations of women's rights in the various latitudes of the planet and how nuances of equal rights have been progressively introduced into the practices and laws of the States, Professor Estrada proposes that currently the question is no longer whether economic, social and cultural rights are justiciable, but rather how to materialize that justiciability (p. 193).

The twelve conclusions of the book are clear and suggestive. All of them are characterized by the idea of a close relationship between human rights, socioeconomic equality and social justice. The author defends that the main challenge of the current historical moment is to move from non-discrimination as a vehicle for the protection of ESCR to the reaffirmation and revitalization of ESCR from the proactive construction of equality and the solidarity policies. In her opinion, equality and solidarity find its foundation in international human rights law. From the analysis of the work of the CESD, the author highlights that the cited Committee has opened new innovative lines of interpretation in relation to the right of housing and the Committee has adopted as well firm positions in relation to the obligation of States to observe the principle of reasonableness and proportionality in evictions (p. 199).

In order to address the effectiveness of the socioeconomic rights of the most vulnerable, the author recalls a comprehensive approach to these rights. She considers that, at the substantive level, a gender perspective should be included and at the methodological level, the inclusion of women in regulatory procedures and in the construction of public policies affecting poverty eradication, health, education and housing, among others, should be ensured too (p. 201).

The author concludes her book by briefly outlining some of the areas where public polices should be established from the prism of solidarity, economic equality and social

justice in order to protect the rights of the most vulnerable and, at the same time, safeguard the planet for present and future generations.

In short, we are before a remarkable work that demonstrates that it is possible to carry out a relevant analysis on the justiciability of economic and social rights if there is a solid conceptual framework on non-discrimination and due diligence in the protection of the most vulnerable that gives current shape and meaning to the socioeconomics rights of the Covenant.

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JANER TORRENS, Joan David, *Conflictos territoriales y Convenio Europeo de Derechos Humanos*, (Aranzadi, Pamplona, 2023, 181 pp.)

The existence of territorial disputes involving States Parties to the European Convention on Human Rights (ECHR) raises several problems regarding the protection of fundamental rights recognised in the Convention. A clear example is Russia's invasion of Ukraine, which began on 24 February 2022 and has caused the biggest challenge to the maintenance of peace and security in Europe since the end of World War II. This led to Russia's expulsion from the Council of Europe on 16 March 2022.

However, several member states of the Council of Europe are involved in territorial disputes, such as those between Cyprus and Turkey, Georgia and Russia, Armenia and Azerbaijan, and Ukraine and Russia. This has brought about a proliferation, especially in recent years, of inter-State cases before the European Court of Human Rights (ECHR).

All these conflicts have had a very negative impact on the respect for human rights in the territories involved, which in turn has led to numerous applications being lodged with the ECtHR. In addition, these conflicts have resulted in the emergence in States party to the ECHR of *de facto* regimes, whose existence is directly dependent on the military and economic support of another State that is also party to the Convention. As a consequence, the State party is unable to fully exercise sovereignty over its territory. This has prompted the development of a very complex jurisprudence of the ECtHR, whose ultimate aim is to prevent a vacuum in the protection of the fundamental rights recognised under the Convention.

This is the context of the work written by Professor Joan David Janer Torrens, a tenured professor at the University of the Balearic Islands. This monograph, released by the prestigious publishing house Aranzadi, deals with the study of the different issues relating to the protection of the rights recognised in the ECHR that are linked to the existence of a territorial dispute.

After a short general introduction, the book is divided into five chapters.

The first chapter analyses the configuration and role of the *de facto* regimes that have emerged in the territories in conflict in relation to the protection of the rights recognised in the Convention that can be carried out by the ECtHR. The ECtHR, on the occasion of the applications brought before it concerning human rights violations committed by the *de facto* authorities in various territories in dispute, has developed a body of jurisprudence on the validity of the decisions adopted, in particular by the judicial and administrative bodies set up by the *de facto* authorities.

The second chapter addresses the analysis of the different issues related to the *de jure* and *de facto* jurisdiction exercised by States involved in a territorial dispute. This is followed by a study of some aspects related to the ECtHR's definition of extraterritorial jurisdiction as a way of guaranteeing the protection of the rights of individuals in situations of territorial conflict. As well as the rules of attribution of the wrongful act

stemming from the violation of the rights recognised in the Convention, which are essentially centred on the assessment of the criterion of effective control over a territory.

The third chapter examines the scope of the positive obligations of the territorial state —whose full jurisdiction over its entire territory is limited as a result of a territorial dispute— as a means of protecting the rights of individuals affected by this type of conflict. The formulation of positive obligations implies an expansive interpretation of the notion of jurisdiction in cases where a state does not exercise control over its entire territory. The ECtHR has made it clear that the existence of positive obligations is necessarily linked to the existence of a certain capacity for maneuver on the part of the territorial State over the territory in conflict where the violations of the human rights in question take place, in order to guarantee a certain degree of protection of the rights at stake.

The fourth chapter deals with the analysis of those aspects relating to the significant increase in inter-State applications linked to situations of territorial conflict that have been brought before the ECtHR. As Professor Janer Torrens points out, the considerable increase in inter-State applications since 2007 responds "not only to the logic of guaranteeing European public order and the protection of the rights of individuals affected by a conflict, but also to the fact that they are also being used as a mechanism for resolving disputes" (p. 126). In addition, inter-State applications coexist with a very large number of individual applications.

The fifth and final chapter of this monograph is devoted to the problems related to the failure to enforce, in due time and manner, those judgments that resolve violations of the rights recognised in the Convention in situations of territorial conflict. As well as the problems which, in turn, derive from the fact that Russia, the main state directly involved in the territorial conflicts currently existing on the European continent, has ceased to be a party to the European Convention on Human Rights as of 16 September 2022.

