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THE INTERNAL-EXTERNAL NEXUS IN THE SECURITY NARRATIVE OF THE EUROPEAN UNION

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Abstract

The construction of EU security actorness has been accompanied by a narrative on security nexuses (internal-external, security-development, civilian-military, public-private) associated with the so-called 'comprehensive approach'. The end of the Cold War enabled the explicitness of EU security actorness. The post 9/11 facilitated the reinforcement of previous trends (transnational threats, externalisation of 'internal security', interpillarisation) and the introduction of innovative tendencies (comprehensive approach, internalization of the Common Security and Defence Policy, interconnection of security nexuses). This paper focuses on the internal-external security nexus declared by the EU in the post-Cold War, and reflects about the rationale and effects of the European narrative and practices on the configuration of a post-Westphalian security actor. Based on the analysis of three expressions of the nexus, it is argued that the latter reflects a securitising move of the European actor explained by the convergence of opportunity (redefinition of security, prioritization of transnational threats in a globalized world, soft power enhancement in the post-Cold War), capacity (legal, organic and operational in the field of security, after the entry into force of the Treaty on European Union), and (ambition to have a) presence. The holistic approach underlying the logic of the nexuses is the result of a co-constitutive adequacy: appropriation of policies and instruments of a multifunctional actor for security purposes (security of the EU and of European citizens); securitization of issues in order to promote the policies and the actor.

Keywords:

European Union; internal security; CSDP; security nexuses; securitization

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Ana Paula Brandão

The initial economic specialization of the European integration process and the failure, in the fifties, of the European Defence Community (EDC) project, associated with the nature of the threat and the guarantee of the security needs of the United States and the North Atlantic Treaty Organization (NATO) during the Cold War period, contributed to postponing the inclusion of the security area in Community Treaties. Despite that omission, the security rationale was present either as a catalytic of the process (prevention of European interstate conflict) or in the result (creation, consolidation and expansion of the European security community).

The changes in the post-Cold War created the opportunity for a new stage, favouring the clarification of the European security actor. The Maastricht Treaty signed in 1992 defined competencies in the field of security, both externally, under the Common Foreign and Security Policy (CFSP), and internally within the framework of police and judicial cooperation in criminal matters (in the broader context of cooperation in the field of justice and internal affairs[1]). The formalization of cooperation on security followed specific aspects: intergovernmental nature ensured through two differentiated pillars (second and third pillars), enshrined in the Treaty on European Union, albeit under a single institutional framework; coordination of national policies in the framework of the European Union (and not the European Community) deprived of legal personality; reproduction of the state model of separation between the external dimension of security (second pillar of the EU) and its internal dimension (third pillar of the EU); cooperation covering "all matters relating to security in the EU"[2], although subject to a specified time in the area of defence. The institutionalization of the (then called) European Security and Defence Policy (ESDP) by the Treaty of Amsterdam established the military cooperation, albeit limited to the Petersberg tasks[3], contributing to the recognition of security actorness by state actors (members and non-members), heirs to the realist legacy that values the military component and the classic distinction between internal and external security. Two changes concerning security introduced by the aforementioned Treaty must also be stressed: the restriction of the third pillar to police and judicial cooperation in criminal matters; the possibility of externalizing such cooperation. A decade later, the Treaty of Lisbon conferred legal personality upon the

1 The JHA Cooperation (Justice and Home Affairs) includes several areas (immigration, asylum, customs cooperation, judicial cooperation in civil and criminal matters, police cooperation, and fight against crime.
2 Preamble of the Treaty on European Union (1992).
3 Humanitarian and rescue tasks; peacekeeping missions; combat forces' missions for crisis management, including peacemaking operations. These missions were initially defined in the context of the Western European Union (WEU) by the respective Ministerial Council which, in 1992, met in the Petersberg Hotel in Königswinter (Germany).

European Union, eliminated the pillar structure and transferred matters relating to 'national security' to the Treaty on the Functioning of the European Union.

Gradually, in true Monnet's fashion, the Union acquired political capacity (designing and implementing policies, setting priorities and agendas, minimum internal cohesion, internal legitimacy of the political process), legal capacity (adoption of legal rules), institutional capacity (common institutions with responsibilities in the area and specific agencies), diplomatic capacity (negotiation and international representation), and material capacity. The area of security includes the Common Foreign Security Policy/Common Security and Defence Policy and cooperation in the field of 'internal security', as well as other Union policies. This allows it to perform four functions in the field of security (Kirschner and Sperling, 2007): prevention (of interstate and intrastate conflicts); assurance (peacebuilding); protection ('homeland security'); compulsion (peacemaking, peacekeeping, peace enforcement).

What are the implications of the gradual institutionalization of the European security actorness? This evolution has been accompanied by the narrative that emphasizes a 'global' actorness ambition in terms of geographic reach and of holistic approach (comprehensive approach). The community nexuses are one of the axes of this approach, which includes the declared "nexus between the internal and external aspects of security". This paper intends to answer two questions: Why the nexus? How is the nexus built? Resorting to the securitization theoretical framework (Buzan, Wæver and Wilde, 1998), combined with the conceptual matrix of Bretherton and Vogler (2007)[4] on European actorness, it argues that the nexus between internal security and external security represents a securitising move of the European actor explained by the convergence of opportunities (redefinition of security, prioritization of transnational threats in a globalized world, soft power enhancement in the post-Cold War), capacity (legal, organic and operational in the field of security after the entry into force of the Treaty on European Union), and (ambition to have a) presence. The holistic approach underlying the logic of the nexuses is the result of a co-constitutive adequacy: appropriation of policies and instruments of a multifunctional actor for security purposes (EU and European citizens' security); securitization of issues in order to promote the policies and the actor.

The chapter begins by tracing the evolution of the narrative of the security nexuses associated with the construction of the European Union's actorness in the field of security, after the entry into force of the Treaty on European Union, which established cooperation in the fields of Common Foreign Security Policy and 'internal security'.

The second and third sections emphasize the discourse and European practices related to nexus between the internal and external dimensions of security, seeking to answer two key questions - why and how (is it built), from the analysis of three cases (examples of nexuses): the civilian dimension of the Common Security and Defence Policy (CSDP); the internalization of the CSDP; the externalization of internal security.

[4] The authors identify three aspects of actorness: opportunity – "factors in terms of ideas and events in the external environment that limit or allow actorness"; capacity – "internal context of EU action – availability of political instruments and agreeing on the Union's capacity to use these instruments to respond to opportunity and/or take advantage of presence"; presence - "the EU's capacity, by virtue of its existence, to exert influence beyond its borders" (Bretherton and Vogler, 2007).

Security Nexuses

In the post-Cold War, debate about security leading to conceptual, theoretical and empirical pluralism became widespread, resulting in its broader re-conceptualization. No longer at the centre of the realistic approach, security is conceived as a multi-sector phenomenon[5] because it is not restricted to the traditional political and military sectors, and as a multi-level one, because it is not limited to the provider and object of state reference. In short, four central themes in the debate can be identified. First, the critical contributions of the threat's realistic setting warned of the complexity of the post-Cold War environment, characterized by multiple threats including non-state ones. Politically, the discourse about the "changing context", diffuse and unpredictable, became widespread. A second front of the debate focused on the referencing *object of security*, deconstructing the realistic equation -'state security' equals 'security of people'? from the question, 'whose security?' One of the answers favoured the people-centred approach in the context of the 'humanizing' discourse of the nineties, also present in the field of development. The diversity both in terms of threat and object (of security) justified a third axis of the reformulation applied to the *security provider*: besides the state, historically enshrined as *the* actor of security, other actors contribute to the security of persons, ranging from supra-state organizations to nongovernmental organizations. The academic and political trend towards a holistic approach (*comprehensive approach*) to security is reinforced by the fourth axis of the debate: the *security nexuses*. The narrative of the nexuses is based on the idea of interdependence of phenomena - two or more phenomena that "are intrinsically interlinked and mutually reinforcing" (Ganzle, 2009: 11) – as opposed to the border rationale (*lato sensu*[6]) underlying the realist paradigm. Thus, the threats are "dynamic" (European Council, 2003: 6) and multidimensional, which requires inter-state coordination in preventing and combating them. The nexus is intensified by the increasing transnational nature of threats.

By way of illustration, two examples are given here to illustrate the presence of the European actor associated with narrative and practice of nexuses. Somalia and the Sahel are perceived as an insecurity continuum, where state fragility, extreme poverty, food crises, climate change, corruption, internal tensions, illegal trafficking, terrorism, violent extremism, and radicalization are interconnected, with a "growing direct impact on the interests of European citizens" (EEAS 2011). In both cases, the EU has adopted a comprehensive approach: the humanitarian support to Somalia in the 1990s was later combined with development cooperation, political dialogue, civil and military instruments;[7] the Strategy for Security and Development in the Sahel (EEAS 2011), with a budget of 600 million euros, covers the areas of security, peace-building, conflict prevention, development, and the fight against radicalization.

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5 Barry Buzan (1991) defined five security sectors: political; military; economic; environmental; societal.

6 Border not only in the geographical sense but also political (conceptual, operational and organizational separation between political areas).

7 "The rising of the Somali insurgent group Al Shabaab in 2006 and its support for Al Qaida's international jihad as well as the escalating attacks on international shipping within the Gulf of Aden and the Indian Ocean resulted in enhanced securitization of EU policies toward Somalia since 2007" (Ehrhart and Petretto, 2014: 182).

In the area of security, the narrative of links abound (security-development/poverty-conflict, migration-security, energy-environment-security, terrorism-organized crime, terrorism-proliferation, civilian-military, internal-external security, public-private security) understood as interdependent, merged or continuum phenomena, a narrative that culminates in a kind of "Pandora's box" - the interconnection of nexuses.

The *In-Out Nexus*

The interdependence between the internal and external dimensions (European Council 2003 and 2008, Council of the European Union 2010) is a transverse view to official EU documents relating to security. What does this interdependence mean?

Both in the political and academic contexts[8], different expressions, not necessarily synonymous, have been used to refer to the phenomenon. This wording cacophony does not facilitate the work of politicians (policy-making) and of academics (teaching and understanding the phenomenon). The strictly scientific field has been marked by "empirical ambiguity, theoretical fragmentation and a lack of scholarly dialogue on this issues" (Eriksson and Rhinard, 2009: 244).

Historically, the study of security, combined with state polity, was based on the separation between "the two arms of the Prince" (Pastore, 2001), the image of "separate tables[9]" being quite fitting. The complexity of the phenomenon, associated with the diversification of threats and the multitude of actors, either as providers of security or as a source of threat in the context of intense mobility and communicability worldwide, bucked the traditional paradigmatic, political and organizational separation between the internal and external dimensions of security defined by the realist legacy. The end of the Cold War and the events of September 11, 2001 potentiated the perception of a holistic security (comprehensive approach) covering four areas: security sectors (multisectoral security beyond political and military sectors); subjects of security (multiple actors, including individuals and groups beyond the state); security players, either as security providers or as sources of threat; border dynamics (trans-governmental cooperation for security; actions of transnational entities for security purposes; perverse transnational actors). In the European Union, the nexus can be applied to different phenomena which, in short, stem from three dynamics: (a) internalizing external phenomena; (b) externalization of initially internal phenomena; (c) cross-border phenomena. As an example:

[8] "blurring the distinction between internal and external security" (Pastore, 2001); "external dimension of Justice and Home Affairs" (Wolff, Wichmannb and Mounier, 2008); "dimension/outer face of internal security" (Rees, 2008); "external aspects of internal security" (Trauner, 2006); "convergence of external and internal security"/"division between dissolving external and internal aspects" (dissolving divide) (Lutterbeck, 2005); "merger between internal and external security" (Bigo, 2000 and 2001; Ehrhart, Hegemann, Kahl 2014), "interface between internal and external security" (Ekengren, 2006), "internal-external security nexus" (Eriksson and Rhinard, 2009; Trauner, 2013), "externalizations of internal security (Monnar, 2010); "External dimension of the area of Freedom, Security and Justice" (Cremona, Monar and Poli, 2011; Monar 2014).

[9] Term used by Gabriel Almond to characterise Political Science ("Separate Tables: Schools and Sects in Political Science". *Political Science and Politics*. Volume 21, no. 4: 828-842).

THREATS AND RISKS	
External original (to the EU) of insecurity /internalization of the effects of external insecurity (a)	Ex. Instability, tension and/or conflict in Europe's neighbouring areas
Illegal activities within the EU and across (external) borders of the EU (c)	Ex. Illegal trafficking; cybercrime
PREVENTION/FIGHTING	
Externalization of European cooperation in the field of internal security (EU's cooperation with external actors – states, international organizations – in the areas of terrorism, transnational crime, etc.) (b)	Ex. EU-US cooperation in the fight against terrorism
Use of EU internal policy instruments externally (b) (b)	Ex. external dimension of Europol
Use of internal security instruments externally (b)	Ex. Police missions (CSDP)
(Possibility of) Using EU external policy instruments internally (a)	Ex. CSDP
Transgovernmental cooperation (c)	Ex. European networks (ex Police Chief Task Force); international networks (ex. Financial Action Task Force)
Combined use of external and internal instruments	Ex. Civilian-military cooperation
Inter-governmental policy coordination	Ex. Internal security objectives in external policy External policy objectives in internal security (exporting the internal model to third countries)

Underlying the in/out narrative is the idea of "globalization of security" associated with the "predominantly transnational character of postmodern risks" (Rehrl and Weisserth, 2010: 21). In this context, a CFSP that is effective in preventing and combating external threats is considered to be a condition to ensure the internal security of the European area. In turn, an effective internal security system is understood as a condition for the former to be an active policy. In the same vein, the European Security Strategy (European Council, 2003 and 2008) asserts the "indissoluble link between internal and external aspects of security" (European Council, 2003: 2), explained by several phenomena, namely: Europe's vulnerability due to its reliance on an infrastructure interconnected in various areas (transport, energy and information); the external dimension of organized crime; the global nature of terrorism, which has increasing resources, including connection through electronic networks; proximity to troubled areas as a result of EU enlargement; regional conflicts that have direct or indirect impact on European interests; climate change that has a "threat multiplier effect" (European Council, 2008: 5). Thus, in the "era of globalization, distant threats may be as much a concern as those that are near at hand" so "the first line of defence will often be abroad" (European Council, 2003: 6) and it is therefore necessary to "improve the way we reconcile the internal and external dimensions" (European Council, 2008: 4). In this sense, the Internal Security Strategy (Council of the European Union, 2010) supports the concept of internal security that is "comprehensive and complete, extending to multiple sectors" and a "global security approach with third countries" (European Council, 2010: 29).

The most recent events, particularly in the field of terrorism, have contributed to intensifying the in-out nexus security narrative. In February 2015, the EU Council reaffirmed the imperative to complement measures in the area of justice and home

affairs with a commitment externally, particularly in the Middle East, North Africa, the Sahel, and the Gulf. In the words of Federica Mogherini, the fight against radicalization and violent extremism must continue to be "a priority, not only for internal and security action, but also for our diplomatic and foreign policy" (EEAS 2015).

In short, the European narrative shows a securitization trend built on the risk of lack of control in a globalized world full of threats described as complex, dynamic, less visible, unpredictable, where remoteness (fragile, unstable and insecure) has become close.

The External-Internal Nexus in the Common Security and Defence Policy

Devised for the European Union's external action under the CFSP, the CSDP[10] was established in 1999 as another instrument at the service of the EU's international and security actorness. The external/internal interdependence began expressing itself in the civilian dimension, reflected in the use of police and judicial means in external instability areas. Following the terrorist attacks of March 11, 2004 in Madrid, the possibility of internal use of the resources, including military, of a policy built for international use was advanced.

The Civil Dimension of the Common Security and Defence Policy

The Common Security and Defence Policy was conceived to implement the use of force for peacemaking purposes in areas external to the EU. This initial structure was changed as regards both the nature of operations/resources (within politics, military only) and their scope (originally, only external). Even before the implementation of the policy[11], the European Council, at a meeting in Santa Maria da Feira in June 2000, endorsed the civilian dimension of the then called ESDP. The latter started to include four priority areas of civilian crisis management: police; rule of law; civil protection; and civil administration (European Council, 2000).

This dimension resulted from the national preferences of militarily neutral states interested in participating in the new policy without jeopardizing the civilian nature of their national foreign policies, which reinforced the policy's initial goal to promote and give credibility to the international actorness of the EU: "strengthen the Union's external action through the development of a military capacity for crisis management, as well as a civilian capacity" (European Council, 2000: 2). Concurrently, it reinforced the holistic approach to security, which also underlies the desire to contribute to peace and stability of the Union:

Protecting the European Union's internal security involves not only measures at and within the Community borders, but also, in particular, engagement abroad.

[10] Then known as the European Security and Defence Policy (PSDP).
[11] Organic operation (political-military structures) and on the ground (missions): establishment of political-military structures on a permanent basis in 2001; Declaration on Operations in December 2001; EUPM (European Union Peace Mission in Bosnia and Herzegovina) first mission in January 2003.

> *(…)*
>
> *On the one hand, we must combat the causes and roots of instability and radicalization using development aid and economic cooperation. On the other hand, we need mechanisms to replace, rebuild or support structures in the field of public security and order following crises. Aside from the deployment of military and police personnel, civil protection teams play an important role here in rebuilding infrastructure (…).* (Future Group, 2007: 1).

Despite this innovation, the truth is that the EU already had experience in civilian crisis management, notably through the Commission's activities under the Development Policy and, above all, Humanitarian Aid. The upgrading of the CSDP contributed to the European specificity in civilian crisis management, having no equivalent internationally. One of the peculiarities is related to civilian-military coordination arising from military support to civilian presence on the ground: civilian missions usually integrate military personnel for advice, planning and/or reconstruction activities. The existence of mixed missions (civilian/military) should also be noted.

A decade later, there has been a clear prevalence of civilian missions at the expense of military operations. This development has been accompanied by organic changes, due to the creation of organizations, either specific to the civilian component, or with civilian-military coordination, as well as by the diversify of the type of missions (police, rule of law, monitoring, security reform, assistance at the border) and geographical areas.

The (declared) Internalization of the Common Security and Defence Policy

In the fight against terrorism after 2001, the European Council, under the aegis of the Spanish Presidency, adopted a declaration on the specific contribution of the CFSP/ ESDP. The document (European Council, 2002) highlighted the following areas: "political dialogue with third countries (promoting human rights and democracy, non-proliferation and arms control) and international assistance; conflict prevention; post-conflict stabilization; exchange of information and production of situation assessment documents and early warning reports; developing a common assessment of threats against member states or against force without crisis management operations; determining military capabilities required to protect such forces from terrorist attacks; analysis of the possibility of using military and civilian resources to help protect civilian populations from the effects of terrorist attacks."