In short, this book provides the reader with a general knowledge of territorial conflicts on the European continent and the jurisprudence of the ECtHR in this regard. And all of this in a context strongly affected by the armed conflict between Russia and Ukraine and the subsequent exit of Russia from the Council of Europe, a state that has played a prominent role in the current territorial conflicts. However, in this scenario full of uncertainties, Professor Janer Torrens has been able to shed light on the matter with an exhaustive and rigorous analysis of a complex jurisprudence that seeks to prevent a vacuum in the protection of fundamental rights as a consequence of the existence of territorial conflicts. To this end, the ECtHR attributes any violation of the Convention that is committed on the basis of the effective and decisive control exercised by the State that protects the different *de facto* regimes that emerge within the conflict. All in all, it is a relevant and thoughtful work that provides an undeniably useful approach to an area in need of fundamental rights-based perspectives, such as the one represented by territorial conflicts.

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SYbIL | Spanish Yearbook of International Law

JIMÉNEZ PINEDA, Eduardo y GONZÁLEZ GRECO, Daniela Jazmín, *Las migraciones climáticas: estudio desde la perspectiva regional y de la cooperación internacional,* (Aranzadi, Pamplona, 2023, 181 pp.)

The book *Las migraciones climáticas: estudio desde la perspectiva regional y de la cooperación internacional*, co-authored by Professor Eduardo Jiménez Pineda and Daniela J. González Greco, contributes to the study of a subject of great relevance in the contemporary international context. Both authors have made a significant contribution to analysing climate-induced migration, which is increasingly recognised in academic discourse but lacks adequate normative treatment in international law.

Anthropogenic climate change poses heterogeneous threats to life on earth, mainly through the global rise in temperatures, which can irreversibly alter ecosystems. One of the primary issues related to increasing temperatures is the rise in sea levels, as well as more frequent and unpredictable droughts and floods, and the alteration of fauna and flora in various regions. These phenomena have an impact on the individual as well as on collective entities, such as states.

Climate change is viewed as a threat within the international society — yet another in a catalogue of risks that has grown steadily in recent years — but also as a vector for cooperation. States and international organisations recognise the need to collaborate in addressing global issues, as individual efforts are unlikely to have a significant impact. Therefore, collective efforts to mitigate the risks of increasing temperatures have resulted in significant normative outcomes, such as the 2015 Paris Agreement and the 2030 Agenda. It is important to note that a state's resilience is largely dependent on its level of socio-economic development. Therefore, socio-economic development plays a crucial role in mitigating the impact of climate change. It is important to note that the effects of climate change are not uniform and can disproportionately affect certain groups of people.

The authors of this book acknowledge this reality. Therefore, they have decided to conduct a comprehensive study on migration resulting from the impact of climate change from a regional perspective, with a particular focus on the significance of international cooperation. The research is presented in a well-organized and systematic manner, comprising a conceptual, normative, and doctrinal analysis that enables a comprehensive understanding of the subject under investigation. Furthermore, the work avoids being excessively descriptive, as the critical vision of the authors is present at all times, accompanied by highly interesting proposals.

The book's first chapter commences with a relevant conceptual review. Analysing the object of study necessitates defining and delimiting concepts. In this case, the authors delve into the nuances between climate migration — caused by sudden or progressive changes in the environment that force people to leave their usual places of residence —, environmental displacement — whose number increases over the years — and planned relocation — caused when states move people to new places of residence, whether temporary or permanent,

under their own authority. However, the authors quite rightly bracket the concept of climate refugees. The subsequent analysis of international instruments shows that there is no direct recognition of this concept in any international treaty. For this reason, the authors argue that "the concept of climate refugees cannot be used indiscriminately in international law" (p. 26). Instead, they will use the term 'climate migration' to refer to movements of people or groups of people that occur as a result of negative environmental impacts.

This lack of recognition of the existence of climate migrants or any similar figure is precisely the starting point used by the authors in their survey of international treaties, mechanisms and initiatives in this area. The second part of this chapter provides a normative review that covers a range of well-known instruments, including the Convention on the Status of Refugees and its Protocol, as well as mechanisms established within the framework of the UNFCCC or the instruments for dealing with the consequences of natural disasters. From this analysis, the reader learns that no legally binding response has been articulated to ensure the protection of the rights of climate migrants. Thus, any interpretation that can be made to accommodate them must necessarily be extensive, resulting in a high degree of legal uncertainty. However, the authors rightly bring us closer to some hopeful and highly interesting proposals, such as the Nansen Initiative.

The authors provide a comprehensive analysis of the root causes of the migrations under study. The second chapter of the book includes an in-depth analysis of the decisions made by the United Nations Human Rights Committee in the cases of *Teitiota v. New Zealand* and *Torres Strait Islanders v. Australia*. Both cases highlight the close link between the protection of the right to life and the environment, within the context of climate migration. Following a factual overview, the authors analyse the legal reasoning of the Committee in both cases, as well as the individual opinions of certain members, for their relevance to the development of legal arguments in the protection of climate migrants. The conclusion drawn by the authors in this chapter is that the Human Rights Committee has laid the foundations for the possibility of applying the guarantee of non-refoulement to situations arising from global warming. A position that we not only share, but which we believe demonstrates the value of the work, which goes far beyond mere descriptive analysis.

The course of the analysis leads the authors to study the international cooperation regime on climate change migration protection. To this end, chapter three first examines the multilateral regime from an idealistic perspective. The authors make it clear that "it would be desirable for states to act in a coordinated and collaborative manner for the sake of governance in this area, characterised by international cooperation and solidarity" (p. 62), and that "the measures adopted will have to be comprehensive" (p. 63). They also make a proposal in which they defend the principles that should inspire the multilateral response and identify them as: equality and non-discrimination; impartiality and neutrality; and the structural principles of international environmental law. Then, on the basis of the multi-causality that is at the origin of climate migration, the authors review the SDGs of the 2030 Agenda, whose respect and fulfilment can contribute to the prevention of the causes that provoke the aforementioned migrations. Finally, the chapter examines the role of the European Union as an example of integration and its fervent defence of multilateralism (p. 77). From the analysis of its normative framework and its External Action expressed, among other mechanisms, in Climate Diplomacy, they

conclude that the EU is an actor with the potential to lead diplomatic efforts towards the constitution of a comprehensive international mechanism for the protection of climate migration.

In the final chapter of the book, the authors concentrate on a case study of two regions that are highly vulnerable to the negative impacts of climate change: Southeast Asia and the Caribbean. As stated in the book's introduction, this choice is also justified by the additional risk they face from the obvious risks of sea level rise as island regions (p. 14). This review presents a somewhat disheartening normative situation. Regional and international organisations, as well as inter-state cooperation in these regions, have failed to establish adequate mechanisms to protect the rights of climate migrants. Therefore, the authors strongly advocate for an international treaty "to address the lack of protection for people affected by climate migration, as existing instruments and initiatives to date are not sufficient" (p. 104).

The book, co-authored by Professor Eduardo Jiménez Pineda and Daniela J. González Greco, makes a significant contribution to the subject of climate migrations. Its original structure and approach complement and deepen the works already published within the Spanish doctrine of public international law. The authors maintain a critical vision while being rigorous in their analysis of normative instruments and expression of proposals. Therefore, the book is aimed at both specialists in the field and those who, out of intellectual curiosity, decide to broaden their knowledge of the subject.

Ignacio Álvarez Arcá

MAGALLÓN ELÓSEGUI, Nerea, *La ley aplicable a la responsabilidad civil extracontractual de empresas por abusos de los derechos humanos,* (Aranzadi, Pamplona, 2023, 172 pp.)

The relationships between business and human rights was not an issue that international private doctrine inclined to address until recently. Only a few voices, such as the prologue writer of this book, Professor Zamora Cabot, glimpsed its importance and began this path some years ago. Impunity for abuses committed by some corporations is now in the target of the international community, as demonstrated by the latest initiatives of the European Union, following initiatives from the United Nations, the OECD, or the ILO, where the Council and the European Parliament today reached a provisional deal on the corporate sustainability due diligence directive (CSDDD). The directive aims to enhance the protection of the environment and human rights in the EU and globally. The due diligence directive will set obligations for large companies regarding actual and potential adverse impacts on human rights and the environment, covering their own operations, those of their subsidiaries, and those carried out by their business partners.

The opportunity and success of this work are undeniable. Prof. Magallón Elósegui is right to focus on the conceptual framework of the liability of companies when they violate human rights in their actions. But she also sharpens her focus to courageously lead us to the question of the law applicable to non-contractual civil liability.

She also succeeds in the way in which the work is organised, with three chapters and conclusions that provide a rigorous analysis of a particularly complex subject. The first chapter presents due diligence in Europe, reviewing both the elements that comprise it and the expressions in which it has manifested itself in our immediate setting. The author examines not only the national initiatives carried out by the United Kingdom, France, the Netherlands, Norway, and Germany but also reviews the European due diligence standards that have been implemented by sector: on non-financial reporting, conflict minerals, deforestation, …concluding with an analysis of the proposed Due Diligence Directive currently under discussion in the EU.

Having established this framework, the second chapter proposes the study of corporate responsibility. In addition to the study of the Spanish perspective, a review of comparative law is added to clarify how the employer is liable in different legal systems. This comparative view makes it possible to intertwine concepts such as due diligence and management control and shapes the current situation, breaking with the traditional principles of legal personality and separate liability.

With these essential premises, the author leads us naturally to the main core of the book with the third chapter entitled “Conflict rules in the area of non-contractual civil liability of companies for human rights abuses”. With an *iusprivatist* approach, Professor Magallón Elósegui encourages us in this chapter to reflect on the need for specialised and materialised conflict rules to deal with cases of human rights violations by corporations. For this purpose, the analysis of the Regulation on the law applicable to non-contractual

obligations (Rome II) is essential. The added value is to carry out this review from a human rights perspective. This is not a simple review of the Regulation. The added value is to carry out this review from a human rights perspective. This nuance provides an adaptive interpretation, highlighting the reasons and resources by which the Regulation is called upon to regulate these cases.

In this way, the author determines the integration of "the potential civil liability for damages derived from abuses of HR in its cross-border activities along the supply chain" (p.127) within its scope of application, although "the social responsibility of the corporation and the relations between the companies belonging to the same group (and, in this sense, the extension of liability between the companies of the group or even, we could think that the duty of vigilance and/or its supervision over the companies of the group) is governed by the *lex societatis*".

After reviewing the scope of application, the author meticulously unravels the points of connection of the conflict rule to uncover the possibilities that may arise when the assumptions of non-contractual liability have their origin in human rights abuses. The possibilities that the author opens with her reflections not only demonstrate her expertise in private international law but also the necessary sensitivity to human rights issues in seeking victim protection. Particularly indicative in this sense is the final part of this third chapter, where the author reflects on the proposal, removed in the latest version of the Due Diligence Directive Proposal, to amend Rome II by adding a new article designed for these cases.

Reviewing the existing rules and proposing critical alternatives to texts such as the provisional deal on the corporate sustainability due diligence directive (CSDDD) that are currently being debated with a view to balancing the relationship between companies and human rights is the objective that Professor Nerea Magallón has not only pursued in this book, but which she has achieved with her work, which is essential reading for anyone wishing to approach the study of business and human rights.

Lorena Sales Pallarés

OBREGÓN FERNÁNDEZ, Aritz, ***Noción de terrorismo internacional. Estudio del marco jurídico vigente y una propuesta de definición con vocación omnicomprensiva,*** **(Aranzadi, Pamplona, 2023, pp. 236)**

Terrorism, an age-old phenomenon, has persisted throughout history, adapting to the changing dynamics of society. While its roots trace back centuries, the legal definition of terrorism has long eluded a universally accepted framework. The evolving nature of the threat, coupled with its diverse manifestations, has made it challenging to devise a comprehensive and universally applicable definition. Only in recent times have concerted efforts been made to legally delineate terrorism, recognizing its multi-faceted nature and global impact. The lack of a precise legal framework until now has posed considerable challenges for international cooperation and the pursuit of justice. As nations grapple with the complexities of this persistent menace, the ongoing quest for a standardized legal definition reflects the imperative to address terrorism comprehensively and collaboratively on a global scale.

To address these issues, Aritz Obregón Fernández, Doctor in International Law from the University of the Basque Country/Euskal Herriko Unibertsitatea, dedicates his work to the product of his doctoral thesis. Faced with the discouragement caused by the blockage of the general agreement project and allegedly irreconcilable positions hindering consensus on a definition of the phenomenon, the author meticulously examines the universal and regional legal frameworks for the prevention and repression of international terrorism, jurisprudential contributions to the matter, state positions regarding the general agreement project, and the most credible doctrinal contributions. The goal is to identify the elements characterizing international terrorism, analyze its content, and determine their general acceptance.