As requested in the report presented to the European Council on the Implementation of the Declaration on Combating Terrorism (European Council, 2004a) and in the Action Plan, the Political and Security Committee drafted a more detailed document on the specific contribution of the ESDP that underlined the comparative advantage of the European Union, holder a variety of instruments, including civilian and military, to fight a complex and multifaceted threat. The "Conceptual Framework" begins by noting the global contribution to prevent (long-term) terrorism:

> *In response to crises, the Union can mobilise a wide range of both civilian and military means and instruments, thus giving it an overall crisis-management and conflict-prevention capability in support of the objectives of the Common Foreign and Security Policy. This facilitates a comprehensive approach to prevent the occurrence of failed states, to restore order and civil government, to deal with humanitarian crises and prevent regional conflicts. By responding effectively to such multifaceted situations, the EU already makes a considerable contribution to long term actions for the prevention of terrorism.* (Council of the European Union, 2004: 6).

As regards the specific contribution of the then designated ESDP, four areas of activity were identified, including consequence reaction and management (dealing with the effects of an attack combining military and civilian means)[12]. Despite the different national sensitivities as to the use of military means in the fight against terrorism, official documents show a consensus on various aspects, such as prevention of the terrorist threat in the territories of Member States, the protection of democratic institutions and civilian population from terrorist attacks, including CBRN, and assistance to a Member State subjected to an attack (European Council, 2004)[13].

In the same vein, there is a solidarity clause in case of terrorist threats and natural or human origin catastrophes which, while not falling under the CSDP, allows the Union to mobilise "all the instruments at its disposal, including the military resources made available by the Member States"[14].

The Externalization of Internal Security

European cooperation accomplishes the externalization of internal security at two levels: the externalization of the internal security of Member States (MSs); externalization of EU internal security through the external dimension of its activity (cooperation with international organizations and third countries). So, as an example, by sharing information, Europol undertakes the externalization of both national police activity and European cooperation[15]. In this section, we focus on the second level.

Cooperation in terms of 'internal security' in the area of transnational security issues between Member States was launched in the 1970s outside the framework of the Treaty

[12] The other three relate to: prevention of terrorist attacks, including sea and air surveillance operations; protection of staff, equipment and resources, protection of civilian key targets, including critical infrastructure, in the area of operations, and protection of European citizens in third countries; support to third countries in the fight against terrorism.

[13] Externally, the restoration of order in failed states and post-conflict stabilization must be mentioned (European Union, 2004b).

[14] Article 222 of the Treaty on the Functioning of the European Union.

[15] In 2006, Europol approved the Europol External Strategy for 2006-2008. In September 2008 it was decided to extend the strategy until 2009. The Europol Strategy 2010-2014 includes several points on the external dimension: cooperation with key partners through the establishment of joint operational plans, agreements and R&D activities to develop new techniques to prevent and fight serious crime and terrorism.

of Rome and community institutions, in the broader context of justice and home affairs (JHA). The driving factor in this informal interstate cooperation was the growing international terrorist activity in Western Europe, which showed the limits of national means to fight effectively against the threat.

In June 1976, ministers meeting in Luxembourg established an informal framework for cooperation - TREVI - that "worked outside the framework of the European Communities on a purely intergovernmental basis as part of the cooperation process in the field of foreign policy" (Mitsilegas et al, 2003: 23). The structure initially consisted of two groups - TREVI I, dedicated to transnational terrorism, and TREVI II, which focused on matters relating to public order, organization and training of police forces - composed of officials from ministries, police and national intelligence services. In the 1980s, the cooperation agenda began to prioritize preventing and combating transnational activities such as drug trafficking and organized crime, which led to the creation of the TREVI III group. Objective 1993 – establishing the internal market[16] – intensified security concerns associated with the creation of an European area without internal borders, leading to the creation of new cooperation bodies, including TREVI 1992, which focused on police cooperation and internal security matters deriving from the abolition of the internal borders of the European community. In this development, the contribution of the Schengen Agreement and the subsequent Implementing Convention, albeit celebrated outside the scope of Community law, should be noted. Schengen, which anticipated the free movement of people among signatory states, also advanced compensatory measures in terms of security.

The second phase of cooperation was initiated by the revision of the Maastricht Treaty that formally introduced JHA cooperation under the Treaty on European Union (TEU):

> *"[T] he most significant change (...) [was] the fact that, through changes to the Treaties, internal security matters were first brought to the centre of the integration process. (...) in the wider context of JHA, internal security matters have become part of the political agenda of the Union"* (Mitsilegas et al, 2003: 32).

The third pillar of the European Union maintained the intergovernmental nature of cooperation, although using EU institutions, with particular regard to the EU Council. The Treaty of Amsterdam introduced three changes: the communitarisation of some JHA issues (immigration, asylum, justice in civil matters), the third pillar becoming restricted to police and judicial cooperation in criminal matters; the integration of the Schengen acquis into Community law; the external dimension of JHA.

The Treaty of Lisbon established cross changes, notably by giving the European Union legal personality so that cooperation on internal security came under the umbrella of an international organization, and by formally abolishing the pillars[17] for the sake of

[16] Free movement of goods, capital, services and people.

[17] The veiled prevalence of the second pillar (CFSP/CSDP) should be noted and, in the area of internal security, a *sui generis* communitisation also prevailed (shared legislative initiative; special legislative procedure concerning operational cooperation; opt-out (Protocol 21 on the position of the United Kingdom and Ireland regarding the area of freedom, security and justice; protocol 22 on the position of Denmark) and 'emergency break' (paragraph 3 of article 82 of the TFEU).

greater coherence between policies in general, and between the internal and external dimension of the Union in particular. Of note are also the specific changes in the field of internal security: transfer of this issue to the Treaty on the Functioning of the European Union (TFEU)[18]; terminological consecration of "internal security"[19]; judicial control of the EU Court of Justice; creation of the Standing Committee on Internal Security (COSI) "in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union" (article 71 TFEU); possibility of establishing a European Public Prosecutor (Article 86 TFEU) to combat crimes affecting the financial interests of the EU. However, exceptions of the operational component of cooperation should be noted: Parliament is merely consulted; the Council decides unanimously (special legislative procedure). The *sui generis* communitisation and the special procedure in the framework of the TFEU are symptomatic of the state's resistance to empowerment in an area that touches the core of sovereignty.

Along this evolutionary synthesis, the institutionalization of agencies promoting cooperation on internal security should be highlighted. In 1991, at the meeting of the European Council, the Chancellor of Germany, Helmut Kohl, inspired by the FBI model, proposed the creation of a European police agency (Europol, 2009: 11). This proposal led to the creation of the Europol Drugs Unit. Following the entry into force of the TEU, the Europol Convention pursuant to Article K.3 of the treaty was celebrated in 1995. The European Police Office is, since 1 January 2010, an EU agency[20] that provides strategic and operational analysis as well as operational support to Member States, and, more specifically: exchange of information; information analysis; strategic analysis; operations support; knowledge sharing (Europol, 2009: 3). A further three agencies work to protect the Union: Eurojust (European Judicial Cooperation Unit), established in 2002[21], contributes to the fight against serious cross-border crime by coordinating investigations and prosecutions between Member States; Frontex, established in 2004, promotes the integrated management of the external borders of the Member States; CEPOL (European Police College), established in 2005[22], offers training to senior police officers of Member States and cross-border cooperation in the fight against crime. The existence of these agencies results from overlapping supra-state dynamics (agencies under EU law, coordination with supra-state institutions), interstate ones (coordination of policies and national resources), and transgovernmental bodies (networks of officials from the ministries, police, prosecutors, judges, members of intelligence services).

Originally devised to function within the Community area, cooperation on internal security later spread out and acquired an external dimension. Although 1999 is

[18] Title IV, dedicated to the "area of freedom, security and justice" (AFSJ), constituting one of the eleven areas of shared competence: legislative initiative, although shared with the Member States, of the Commission; ordinary legislative procedure; the majority principle in the Council; adoption of regulations and directives.

[19] In previous versions of the Treaties, the expression was virtually silent. Cooperation in matters of internal security was done through police and judicial cooperation in criminal matters in the framework of the JHA, and, following a review of the Treaty of Amsterdam, of the AFSJ. The Treaty of Lisbon added the term 'national security', which refers to 'internal security of Member States', thus distinguishing itself from the 'EU internal security'.

[20] In 2009, Europol's legal framework was simplified by replacing the Europol Convention and subsequent Protocols by the Council Decision of 6 April 2009 that created the European Police Office under Title VI of the TEU then in force.

[21] The creation of a judicial cooperation unit was triggered by the European Council of Tampere. In 2000 a provisional unit (Pro-Eurojust) was established

[22] Equivalent to an the agency, it was the successor of CEPOL established by Decision 2000/820/ JHA.

considered to be the milestone of this externalization[23], one can find precedents in the 1980s, particularly associated with the need, identified by the European Commission and the Council, to include the fight against drugs and organized crime in the Union's external relations. In the same vein, the Amsterdam European Council urged "the Council to pursue its work on cooperation with third countries and regions" (European Council, 1997) under the Action Plan against Organized Crime; the Vienna European Council[24] welcomed "the development of various regional cooperation initiatives" and "urged that those related to Latin America and Central Asia be carried forward without delay" (European Council, 1998). The externalisation of proximity with regard to candidate countries for EU accession must also be noted: in 1998, the JHA Ministers of member and candidate countries adopted a pre-accession pact on organized crime (EU Council, 1998). Still regarding proximity, concern was centred in the Balkans, with particular focus on organized crime, so the stabilization and association process, after NATO's intervention in Kosovo in 1999, also included cooperation in this field. The security rationale was explicit in the European narrative:

> *"The choice for us in this case is very clear: either we export stability to the Balkans, or the Balkans export instability to us"* (Patten, 2002)[25].

The Tampere European Council established the externalisation of internal security in the broader framework of JHA, stressing that "all the skills and all the instruments available to the Union, particularly in external relations, must be used in an integrated and coherent manner so that we can create an area of freedom, security and justice. Justice and Home Affairs should be integrated into the definition and implementation of other Union policies and activities" (European Council, 1999).

The following year, the Santa Maria da Feira European Council approved the report on the EU external priorities in the JHA area, stating that these priorities "should be integrated into the overall external strategy of the Union in order to contribute to the creation of the area of freedom, security and justice "(European Council, 2000). It was not about developing a specific/parallel foreign policy, but about consolidating the Area of Freedom, Security and Justice (AFSJ) through EU external action and under the control of diplomats.

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[23] In the broader framework of justice and home affairs.

[24] Approved the first action plan on Justice and Home Affairs.

[25] "Even before the horror of 11 September, the recent tragic history of the Balkans had shown to Europe and to the wider international community the danger that failed, or failing, states can pose to our stability and security in this small and interconnected world. The Balkans have demonstrated how instability is contagious, how quickly someone else's problem can become everyone's problem. (…) They have reminded us and this too has wider application that standing up for our values when they are in danger, standing up for democracy, for others' rights, for justice, is not flabby idealism: it is a matter of hard security, and profoundly in our self-interest" (Patten, 2002). "Every country of the region is blighted by the smuggling of drugs and cigarettes, by the trafficking of people and weapons, by corruption and by racketeering. The cumulative effect is intolerable - important war criminals remain at large, often sustained by organised crime. It is an affront to justice, a barrier to the progress and development of the countries of the region, and a threat to the security of us all. Quite simply, it must stop" (Solana, 2002).

> *"This 'demonstration of force' by the diplomats could also be interpreted as an implicit recognition of the progressive 'contamination' of the EU's foreign policy objectives by internal security concerns"* (Wolff et al., 2009: 12).

In short, the strategy was justified by the "pressure of an increasingly interconnected world and of the inherent international character of threats," the security and stability of the European Union requiring the "external projection of values underpinning the AFSJ," the external dimension contributing to enhancing the credibility and influence of the EU in the world (European Parliament 2007: 354).

The first multi-presidency programme[26] for the external dimension of the JHA (Council of the EU, 2002) provided for the adoption of common strategies (Russia, Ukraine and the Mediterranean), dialogue with partners (US, Canada, Latin America, EFTA countries and African countries), and cooperation with other international organizations (UN, Council of Europe, the Hague Conference and G7/G8).

At the request of the European Council, a strategy for the external dimension of JHA was written in order "to contribute to the successful establishment of the internal area of freedom, security and justice and to advance the EU's external relations objectives by promoting the rule of law, respect for human rights and international obligations "(Council of the EU, 2006: 3). The JHA-RelExt Strategy adopted in December 2005 sought to articulate this area, the CFSP, the ESDP, the Development Policy, the European Security Strategy, and the economic and commercial objectives of the EU, defining thematic[27] and geographical priorities (candidate countries; neighbouring countries, strategic partners)[28]. The following year, a Ministerial Conference took place in Vienna, in which representatives from the EU, from third countries, the United States, Russia and from other international organizations discussed the role of internal security in relations between the EU and its neighbours. The geographical priority was also explained by proximity:

> *Internal security cannot be guaranteed in isolation from the outside world and, in particular, from immediate European neighbourhood. It is therefore important to ensure coherence and complementarity between the internal and external aspects of EU security. As recognized in the European Security Strategy and the Internal Security Strategy, the relationships with our partners are of fundamental importance in the fight against serious or organized crime and terrorism.* (European Commission, 2011: 12).

[26] The trio consisted of the Belgian, Spanish and Danish Presidencies.
[27] Terrorism, organized crime, corruption, drug trafficking, management of migration flows.
[28] North Africa (fight against terrorism), Western Balkans and other neighbouring countries (fight against organized crime, corruption, illegal immigration and terrorism), Afghanistan (fight against the production and trafficking of drugs) and African countries (cooperation on migration matters).

The Working Group JAIEX[29] was created to facilitate coordination between JAI and RELEX groups, particularly in terms of exchange of information and strategic and horizontal reflections.

How is cooperation in the sensitive area of internal security undertaken? Four principles govern the external dimension (European Commission, 2011: 3): differentiation, by regional area and/or country; conditionality, i.e. enhanced cooperation is gradual and depends on progress and success in the agreed areas; coherence with the overall foreign policy of the EU, with other relevant policies and cooperation in different regions/countries; regionalization, which translates into supporting regional and sub-regional cooperation initiatives. The cooperation comprises three levels: general, supported by partnership and cooperation or association agreements that cover several areas, including internal security; specific, through agreements on internal security; operational, mainly associated with the external dimension of EU agencies. Cooperation is implemented by means of legal, political, diplomatic, and financial instruments: agreements/treaties/conventions, joint political declarations, programmes/agendas/action plans; meetings (from annual summits at the highest level to regular meetings between senior officials, and including the meetings of cooperation councils, committees and subcommittees); networks of experts and professionals; assistance programmes.

The EU-Russia cooperation is an example of this. The St Petersburg Summit in 2003 launched the four common spaces of cooperation, including the space of freedom, security and justice. Two years later, the respective road map[30] was approved, whose implementation is monitored by the cooperation central body, the Permanent Partnership Council in the field of Freedom, Security and Justice that meets twice a year. The road map, in the point related to security, envisages cooperation in the fight against terrorism and all forms of organized crime[31]. The cooperation has resulted mainly in supporting the preparation of legislation, training and exchange of information. Over the years there has been a "growing network of professional contacts, meetings and consultations, commitments" (Hernández i Sagrera and Potemkina, 2013: i). Despite the positive effect of this socialization, the concrete results of cooperation have been limited. In the specific area of internal security[32], the agenda has been dominated by transnational crime, drug trafficking and terrorism[33]. An operational agreement was also concluded between Russia and Frontex to promote practical cooperation at three levels: training, exchange of knowledge and good practices; sharing of information for risk analysis; joint operations. The agreement established

[29] This Working Group of the EU Council, initially under the name JAI-RELEX Ad Hoc Support Group, became permanent (JAI-RELEX Working Party) in 2010, after the entry into force of the Treaty of Lisbon.

[30] "Road Map on the Common Space on Freedom, Security and Justice" (EU-Russia Permanent Partnership Council on Freedom, Security and Justice, 2005).

[31] The road map covers the following areas: terrorism, document security, transnational organized crime, money laundering, drug trafficking, trafficking in human beings, corruption, vehicle theft, and items with historical and cultural value.

[32] The broader agenda of the FSJ includes the movement of people and migration. Two agreements were signed (Agreement between the Russian Federation and the European Community on the facilitation of the issuance of visas to the citizens of the Russian Federation and the European Union and the Agreement between the Russian Federation and the European Community on readmission, 2006) and the "Common Steps towards visa free short term travel for Russian and EU citizens" (2011) is in progress.

[33] "European Union Action Plan on Common Action for the Russian Federation on Combating Organized Crime" (2000), "Memorandum of Understanding between the Federal Service of the Russian Federation for Narcotics Traffic Control and the European Monitoring Centre for Drugs and Drug Addiction" (2007). Available at: http://www.russianmission.eu/en/basic-documents.

with Europol[34] prior to the approval of the road map is limited to the sharing of strategic information[35] and threat assessment documents, and negotiations on an operational agreement have not yet taken place[36]. Despite two rounds of negotiations[37], the agreement with Eurojust has not yet been completed, so until now cooperation is materialized in the meetings of the parties' liaison officers. The main obstacle to cooperation results from the EU's use of political conditionality, which is not well accepted by Russia (Hernàndez i Sagrera and Potemkina, 2013). In addition, the deficit in mutual trust, which is fundamental in sensitive areas such as security, the heterogeneity of legal and administrative cultures and the differences in the perception of threats are also factors that deserve to be mentioned.

Final Comments

In the post-Cold War, the building of the European actorness on security was accompanied by the narrative of security nexuses. This narrative began to emerge associated with the prevention and assurance functions, in which the nexus between security and development played a part. In this context, particular emphasis was given to the root causes of conflict, as well as situations of state fragility viewed as an obstacle to development and as a source of regional and international instability. The nexus serves the interests of the international organization (as a means to increase the effectiveness of the EU's international and security actorness), of the European Commission (starting from an area under its remit where it has accumulated experience) and of Member States (Europeanization of national policies).

The terrorist attacks of September 11, 2001 and subsequent ones in European stages amplified previous trends, consolidating security's holistic approach (comprehensive approach), the ambition of global actorness and security narratives and practices. In this context, "the nexus between the internal and external aspects of security" was reinforced, which stems from three situations that reinforce each other: internalization of externally-based phenomena; externalization of initially internally-based phenomena; transborder phenomena.