The work is structured into four parts: a brief introduction, two chapters, and conclusions. The first chapter provides a conceptual approach to the international terrorism phenomenon, emphasizing three aspects: the origin of the phenomenon, its different phases, and the role of state actors. Obregón Fernández rightly highlights that international terrorism, as a global phenomenon, requires a global response. It constitutes a permanent and multidimensional threat to peace, democracy, and human rights, recognized by the United Nations Security Council as a threat to international peace and security. Unfortunately, global terrorism is on the rise and expanding, a daily reality in many countries despite not constantly receiving the same level of attention in the media and social networks—a testament to the international community's double standards. Its devastating consequences in terms of lives and material damage are considerable, causing waves of migration and displacement with catastrophic impacts.

The second section of this chapter reviews the existing limits and difficulties in defining international terrorism, emphasizing the "lack of a legally comprehensive definition" and advocating for a legal definition. The author analyzes the general agreement project against international terrorism and the customary definition proposed by the Special Tribunal for Lebanon. Additionally, the author addresses what he terms

the "sectorial solution," seeking to elucidate how states have managed the lack of a general definition by producing universal and regional legal frameworks for preventing and repressing international terrorism. This involves the adoption of international sectoral treaties to ensure the prosecution of those responsible, the establishment of norms and sanction regimes to prevent funding or movements across countries, the promotion of international cooperation in various sectors, and, in the most severe cases, military operations against terrorist groups to reduce their threat level. This response has taken place without a legal definition of international terrorism.

The absence of a definition is one of the factors promoting terrorism and facilitating violations of international law. Conversely, a legal definition would have multiple benefits, including the more coherent development and application of obligations related to the prevention and repression of the phenomenon. Therefore, in Chapter II, through the joint analysis of universal and regional legal frameworks for preventing and repressing international terrorism, international jurisprudence, international legal doctrine, and studies on terrorism, the author breaks down the phenomenon into seven possible elements. These include strategic objectives, ideological factors, the terrorist act itself, the authors of terrorist acts (including the possibility of states committing them), the victims of violence, the communicative dimension of the phenomenon, and its "internationality," with varied normative manifestations and doctrinal contributions. The degree of general acceptance of each of these elements is also examined.

For decades, various attempts have been made for the prevention and repression of international terrorism without a generally accepted legal definition. Totalitarian regimes label those fighting against the system as terrorists, while those attempting to overthrow such regimes self-identify as "freedom fighters." Therefore, this work represents a significant step toward a legal definition of international terrorism. In the second section of this chapter, using the elements mentioned earlier, the author believes that, through the sectorial approach, an "accumulated set of elements capable of forming part of a legally comprehensive definition" has been created. Consequently, two definition proposals are offered: a) a "comprehensive" definition composed of elements currently enjoying general support among states and international organizations, and b) another "holistic" definition aimed at contributing to a comprehensive understanding of the phenomenon, taking into account other relevant elements that have not yet received the same degree of recognition. This approach reconciles the search for a definition identifying the central elements of international terrorism, garnering general support with a holistic understanding of this type of violence.

The work contains a significant bibliography, citing key sources such as international treaties, jurisprudence, acts of international organizations, and some primary state sources. It would have been desirable for the coverage of these national sources to be more extensive, including some countries in Latin America, Asia, and Africa.

The acts of terrorism carried out by Hamas on October 7, 2023, underscore the present significance of combating terrorism on a global scale. Such incidents serve as stark reminders of the ongoing threat posed by extremist groups and the need for international collaboration to address this menace. The fight against terrorism is not only a matter of national security but also a collective responsibility to safeguard the lives and well-being of innocent civilians worldwide. The international community must

remain vigilant, united, and committed to eradicating the roots of terrorism to ensure a safer and more secure future for all. Legally defining international terrorism will contribute to this aim.

This is an outstanding book that reveals the intricate nature of different conceptions surrounding international terrorism. Its conclusions represent a valuable advancement towards legally defining this phenomenon. The book robustly contributes to this goal, and I highly recommend reading it.

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PIGRAU, Antoni, FONT MAS, Maria, MARÍN CANSARNAU, Diana, BORRÀS PENTINAT, Susana, GONZÁLEZ BONDIA, (Dirs.) *La comunidad internacional ante el desafío de los objetivos de Desarrollo sostenible, XXIX Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales* (Tirant lo Blanch, Valencia, 2023, 547 pp.)

In December 2021, the XXIX Conference of the AEPDIRI (Spanish Association of Professors of International Law and International Relations) was held at the Rovira i Virgili University, in Tarragona. The publication here reviewed (*La comunidad internacional ante el desafío de los objetivos de Desarrollo sostenible,XXIX Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales*, Valencia, Tirant lo Blanch, 2023) is the fruit of the presentations and discussions successfully held at the Conference, which all revolved around the 2030 Agenda for Sustainable Development and the challenges it presents to the international community.

While the theme of the book already justifies its timeliness and relevance, the smart structure followed by the book, and the very varied perspectives from which the 2030 Agenda is approached make this an essential read for anyone interested in understanding how the international community can achieve the Sustainable Development Goals (SDG) and where it is finding the hardest obstacles. The inclusion of authors from the three disciplines that AEPDIRI itself brings together —that is, Public International Law, Private International Law, and International Relations— is also a wise decision, thereby showing that global challenges are interconnected and must be addressed simultaneously from multiple angles.

The United Nations General Assembly's Resolution titled "Transforming our world: the 2023 Agenda for Sustainable Development" (A/RES/70/1, 25th of September 2025) sets out the guiding principles, goals, and commitments of States and other subjects to achieve sustainable development worldwide. It does so by recognizing the importance of addressing economic, social, and environmental challenges in an integrated manner and it defines this universal Agenda as a plan of action for the planet, people, and prosperity, which also seeks to strengthen international peace and access to justice. These four spheres are the pillars around which this book is constructed although before concluding, its directors decided to include a fifth and last pillar, one dedicated to SDG 5 and the violence against women and girls.

The five-part structure, each consisting of several chapters, allows the reader to easily identify those issues that relate to a particular sphere or aspect of an SDG as well as how subjects like the EU or actors such as companies are approaching the 2030 Agenda. In fact, the role of the EU features prominently throughout the book, with several chapters devoted to the actions of this regional organization. This echoes the structure of the AEPDIRI Conference itself, which even devoted part of its title to "the role of the EU in the light of the SDGs".

At this point, mention should also be made of the strong interest of the editors of this publication (as well as of the Academic Organising Committee of the Conference), in ensuring that this book contributes to the transfer of knowledge to society on the 2030 Agenda. The role of the University and the importance of transmission by professors and researchers to the public is and must be, increasingly important. Therefore, the didactic zeal and the appropriate choice of a topic as pressing as the one discussed here, make this book "one of the most substantial contributions made by Spanish internationalists to the task of promoting the SDGs", as Professor Antoni Pigrau, Coordinator of the Conference, states in the introduction.

As it is well known, the SDGs are 17 and they are divided into 169 targets which aim at stimulating action over 15 years (2015-2030) in areas of critical importance for humanity and the planet. While UNGA's Resolution begins by referring to people, this book starts from the most comprehensive prism: the planet and those SDGs that work for the environment more broadly.

Karlos Pérez de Armiño is the one opening the section on *Planet* with a chapter on risks and threats and the discursive securitization of climate action. More specifically, he explores the nexus between security and climate change, and how the choice to securitise this phenomenon has shaped EU climate policies since it first became involved in global environmental issues in the run-up to the Earth Summit in Rio de Janeiro in 1992. This decision, which deserves an ambivalent assessment according to the author, has impacted stakeholders within the EU's borders, and it has elevated climate change as a matter of high politics, granting climate diplomacy a very relevant place on the European External Action Service agenda.

Professor Carballo identifies the many challenges attached to the conservation and sustainable use of oceans, seas and marine resources and the role international private law could play to solve several problems. Among them, one stands particularly out: the "deregulation in which transnational corporations operate with impunity", which has a devastating impact not only on the marine ecosystem but also on the livelihoods of coastal communities and the human rights of seafarers. In line with the criticism of the lack of attention by governmental and non-governmental bodies to SDG 14 —dedicated to underwater life—, are also Monsterrat Pintado Lobato, Irene Rodríguez Manzano and Carlos Teijo García. Their thorough contributions promote awareness-raising on the topic and reflect the enormous importance of this goal with multiple ramifications, all of them interconnected with the other SDGs.

The approach taken by Montserrat Pintado highlights the "integrated character" of the 17 SDGs by cleverly presenting the tensions that arise within the EU when the so-called "green" and "blue" economies intersect. The still-ongoing debate on the conceptual definition of "blue economy" acknowledged by the author is further explored by Irene Rodríguez, who uses the term as a baseline when explaining how to move towards a sustainable fisheries system that "leaves no one behind". Carlos Teijo's chapter, also framed within SDG 14, neatly dissects the implications that the adaptation to the principles of sustainable development is having for international law. Using the prohibition of subsidies which contribute to overcapacity and overfishing (14.6), the author illustrates how the mechanisms of international trade, maritime, and environmental law come together, albeit not without difficulties.

Within the framework of the EU, Professor Beatriz de las Heras offers an excellent analysis of how SDG 13, referring to Climate Action, finds in the European Green Deal the strategic framework with which the EU intends to achieve climate neutrality. Recognizing the harsh impact that COVID-19 had on the economy and society, and keeping in mind the integration of sustainability as a cross-cutting objective, the EU has been introducing paradigms such as "competitive sustainability" in order to foster post-pandemic recovery and to position the EU as a world leader in this transition. In any case, the Green Pact will be complemented by other instruments such as the European Climate Pact, regulations and directives on, for example, emission rights, or the European Climate Law-linked to the Paris Agreement. In conclusion, until 2050, the binding date for achieving climate neutrality, this framework will need to be further strengthened. In this sense, for David Carrizo Aguado, the European Green Pact has been a missed opportunity in terms of further concessions for the protection of those who migrate because of the burdensome consequences that have their origin in the environment. According to the author, not only the EU but also the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) itself has failed to make any concrete proposals on such population displacements and forced migrations. David Carrizo's chapter addresses the challenges to the protection of climate-displaced persons in the 21st century from the perspective of private international law. His contribution, which concludes with the hopeful wish that the new European Pact on Migration and Asylum promotes cooperation and efforts to protect this collective, brings the reader closer to the issues more directly related to people, the core of the second part of the book.

The section on *People* consists of five chapters and as might be expected, it looks at how international law protects individuals, especially those in vulnerable situations such as migrants, refugees, unaccompanied minors, or children with disabilities.

Cristina Churruca Muguruza's chapter opens this section of the book by bringing to the centre of the debate two international instruments aimed at governing migration, by ideally following goal 10.7, that is: "facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies". To this end, Professor Churruca contrasts the Global Compact for Safe, Orderly and Regular Migration, adopted at the end of 2018, with the position of the EU and its new European Pact on Migration and Asylum. The author assesses this position as "paradoxical", since "despite having presented a common position and decisively influencing the negotiations, the EU becomes the region with the greatest opposition to the Global Compact, questioning the very existence of a common foreign policy in this area". The EU also occupies an important place in the contribution by Sílvia Morgades Gil, who explains in detail how the international subjectivity of refugees is reflected in both international and European law. The author does not overlook the importance of the date of adoption of the 2030 Agenda, since 2015 was "a particularly complicated year in terms of forced migration", which resulted in this issue reappearing as an object of concern and regulation in the international forum. This chapter provides a rigorous timeline of the past and, perhaps, future legal developments of refugees as subjects of law in the various international bodies of law.