The analysis of three expressions of the nexus (civilian dimension of the CSDP, internalization of the CSDP, externalisation of internal security) demonstras that a combined rationale underlies it: security (ensure the safety and stability of the EU in the presence of transnational risks and threats); political (consolidation of the AFSJ specific area as well as of EU external action); institutional (interest of the European Commission in developing the security components that can have more presence). The security narrative is built on the idea of risk of lack of control in a globalized world of threats, described as dynamic, less visible, unpredictable, where distance, perceived as being fragile, unstable and insecure, becomes close. The actorness and the security narrative of the nexuses are thus co-constitutive: appropriation of policies and instruments of a multifunctional actor for security purposes; securitization of issues to consolidate policies and actor projection. In short, the in/out nexus is justified by the

[34] Agreement on Co-operation between the European Police Office and the Russian Federation (2003).
[35] It does not allow the transfer of data.
[36] "Discussion with the Russians had been rather empty. Professor Rees thought that Russia was resistant to EU incentives because the Kremlin considered itself to be too important to have its policies moulded by Brussels" (House of Lords, 2011: 21).
[37] The parties began negotiating in 2009.

environment (opportunity), legitimizing the use of various instruments (capacity) to promote European atorness (presence).

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THE TWO WORLD WARS AS EVIDENCE OF THE ABSENCE OF INTERNATIONAL ANARCHY

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Abstract

The First World War and the decades of turmoil thereafter, namely the 1930s, the Second World War and, later, the Cold War, are historical moments relevant to prove that one of the most famous ideas of International Relations is, in fact, impossible. The idea of an ontologically, yet not phenomenologically, permanent state of war is incompatible with a world filled with sovereignties. These sovereignties have never lost their political and strategic control of wars, not even in the main conflicts of the 20thc. All these conflicts were strategically mediated and never led to absolute war.

Keywords:

Anarchy; War, Strategy; Sovereignty

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THE TWO WORLD WARS AS EVIDENCE OF THE ABSENCE OF INTERNATIONAL ANARCHY

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The First World War and the decades of turmoil thereafter, namely the 1930s, the Second World War and, later, the Cold War, are historical moments relevant to prove that one of the most famous ideas of International Relations is, in fact, impossible. We are referring to the idea of international anarchy.

Obviously, we must start by defining the issue at hand. In this short paper, we will clearly not focus on all the nuances of the concept of war or that of international anarchy, nor will we analyze in detail all the reasons for our definitions of the concepts we present. The referred definitions will be important for the reader to know what we mean when we discuss war and international anarchy.

1. War and Sovereignty: the sovereign standardization of war and absolute war.

Thus, we can start by defining the concept of war as "violence (fight, scale duel) among political groups (or groups with politico-sacral objectives), in which resorting to armed conflict is a potential possibility at least, so as to attain a goal in the limits (preferably external) of politics (or mainly political goals but not only, from the modern era onwards) aimed at the opponent's sources of power and developing in a continuous game of possibilities and chances".[1]

The parenthesis are crucial here for the *de jure* internalization of war in political action, in politics itself, is established only in the Modern Era and, step by step, by an almighty force that will have the means to do it: sovereignty. It is the sovereign, that absolute, endless and indivisible power, defined by exception, by the ability to proclaim a state of exception, i.e., to make war an ordinary event.

War becoming an ordinary implies desacralizing it; this secularization, carried out by the sovereign, changes the features of war, which was, until then, mythologized and enshrined in a dystopian manner, out of reach for the common human being. The sovereign links the worlds of peace and war which were separate until the modern era, blend order and disorder in a new state that allows the possibility, the ontological and

[1] For those familiar with strategic means, the definition is inspired in another by Abel Cabral Couto. The definition by the Portuguese strategist was originally published by him in (Couto, 1989: 148), who states that: "organized violence among political groups, in which resorting to armed conflict is at least a potential possibility so as to attain a political end, aimed at the opponent's sources of power and developing in a continuous game of possibilities and chances".

phenomenological possibility of permanent war because from there onwards war is viewed as an ordinary political action. A state that we may define as a state of peace under sovereign conditions.

Obviously, the sovereign, or better, the several sovereigns in the international scenario must have some control over it because you can only rule what you know. The state of exception is not the chaos before or after order but a state in force at a time when legal order has been suspended, when law cannot be formulated and we can hardly tell if we are complying or breaking the law; a state in which you are completely dependent on the discretion of the sovereign, or on the sovereign governmental mechanisms, but not on their arbitrariness, as this would tend towards anarchy, towards disorder.[2]

Yet, if war is partly a state of exception, when you can kill and that is not considered a homicide, it is equally an exception beyond the state of exception, so to speak. We cannot forget the value of marginal utility, which establishes "price", the ultimate sense or *nonsense* of war as a phenomenon with internal and autonomous consistency, i.e., with its own grammar, what Clausewitz named absolute war. This is the irredeemable core of war, the absolute chaos, the cylinder of pure violence, the inner core of armed conflict, which, though not encompassing all manifestations of war, is present and fuels each war that breaks out, always fostering extremes because extremes tend to go extreme. This implies that a war fueled by its own sources leads to a politically uncontrolled state, even for sovereign power. In other words: as war has its own grammar, its own internal consistency, or better, its own power of erosion , of huge asymmetries, of disaggregation, it has a core that does not surrender, not even to the power of the sovereign. Unfortunately, that core provides it life, shakes the foundations of normalcy, even the terrible "normalcy" that is the suspension of the sovereign logic. However controlled, war encompasses chaos, continuously deletes order and even challenges sovereign discretion. To let war lose is to risk doom; and the sovereign logic, more than any other political tool, has provided the conditions for war to become extreme, as Clausewitz stated.[3]

2. International Anarchy as State of War: how permanent war is impossible in a world filled with sovereignties

We must now consider the concept of international anarchy by analyzing the image that realistic thought provided to international anarchy. In our opinion, the most important relevant realistic thinker on this theme is Kenneth Waltz, as he approaches the issue frankly. Nevertheless, all other realistic internationalists also hint at what Waltz clearly states:

> "*among men as among states, anarchy, or the absence of government, is associated with occurrence of violence*" (Waltz, 1979: 102).

[2] Despite the features of the state of exception as we describe it, we have been influenced by Agamben (Agamben, 2006: 105-106).

[3] (Clausewitz, 1986: book VIII, cap.IIIB, 593 and book VIII, cap.VIB, 606), respectively, for realizing that under Napoleon war is close to extreme, of its absolute form and of powerful politics (and sovereign power is like that); Clausewitz is aware of this, that it powerful politics may help in freeing absolute war from the restrictions that usually control it.

This means that the concept of anarchy (meaning disorder) presupposes an inextricable link with the concept of war. Obviously, there is no internationalist related to the concept of international anarchy who considers international anarchy a permanent and generalized factual state of war or disorder. War is not, in today's international life, a factual necessity. The concept of international anarchy means rather that, ultimately, each international actor cannot depend but on its imposing capacities, on its own power. This means that, even when there is no order or disorder (phenomenology), war tends to be about the actors, more than a possibility, the ultimate reason (ontology) for their behaviour. Thus, we can state that anarchy is a state of disorder linked to armed violence, i.e., the sense or (non)sense of violence is at the basis of international politics, is its background, its ontological blood, its inner soul. To sum up, the state of war is ontologically present and sometimes also phenomenologically in existence.

The distinction is clear and it was clear to Hobbes when he states in *Leviathan* that

> *"war is not just the battle, it is not just fighting but also includes that time in which the will to fight is well known.[…] the nature of war does not consist of actual fighting but in the known will to do so, during all the time when there is not guarantee of the opposite. The remaining time is one of peace. So, all that is valid for a time of war, when all humans are enemies, the same is valid for the time when humans live with no other security than that provided by their own strength and invention. In such a situation, there is no room for industry, for its fruit is uncertain; thus, the land is not cultivated, there is no sea traveling or use of goods[…]"*,

and so one, says Hobbes. Interestingly enough, I argued shortly after that, though sovereigns live in permanent rivalry, with arms ready, like gladiators watching one another, which, for him, is an attitude of war , he nevertheless concludes that

> *"since they protect their subjects' industry that way, it does not lead to the poverty that is typical of free yet isolated humans"* (Hobbes, 2002: cap. XIII, 111-112).

Hobbes is drawing our attention to the fact that the sovereigns' attitude evidences a structural predisposition for war, but not more than that (which is a lot!), because if it was more than that, there would be no industry to protect, there would only be the poverty he himself described. This accurate argumentation by Hobbes would suffice to refute any attempt to root the idea of international anarchy in the English philosopher's writings. But that is another matter.[4]

[4] For refutation of the idea of international anarchy being Hobbes', as well as criticism to the foundations regarding the concept of international anarchy, see Fernandes (2012).

However, if international anarchy is an endemic state of armed violence, we have a real incompatibility issue. A structural state of war related to both previous understanding and to ontological understanding of its political actors is not compatible with the ruling character of sovereignty. The issue in not the changing from *hostis* to *inimicus*, because the sovereign easily makes that transition. The qualitative degree opponents face one another with is not decisive because sovereigns, due to their need to rule, even if disputing only a few items, may well demonise their opponent, even if that is the riskier option because it allows (does it does not impose) extremes and the management of war. The issue resides in the dimension of disorder, or in its nuclear "standardization", precisely in the management of war as background, as ontological principle that limits behaviour and as explanatory epistemological principle because otherwise there would be no sovereign, considering that, by definition, what escapes order escapes sovereignty of absolute power (of designing and breaking the law). The state of war as a rule would eliminate sovereign objectives. If the operational core of international relations were war, sovereignty would never have existed, and as sovereignty does exist and sovereign logic still predominant, state of war cannot be a decisive factor. Hobbes' Lord Protector would protect nothing, leviathan would not be the one, which seems a contradiction, since sovereigns have that standardized predisposition to war considering the huge potential for conflict generated by the closeness of powers which are by nature exclusive. Besides, not only would be the logical consistency of sovereignty radically affected by the entropic abyss of war as a motor of international politics, but rather the first and foremost reality of sorority, inescapable even for sovereigns, the remaining equal, as we have tried to prove before (Fernandes, 2012: 93-97). Where there are sovereigns, anarchy just does not make sense, war is not the first word, only its possibility is. Yet, since we are talking about its ontological and not simply its phenomenological character, the difference between possibility and reality is abysmal.

In other words, I am considering the previously mentioned secularization of war. If war was the permanent ontological basis, not only would nobody endure that state for long, but especially, war would become a myth again, it would regain its sacred character of demonic power; thus, it would be out of the sovereign's reach, who is, at best, a mortal god, to paraphrase Hobbes. Our reference is to sovereignty itself and not only to the condition of the human that embodies it. Worse, since sovereignty had already destroyed the ontological dichotomy between peace and war, this sacred, uncontrollable presence of war would now become closer to everyday living and, as a consequence, less manageable and controllable, with the inclusion of the figure of power humans had created, sovereignty, as absolute and allowed to humankind.

In the modern era, war became a permanent possibility, continuously hanging over the head of humanity; this allowed for the opening of Pandora's Box. But not as a permanent force of being, passive or active, because the being in potential is already being. If the war was to be that permanent force of being, absolute war would have to be revalued. This would mean that war would set the rules, would change politics and make it an extension of war by other means, something which, as we know, has never occurred. Though it seems nothing can prevent it from happening some day.[5]

[5] In truth, we doubt this will ever happen because of some metaphysically-based anthropological preventions. However, this is not the time or place to develop these considerations.

Nevertheless, if there is rooted sovereignty, then a state of international anarchy and that sovereignty become an oxymoron. The opposite would be expected: that sovereign dynamics would be a catalyst for anarchy. This is the greatest error in judgment but this is not the place to analyze the origins of that error.

3. Politics and Strategy in the First and Second World Wars: the absence of anarchy

After all, how can the two world wars prove our argument when apparently we should have discarded them?

The direct answer cannot be easily given. War was made by sovereigns and they still exist. Therefore, there is no place for anarchy - in this case the specific features sovereignty has acquired since the onset of the Modern Era up to today are not important.[6] However, we could retort that, during the war, sovereigns may have lost control and later regained it. That would be strange because of the violence of the two wars and the historical changes they brought about. In any case, this will not be our argument; we will rather introduce an additional element.

The first world conflict sees the rising of an intermediary, which we have not yet mentioned, in the social division of political work: strategy.

Before going any further, and as I did regarding the concepts of war and international anarchy, we will not develop the reasons underlying our definition of strategy. We opted for a soft definition, i.e., a consensual and canonical definition of the term, put forth by the so-called classics in the theory of strategy of the past 50 years in the Western world, where the field has developed free from the shortcomings of Anglo-Saxon theories. Therefore, we can define strategy as collective practical wisdom developed by political actors so as to be prepared and lead hostile confrontation against one another.

Resuming, when the First World War breaks out, though the strategy remains essentially military (and will continue to be so until the end of WWII),[7] and though the foundations for other strategies are already visible, then gathered under the

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[6] If we consider Christopher Clark's work on the origins of the First World War, we realize that, though in the years prior to the war breaking out, there were more and more voices willing to accept possible war, to consider it a certainty in view of international relations, viewing it as therapeutic (279-281). However, this dis not mean that they saw the international scenario as essentially an arena. It was rather an area of possible confrontation, a consequence of the clash between the interests of different sovereignties and the struggle for power these differences implied (Clark, 2013: 237-239). This obviously points towards the sovereign logic, ultimately, for the frenzy of the sovereign kinetics (hard to control even by those sovereigns that give the first step, as was made evident in the outcome of WWI) and not towards the sovereign gap and its specific order.

[7] In truth, to use a metaphor dear to the new founder of the Portuguese strategic school, Abel Cabral Couto, the last of the great classics of strategy still living and producing, WWI sets the principles for the change from a strategy limited to military action, strategy as a solo recital, in the words of Abel Cabral Couto, to strategy as a specific instrument which remains relevant but is included in a set of support dimensions which will be the start of future economic, diplomatic (perhaps this will be the first), ideological, cultural, communicational strategies, among others. Strategy viewed as a concert for a given instrument. The version we have arrived to is, as you know, that of integral strategy, whose aim is that different sets of instruments, several general strategies, foster a collective harmonious movement. In Abel Cabral Couto's words, this is strategy in its symphonic version. Naturally, though this set of three should not be seen in terms of progress in music, the same could not be said in terms of strategy. Additionally, developing new forms of strategy other than military corresponded to a development in modes of war other than armed fight.

fashionable concept of the time, the defense, a kind of Spanish shelter that encompasses all that does not yet have a precise definition, the truth is that, due to the new conditions of industrial war and the concept of nation at war, it is realized that strategy can no longer be limited to and immersed in the operational aspect of war. Strategy is needed to prepare for conflict and to design objectives to leave the conflict. In practice, strategy's horizontal placing in regards to politics and tactics, i.e., their differentiation due to the social nature of their actions and actors tends to be replaced by a vertical criterion, in which the important is not what is done in the conflict but the relation between their action and political power as well as the consequences of those actions. This means that the strategic social rationalities - the specific conduct that a given society has regarding hostile conflict, which, in view of its exceptional nature leads to intermediate means in correlation with the political guiding principles - gain a never known importance.

How important is this? The answer is not easy, at least for strategists. Wars of the type of the world wars tend to invert the strategic pyramid, subordinating, or at least reducing, the political objectives to those linked to hostility and fall under the scope of strategy. This is a negative situation which places in question the core of strategy, the prudent assumption of the conflict, and that strategy tries to oppose to, reacting against a more violent dynamics of politics so as to avoid squandering of human and material resources though not always successfully. In any case, for the purpose at hand, the important thing is to emphasize that, on those occasions, which are not uncommon in WWI and WII, politics does not founder because of war but politics becomes more closely linked to violence management. That management, though it has an impact on strategy, making it a function on strategy, is nevertheless still far from being the merciless violence of war. On the contrary, though strategic prudence there becomes evil calculation to assess the ability to inflict damage to the opponent, at the risk of fostering violence beyond control, undermining the very nature of strategy, which is to calm the conflict, fire against fire, that management implies being at the helm, not having been destroyed by violence even in the worst case scenarios of political limitations, of pyramid inversion, of politics being subordinated to strategy.

Why is that? Why is it that strategy, in a self-destructive process - considering that what makes strategy is that it takes on its pyramidal role as an intermediary, being framed by politics in an organized area and towards a firm control of violence - does not simply light the fire? Because the visceral nature of strategy, even when it was only a conduct of war, was to be that personalist counterpoint to violence, better, an unexpected fifth column attempt to put the fire of violence down and provide the conditions for definitive peace.

There are two objection left, though. The first has to do with the concept of total war and its practical application. The concept of total war, introduced by the French politician and journalist Léon Daudet, in 1918,[8] and afterwards developed and popularized by the German general Erich Ludendorff, in 1935, in his book *Total War*, is not, as it might seem, an all-out war, leading war to its ultimate consequences. Ludendorff's states the opposite, total war implies total politics, the politician should give in to the commander-in-chief, should be the commander-in-chief and thus submit

[8] Daudet defines total war as the "extension of the fight in its most acute and chronical stages in the political, economic, commercial, industrial, intellectual, legal and financial domains. The fight is not just between the armies but between traditions, habits, codes, spirits and mostly banks" (Daudet, 1918: 8).

politics to strategy exactly because it requires total control. Operations should cease rapidly after attaining the objective so as to avoid inner disintegration of society. (Ludendorff, 1941, 36, 113, 233-).[9]

Actually, the concept of total war is the historical expression of an era after the end of WWI which ends with WWII; it expresses the use of all types of fighting simultaneously and with maximum intensity, whose features also include politics giving in to the objectives of hostility, those who fall under the influence of strategy, if not by politics being subordinate to strategy (and not war) due to its prudential self-neutralization; better still, changing its cognitive register, mere calculation, slyness, mischievous consideration, never abandoning its sense of restraint.

In practice, pyramid inversion was proven not just a serious possibility but rather an historical fact. It is true that, in theory, the fact that politics has a closer link to the political objectives of hostility may lead to a situation of political determination regarding strategy, reducing political synthesis to those objectives and making them ancillary for defining what you want to be in terms of political actor. Nevertheless, it is also true that that closeness tends to boost strategy because it concentrates its strength in its space and thus deforming the prudential logic of strategy. Strategy is then led to radically limit its prudential function and rise to the point of politics becoming strategy, submitting to it because the scopes seemed to overlap and, in that case, strategy appears technically more apt for the task considering the previously mentioned consequences. Needless to say that in the historical situation, the easiest solution was the one adopted - that of confining strategy.[10]

The second objection seems more relevant. Because, despite what he have said, it is true that certain passages in the two world conflicts indicate or even mean going beyond the pyramid inversion, politics and strategy becoming immersed in war. The slaughter in Verdun, in WWI, and many episodes (probably more than that) in the

[9] Jean-Ives Guiomar, French historian of total war, in the previously quoted book, believes that the emergence of total war occurred with the wars by revolutionary France, though he acknowledges that that very same total war is only fully present in the 20th c. (Guiomar, 2004: 25, 102-105, 120, 151). However, we believe the French historian several times overlays the concept of total war and that of absolute war. Though he states (Idem: 302) that he does not aim to solve the issue - which, for him, is an open issue - of whether the concept of total war means the same as that of absolute war. In truth, the author claims (Idem: 19-20) that total war is a war that cannot be stopped or interrupted by the one that declares it, it expands constantly in space and in time. Yet, this is a feature more in tune with absolute war, i.e., war that responds to its specific grammar, than with total war.

[10] In reality, strategy is not a mere technique, instrument, tool. The fall of politics and the consequent rise of strategy, both eventually coinciding, option then being for the preponderance of strategy, do not derive from neutral judgment but rather from instrumental reasoning. Though politics was responsible for strategy, the latter did not have a more passive role. Not only did strategy acquire a retroactive prominence over politics, in terms of moderating it, at the beginning of the nuclear era, when it was framed in political terms, but it also tended to monopolize politics in the era of total war, when it still was a very significant tool. The obvious contradiction must be resolved differently. What happened was that politics and war impacted on strategy in its most violent strands, and as strategy was still undergoing vertical placing criterion which placed it closer to politics, yet still keeping its tactical character, opted for neutralization (it was simpler and more in accordance with its traditional plaing) and thus respond to violence of its most ... strands with a resolution highly instrumental, blind and mechanical. In fact, we saw strategy counteracting as instrumental reason, invading, in an apparently neutral way, other areas which were completely unrelated to hostility. Or would it be plausible to think that this neutralization of aims and the inversion of the pyramid relation between politics and strategy, so as to meet the fascination of a time and an ideology, would ever occur if strategy were a mere instrument? How? What if the pyramid inversion were later reversed, when strategy becomes more robust and once again is an aim in itself, and if that inversion typical of the era of total war, which already inverts a previous context (that which leads to the First World War), in which strategy is less loose but in which sovereign politics is even less incisive than it became later on?

Eastern Front, in WWII, not to mention the genocides, point in that direction. That seems unquestionable. And? The only lesson to be drawn is to acknowledge how easy it is to go to the extreme. Because, in contrast, what we can realize is the difference between these and other stretches of war and that the difference lies in the fact that in other stretches of history, when war is phenomenologically latent, there should ontologically be a state of war. If war were ontologically active, the common situation would be more similar to those dark moments than to any other; better still, after so much time it would be unlike anything.

4. International Anarchy: an image out of the picture

Finally, the Cold War. In this case, it would be best to not even object. The Cold War corresponds to the adult age of strategy as a discipline of intermediary and incomplete aims to be completed in higher political synthesis. Therefore ready as never before for a perfect (or almost perfect) coexistence with politics; under the nuclear threat, the former threat to be able to rapidly make Armageddon. The emergence of nuclear arms and of subversive and counter-subversive doctrines lead strategy to a new era, that in which we strategically live in.

The emergence of the atomic era, or more specifically, the emergence of thermo-nuclear war and the arms race, made it clear that only through dissuasion could catastrophe be avoided. Direct strategy would not pay off. From then on, the war and strategic effort could not be solely military; other strategies would become autonomous. What, according to total war, would be another step in the ladder, becomes a means of fighting war, of carefully and prudently choosing the best strategies. Would strategy be able to do that if it did not have specific aims? If it is true that only after the emergence of nuclear power and later with the possibility of subversive war, which implies a greater coordination between strategy and politics and even the submission of strategy to politics, is strategy allowed to, as integral strategy, to fully evidence its prudential capacities, it is also true the escalating of violence, provided by the new modes of war, did not lead to absolute war only because strategy imposed its prudential resources. And we must not forget that, in all likelihood, absolute war would be at stake, its destructive hubris having been liberated, the state in which, if war ruled, it would not need much time to devastate the earth, a situation which always leads to problems because humans can become tired of such havoc.

But are we not still alive? The question is the answer.

Where politics, and above all strategy (in terms of hostility), flourishes, war, war left to its own devices, international anarchy, cannot flourish. The effort to rise, if real, compromises anarchy because war, left to its own devices, tends towards solipsism, to move towards emptiness. However, neither politics nor strategy, on their own ,have the strength to stop armed chaos; you need another reason to do that, a conversion from pure peace, which, in fact, feeds strategy in its development. However, if we look closer, the insufficiency of strategy and politics alone evidence the impossibility of international anarchy, of a state of war ontologically come true. Insufficient is that which is not sufficiently able, which is not able to do something on its own. But would we still be discussing capacity if war ruled or would we be overwhelmed, our actions fostered by the same (hypothetical) hope that we can find at the end of Cormac McCarthy's tragedy *The Road*:

> *"in deep valleys where the trouts lived, all things were more ancient than Man and in them there was mystery"?* (McCarthy, 2007: 187).

The indestructible and primal inclination towards good has been swept away - we do not know how, especially because we are not referring to any accident or of an unexpected effect of a given war. What if this was even more obscure, would we not only dependent of the belated miracle-working miracle?

Luckily, we are not. Then why would advocates of international anarchy want to lead us to the absurd?

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OPINION TRIBUNALS AND THE PERMANENT PEOPLE'S TRIBUNAL

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Abstract

There is dialectic between public opinion and the enforcement of justice by the competent authorities. History contains numerous examples where international opinion movements demonstrate against judicial decisions, since, either by act or by omission, established jurisdictions sometimes pronounce questionable verdicts or leave unpunished crimes that were committed. These demonstrations take a variety of forms, ranging from the international commission of inquiry to the truth and reconciliation commissions. Among such exercises of citizenship from civil society, the so-called “opinion tribunals” stand out, whose first major initiative was due to Lord Bertrand Russell in the 1960s. Following this tradition, the Permanent Peoples’ Tribunal has been very active between 1979 and 2014, organizing deliberative assemblies and pronouncing decisions in a “quasi-judicial” framework. Its critics point a finger at the resemblance of justice used for ideological purposes, but the legitimacy of these initiatives, backed by current international law, is defendable for their capacity to shake consciences and for being a legal innovation at the service of the right of peoples.

Keywords:

International law; public opinion; opinion tribunals; peoples’ rights; legal constructivism

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Opinion Tribunals and the Permanent People's Tribunal
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OPINION TRIBUNALS AND THE PERMANENT PEOPLE'S TRIBUNAL

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Although not always widely known, the existence of "opinion tribunals" has been a reality for the past decades. As a rule, they act in the international arena. Even when dealing with internal issues of a particular country, they address global issues and the echoes of their deliberations extend beyond national borders. The purpose of this paper is to critically reflect on the nature and role of opinion tribunals, particularly the Permanent People's Tribunal, created in Bologna in 1979. This reflection is part of a research project about international jurisdiction conducted by OBSERVARE, the international relations research unit of Universidade Autónoma de Lisboa[1].

The term "opinion tribunal" encompasses two concepts: the idea of "tribunal" is immediately associated with the enforcement of justice based on a legal norm; the concept of "opinion" refers to the somehow diffuse idea of public opinion, in which collective feelings, widely shared trends of ideas and beliefs insistently emphasized in public manifest themselves. There is a peculiar dialectic between law and public opinion – in our case, between national and international law and international public opinion. Due to their imperative nature and also to their gaps, laws enforced by the courts impact their influence on public opinion, projecting their values on them, disseminating rules of conduct and promoting consensus around commonly accepted principles, sometimes leaving issues unresolved; conversely, the sensitivity of public opinion displays interfere in the formulation of laws, require their enforcement or refute their failure. As a French sociologist of international relations defined wisely:

> *Public opinion and international law should not be confused and gain nothing if they were to be confused. It is the inevitable and necessary tension between them that may lead to a bit more fairness in the world. If lawyers were to be freed of the pressure of public opinion, they would risk becoming strictly technicians of the established order. If opinion was to be left to itself, it would risk wandering endlessly in search of its projects: only law can help it*

[1] When preparing this text I received valuable indications and suggestions from Gianni Tognoni (Secretary General of the PPT) and Piero Basso, former comrades in mobilizing causes, as well as from Simona Fraudatario (of the Lelio Basso International Foundation). My colleagues Mario Losano, of the University of Eastern Piedmont, and Miguel Santos Neves, of Universidade Autónoma de Lisboa, enriched the original text with important comments and suggestions and other colleagues, jurists Patrícia Galvão Teles, Constança Urbano de Sousa, Mateus Kowalski and Pedro Trovão do Rosário, helped overcoming my limitations in this field. Brígida Brito offered meticulous support in all methodological aspects. To all I give special thanks.

> *realize its ideal by providing it with the staff and the institutions of a new world. Accordingly, it is in the interest of the community of human beings that the dialogue between international law and public opinion never ceases.* (Merle, 1985: 97).

Having accepted this viewpoint, prior clarification is still required: one should not perceive "opinion tribunal" as a trial carried out by public opinion. The concept of public opinion is too volatile to support the consistency of a founded, dispassionate and weighted judgement. Justice cannot be at the mercy of the emotions of current opinion or of the vicissitudes of published views. Legal procedures, in their rigour and technical complexity, in their connection to the current legislation, in their respect for the guarantees of accused persons, are not comparable to floating perceptions and preferences, however widespread they may be. Still, that does not prevent, quite the opposite, consensus around certain principles from being gathered, so as to anticipate norms that have not yet been legislated which may later be legally enforced, or to protest against the insufficient implementation of international laws, or to fill legal loopholes or institutional omissions responsible for the impunity of criminals.

Opinion movements and court rulings

The history of the twentieth century is dotted with examples of opinion movements that acted as critical conscience regarding controversial acts in the enforcement of justice. Sometimes, their impact was limited to restricted circles of informed elites. In other cases, they had a long echo in public opinion. It is worth remembering some emblematic cases that were symbolic moments in the dialectic between law enforcement and international public opinion.

At the end of the nineteenth century, the famous Dreyfus Affair shook public French and international opinion, with the particularity of disclosing perverse anti-Semitism reactions and triggering vehement protests that later led to justice being made. Alfred Dreyfus, an officer of Jewish origin, held posts of responsibility in the French army and in 1895 was accused of spying in favour of Germany, when the resentments of the Franco-Prussian war were still felt. After having been dispossessed of his post and deported to a distant island, Dreyfus always claimed his innocence and his case raised a wave of indignation that led to his credibility being restored.

A few decades later, the United States were shaken by a tremendous miscarriage of justice that led to the death sentence of Nicola Sacco and Bartolomeo Vanzetti. These two Italian immigrants, anarchists, carriers of illegal weapons, were suspected of murder and robbery, arrested in 1920 and convicted in court for murder, despite the absence of evidence and the massive appeal against their conviction: solidarity committees were created, large demonstrations were held in several countries and eminent international figures claimed for their release. All was in vain and Saco and Vanzetti were electrocuted seven years later. It was not until 1973 that the truth was officially restored and the memory of the two anarchists posthumously rehabilitated.

Meanwhile, the rise of National Socialism in Germany had a dramatic episode that marked both Hitler's escalating seizure of power and the anti-Communism hatred of his regime: the fire at the Reichstag – the palace of the Berlin Parliament – in February

1933. The Nazi investigation identified a suspect, a young left wing Dutch who ended up sentenced to death, and the blame was attributed to the Communists, leading to the arrest of many thousands of people who resisted Nazism. However, in September of the same year, the " Legal Commission of Enquiry into the Burning of the Reichstag" was set up in London and organized a counter-case that concluded that the Nazi leaders were likely to be guilty[2].

Between 1936 and 1938, the Moscow Trials triggered major international repercussions. On the orders of Stalin, a massive purge was carried out that physically killed most of the Soviet elite. Following forged complaints or "confessions" of convenience, the courts pronounced ruthless sentences against the ruling class, especially against Trotsky and his followers. The European Left reacted with ambiguity to the events, despite the severe criticism of people like the surrealist poet André Breton and the Marxist Victor Serge; an international investigation commission was created in the United States, chaired by the prestigious philosopher of morals John Dewey, who concluded that Trotsky was innocent, despite the fact that the majority of the members of the commission distanced from his ideas[3].

Another trial, also in the United States, that caused intense international outcry was the one involving the Rosenberg couple after the end of World War II. They were accused of spying on the nuclear program in favour of the USSR, which would have allowed the Soviet Union to accelerate the production of the atomic bomb. Trialled in 1951 and executed in 1953, Julius and Ethel Rosenberg were Jewish and communism sympathizers and even today there is controversy about their guilt, especially that of his wife Ethel. Numerous prominent world figures, such as Einstein, Pius XII, Sartre, and Brecht protested against the sentence, denouncing primary anti-communism and the latent anti-Semitism, asking for clemency for a couple that was convicted without conclusive evidence.

In their symbolic strength, all the above mentioned cases illustrate the tension between the enforcement of legal norms and international public opinion, as well as between formal bodies that have judicial authority and informal bodies that contest them. Like a kind of dialogue or confrontation between powers and counter-powers, a dialectical opposition and complementarity between legal judgments and currents of opinion emerges. The enforcement of justice, fallible as it is, vulnerable to all sorts of abuses, is not limited to the jurisdiction of the courts and extends itself to the social capacity of protest, which does not mean that the latter has any guarantee of being right or any prerogative of "moral superiority." By act or omission, whether due to deficit of interpretation or due to a legal void, the law, and especially international law, does not always respond to the demands of complex human situations. Hence this apparent historical necessity of creating correction, rehabilitation and contesting moments as an antidote to the potential perversion of justice caused by its own agents.

Perhaps it is this very same need to do justice outside the conventional structures that leads to the creation of special bodies when regular courts do not seem to be the most appropriate places to judge collective or individual behaviour, as is the case of truth and reconciliation commissions. There are known initiatives in this area, such post-apartheid South Africa or Latin American societies after the military dictatorships.

[2] For a detailed analysis of this case see Klinghoffer, A.J. and Klinghoffer, J.A. 2002: 11-50.
[3] For more detailed information, see also Klinghoffer, A.J. and Klinghoffer, J.A. 2002: 51-101.

Seeking to avoid the settling accounts that are likely to reopen wounds of the past, but also taking as inadmissible the impunity of those responsible for the crimes committed, such commissions have had the role of preserving the memory of the facts and of determining the responsibility of political actors, with the aim of obtaining recognition, disclosure, forgiveness and reconciliation, and not so much punishment. In these cases, the wisdom of the transition phase with a view to consolidating democracy prevails, more than the mechanical enforcement of criminal laws.

There was a similar process in Rwanda as a therapy against the memory of the tragic genocide of the Tutsis perpetrated by Hutu militias between April and June 1994, which killed over 800,000 Rwandans and forced nearly two million people to flee. A special international tribunal was set up to indict those responsible for the crimes, but a large number of prisoners, over 100,000, remained in the country, for which reason the official courts were unable to prosecute all cases. The local government encouraged resorting to the traditional conflict resolution institution - called Gacaca - as a way to mobilize the population for the fulfilment of justice, with emphasis on the role of the elders and the function of social integration, according to the best African traditions.

The aforementioned examples attest the variety of ways that have been used to find solutions to challenge or complement the role of established judicial systems, either through opinion movements, or international commissions of inquiry, truth and reconciliation commissions, or via customary practices, in the aforesaid tension between law and public opinion. Ultimately, this action can even be conducted by individuals, as shown in the special case of the blog of the great American jurist Richard Falk, one of the most influential names in the field of international law[4]. It is a blog he created on the day he turned 80 and is an impressive repository of his independent and critical thinking on legal and political issues, with a title that is, in itself, a programme: Global Justice in the 21st Century.

International jurisdictions and opinion tribunals

For centuries, international law has been regulated by treaties agreed between two or more states, which, despite the legal nature of the established relationship, were only morally obliged to abide by their provisions, without the strict existence of an international jurisdiction with instruments to ensure compliance therewith, and, if necessary, by enforcement action. However, back in 1899, a Permanent Court of Arbitration was created following an international Hague Conference, and although there was already a Permanent Court of International Justice established under the Covenant of the League of Nations, it was only in 1946 that the International Court of Justice, based in The Hague, started functioning as part of the multilateral framework of United Nations. Its role was clearly defined: to resolve conflicts between states. The European Court of Human Rights, based in Strasbourg, created in 1959 by the Council of Europe, had a different purpose. Much later, in 2002, after its statutes were adopted in Rome, the International Criminal Court was created, coincidentally also based in the capital of the Netherlands, different from the ICJ due to its capacity to judge individuals accused of committing aggression, genocide, war crimes, and crimes against humanity.

[4] See http://richardfalk.wordpress.com/, accessed on 29/12/2014.

Meanwhile, at the initiative of the United Nations Security Council, three other tribunals were created to trial one-off concrete situations: the International Criminal Tribunal for the former Yugoslavia, established in May 1993, the International Criminal Tribunal for Rwanda, set up in November 1994, and the Special Court for Sierra Leone, created in 2000[5], intended to judge the crimes of genocide, war crimes and crimes against humanity in these countries. Somehow, they are actual replicas of the special tribunals set up immediately after the 1939-45 war to try crimes perpetrated by the Germans and the Japanese, the Nuremberg Tribunal and the Tokyo War Crimes Tribunal, respectively. The latter, of course, had very particular characteristics, as they were military courts organized by the victors of the war; they created jurisprudence as the decisions were based on norms that had not been previously legislated, thus calling into question the principle of non-retroactivity of criminal law; however, they had the merit of judging the individual responsibilities of political leaders - no longer sheltered behind the regime under which they were fulfilling orders - and of condemning crimes not previously explained, such as crime against peace, war crime, the crime of genocide and crime against humanity.

Thus, we have two kinds of international courts: the emergency courts, with ad hoc functions and powers limited to specific situations (Nuremberg, Tokyo, former Yugoslavia, Rwanda, Sierra Leone ...) and the regular or permanent courts - two in The Hague, the ICJ and the ICC, and the European Court of Human Rights - which are stable elements of the international legal architecture.

Opinion tribunals appeared in a totally different situation. One can doubt the relevance of this designation, as we will see later. In any case, numerous initiatives of citizens without any official mandate have taken the form of judicial processes to enunciate pronouncements on issues when fundamental human rights are at stake. Thus, they are a kind of informal international jurisdiction arising from the civil society and not from established powers, devoid of coercive force but aspiring to sensitize international opinion and public authorities thanks to the moral value of their sentences, which are in fact based on current international law.