Further exploring the implementation of the SDGs in a migratory context, we find Lucas Andrés Pérez Martín's contribution. His chapter presents, in an optimistic light,

the "Reglamento de Extranjería" (the Spanish Regulation for foreigner's rights) after its 2021 recast, setting the specific focus on the protection granted to non-accompanied children. This much-needed reform at the national level bears on the better achievement of SDGs 3 (healthy lives and well-being for all at all ages), 8 (decent work for all), 10 (reduce inequality within and among countries), and 16 (peace, justice and solid institutions). However, as Lucas Pérez warns, we should not be indulgent. In the absence of a regulation that could have been more courageous, we must be vigilant that the political will (as well as the administrative rigour) does not falter in its fulfilment.

The following chapter, written by Mercedes Soto Moya, dissects in a detailed and orderly manner the legal-documentary consequences and the consequences for the right to family life of the application for international protection. The author's examination of the state of the art in private international law, using the Spanish context, allows for *lege ferenda* proposals aimed at better achieving SDGs 1, 2, 3, 4, 8 and 10.

Professor Begoña Rodríguez Díaz is responsible for closing the section dedicated to people, and she does so in a highly competent manner with a chapter dedicated to another group of "vulnerable people": children with disabilities. The situation of these minors is even more defenseless than that of adults with disabilities, 80% of whom live in poverty. Indeed, children with disabilities are among the most underprivileged groups in the world, which is why as many as 10 SDGs mention either persons with disabilities or children as beneficiaries of rights and anti-discrimination measures. It is worth highlighting the table created by the author in which the 2030 Agenda is contrasted with the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) before identifying the EU as an appropriate forum for the further development of protection measures. In any case, there is plenty of room for manoeuvre and the magnitude of the challenge should not discourage action.

In the third section of the book, dedicated to *Prosperity*, emphasis is placed on the involvement of the private sector and corporations, which are key actors in achieving the SDGs because of their capacity to generate innovation, investment, employment, and the development of new technologies. Due to the impact of its regulatory frameworks, the EU also occupies a prominent place in this part of the book, with all six chapters being devoted in greater or lesser measure to European law and how this framework addresses those SDGs that are more directly linked to prosperity.

In the first place, Mercedes Guinea Llorente questions whether the 'Next Generation EU' Programme guarantees a sustainable, equitable and competitive development model or if all the references to the 2030 Agenda and to specific SDGs are merely rhetorical clauses. Her response is that the analysis of the Next Generation programme in the light of the SDGs reveals that the development model of this new policy indeed includes the triple economic, social and environmental dimensions. However, Professor Guinea is aware of the short periods of implementation, thus concluding that the analysis is currently limited to how this policy is formulated. We will have to wait to see whether the goals will be achieved and whether the funds already approved will be enough.

For its part, Guillermo Palao Moreno addresses the notion of 'decent work' as conceptualised in European private international law. SDG 8 aims to promote sustained, inclusive and sustainable economic growth, full and productive employment and decent

work for all. However, as the author points out, "decent work" already appeared in the Millennium Development Goals and in many instruments adopted by the International Labour Organisation (ILO) and the EU itself. Insofar as international private law entails certain limits concerning the regulation of decent work (such as fragmentation, an unequal legal framework, the eminently state character of the systems, etc.), Guillermo Palao suggests, among other things, that "the European regulatory response to this respect should serve as an inspiration and model for the international legislator".

In the next chapter, Xavier Fernández Pons focuses on how the EU is promoting sustainable development through international trade. By drawing on an exhaustive and rich analysis of the key measures adopted by the EU in its trade policy, Professor Fernández provides the clues necessary to understand the next moves within the WTO. This contribution sets out how the EU is seeking to change the paradigm of international trade and lead the transition towards a sustainable model through measures such as the inclusion of a chapter on trade and sustainable development in its preferential trade agreements negotiated with third states, through autonomous measures, or its Generalised System of Preferences. Nevertheless, this ambitious proposal is not without its difficulties, including resistance from emerging economies and developing countries or the uncertainty of how the WTO adjudicating bodies will view these EU's measures.

Moving down a step to reach the corporate level, we find Vésela Andreeva Andreeva's contribution, which presents the EU's Directive 2019/2121 on corporate mobility. This chapter highlights how European regulation, which seeks to protect members, employees, and creditors of companies in situations of cross-border conversion, merger or division, might, on the other hand, be a limitation to the freedom of establishment enshrined in the EU Treaties and whose only permitted limit is in cases of abusive, fraudulent or criminal purposes. After a careful analysis of the abovementioned new Directive, Professor Andreeva concludes that it can be positively assessed insofar as it accomplishes the European Commission's objective of avoiding the lack of a harmonized EU legal framework regarding cross-border conversions and divisions.

Finally, the last two chapters of this third section, address important intangible challenges of the online world. Antonio Merchán Murillo makes special reference to the EU regulatory framework when discussing the importance of digital identity in the framework of the SDGs, and Lucía Modroño Pérez closes the block by introducing the new regulatory framework in the EU to strengthen the resilience of critical entities and network security against cyber threats. These two contributions nail down the steps that the EU is taking to keep their citizens, companies and infrastructures safe in one of the realms on which future "prosperity" will depend most.

The fourth section of this publication is dedicated to *Peace, Justice and Partnerships*. Resolution 70/1 emphasises the universality of the 2030 Agenda, urging all countries, regardless of their level of development, to participate in and contribute to the achievement of the SDGs. While it is very comprehensive and it emphasizes the importance of collaboration between governments, civil society, the private sector, and international organisations to implement and monitor progress towards these goals, the Agenda fails to explicitly address the commitments that must be made in the field of international security. The only mention to "peace and security" can be found in paragraph 35, when it is stated that "sustainable development cannot be realized

without peace and security; and peace and security will be at risk without sustainable development". The absence of a direct reference to such a topic is the object of Cástor Miguel Díaz Barrado's chapter. In a discursive style, Professor Díaz Barrado illuminates the areas of the international architecture where the security-development nexus is most evident. Thus, he brings up reports of previous Secretary Generals, UN General Assembly Resolutions, and declarations of the Organisation of American States or the Organisation for Security and Cooperation in Europe that include an evolved and broader notion of security. Although thanks to his analysis it can be concluded that the 2030 Agenda tacitly recognises the importance of peace and security as a building block for achieving the SDGs, Goal 16 —which comes closest to the issue—, only touches on international peace and security in a very tangential way.