The most representative of these opinion tribunals is perhaps the Permanent Peoples' Tribunal (PPT), which has been active since 1979 and is the central object of this study. Its creation, however, lies in a context that should be recalled.

The PPT originated in a previous truly "founding" experience, the international tribunal against war crimes committed in Vietnam, known simply as the Russell Tribunal[6], which was the source of inspiration for all subsequent similar actions. The initiative was taken by Lord Bertrand Russell, philosopher, mathematician and Nobel Prize winner for Literature in 1950, who also stood out as an activist for the cause of peace and disarmament. He was joined by an extremely prestigious group of persons, including another big name in twentieth-century thought, Jean-Paul Sartre, at first reluctantly, then convinced by Simone de Beauvoir, accepting to chair the court sessions in London in 1966. The work was resumed in Stockholm (1967) and finally in Roskilde, Denmark,

[5] On this truly special case, since it was a hybrid national and International tribunal, see Paula, Thais and Mont'Alverne, Tarin "A evolução do direito internacional penal e o Tribunal Especial para Serra Leoa: análise da natureza jurídica e considerações sobre sua jurisprudência", *Nomos: Revista do Programa de Pós-Graduação em Direito da UFC,*
Available at http://mdf.secrel.com.br/dmdocuments/THAISeTARIN.pdf, accessed on 30/1/2015.

[6] Very detailed analysis in Klinghoffer, A.J. and Klinghoffer, J.A. 2002: 103-162.

in the same year. It was due to be held in Paris, but General De Gaulle, then president of France, did not consent, although he opposed the US policy towards Vietnam. In a letter to Sartre he explained that his decision in no way restricted freedom of expression, but argued that "I shall not teach you that any justice, in principle and in its implementation, belongs exclusively to the State"[7]This is an issue of primary importance that shall be further addressed. In his response, Sartre defined the foundation of the PPT's legitimacy:

> *Why have we appointed ourselves? It was precisely because no one else did. Only governments or the peoples could have done it. As for governments, they want to retain the possibility to commit crimes without running the risk of being judged; therefore, they would create an international body empowered to do so. With regard to the peoples, except in case of revolution, they do not assign courts, for which reason they could not appoint us*[8].

Somehow, this first Russell Tribunal recovered the previous one constituted by the Nuremberg Tribunal (Jouve, 1981: 670-671; Merle, 1985: 56-59), dealing with a typology of crimes that included crimes against peace, war crimes, crimes against humanity and the crime of genocide[9], with the key difference that it was a tribunal that was aware that it did not have the capacity for physical coercion or to enact effective sanctions.

After Bertrand Russell died, a second Russell Tribunal with identical structure was summoned by Italian Senator Lelio Basso, who had integrated the jury of the first one and distinguished himself due to his intervention. Three sessions were held in Rome and Brussels between 1973 and 1976, dedicated to denouncing and condemning the crimes conducted by various Latin American military dictatorships, namely Brazil and Chile but also Bolivia, Uruguay, Argentina and other Central American countries, with significant impact on the public opinion of this sub-continent[10]. The name of Lelio Basso reappeared later, definitely connected to the Permanent Peoples' Tribunal: it is possible that the contact he maintained with the atrocities of Latin American dictatorships gave him intuition: there are governments that are at war against their own people, and these must be given voice, in addition to the states that are supposed to represent them.

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7 General De Gaulle's letter, dated 19 April 1967, is available online at http://bernat.blog.lemonde.fr/2008/06/10/le-tribunal-russell-et-le-proces-du-11-septembre/ Accessed on 29/12/2014.

8 *Ibid.* There is a lot of information about the Russell Tribunal, including the complete list of members, technical contributions and individual testimonies available at http://911review.org/Wiki/BertrandRussellTribunal.shtml, accessed on 29/12/2014. The English version of Sartre's inaugural speech can be read in http://thecry.com/existentialism/sartre/crimes.html, accessed on the same date.

9 The term "genocide" is a neologism first used by the Polish Jewish lawyer Raphael Lemkin to describe the systematic Nazi persecution of Jews: information at http://www.ushmm.org/wlc/en/article.php?ModuleId=10007043, accessed on 29/12/2014.

10 The most detailed study on the Russell Tribunal II is available online in a PDF in *academia.edu* by Julien Louvrier: http://www.academia.edu/166082/Le_Tribunal_Russell_II_pour_l_Amérique_latine_1973-1976_Mobiliser_les_intellectuels_pour_sensibiliser_l_opinion_publique_internationale, accessed on 29/12/2014.

There are also brief allusions to a Russell Tribunal III which met in Frankfurt in 1978 on a seemingly local theme - professional bans in West Germany - and a Russell Court IV based in Rotterdam in 1980 to denounce the "ethnocide "of the Amerindian peoples (Jouve, 1981: 671).

In this context of the Russell Tribunal sessions, a remarkable initiative of similar contours took place in Portugal in 1977-78: the Humberto Delgado Civic Court (a general who opposed the Salazar regime, murdered by the PIDE – Salazar's political police), created to trial the dictatorship crimes in Portugal. It was a brief but intense experience motivated by the lack of prosecution of those responsible for the dictatorial regime, in particular the political police. It brought together prestigious democratic individuals[11] and made a final decision entitled "Judging the PIDE, condemning fascism".

Shortly after, in 1982, the Russell Tribunal on Congo met in Rotterdam to judge the crimes committed during the dictatorship of Mobutu Sese Seko[12], President of Zaire. Seemingly, the name "Russell Tribunal" was taken as a "brand" used in different circumstances.

Meanwhile, the IPT – Indian Independent People's Tribunal – also called Indian People's Tribunal on Environment and Human Rights[13], was created in 1993, in the tradition of the grassroots movements crossing the Indian society, focusing on human rights issues and particularly on environmental justice.

In 2000, an Opinion Tribunal was held in Tokyo (*minshû hôtei* in Japanese, meaning people's court) on the "comfort women"[14] used in military brothels: an initiative of the Violence against Women in War Network, the aim was to judge responsibilities relating to kidnapping and mass deportation of women for sexual favours made to Japanese soldiers in the territories occupied by the Japanese expansionism in the years 1930-40. This issue was well-known but had always been silenced, despite having affected women from Korea, Taiwan, Indonesia, East Timor, China, and Vietnam.

There are also references to the meeting held in Berlin in 2001 of the Court of Human Rights in Psychiatry[15], also referred to as the Russell Tribunal, which had the particularity of having concluded its work with a double verdict: a majority one that considered the existence of serious abuse of human rights in psychiatric practice, and a minority one that just alerted for possible deviations in the practice.

From the years 1998-2000 to the present, the Latin American Water Tribunal, also linked to the so-called Central American Water Tribunal, has been very active conducting activities on contamination and water resources issues in a number of

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11 See the analysis available at http://www.esquerda.net/artigo/tribunal-c%C3%ADvico-humberto-delgado-uma-experi%C3%AAncia-breve-1977-1978/28229, accessed on 28/12/2014. The full sentence can be found at http://ephemerajpp.com/2014/01/11/tribunal-civico-humberto-delgado/, accessed on 29/12/2014.

12 Check the brief description at http://fr.wikipedia.org/wiki/Tribunal_Russell_sur_le_Congo, accessed on 29/12/2014.

13 The website is http://www.iptindia.org, accessed on 29/12/2014.

14 See Rumiko Nishino, «Le tribunal d'opinion de Tôkyô pour les « femmes de réconfort » », *Droit et cultures* [online], 58 | 2009-2, made available on 1/10/2009, accessed on 29 /12/2014. URL: http://droitcultures.revues.org/2079.

15 See Ian Parker, "Russell Tribunal on Human Rights in Psychiatry & "Geist Gegen Genes", *PINS (Psychology in society),* 2001, 27, 120-122 30 June-2 July 2001, Berlin*,* available at http://www.pins.org.za/pins27/pins27_article12_Parker.pdf*,* accessed on 29/12/2014. See also http://www.freedom-of-thought.de/rt/accusation.htm, accessed on the same day.

countries in the region. There were sessions in Rotterdam in 1983 about the contamination of the river basin of the Rhine, as well as those held in 1992 in Amsterdam on ecological crimes in several continents, and also to the National Water Tribunal in Florianopolis, Brazil, in 1993, on the mining contamination and pesticide products[16]. Defending the democratization of environmental justice, these Latin American documents use the term "ethical court" (noted for its nature) and the category of "ecocide" (to characterize environmental crimes).

The Western military intervention in Iraq was one of the events that gave rise to several initiatives such as opinion tribunals. A World Tribunal on Iraq[17] was created in 2003 in Brussels, also called the Brussels Tribunal or BRussells Tribunal (playing with the phonetic proximity of Brussels to Russell), confirming that the Russell Tribunal remains the key reference. It held sessions in Brussels and in Istanbul in 2004 and 2005 and examined the Project for a New American Century, of the American neo-conservatives and the resulting aggression against Iraq. A session took place in Lisbon in 2005, with the collaboration of several Portuguese lawyers[18]. Later the World Tribunal on Iraq became a permanent forum, evolving into an international network of "academics, intellectuals and activists."

Since 2007 a commission has been active in Malaysia to investigate war crimes. It is called Kuala Lumpur War Crimes Commission (KLWCT), also known as Kuala Lumpur War Crimes Tribunal and is an alternative to the International Criminal Court, deemed to be ineffective[19]. It is chaired by the former prime minister of Malaysia, Mahathir Mohamad and in 2011 it condemned the intervention in Iraq, personally blaming President Bush and Prime Minister Blair for it. In 2013, it accused the Israeli state for the genocide of the Palestinian people.

Again in Brussels, the opinion tribunal on the detention of foreign children in closed centres was held in 2008[20]. At the initiative of the NGOs Coordinator for Children's Rights, the verdict symbolically condemned the Belgian State for infringing the relevant international conventions.

Despite the distance in time with respect to the events, in 2009 the opinion tribunal met in Paris on the use of "Herbicide Orange"[21] (or "Agent Orange"), the name of a powerful chemical defoliant, comprising a mixture of two strong herbicides used by the US in the Vietnam War, whose impacts are still being felt. As a chemical weapon of devastating effects, this defoliant is prohibited by international conventions. The tribunal condemned not only the US government, but also the companies producing the product, such as Monsanto Corporation and Dow Chemical.

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16 See http://tragua.com, accessed on 29/12/2014, as well as http://www2.inecc.gob.mx/publicaciones/libros/363/cap18.html, accessed on the same day.

17 See its website http://www.brusselstribunal.org, accessed on 30/12/2014.

18 Documentation available at http://tribunaliraque.info/pagina/ap_tmi/o_que_e.html, accessed on 30/12/2014.

19 See the respective website in http://criminalisewar.org, accessed on 30/12/2014.

20 Reference in http://www.lacode.be/tribunal-d-opinion-sur-la.html, accessed on 29/12/2014.

21 About the tribunal see http://www.mondialisation.ca/agent-orange-le-tribunal-international-d-opinion-de-paris-condamne-les-tats-unis-et-les-firmes-tasuniennes/13667?print=1, accessed on 29/12/2014. Additional information at http://www.history.com/topics/vietnam-war/agent-orange, accessed on the same day.

One of the most representative opinion tribunals is perhaps the Russell Tribunal on Palestine[22], which held sessions from 2010 to 2013 in Barcelona, London, Cape Town, and New York and, more recently, an extraordinary session (September 2014) in Brussels on violations of international law by Israel in Gaza. As a rule, however, the aim is not so much to condemn Israel (Israel's violations of international law are all too familiar), but rather to show the responsibilities of the entities that objectively support Israel in its violations of international law. It described the situation in Israel as similar to the South African *apartheid* regime and introduced the category of "sociocide" to characterize the attack on Palestinian identity.

In addition, an "informal" tribunal was held in Venice in September 2014 on the situation in the Ukraine[23]. Not entirely explicit and even dubious in nature, it also claimed to follow the Bertrand Russell tradition. It ended up condemning US President Obama and the Ukrainian President Poroshenko, NATO and the European Commission, charging them with war crimes committed in the East of the country.

Besides these initiatives, several appeals to the formation of opinion tribunals according to the Russell model on a range of issues have been reported. For example, in Paris, in 2010, there was an appeal for a world opinion tribunal on climate and biodiversity[24], based on the lack of success of major international conferences on the subject. The following year, a petition whose signatories called for an opinion tribunal to judge nuclear crimes[25] was started, prioritizing, in this case, nuclear disasters affecting civilians, as in the Chernobyl and Fukushima tragedies.

Tokyo, Kuala Lumpur, Brussels, Rome, Paris, Florianopolis, Rotterdam, Amsterdam, Lisbon, Venice, Cape Town, New York, London, Stockholm, Roskilde, Frankfurt, Berlin, Istanbul, New Delhi, San Jose in Costa Rica, The Hague - cities in three continents expressing the cultural and geographical dispersion of events that the organizers designate in many ways as courts, opinion tribunals, citizens' tribunals, international courts, ethical courts, conscience tribunals[26].... However, in addition to their geographic spread and variety of designations, they have some common features: they are civil society initiatives; they are participatory processes involving intellectuals and activists; they are technically grounded on current norms of the community of nations; they seek to compensate for shortcomings of international law or its implementation; they denounce and condemn the most serious crimes against human beings and against peoples; generally they have a clear anti-imperialist and anti-colonialist ideological standpoint; they are carriers of causes of emancipatory intent; they use analogies with legal procedures to make their conclusions; they aim to raise public awareness and through it call the attention of powers that be.

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[22] Plenty of information available at http://www.russelltribunalonpalestine.com/en/, accessed on 29/12/2014.

[23] News in http://rt.com/news/187584-russell-tribunal-obama-ukraine/ accessed on 29/12/2014.

[24] News available at http://www.lemonde.fr/idees/article/2010/10/27/pour-un-tribunal-mondial-d-opinion-pour-le-climat-et-la-biodiversite_1431693_3232.html, accessed on 30/12/2014.

[25] As can be seen in http://www.rene-balme.org/24h00/spip.php?article1358, accessed on 30/12/2014.

[26] The designated "peoples' tribunals are very different from these, promoting summary sentences and sometimes summary executions, leading to a true perversion of justice, such as those conducted by the Red Brigades in Italy in the sentencing of Aldo Moro, or that have been promoted even by governments in periods of instability, as happened in Angola (see http://www.casacomum.org/cc/visualizador?pasta=04308.001.017, accessed on 27/1/2015).

The Permanent People's Tribunal (1979-2014)

In the above context, the Permanent Peoples' Tribunal (PPT) has special importance. Its main aspects include: Lelio Basso, senator of the Italian independent left, of unusual political stance, had been part of the Russell Tribunal I and was the soul of Russell Tribunal II. He died in 1978, leaving incomplete a project involving three institutions: the Lelio Basso Foundation, the International League for the Rights and Liberation of Peoples and the Permanent Peoples' Tribunal. The Foundation is based in Rome and still exists today; the League, established in 1976, was an extended social movement of meritorious action but in the last years of the twentieth century its members dispersed to various causes; as for the Tribunal – already after Basso's death – it was only formed in 1979 in the city of Bologna. Its first president was François Rigaux, an eminent Belgian jurist and a professor at the Catholic University of Leuven[27]. The general secretary was Gianni Tognoni, a physician in Milan professionally connected to health policies.

This set of institutions used a kind of "magna carta" as a reference: the Universal Declaration of People's Rights[28], proclaimed by Lelio Basso in Algiers on 4 July 1976, a symbolic day marking the 200 years of the independence of the United States. The Algiers Declaration, a document anchored in values that were emerging at the time, was characterized by some fundamental traits: it considered people as collective subjects of rights, in line with the UN's own approaches, thereby complementing the current vision about human rights; it addressed a new kind of recently recognized rights, so-called "third generation" rights (in addition to the civic-political, economic and social rights), such as the right of peoples to existence, cultural identity, political and economic self-determination, the right to scientific progress as the common heritage of humanity, the right to environmental protection and access to common resources of the planet, and the rights of minorities. Moreover, the spirit of the Declaration was fully in line with the claim for a "new international political and economic order," which was then so insistently present in the political discourse of the leaders of the Third World and European left, and assumed by multilateral institutions.

After describing briefly the circumstantial framework and ideological milieu that led to the creation of the Permanent Peoples' Tribunal - PPT -, its characteristics are described below.

First of all, it is a **permanent** tribunal. The majority of other similar experiences were initiatives of opinion tribunals aimed at specific issues and particular cases, geographically defined and circumscribed in nature. Instead, the PPT has existed for 35 years (1979-2014) and deals with a large number of situations, since it is open to the variety of processes that come its way. Hence the relevance of being considered "permanent", as it operates in the long run and is constantly ready to cater for those suffering from violations of fundamental rights.

Secondly, it is an **international** tribunal, for many reasons: a) its composition (the jury members come from 29 different countries); b) the topics it covers include many

[27] François Rigaux died in December 2013; he had already been succeeded as Chairman of the PPT by Salvatore Senese and later by Franco Ippolito, Italian jurists.
[28] Full text available at http://www.internazionaleleliobasso.it/?page_id=214, accessed on 30/12/2014.

sensitive issues of world politics and the cases it addresses- even when they are local - have an impact across borders; c) its constant references to international law and human rights and peoples, bearers of universal values; d) it has the ambition to influence international public opinion, global decision centres and the initiatives of the community of nations.

Third, it is a tribunal of the **peoples** (regardless of the known ambiguity of the term "peoples"). Lelio Basso refused the possible designation of "citizens' tribunal" for its alleged "bourgeois" connotations, preferring "peoples' tribunal" (Klinghoffer, AJ and Klinghoffer, JA 2002: 164). The subject of rights that the PPT privileges is the collective subject, a particular people, a particular human community, a particular society as a whole. It is true that human rights are at the forefront of its agenda but, according to its status, "the Tribunal has no jurisdiction to rule on particular cases of single individuals, except where there is a relationship with the violation of the right of peoples"[29] . This is in line with the Algiers Declaration (Universal Declaration of Peoples' Rights) and the designation of the International League for the Rights and Liberation of Peoples. In a context where states are conventionally considered to be the only subjects of international law, the PPT breaks away from this view and affirms the prerogative of the people being themselves subjects of international law, so that they can act as interlocutors of international jurisdictions.

Fourth, the PPT has a similar function to that of a **tribunal**. It is guided by the "Nuremberg principles[30]", its statute and practice set out a series of procedures inspired in court cases: when a "complaint" is received, it can be filed (in case of inconsistency) or accepted for the inquiry to be open; the situations are examined in-depth in a widely participatory process aiming to identify violations of international law, listing witnesses, hearing experts, and preparing reports; public sessions are chaired by a jury; the defendants are invited to attend and present their version of the facts (which rarely happens); the jury meets in closed sessions and prepares a final judgment for which there is no appeal; the judgment is made public and sent "to the United Nations, relevant international bodies, governments, and the media." The entire basis for the decision is grounded strictly on existing international law and the formalism of the public sessions reproduces the model of a court hearing. This analogy with the judicial process will be discussed later.

In fifth place, the **jury's composition** is also statutorily regulated, requiring the presence of seven members for a valid sentence. The current members[31] co-opted by the central structure are altogether 71 from 29 different countries and are called on a case by case basis for the PPT sessions. Over its 35 years of activity, numerous other people formed this body of judges, many of them world-renowned. Most of the members are lawyers, academics, scientists, writers, established artists, leaders and former leaders, members with experience of international organizations, some Nobel laureates, and prominent figures of social movements.

Finally, in sixth place, comes the **financing** of the PPT activities. The everyday functions of the secretariat have the logistical and operational support of the Lelio

[29] Article 1 of the PPT Statutes, available at http://www.internazionaleleliobasso.it/?page_id=213, accessed on 2/1/2015.
[30] *Ibid*. The following points always refer to the Statute.
[31] The current list can be read in http://www.internazionaleleliobasso.it/?page_id=215, accessed on 3/1/2015.

Basso International Foundation, while the costs of conducting public sessions are supported by public and private sponsors contacted for this purpose by the Tribunal's secretariat and the entities interested in presenting the process.

The sentences of the PPT

With over forty sessions in very different cities in various continents, the cases proposed to the Tribunal were examined and the ensuing rulings are an important collection of factual, legal and political documentation[32]. Given that it is impossible to analyse the contents of each of the sentences pronounced by the PPT, a systematization of the topics is proposed here [33].

The first area has to do with **minor aspects of unresolved decolonization processes**, as in the cases of Western Sahara, a former Spanish colony annexed by Morocco, Eritrea, a former Italian colony annexed by Ethiopia, and East Timor, a former Portuguese colony annexed by Indonesia, in sessions that took place in Brussels (1979), Milan (1980) and Lisbon (1981), respectively. They were typical situations which concerned the principle of self-determination, in accordance with the rules of the international community, and processes were introduced by liberation movements recognized as such: the Polisario Front, the Popular Front for the Liberation of Eritrea and FRETILIN. The situation in Puerto Rico was also addressed (Barcelona, 1989).

Another series of sentences were linked to **violations of minority rights**, a theme already referenced in the Algiers Declaration and the PPT statutes. The regime in the Philippines and the violation of the rights of the Bangsa-Moro people was tried (Antwerp, 1980); Another sentence condemned the historical genocide of the Armenians (Paris, 1984); the rights of indigenous communities in the Brazilian Amazon were addressed in a session (Paris, 1990); the violations of the Tibetan people's rights were equally judged (Strasbourg, 1992); the rights of the Sri Lankan Tamil people, later silenced by military action, were the subject of two sessions (Dublin, 2010, and Bremen ,2013).

The PPT also took on cases concerning **regimes oppressing their own people**, whether in the context of military dictatorships, or as part of systematic denial of the rule of law. This was the case of the session that condemned the military junta in Argentina (Geneva, 1980); shortly after the repressive El Salvador regime was judged (Mexico City, 1981); the following year the regime of Zaire's President Mobutu was sentenced (Rotterdam, 1982); this was followed shortly after by the trial of authorities in Guatemala (Madrid, 1983); the Philippine regime, which had already been tried in the session concerning the Bangsa-Moro people, was sentenced again (The Hague, 2007).

Some of the Tribunals' sessions focused particularly on **human rights violations** in different societies, starting with Latin America (Bogota, 1991), specifically against "impunity for crimes against humanity"; restrictions on the right to asylum in Europe were also judged (Berlin, 1994); the special case of violation of the rights of children

[32] The sentences for the years 1979-1998 are compiled into a book in their Italian version in Tognoni, Gianni (org) (1998). To see the rest check http://www.internazionaleleliobasso.it/?cat=15, accessed on 3/1/2015.

[33] Klinghoffer, A.J. and Klinghoffer, J.A. 2002: 165-181 proposed a systematization that is different from the one shown here.

and minors in the world was addressed in a process that unfolded in three cities (Trento, Macerata, Naples, 1995); the same theme on the rights of children and adolescents in the Brazilian society was judged (São Paulo, 1999); a session (Paris, 2004) was devoted to human rights violations in Algeria in the 1992-2004 period.

On several occasions the PPT spoke out about **situations of armed conflict** where the fundamental rights of people were violated. First, the Soviet intervention in Afghanistan was described as "aggression" that went against the rules of the international community and the USSR was thus condemned as a country-aggressor (discussed in two sessions: Stockholm, 1981 and Paris, 1982); Likewise, crimes against humanity committed in the conflicts in the former Yugoslavia were treated in two sessions (Bern, 1995 and Barcelona, in the same year); earlier, there had been a statement condemning the US military aggression against the Sandinista regime in Nicaragua (Brussels, 1984); a special historical case can be included in this area: the conquest of America and the denial of the rights of the Amerindian peoples, analysed five hundred years after the arrival of Columbus to that continent (Padua and Venice, 1992); Finally, predicting the imminent aggression ("preventive war") against Iraq in 2003, the PPT organized a session on "international law and the new wars" (Rome, 2012).

A separate chapter in the PPT's sentences concerns **environmental crimes** of extreme gravity representing large-scale violations of human rights to life, health and sustainable environment. This was the case of the chemical industry accident of the Union Carbide company in Bhopal, India in 1984, resulting from a gas leak that killed thousands of people and had health consequences on hundreds of thousands (sessions on industrial risks and human rights in Bophal, 1992 and in London, 1994); the same applied to the Chernobyl nuclear accident in 1986, tried ten years later (Vienna, 1996).

More recently, the **economic policies** of multilateral organizations and the activities of **multinational corporations** that affect the rights of the people have figured prominently in the PPT's agenda, thus addressing the root causes of structural violence affecting our societies. The macro-economic policies of the International Monetary Fund and the World Bank were the subject of two important sessions (Berlin, 1988 and Madrid, 1994), with a harsh judgment of their practices; clothing manufacturing companies were condemned for disrespect for workers' rights, including for subcontracting companies in the poorest countries (Brussels, 1998); the oil company Elf-Aquitaine was judged for criminal activities in Africa (Paris, 1999); in general, the role of multinationals was discussed in a PPT session (Warwick, 2000); the specific case of human rights violations by multinationals in Colombia was judged over a long period of time(2006-2008); in turn, the practices of the European Union and multinationals in the whole of Latin America were scrutinized and condemned (Madrid, 2010) for violation of often forgotten rights, such as the right to land, the right to food sovereignty, the right to public health, the right to the environment and so on; multinational companies operating in the agro-chemical sector had their own specific judgment (Bangalore, 2011); Finally, a series of hearings in several Mexican cities culminated in a final session in Mexico City in 2014, on "free trade, violence, impunity and peoples' rights in Mexico".

Now that the characterization of the Permanent Peoples' Tribunal and the systematization of its contents[34] have been done, the essential issues raised by previous observations will be analysed and the questions regarding the legitimacy and functions of the PPT and their relationship with international law will be addressed.

What is the legitimacy of the PPT?

Earlier we quoted de Gaulle's phrase: "any justice in principle and in its implementation, belongs exclusively to the state". The classical theory is very clear in this respect, in that it considers the enforcement of justice as a sovereign function, in the framework of rule of law being based on the famous division of powers, where precisely the legislative and the judicial powers are cornerstones of the sovereign state, with any non-public authority being excluded from its remit. In this respect, the initiative of the opinion tribunal is summarily deprived of legitimacy, further aggravated, according to the critics, by the fact that it stages a simulation of justice without any mandate to do so, at the service of a political struggle that swings according to ideological motivations. The aforementioned sociologist Marcel Merle uses the same harsh criticism, denouncing the "mockery of justice for propaganda purposes" (Merle, 1985: 85). The composition of the tribunal is "somewhat elitist, rather than democratic, composed of self-appointed committees (...) selected more for their ideological preferences than for their legal righteousness" (Klinghoffer, AJ and Klinghoffer, JA 2002: 7). By politicizing the supposed enforcement of the law, the opinion tribunal undermines the very idea of justice, because it renounces the principle of impartiality as a precondition for the correctness of the judgement. In this sense, the "sentence" is inevitably damaged by the absence of exemption and the process is nothing more than the assembling of parts leading to the desired conclusion. The "accused" is previously "condemned" and the audience of the "tribunal" is a mere theatrical procedure for propaganda purposes.

These harsh critical questions should be taken seriously for, due to their vehemence, they question the practice of opinion tribunals. If taken literally and to their ultimate consequences, they would end up disallowing these initiatives, removing credibility and even respectability from them.

In contrast, it is possible to reflect about opinion tribunals and in particular the PPT taking into account their real configuration and reconsidering the sources of their legitimacy. In this sense, it can be argued that their nature is "quasi-judicial" and that their legitimacy is founded on imperatives of conscience, referring to existing international law and involving the broad participation of witnesses to establish the facts where flagrant violations of human rights and the rights of peoples occur.

First of all, the "quasi-judicial" nature should be examined. This expression is used here by analogy with another term that recently entered the vocabulary of international relations studies: "paradiplomacy". Traditionally, diplomatic action is also considered to be a sovereign function and, as such, the exclusive competence of states. However, at

[34] The PPT obviously was interested in other cases and causes which, in one way or another, came its way, but never made it to a session. The problem of the Kurds, widely considered to be a stateless nation, was considered but it was blocked due to circumstances that led to breaks in contact. Similarly, the issue of the Palestinian people's rights was repeatedly raised, despite the difficulties caused by divisions between Palestinian nationalists and, dramatically, by the murder of three of its high-level interlocutors.

present, an increasing number of entities other than central powers conduct external relations initiatives that are close to the concept of diplomacy, as in the case of interests and cooperation projection actions undertaken by cities, regions, companies, foundations, NGOs, and various other associations ... All these activities have been described by some authors as "paradiplomacy"[35]

Similarly, the "quasi-judicial" nature can be attributed to events outside the sphere of public powers but which have a formality similar to that of official courts and follow procedures based on both national and international legal proceedings. As was abundantly stressed at the outset, numerous initiatives have used this "quasi-judicial" paradigm, ranging from international commissions of inquiry to opinion tribunals.

In the case of the PPT, the procedures were described above, justifying the analogy now invoked. The indictment, the sentence, the opening of the inquiry, the right to a full defence, the testimony of witnesses and expert reports, the reference to the laws in force, bear resemblance to court proceedings, giving symbolic and moral strength to verdicts. As it turned out, all this is happening on the understanding that the term 'tribunal ' is merely analogical, almost metaphorical, especially as we know that the decision is devoid of coercive power. In a word, it lies in the sphere of the "quasi-judicial".

The term "quasi-judicial" has the advantage of pointing implicitly to some ambivalence in the concept of justice. On the one hand, justice is the enforcement of the rule of law and in this sense one says that the courts do justice. But justice is also an ethical and social value, an ambition of fairness in the relationships between humans, and, in that sense, justice is something programmatic into the future. Opinion tribunals stand somehow on the border of these two concepts: on the one hand they are close to the legal procedure and codified law, on the other they try to echo the aspiration of justice that positively permeates societies.

This being its specific nature, the question of its legitimacy is left open. On this, one can say that the legitimacy of the PPT is based on the fundamental democratic right to freedom of opinion and expression of thought and is based first and foremost on the shaking of consciences. Given the countless violations of people's rights, the impunity of those responsible, the omission of both national and international judicial bodies, it is natural that the conscience of those reacting with nonconformity to these situations wants to be heard, like a cry. It is as if the authority of ethics comes to the aid of non-compliance with legal authority with the aim of replicating its action, as if it stood at "post-conventional level" (to use the expression used by Lawrence Kohlberg[36]), in the sense that respect for standard is superiorly assumed and overcome by the apprehension of values. For some reason we found expressions such as "ethical tribunal" or "conscience tribunal" along the way: they illustrate the ambivalence where the legal and the axiological cross, on the side of "reasons of state" or the convenience of international jurisdictions.

Such legitimacy, however, is enhanced by a component of PPT sessions: the initiative of civil society and, even more, the broad participation of numerous grassroots

[35] See, for instance, Miguel Santos Neves “Paradiplomacy, knowledge regions and the consolidation of ‘soft power’” in JANUS.NET, *e-journal of International Relations,* Vol. 1, no 1 (Fall 2010), pp. 12-32.

[36] See Kohlberg, Lawrence (1981) *Essays on Moral Development, I: The Philosophy of Moral Development: Moral Stages and the Idea of Justice.* San Francisco: Harper & Row.

institutions that collaborate in establishing the facts, the testimony of experienced situations in denouncing violations of rights. These facts act as an antidote against any arbitrariness temptation and at the same time ensure the rooting in social reality, where the cry of the victims is heard louder.

If we take one example among many others, the PPT's ruling on the social and environmental crimes in the Brazilian Amazon lists no less than 26 local organizations that formed the basis of the prosecution and supported the argument of the whole process[37] of the session organized in Paris on 16 October 1990. This is how the legitimacy of a citizenship exercise is built, deriving from collective perceptions, based on shared feelings and, above all, on verifiable facts, while giving voice to the voiceless. Its connection to social movements enables giving the PPT a counterpower quality that affirms itself, under democratic principles, against the established powers. This also helps legitimize its practices, because the existence of countervailing powers is healthy in any society, and their action should not be regarded as abusive, since they act as balancing factors as a precaution against the pathology of "official truth" or single thought.

The PPT also benefits from another kind of legitimacy that is achieved a posteriori. The fact that, as a rule, the majority of its deliberations is subject to recognition by the international community at a later stage can mean a kind of ratification that is legitimizing. This is illustrated by the cases the Tribunal has chosen to take on, such as the Western Sahara, Eritrea and East Timor ones, making us conclude that the alleged rights came to be widely acknowledged. This retrospective look sheds new light on the set of sentences by giving them both legal and political relevance, timeliness and consistency.

Finally, the legitimacy of the PPT is further evidenced by the impartiality of its decisions. It condemned both the US aggression against the Sandinista regime in Nicaragua and the invasion of Afghanistan by USSR troops. It condemned both the social and environmental crimes in Bhopal, India and the ones in Chernobyl, in the Soviet Ukraine. Against suspected ideological partisanship, the reference to the rights of people became a guarantee of impartiality and, therefore, of credibility.

The PPT and international law

In the context of the aforementioned "quasi-judicial" perspective, the deliberations of the Permanent Peoples' Tribunal relate permanently, and logically as, to acquired legal norms. Thus, it resorts to the multiple codification of the rules that safeguard human rights and the rights of peoples, and regulates the roles of international political and economic agents and the relationships of the members of the world community. A

[37] These are: Centro dos Trabalhadores da Amazónia, Associação Brasileira de Reforma Agrária, Associação dos Geógrafos Brasileiros, Instituto de Apoio Jurídico Popular, Instituto Vianei, Conselho Indigenista Missionário, Comissão Pró-Índio, Campanha Nacional para a Defesa e o Desenvolvimento da Amazónia, OIKOS, Salve a Amazónia, Fase (Nacional), Amigos da Terra (Rio Grande do Sul), IBASE (Instituto Brasileiro de Análises Económicas e Sociais), Movimento Nacional de Defesa dos Direitos Humanos, Sociedade Parense para a Defesa dos Direitos Humanos, UNI (União das Nações Indígenas), CPT (Comissão Pastoral da Terra), Campanha Nacional pela Reforma Agrária, Campanha Nacional dos Seringueiros, CEDI (Centro Ecuménico de Documentação e Informação), IAMA (Instituto de Antropologia e Meio Ambiente), MAGUTA (Centro de Documentação e Pesquisa do Alto Solimões), NDI (Núcleo de Direitos Indígenas), CTI (Centro de Trabalho Indigenista), INESC (Instituto de Estudos Sócio-económicos) and CUT (Central Única dos Trabalhadores). In Tognoni (org) (1998) p.358.

legislative and contractual collection of texts resulting from sedimentation and ripening over the centuries that the PPT uses as a basic reference is available.

The example that follows is particularly illuminating: the resolution on the social and environmental rights in the Brazilian Amazon[38], examined in October 1990. The sentence passed at the time listed the legal documents that informed it, starting with Brazil's own Constitution and making reference to more than 40 norms of national law, to which a further 24 documents of international law were added: declarations, conventions, agreements, resolutions, and relevant international treaties. This is a rule present in all of the PPT's verdicts, namely the rigour of the reasoning based on positive law, emanating from both the national legislatures and the international community or contracted through treaties between states as well as the jurisprudence of other bodies.

However, the PPT does not just reproduce the processes established by judicial bodies. Conversely, it has, with regard to them, the function to replace and complement them. An example of this was the decision made on crimes in the former Yugoslavia at a meeting in Bern in 1995, which explicitly stated:

> *Asserting itself as heir to the International Tribunal on American war crimes in Vietnam and to the Russell Tribunal II on Latin America, the Permanent Peoples' Tribunal takes upon itself a supplementary role, due to the deficiency and inadequacy of existing international tribunals, and the impossibility for peoples, individuals and NGOs to access such courts, which are exclusively entitled to judge conflicts between states or act upon a strictly regulated mandate*[39].

This need is particularly felt in the area of political and economic activities, which are outside the scope of international jurisdictions, despite its human and social relevance. For all the above reasons, it can be affirmed that the PPT seeks to fill a void and play a subsidiary role: "opinion tribunals played a relevant role since the end of World War II in the dispute to illuminate the historical and geographical gaps in the persistent selectivity of international criminal law" (Feirstein, 2013: 118).

Another feature concerns the understanding of the judging function. More than punish, which would be out of the question due to the absence of coercive force, the PPT favours not the criminal role but awareness about the violation of rights and – by recognizing the role of people - the capacity of liberating energies. The legal field thus seems to be brought back to its original vocation:

> *The original role given to law is thus recovered. Far from being an instrument of control, it acts as an instrument of liberation from all forms of domination, exclusion, and denial. The 'judges' also leave*

[38] Available at http://www.internazionaleleliobasso.it/wp-content/uploads/1990/10/Amazzonia-brasiliana_TPP_it.pdf, accessed on 13/1/2015.
[39] See http://www.internazionaleleliobasso.it/wp-content/uploads/1995/02/ExYugoslavia_I_TPP_it.pdf, accessed on 13/1/2015.

> *behind the traditional role of judiciaries, surpassing the criminal and punitive dimension of law, so as to become overseers whose role is to guide the interpretation of the facts for the reconstruction of the truth that legitimates complaints and resistances* (Fraudatario and Tognoni, 2013: 5) [40].