Indeed, SDG 16 aims at the promotion of peaceful and inclusive societies for sustainable development, access to justice for all and effective, accountable and inclusive institutions at all levels. Precisely this last nuance referring to all levels, including the local one, is the benchmark used by Óscar Mateos Martín when deconstructing Goal 16. Acknowledging that "the 17 SDGs are born in a context in which problems and solutions are no longer exclusively defined by the global North towards the global South, but in a much more shared manner", Professor Mateos offers an in-depth analysis of how SDG 16 came into being to later assess its impact on an increasingly contested international peacebuilding agenda. He also discusses the need to ensure "local ownership" in the implementation of this Goal before concluding that, so far, it has been more rhetorical than real.

Estrella del Valle Calzada's chapter addresses land grabbing, a phenomenon that has a direct impact on the implementation of SDGs at the local level and is often embodied by transnational corporations with a voracious appetite for investing in agricultural land, monopolising territories and hoarding resources. This important contribution concludes, after presenting the main legal initiatives in the field, that "existing instruments are insufficient to curb corporate interests and defend the rights of local communities", even though the effective fight against land grabbing would have a direct and positive impact on the achievement of SDGs 1, 2, 5, 14 and 15.

Also focusing on irresponsible business practices, the chapter by Daniel Iglesias Márquez explores the synergies between the Guiding Principles on Business and Human Rights adopted by the UN Human Rights Council in 2011 and the 2030 Agenda. Furthermore, at the European regional level, the author considers the extent to which the EU's business and human rights agenda contributes to and complements the SDGs of the 2030 Agenda. Once again, we see that despite the efforts, there remain problems in the implementation. In the case of the EU, its actions —despite being forward-looking— have not yet succeeded in transforming the paradigm of the current unsustainable economic model in which businesses operate.

Tackling access to justice at the heart of the international legal order, Francisco Javier Zamora Cabot uses the *Doé v. Nestlé* case before the US Supreme Court to dissect the impact of the High Court's decision on transnational human rights litigation arising from corporate actions. Professor Zamora also reviews relevant judicial decisions from other forums (US, UK, Hague Court of Appeal, etc.) in an orderly fashion. All of this allows him to conclude that the Alien Tort Statute, regardless of how long it remains relevant,

has already amply demonstrated its importance in the defence of human rights in the context of business interaction. On his side, Josep Gunnar Horrach Armo also addresses access to justice in such cases but within the European context. His chapter analyses the suitability of *forum necessitatis* in the EU as a mechanism to protect human rights violated by transnational corporations. After reviewing the requirements of subsidiarity, exceptionality and sufficient connection, Professor Horrach concludes that as long as these conditions are respected, it would be advisable to include a *forum necessitatis* in the forthcoming reform of the Brussels I Regulation. The ultimate objective would be to reduce the denial of justice in human rights matters.

Finally, as previously advanced, the fifth and last part of the publication is dedicated to *SDG 5 and the violence against women* of all ages. Its four timely contributions cover the most relevant international mechanisms currently in place to achieve gender equality and empower all women and girls. While each of the authors addresses a different aspect of this goal, the identification of the lack of enough political will and provision of resources seems to be, so far, a permanent flaw of all mechanisms.

Against the backdrop of 1325 UN Security Council Resolution of 2000, Magdalena M. Martín Martínez provides an analysis of how the 2030 Agenda presents some synergies with the Women, Peace and Security Agenda (WPS). Moreover, Professor Martín offers a forward-looking critical approach on how to rethink the international legal framework in the fight against women and girls. The adequacy of international law to address inequalities against women is contested, according to the author, due to the fragmentation and legal gaps in conventional instruments such as the CEDAW, due to the growing disconnect between international theory and praxis (where international courts barely intervene), and due to the lack of intersectionality (i.e. the failure to recognise that womanhood intersects with other categories such as race, age, disability, etc.).

Also within the UN framework, Dorothy Estrada Tanck resorts to the work undertaken by the United Nations Working Group on discrimination against women and girls to offer a set of experiences and good practices in the fight against one of the most spread-out threats in the world: gender violence. This chapter does a good job in sounding the alarm about specific and newly identified forms of gender-based violence such as that perpetrated in the political and electoral arena or that which occurred in the context of a pandemic.

Though aware of the seriousness and expansion of gender violence and gender inequality, the European External Gender Agenda finds itself at a crossroads, as Itziar Ruiz-Giménez Arrieta exposes in her chapter. Despite some substantial achievements in the EU's global promotion of gender equality over the last three decades, and especially since the adoption of the Women, Peace and Security Agenda and the 2030 Agenda, gender issues in the EU's external action still suffer from a lack of political will, a scarcity of resources (human, economic and material), excessive double standards and the habit of always prioritizing the securitization of development aid funds.

The final chapter of both section 5 and the book as a whole is signed by Rosario Espinosa Calabuig. Her detailed and nuanced contribution focuses on the possibilities offered by private international law, which the 2030 Agenda seems to have ignored, to deal with one of the most domestic aspects of gender-based violence: international

child abduction. Professor Espinosa reviews international (CEDAW, Hague Convention, Istanbul Convention), European (Directive 2012/29, Council Framework Decision 2001/220/JHA), and national (Law 4/2015, Organic Law 1/2004) instruments before concluding with the identification of the main obstacles, both procedural and political, that prevent the full achievement and implementation of SDG 5.2.

In summary, this book is a powerful tool to educate, inspire and mobilize States, subjects and international actors toward action for a more sustainable and inclusive world. The detailed analysis of the specific challenges provided by its 28 authors, the diverse focus used to explore the implementation of the 2030 Agenda (governments, private sector and civil society), and the concrete examples of how international and European regulation pursue the SDGs, offer a complete, clear, didactic and inspiring vision of the most pressing challenges and the most valuable efforts made to respond to the needs identified in each sphere of action.

Ana Sánchez-Cobaleda

URBANEJA CILLÁN, Jorge, *La crisis del Estado de Derecho en los Estados miembros de la Unión Europea,* (Aranzadi, Pamplona, 2023, 352 pp.)