The initiatives of the PPT thus have the role of pointedly warning against the crushing of collective rights, aiming at bridging gaps and anticipating regulations that may be imposed. The exercise of citizenship is consequently a contribution to the advance of positive law itself, in the manner of a "reservoir of ideas" (Merle, 1985: 58), becoming a pressure group for the improvement of international law in its normativity and applications. Therefore, we find a dynamic vision of law whose norms are always receptive to innovation, not only to deal with the amazing vicissitudes of our history, but also to improve its humanization mechanisms.

Interestingly, in this regard the texts on the PPT by the main authorities on the topic are instructive: François Rigaux, who was its president for many years, and Gianni Tognoni, who has always been its secretary general. More than any other, they theorized about the PPT and clarified their views on it. They have different views about the same reality that complement the identity of the PPT. Rigaux is essentially a jurist and so his views refer to the imperative nature of the law:

> *The permanent peoples' tribunal is not a people's court, but an opinion tribunal. Its unique strength lies in rationality itself: gathering the facts, hearing witnesses, requesting clarification from the rapporteurs, and then verifying whether the facts that it declares to be proven are contrary to any legal norm. (...) The objective foundation of the activities of the Permanent Peoples' Tribunal can be inferred from the dynamism inherent in the rule of law.* (Rigaux, 2012: 168-169).

Here the emphasis is placed on the rationality of the legal procedure and legal basis of its deliberations. The source of authority of the PPT's pronouncements lies basically in its conformity to the international legal order. Gianni Tognoni's views, in turn, are not distant from Rigaux's, but he emphasizes a versatility and creativity that foster a different intellectual approach. His words fully illustrate his different stance. For him, the PPT is a "research exercise" involving "choosing intelligence over power, having the responsibility to seek the roots of things and of their future potential, more than manage the balance of the present". He sees it as "a borderless exercise in listening and observing, out of respect for people with needs and those seeking a sense of liberation", pursuing a" shared research logic "(Tognoni 1998: I). In another text

[40] See also the following: "Far from affirming itself as a producer of convictions, the real purpose and mission of the PPT is to give victims the recognition and the legitimacy of their truth – which never corresponds to the official one – so that it becomes an instrument of struggle and claim before the official bodies. On the other hand, the legitimacy of the Tribunal and of its sentences, truths and memory depends on the subsequent recognition of those same truths reconstructed by the victims, which turns the PPT into an instrument of anticipation of truths, minimizing any argument about their impotence". In Fraudatario and Tognoni (2011) p.3.

written with Simona Fraudatario, they state that the documentation produced by the PPT is like a "working agenda" and that its practice is primarily a "permanent tool for exploring and experimenting" (Fraudatario and Tognoni, 2013: 2). When describing the backbone of the project underpinning the tribunal, they write that the PPT:

> *Experiments practices and languages for the structural restitution of the role of active protagonists to the victims of violations, which were caused by invisibility, non-recognition, and impunity by the existing international law (...). Its deepest mission is the continued pursuit of observation instruments and to interpret reality with a comparative and critical stance directed at the capacity of the right to prevent, protect and guarantee the existence of people, victims, and offended persons* (Fraudatario and Tognoni, 2013 : 2 and 4).

Research, observation, and experimentation: these words express a "laboratory" view of the relationship between the PPT and law. The vitality of the communities, the unpredictability of history, the complexity of collective processes, and the deepening of awareness of the values in question, require legal innovation. This "experimentalist" conception of international law seems especially interesting: the codification of rules of conduct is not a static and finished process, but rather an open process that seeks new solutions, in reference to the social dynamics and the growing ethical requirements perceived by people. One can describe it as a constructivist perspective of law, understood as something *in fieri*, under construction. The legal normativity is thus a tool for progress and humanization. Opinion tribunals and in particular the Permanent Peoples' Tribunal, coming from the private sector, citizenship, civil society, linked to social movements from the base, have shared responsibility for contributing to avoid the impunity of crimes committed and for fostering the enforcement of law, not as an oppressive norm, rather as a liberating matrix.

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PORTUGAL'S INTEREST IN THE CONTEXT OF SECURITY AND DEFENCE POLICY AND MARITIME AFFAIRS. SOME THEORETICAL CONSIDERATIONS AS PART OF THE RELATIONSHIP BETWEEN PORTUGAL AND THE EUROPEAN UNION

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Abstract

With the accession to the European Union, Portugal became part of an area that has been moving towards greater economic and political integration. In this process, Member States have delegated part of their powers to European institutions, hoping that decisions on matters of joint interest can be made more effectively at European level. However, the current economic and financial crisis has revealed weaknesses in the European construction process that have highlighted the difficulties in achieving the convergence of Member States' national interests.

In these circumstances, this study aims to evaluate whether Portugal's interest is being properly safeguarded given the strategies and common policies enacted by the European Union within the framework of security and defence policies and affairs of the sea.

To this end, the concept of national interest is analysed in the first part in order to establish a common understanding of the subject. In the second part, Portugal's current interests are identified and the third examines EU's interests in the areas under review. The fourth part reflects on how national interests connect with European interests, seeking to highlight the opportunities to be seized and the threats to be addressed.

The analysis concluded that it is not easy to identify a clear European interest in the field of security and defence, while in the area of maritime affairs that interest is evident and requires securing the exclusive competence of the Union in the management of the biological resources of the sea. The defence of Portugal's national interest requires proper monitoring of the negotiations leading to the building of sector strategies and common EU policies.

Keywords:

Portugal; European Union; National Security; Security and Defence; Sea Affairs

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Portugal's interest in the context of security and defence policy and maritime affairs
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PORTUGAL'S INTEREST IN THE CONTEXT OF SECURITY AND DEFENCE POLICY AND MARITIME AFFAIRS. SOME THEORETICAL CONSIDERATIONS AS PART OF THE RELATIONSHIP BETWEEN PORTUGAL AND THE EUROPEAN UNION[1]

Jaime Ferreira da Silva

1. Introduction

By joining the then European Economic Community, now the European Union (EU) in 1986, Portugal became part of an entity that has come a long way towards greater economic and political integration of the states that constitute it[2].

Although all Member States are sovereign and independent, they ceded part of their decision-making powers to European institutions that were since created, in the knowledge that it leads to a reconfiguration of some aspects of sovereignty. In those circumstances, it is important to take into account the cost-benefit ratio of the losses associated with the new attributes of sovereignty and the gains from integration into a larger space.

In the current climate this issue is of great importance, as the lack of a real European government to pursue community interests and the cleavages since created by the economic and financial crisis have demonstrated the difficulty in obtaining the convergence of national interests of Member States in order to pursue a clearly perceived common interest.

Accordingly, it is important to ascertain to what extent the Portugal's interest is being properly safeguarded in the context of sector strategies and common EU policies. This study aims to contribute to that evaluation in the fields of security, defence and affairs of the sea.

To this end, the work is structured into four main parts. The first analyses the concept of national interest in the light of the realistic and constructivist theories of international relations. The second identifies the current national interest in the areas concerned, based on the legal structure of the Portuguese state. The third part acknowledges the common interests of the Union by examining relevant Community documents. The fourth part reflects on how national interests are linked with those of the EU in order to identify the opportunities to be seized and the threats to be neutralized in the course of the European construction project.

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1 This article is based on the study conducted to deliver the inaugural lecture of the Institute of Higher Military Studies on 27 November 2013, on occasion of the Official Opening of the 2013/2014 Academic Year.

2 Professor Armando Marques Guedes has kindly read more than one version of this article, and I thank him for his nice comments.

2. National interest in the context of International Relations

Several researchers have reflected on the concept of national interest. In order to establish a common understanding of the notion, a brief review of it is made here in the light of realistic and constructivist theories. The liberal approach is an alternative stance that has become "classical". However, liberal theories in international relations are more a family of stances than a truly coherent entity. They contrast with neo-realism and merge, in variable ways, with constructivist positions. Contrary to the neo-realists, they do not stipulate an "immutability" of the international system, even if the latter is only constituted by states that interact as if they were "billiard balls". Liberal theories focus on the "peoples" first and foremost and consider that the international system can be formally changed through the institutional channels (e.g. international and/or legal organizations), considering that, this way, international anarchy is progressively blurring; informally, the liberal positions on international relations theories allude to interim players, such as international regimes. For this reason one sees the existence of a kind of gradient between liberalism and constructivist trends in the context of international relations. This progressive fusion is felt the most in hard areas, such as security and defence, foreign policy, and strategy and the sea because they stand very close to the sovereignty of states. In this article, the liberal theories are examined within the wider framework of the so-called constructivist theories.

In international relations, the concept of national interest is used to indicate a particular need that has reached acceptable claim status on behalf of the state, but also to justify and support the pursuit of certain specific policies (Griffiths, *et al.*, 2008: 216). In a pragmatic manner, the National Defence Institute defines national interest as the "integrated and compatible expression of the wishes and concerns of individuals and groups that make up the national community", corresponding to a generalized abstraction of the aspirations and basic needs of that community (Sacchetti, 1986: 14).

The national interest has a dimension associated with the state's domestic policies and another related to its foreign policy, although globalization has dimmed the differences between the internal and external dimensions of the interests of countries (Stolberg, 2012: 13; Guedes & Elias, 2012b).

In the context of domestic policies, it is often called public interest, especially in democratic regimes, or common good, among communitarians. In that circumstance, it is understood as something that is important for the general population of a given state, as opposed to the particular interest of citizens, socio-economic groups and regions that make up that state (Bobbio, *et al.*, 1998: 642). In the context of foreign policy, the concept is usually associated with the classical realist perspective of international relations, also dubbed the "theory of the interests of the states" (Bobbio, *et al.*, 1998: 641).

This theory believes that states are the central actors in the international system and interact in a lawless environment in which there is no higher power able to set and enforce rules governing their relations. In this context, policies are based on the national interest, which is grounded on the power of each state (David, 2001: 33). As realists see international politics as essentially conflictual, states must develop a credible power to ensure their safety and protect their interests, with the military vector having a leading role in its construction. In a world where sovereign states compete for resources, the nation's survival becomes the essential national interest.

Once survival is guaranteed, the state can then have other interests, bearing in mind that those who neglect their interests ultimately do not survive as sovereign nations (Dougherty & Pfaltzgraff, 2011: 95-97). According to this view of international relations, the interests and identity of states are defined before any interaction on the international scene, and the power relations that are established are determined depending on the material capacities of states.

However, this perspective, which occupied a dominant position in the study of international relations in the period between the end of World War II and the early 1980s, was criticised on various fronts. In an attempt to find answers to the identified omissions, the neorealist and neoliberal perspectives focused their attention on how structures affect the rationality of the players. On the one hand, neorealist authors emphasize that the competitive pressure of an anarchic international system decisively influences certain types of state behaviour, namely the constant demand for balance of power. On the other, neoliberals argue that in an interdependent world, international institutions are constituted as an alternative structural context in which states can define their interests and coordinate the different policies (Katzenstein, 1996: 12).

Conversely, these liberal views, which focused less on states and more on people as actors, still do not take into account that the national interest depends on the interpretation that policy makers make of it and that the meaning they attribute to it is conditioned by their education and values as well as by the data that is provided to them. In addition, they do not take into account the key role that national identity plays in the construction of the interests of nations, and that it is not exclusively the result of materials and external factors, because if so, states with similar capabilities would have the same behaviours. This identity has an internal dimension related to how groups, states or agents see themselves, and an external dimension which expresses how they perceive those around them. Thus, as has been argued, inter-subjective consensus about their external roles is reached, which in turn shapes the national interest that emerges from standards and rules created within the group[3].

Devising the national interest as the product of a socially constructed identity and not as something material, belongs to the group of theories dubbed constructivist (Dougherty & Pfaltzgraff, 2011: 121, 122). For constructivists, the national interest is constructed through social interaction among states in international institutions, and is not defined at the outset (Katzenstein, 1996: 2). The international system is the result of relations established among its members, which give meaning to the material capabilities of states. It is anchored on the following principles: (i) states are the main units of analysis; (ii) the key structures of the system are not material, but inter-subjective; and (iii) identities and state interests are largely constructed by social structures (Wendt, 1994: 385). The normative output of the major institutional structures exerts a decisive influence on the formation of the identity and interests of states, which have a corporate identity that establishes generic goals. However, the way they attain them depends on their identities, i.e., it depends on how they see themselves in relation to other states. Institutions incorporate the rules governing interactions between states. In turn, these interactions will condition the formation of identities and interests of states, also establishing the possibilities for action and the constraints to which they are subject (Griffiths, *et al.*, 2008: 51, 52). Thus, the

[3] Intersubjective consensus is achieved through shared understanding, expectations and existing social knowledge in International institutions.

constructivist perspective is considered to be particularly suitable to analyse the formation of the EU's common interest as a result of the interaction between Member States in EU institutions.

National interest upholds what the state wants to safeguard, and its identification is the starting point for the development of a particular policy or strategy, for which reason special care should be placed in its assessment. Once the interactions between the various categories of interests have been acknowledged and analysed, it is up to the government to set the national goals that indicate what the state wants to achieve. Attaining the proposed goals will depend on the satisfaction of interests (Sacchetti, 1986: 17) (Santos, 1983: 45).

Identifying national interests correctly in a given historical moment is not an easy task, because these elements are not clearly spelled out in a single document. To infer them requires analysing official documents and the discourse of policy makers. In this context, the next chapter systemizes the analysis of the documentation on the national legal framework that is relevant to identify Portugal's current national interest in the fields of security, defence and affairs of the sea.

3. Portugal's National interest today

The national interest has a constant dimension that remains unbroken over long periods of time, and another cyclical dimension that runs in a certain context (Santos, 1983: 48). The permanent national interest of Portugal is inseparable from the Atlantic, European and Lusophone options that shape its foreign policy. As a country of scarce resources, the framework of alliances in which it operates plays a key role in safeguarding the national interest. In this regard, the alliance with the maritime power has been a constant throughout Portugal's history, so maintaining a special cooperation relationship with the US is particularly important. The reasons are systemic rather than strictly political-ideological. The United States, in this sense, merely takes the place that until the mid-twentieth century had been occupied by England. In a context where Europe is the main geographical area of Portugal's permanent strategic interest, soon followed in importance by the Euro-Atlantic area (Government of Portugal, 2013a: 20), the EU and NATO are key strategic partners. In another aspect, the national interest is also associated with the consolidation of the Community of Portuguese Speaking Countries (CPLP) as an area of cooperation among its member states (Government of Portugal, 2013a: 8).

As regards the cyclical national interest, this is influenced mainly by the situation in the EU. The international financial and economic crisis that particularly affected the euro zone revealed deficiencies in the architecture of European integration that until then had not been identified. Faced with adversity, political leaders have reinforced the priority given to the interests of their own countries, giving rise to internal tensions and testing Europe's solidarity implicit in the European project. In this context, the revaluation of the Member States' position regarding treaties and common policies in force is a variable to consider, especially when the national interest is at stake. For this to be feasible, countries must be given the necessary freedom of action to act in defence of their interests, which is not happening in Portugal currently. This is the main limiting factor in defining Portugal's national interest today.

In the field of security and defence, financial constraints inherent to this crisis and the consequent negative impact on the budgets of these areas, as well as the emergence of new powers and obligations arising from commitments under NATO and EU, are the factors that most influence the definition of the national interest (Government of Portugal, 2013a: 6).The reorientation of the strategic priorities of the US towards the Asia-Pacific area dictated its smaller commitment to Atlantic and Mediterranean issues, which means increased responsibility for the European allies, mainly due to the current turmoil in North Africa and the Middle East. Within NATO, the comprehensive approach concept, which advocates the need to adopt an method involving political, civil and military instruments in crisis resolution, and smart defence, which seeks to encourage the emergence of a new cooperation culture that enables the development of better capabilities at reasonable costs, were introduced (Government of Portugal, 2013a: 21). Within the EU, an institutional construction inspired by liberalism, the Treaty of Lisbon led to the replacement of the European Security and Defence Policy (ESDP) by the Common Security and Defence Policy (CSDP), resulting in the establishment of mutual defence and solidarity clauses by extending the area of enhanced cooperation and the creation of the permanent structured cooperation mechanism. On the other hand, the European Security Strategy reinforces the EU's need to improve its ability to act in an environment characterized by the diversity of civilian and military resources. Budgetary constraints resulted in the increased role of the European Defence Agency (EDA) and in the identification of the need to develop the concept of pooling and sharing, which translates into the sharing of military assets and capabilities (Government of Portugal, 2013ta: 22).

In the field of maritime affairs, in recent years there has been an increased interest of the international community in the oceans, especially the prospect of accessing the marine resources that they potentially contain. The emergence of new powers in a process of accelerated economic development coupled with the rapid population growth in some regions of the globe, has implied an increase in demand for natural resources. This has resulted in the progressive depletion of natural resources on land, so access to marine resources takes on a new importance. In this context, the possibility of extending the continental shelf beyond 200 nautical miles is of undeniable importance to coastal states, which thus see the area over which they exercise their sovereign rights enlarged for the purpose of exploitation of marine resources. On the other hand, awareness of the finite nature of natural resources has led to need to explore it in a sustainable manner and to adopt an integrated management of the sea and coastline.

In order to identify the current national interest in the fields in question, the national documentation where normally these matters are addressed was examined, including the Constitution of the Portuguese Republic (CRP), the National Defence Law of (LDN), the Strategic Concept of National Defence, the 19th Constitutional Government programme, and the See National Strategy 2013-2020.

The analysis concluded that, in the context of security and defence, national interests extend along three vectors. The first is associated with the fundamental values and comprises:

– The guarantee of state sovereignty, national independence and integrity of the Portuguese territory, as well as the freedom and security of the population (article 273 of the Portuguese Constitution and article 1 of LDN); and

– Safeguard European, Atlantic and international stability and security (Government of Portugal, 2013a: 8)

The second vector is related to the policy of alliances and strategic partnerships. In this context, national interests are associated with:

– The strengthening of EU and NATO cohesion (Government of Portugal, 2013a: 28);

– The strengthening of the relationship with NATO and European structures responsible for the implementation of the CSDP (Government of Portugal, 2011: 10);

– The consolidation of friendly and cooperation relations with CPLP countries (article 7 of the Portuguese Constitution, based on the strengthening of the technical and military cooperation with those states (Government of Portugal, 2011: 111).

The third vector concerns capacity building and includes:

– Strengthening the capacity to face external threats or aggressions (article 5 of the National Defence Law);

– Strengthening the capacity to participate in humanitarian and peacekeeping international missions (Government of Portugal, 2013a: 28); and

– Developing integrated civilian and military capacities (Government of Portugal, 2013a: 28).