There are undoubtedly fashionable topics and what this book deals with is certainly one of them. This is proven by the fact that at the time we write these lines the issue of the Rule of Law is hotly topical in our country due to events that are on everyone's minds. The work we are discussing, however, is built with the desire to transcend what is a simple issue of current affairs and approaches the analysis of the matter with an ambition and a solid doctrinal background that must be fairly weighed.

With this aim, the author proceeds to present the foundations of the concept in International Law, in the Law of the Council of Europe and, fundamentally, in the Law of the European Union to which, as the book's title reveals, he dedicates the bulk of the work. Regarding the first, the almost titanic efforts to present a notion of the Rule of Law present in the heterogeneous work developed within the United Nations should be appreciated. However, the complex work, the author acknowledges, leads all the more to benevolently admitting that said process has led, at most, to "forming a principle yet in progress".

The investigation into the work of the Council of Europe on the matter is more solid, since it is identified as a constitutive principle of the Strasbourg organization and the commitment to its realization has led to the creation of a specific body: the Commission for Democracy through Law —better known as the Venice Commission— which has been playing a fundamental role in shaping the most outstanding characteristics of the notion, within the framework of its constitutional advisory activities in the processes of democratic transition developed fundamentally in the Eastern European States. But, as the author highlights, the commitment of the Council of Europe to the concept of the Rule of Law is also projected in the activity of its Parliamentary Assembly and also finds projection in the jurisprudence of the European Court of Human Rights. In fact, the European Court has developed a detailed jurisprudence on the independence and impartiality of the judicial bodies of the States parties to the European Convention on Human Rights, confirming the existence of serious deficiencies in the functioning of the rule of law in some of them (Russia, Ukraine, Turkey, Hungary and Poland). In spite of this, as the author shows, the weaknesses of the mechanisms for the execution of ECtHR rulings at the disposal of the Council of Europe has greatly reduced the effectiveness of its pronouncements.

However, the core of the work obviously concerns the examination of the issue within the framework of the European Union. In the profuse analysis developed, the characterization of the Rule of Law as a value of increasing relevance, despite its recent conceptualization, as well as the examination of the political mechanisms successively devised by the EU with a view to ensuring its respect by its member states. In this order, it is not surprising that the careful examination carried out yields an obviously negative conclusion given that neither the preventive and sanctioning procedures established in the TEU nor the pre-preventive mechanism conceived by the Commission in 2014

have produced effective results. In fact, without ever having articulated the sanctioning procedure of art. 7.2 TEU, the alternative instruments used have brought about a resounding failure, without, on the other hand, a possible reform being considered on the horizon in light of the considerations set out in the Report on the Result of the Final Conference on the Future of Europe. It is true, however, that hope lies within this list of instruments: this is the case of the most innovative mechanism to reinforce the Rule of Law in the Union launched by the Commission in its communication of July 17, 2019 and through which a review cycle is established applicable to all Member States, which, as the author highlights, has proven in its still brief history to be an adequate evaluation instrument, although its effects are still imprecise. In this order, he also dedicates an epilogue in his work to the question of the renewal of the CGPJ in Spain within the framework of the aforesaid procedure.

In the face of these uncertainties, other developments has undoubtedly proven to be of greater effectiveness. This is the case, on the one hand, of the jurisdictional mechanisms and, on the other, of the financial instruments, to which the author dedicates the last chapters of his work. In the first of them, the jurisprudential doctrine recently coined by the Court of Justice is addressed and by virtue of which if not the Rule of Law itself, but the respect for the principle of judicial independence by the Member States is established as an essential element in the jurisdictional control to be exercised by the Court of Justice through the direct effect now attributed to art. 19 TUE.

In the careful examination dedicated to this jurisdictional dimension of the issue, the effectiveness of the existing procedural remedies to address the problem of judicial independence and its systematic violation by some Member States becomes clear. In fact, as highlighted in the work, the jurisprudence developed by the Court of Justice since 2018 has become the strongest pillar for the defense of the Rule of Law in the EU Member States. Thus, the appeal for non-compliance has proven to be an effective mechanism in the hands of the Court of Justice to face the Polish challenge through the provisional measures and periodic penalty payments that the Court has agreed on in the course of some of the processes carried out. In turn, the preliminary ruling has served as a promising tool for national judges to raise questions in relation to the interpretation of national regulations related to the principle of judicial independence and the responses issued by the Court of Justice have served to specify certain requirements of the principle of judicial independence with respect to essential aspects of the judicial organization in the Member States (appointments, guarantees and disciplinary responsibility). Finally, the jurisprudence of the Court of Justice has even assumed the possibility of non-execution of European Arrest Warrants in the presence of serious systemic deficiencies that affect any of the judicial systems concerned. However, in this case the solution arbitrated by the Court of Justice ("examination in 2 stages") raises, as the author highlights, some sensitive questions by placing on the judges a complex task of assessment, required undoubtedly of a normative clarification.

This issue, among others, reveals the limits that the judicial response poses to the systemic crises that affect the rule of law and explains the need to consider other mechanisms through which the EU can enhance its capacity to address this challenge. As it is known, the solution has come finally through the conditionality regime for the protection of the Union budget articulated in the Regulation 2020/2092, through which

the suspension of the disbursement of European funds is possible when two principles are cumulatively violated: the Rule of Law and the good financial management or the protection of financial interests in a sufficiently direct way. Given the relevance that the financing provided by the EU to Member States has gained as a result of the pandemic, it is not surprising that this mechanism of economic pressure has proven to be indisputably effective; especially given the guarantees and exhaustive evaluation elements provided for its application. However, the benefits of the mechanism have been called into question just at the time we write these lines (December, 2023), as the funds suspended to Hungary —a measure agreed upon in 2022— have been unblocked to enable an agreement in relation to the start of the negotiations of Ukraine's accession to the EU, and therefore regardless of the persistent deficiencies in order to comply with the requirements of the Rule of Law still at stake in Hungary. In short, once again political interests have come into play, frustrating the initial objectives conceived in the Regulation 2020/2092 and calling into question the categorical and forceful defense of the rule of law that the conditionality mechanism intended to promote.

These inflections, perceived by the author himself, do not in any way cloud the rigor of an indispensable work to address a topic called to play, unfortunately, a decisive role in the future of the Union, as the most recent events concerning our country are clearly showing.

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