In turn, in the field of maritime affairs, national interests have also developed along three axes. The first is related to the role of the sea as an international instrument of Portugal's affirmation, with the following associated interests:

– The recovery of Portugal's maritime identity (Government of Portugal, 2013a: 62);

– The valuation of Portugal's Atlantic vocation (Government of Portugal, 2013a: 28); and

– The consecration of Portugal as a maritime nation as part of the Integrated Maritime Policy (IMP) and the EU Maritime Strategy, namely in the Atlantic (Government of Portugal, 2013b: 62).

The second axis concerns the sea as an economic development tool, and national interests include:

– Mobilization of financial resources for investment in maritime economy sectors (Government of Portugal, 2013b: 62);

– Promoting interoperability between maritime services and ports, shipbuilding and ship repairing and marine works (Government of Portugal, 2011: 53);

– Protection of fisheries and aquaculture promotion (Government of Portugal, 2011: 53);

Promoting the well-being and quality of life of the population (Article 9 of the Portuguese Constitution), in this context with emphasis on the fishing populations; and

– Assumption of the strategic nature of the continental shelf extension project, due to the prospect of accessing potential mineral, energy and biogenetic resources (Government of Portugal, 2011: 110).

The third axis is related to sustainable development and comprises:

- The protection of nature and of the environment and conservation of natural resources (Article 9 of the Portuguese Constitution); and
- The correct arrangement of the national territory and its harmonious development (Article 9 of the Portuguese Constitution), with emphasis on the planning of the coastline.

Following this overview of what is perceived to be the national interest stated in the relevant national documentation in the fields of security, defence and maritime affairs, the common interests of the Union in the same fields will be identified next.

4. The interest of the EU

The hybrid governance model that embodies the EU, with intergovernmentalism coexisting with supranationalism, turns it into a new kind of actor in international politics (Buzan & Little, 2000: 359). Its unique character stems from the fact that, despite all Member States being sovereign and independent, they have given away some of their sovereignty and delegated some of their decision-making powers to European institutions since created. The question of the existence of a common European interest is not consensual, and there is the prospect that this interest simply does not exist, or is just the sum of the interests of the several Member States. Along a different strand, some argue that the mechanisms leading to decision-making are not sufficiently robust in the European Union. However, certain clues may indicate that this interest exists, as evidenced by the very name of EU policies, which are classified as common. In this regard, the change in the designation of the ESDP to CSDP is paradigmatic. This fact of undeniable political significance demonstrates the intention of Member States to roam a path that leads to the identification of common interests in the area of security and defence. As one notices, at the moment there is still a long way to go to materialize a genuine common policy in this area. However, a common European interest is perceived to exist in certain contexts, formed in the course of interactions among member states in European institutions.

The EU is based on rule of law and decisions taken are based on treaties ratified by the Member States. The Treaty of Lisbon was established as the last change to the treaties, with previous treaties being incorporated in a consolidated version embodying the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (European Commission, 2013: 3, 4). The policy areas where the EU can make decisions are determined by the treaties of the Union. The EU's exclusive areas of competence comprise customs and trade policy, competition rules, monetary policy in the euro area and the conservation of marine biological resources (Article 3 of the TFEU). Competence is shared in the areas of internal market, agriculture, consumer protection, and transport, among others, (Article 4 of the TFEU). In other policy areas, decisions are the responsibility of Member States, and the European Commission cannot legislate in these matters (European Commission, 2013: 8).

In order to identify the interests of the EU in these areas, the treaties of the Union, the Europe 2020 strategy, the European Security Strategy, the Integrated Maritime Policy (PMI), and the legal mechanism embodying the Common Fisheries Policy (CFP) were examined. The analysis showed that the interest of the EU is essentially and implicitly

laid down in the TEU. The above study indicates that European interests in the field of security and defence include:

- Protecting its security, independence and integrity (Article 21 of the TUE);
- Promoting peace and well-being of its Member States (Article 3 of the TUE);
- Promoting its values, namely respect for human dignity, fundamental freedoms, democracy, equality, rule of law, and human rights (Article 2 of the TUE);
- The creation of an area of freedom, security and justice without internal borders (Article 3 of the TUE);
- Promoting peace and international security, as well as solidarity and mutual respect among peoples (Article 3 of the TUE);
- Developing privileged relations with neighbouring countries in order to create an area of prosperity and good neighbourliness (Article 8 of the TUE); and
- Establishing relations and partnerships with countries and with international, regional or global organizations that share the same values as the EU (Article 21 of the TUE).

The following European interests, although not exclusively related to maritime affairs, share some points with them:

- Establishing an internal market based on sustainable development (Article 3 of the TUE); and
- Preservation of the environment and the sustainable management of natural resources (Article 21of the TUE).

Based on the above, the issue of the relationship between Portugal's national interests and the interests of the EU will now be examined, in order to identify points of convergence and of potential conflict.

5. The articulation of the national interest with the interest of the EU

From the analysis of security and defence according to a generic point of view, it appears that the resolutions on the CSDP are adopted unanimously (Article 42 of the TEU), which offers relative guarantees that decisions are not made behind the backs of national policy makers. Looking retrospectively to the process of European construction, it turns out that the EU's interest is very diffuse regarding security and defence, pointing even to the absence of a real common interest. This is evident in the wording that was given to the mutual defence clause in the TEU which is transcribed below (Article 42 of the TEU):

> *"If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power (…) This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area shall be consistent with commitments*

under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation".

This clause clearly shows that it results from a compromise that seeks to meet the interests of three types of Member States (Monteiro, 2011: 734.):

- The integrationists, who wanted to see the obligation to help the Member State that suffered the aggression reflected in the clause;
- The traditionally neutral states, who wanted respect for the security and defence policies of each Member State to be enshrined in it; and
- The Atlanticists, who in their capacity of NATO members, wanted their defence to be the remit of the Alliance.

These three groups of states reflect the EU's major trends in the field of security and defence, so although there is a security and defence policy called common, one cannot see the existence of a clear common interest. It is no coincidence that the TEU expresses the intention of the CSDP to build a common defence, but only when the European Council, acting unanimously, so decides. In the current context when the financial and economic crisis is putting the entire European project to the test, one fails to see how this route can be taken in the near future.

Focusing now on the analysis of the articulation of interests according to the vectors through which Portugal's national interests in security and defence are developed, it turns out that there is an alignment between national interests and the interests of the EU in the vector of the fundamental values, which is not surprising bearing in mind that European integration is underpinned by sharing basic principles. The mutual defence clause and the solidarity clause contribute particularly to safeguarding the national interest in this field. The first establishes the political commitment to mutual help in the event of armed aggression against the country, while the latter sets out mutual assistance in the event of a Member State being the target of terrorist attack or the victim of natural or human-based disaster.

In the context of alliances' policy, the articulation of interests has to be analysed from the perspective of the relationship between the EU and NATO, as well as structured permanent cooperation. Portugal is part of the group of states that give primacy to their defence within the Atlantic Alliance, so it is in its interest that the relationship between NATO and the EU is strengthened. On this matter, there is an alignment between the interests of the Union and the national interest because, while the CSDP respects the obligations of Member States under NATO, the report on the implementation of the European Security Strategy strengthens the need for the EU and NATO to deepen their strategic partnership for the benefit of better cooperation in crisis management (Council of the European Union, 2008: 2). This cooperation has been increasing, and one notes that sometimes in the implementation of EU missions, there is coordination with NATO, whose command and control structures are used (European Commission, 2013: 18). Thus, the institutionalization of forms of cooperation that enable the articulation of resources and existing capacities is considered to be of interest to Portugal and to those aforementioned organizations. This may involve

coordination in planning forces, so that a more efficient use of available resources is made.

In another aspect, Member States are allowed to establish closer cooperation among themselves in areas where the EU does not hold exclusive powers (Article 20 of the TEU). Authorisation to proceed with enhanced cooperation is granted by unanimous Council decision (Article 329 of the TFEU). In this context, the Treaty of Lisbon established the permanent structured cooperation, which is a cooperation mechanism created specifically for the CSDP (Article 46 of the TEU). Structured cooperation stands halfway between the creation of formal alliances and the emergence of international regimes, as customary force. The very notion of structured cooperation pays tribute to constructivist liberalism.

This instrument allows Member States with the highest military capabilities to have commitments among themselves, with a view to conducting the most demanding military missions. Participation in the permanent structured cooperation implies the commitment of Member States to develop their military capabilities more intensively (Article 1 of Protocol 10 on the Permanent Structured Cooperation). This mechanism can act as a catalyst for developing the military capabilities of Member States, allowing Europeans to take greater shared responsibility with the US, but it can also pave the way for the formation of a multi-speed Europe in the field of security and defence. Thus, to achieve the desired objectives, a lot of care must be placed in defining the criteria for membership. If the stated conditions are lax, the goal of promoting Member States' development of defence capabilities will not be attained; if they are very demanding, the conditions for the existence of a multi-speed Europe in this area will be created. In this case, Portugal may not be at the forefront due to structural and financial constraints hampering the development of the necessary military capabilities. If one bears in mind that the defence of national interests is at the forefront of European integration so as to actively participate in the EU' decision-making process, not being part of a possible permanent structured cooperation can be contrary to national interests.

Concurrently, the protocol on permanent structured cooperation sets out that, as much as possible, member states should harmonize military instruments and specialize their defence resources and capabilities (Article 2). Portugal as a country with interests in a wide geographical area, materialized in a diaspora spread all over the world, should not discard the possibility for autonomous action, when the defence of its interests so requires, which may be compromised if the path towards specialization of military assets and capabilities is initiated. This condition is another factor to consider in the event of a possible participation of Portugal in this mechanism.

However, it should be pointed out that, since its inception, the idea of creating structured cooperation has been a very controversial issue, with the very remote probability of ever being implemented. This is attested by the fact that even after several years having passed and efforts made by some countries (e.g. Belgium, Hungary and Poland) to replace the eligibility criteria for participation commitments, no Member State has yet notified the Council about the intention to engage in structured cooperation. With regard to Portugal, the fact of not having fulfilled the basic conditions to be able to join a future structured cooperation, could significantly affect its ability to

protect the national interest, rather than making any sovereignty concessions to European institutions[4].

The aforementioned issues lead to the third aspect regarding national interests in the context of security and defence, which is related to capacity building. The TEU gives the EDA competences to contribute to the identification of the military capabilities objectives of Member States, to promote harmonization of operational needs, as well as to implement measures to strengthen the industrial and technological base of the defence sector (Article 45 of the TEU). While the allocation of powers to a European agency to identify military capabilities goals of the Member States is something that may compromise national interests, participation in research projects and defence technology development may be of interest to Portugal, if it results in increased spending in defence activities.

Whereas in the field of security and defence it was not possible to identify a clear common interest, in the area of maritime affairs that interest is manifest, involving securing the EU's exclusive competence in the conservation of marine biological resources. The intention to communitarise marine biological resources is evident right from the Treaty of Rome, but it was only with the achievement of a common policy for the fisheries sector that the first steps in this direction were taken. This interest culminated in the Treaty of Lisbon with the adoption of a clause stating that, within the CFP, the EU has exclusive competence as regards the conservation of marine biological resources (Article 3 of the TFEU).

Aware of the problem of overfishing, the EU tries to impose measures that contribute to the sustainability of fish resources, while member states, concerned about the well-being of fishing communities, seek to ensure the access of their fleets to fishing areas, resulting in a conflict of interest. This conflict has been settled within the EU by adopting exception clauses, which have enabled Member States to safeguard the interests of local fishing communities that depend heavily on traditional fisheries conducted along the coast. These clauses have allowed Member States to maintain the uniqueness of fishing activity in their territorial sea for their own vessels. In addition, in the archipelagos of Madeira and the Azores, with the entry into force of Regulation (EC) No 1954/2003 on the management of fishing effort, Portugal has managed to restrict fishing to vessels registered in the islands' ports, in a strip between the baseline and 100 nm. This restriction does not apply to Community vessels that traditionally fish in those waters, provided they do not exceed the fishing effort traditionally exerted. With the exception of Belgium and Holland, where large vessels prevail, in other Member States vessels under 12 meters long are the majority (European Parliament, 2013, p. 2). In these circumstances, coastal fishing is of special relevance to European countries, which attests the importance of safeguarding the exclusivity of fishing activities in coastal areas for national vessels.

Another aspect that should be taken into account with regard to fisheries is the negotiation of fisheries agreements by the European Commission on behalf of Member States. With these agreements the EU is seeking permission for its vessels to fish in the EEZ of the partner country. The conclusion of these agreements could benefit or harm Portugal's interests, for which reason the negotiating processes should be followed up case by case with particular attention.

[4] I thank the anonymous reviewer for drawing my attention to such important issues.

To complete the analysis of the fishing industry, there is the fact that this sector has not yet been become autonomous in relation to agriculture. This lack of autonomy is reflected in the absence of specific rules on fisheries in the treaties, which are governed by the provisions relating to agriculture (Monteiro, 2011: 742). This circumstance is made clear in the TFEU, which states that "'agricultural products' means the products of the soil, of stockfarming and of fisheries (...)" and that "references to the common agricultural policy or to agriculture and the use of term "agricultural", shall be understood as also referring to fisheries (...) "(Article 38 of the TFEU). Another tell-tale sign of this lack of autonomy is the fact that the European Economic and Social Committee meets in plenary sessions divided into six thematic sections, and fishery issues are dealt with at the Section for Agriculture, Rural Development and the Environment (European Commission, 2013: 32). The non-protection of the specificity of the fisheries sector is deemed to be contrary to the interests of a country like Portugal, which, in September 2011, had the fourth largest fishing fleet in the EU (European Commission, 2012: 15, 21, 44).

On the other hand, the strategic nature of the issues related to the continental shelf suggests that close attention should be paid to this matter, so as not to miss this window of opportunity for Portugal. Whereas with respect to non-living resources of the continental shelf there is nothing in the European treaties that removes sovereignty from Member States, in relation to living resources the situation is not linear because the TFEU states that, under the CFP, the EU shall have exclusive competence as regards the conservation of marine biological resources. This issue is particularly relevant in the case of benthic organisms in hydrothermal vents, as a result of their potentially economically profitable exploitation due to possible applications in biotechnology industries. Hence the need to clarify whether these organisms, which do not correspond to the traditional definition of fishery resources, are included in what the TFEU calls biological resources of the sea. In a simplistic analysis that lacks proper legal basis, we are led to believe that, in light of the provisions of Regulation (EU) 1380/2013 on the new CFP, organisms of hydrothermal vents should be considered to be biological resources of the sea. Indeed, the regulation states that marine biological resources include "living, available and accessible marine aquatic species, including anadromous and catadromous species during their marine life", thus covering the bodies of the seabed, which is contrary to national interests.

The analysis of the IMP indicates that one should take care that its integrating stance does not lead the EU to centralize current existing expertise in matters of the sea. This can be achieved by observing the principle of subsidiarity, thus allowing solutions to be found which take into account national specificities.

On the other hand, always attentive to environmental issues, the EU launched an international appeal for the reduction of greenhouse gases, committing to reduce, by 2050, 80-95% of its emissions compared to 1990 levels. To do this, studies indicate that 60% reduction in emissions in the transport sector must be attained (European Commission, 2011: 3, 4). Many targets were set to achieve this goal, with the intention to transfer 30% of road freight over distances greater than 300 km to sea/river or rail transportation by 2030, and over 50% by 2050 standing out (European Commission 2011: 10). In a context where the enlargement of the Panama Canal could turn Portugal into the gateway to Europe for such important markets as the US and Asia, this fact is an opportunity not to be wasted (Guedes, 2012a). To this end, developing

national port infrastructure is necessary to meet the expected increase in maritime transport, as well as creating logistic support in Portuguese ports that add value to the goods carried by large ships. The flow of goods can take place by sea and it will be necessary to transfer them to smaller vessels, or by land, in this case with railways playing a key role. Like any sea economy cluster based on a strong sector of maritime transport, the EU's environmental concerns are an opportunity for Portugal to develop this sector of the economy, which should not be wasted. The future will tell us if and how we were able to do it.

Following the above, the main threats and opportunities in the areas concerned will now be examined from the perspective of safeguarding the national interest. The main threats are as follows:

- The creation of permanent structured cooperation without the participation of Portugal, because otherwise the country would be left out of the Community's decision-making process in this area;
- The possibility of having a specialization of military resources and capabilities, as this would condition Portugal's possibility to intervene autonomously where the nature of its interests so requires;
- The possibility that military objectives and capabilities are identified by the EDA, due to the chance that it will not take the specificity of national interests into account;
- The communitarisation of marine biological resources, due to the possibility that the living resources of the continental shelf end up being managed by the Commission; and
- The negotiation of fisheries agreements by the European Commission, as this may lead to situations where the national interest is not properly addressed.

Regarding the main opportunities, the following stand out:

- Carrying out actions that contribute to enhanced cooperation between NATO and the EU, with a view to better coordinate military resources and capabilities
- Participation, within the EDA, in research and development projects that allow maximizing the scarce financial resources available, address vulnerabilities in the national force system, foster the development of the technological and industrial basis of defence, and increase the interoperability with the Armed Forces from other Member States; and
- Adapt national port infrastructure to take on the expected increase in maritime traffic and the EU's intentions within the framework of the Common Transport Policy.

6. Conclusion

This paper examined the question of the relationship between Portugal's interest and the interest of the EU, seeking to ascertain whether the national interest is being properly safeguarded in the fields of security, defence and affairs of the sea. The topic was analysed in the light of realistic and liberal theories and its constructivist variants in International Relations, the constructivist approach being deemed particularly suitable to study the formation of interests in a political entity such as the EU.

The analysis pointed to the conclusion that in the field of security and defence, it is not possible to identify a clear common European interest, but rather the interests of three groups of member states, namely the integrationists, the neutral and the Atlanticists. In order to safeguard its national interest, Portugal must foster cooperation between the EU and NATO and achieve adequate material, human and financial conditions to participate in the structured cooperation that will eventually be created. It should also avoid the path towards specialization of military resources and capabilities, as well as endeavour to participate in research and development projects under the EDA, enabling it to maximize the scarce financial resources available.

In turn, in the field of affairs of the sea, it was possible to detect an obvious European common interest related to the sustainability of the sea's biological resources. Pursuing this interest requires the communitarisation of marine living resources. To safeguard national interests in this field, Portugal should try to prevent the European Commission from managing the living resources of the continental shelf, and properly monitor the fishing agreements the EC negotiates with third countries.

In short, within a framework of progressive transfer of sovereignty to the European institutions on behalf of a common interest, protecting the national interest requires the close monitoring of negotiations leading to the building of sector strategies and common EU policies, always bearing in mind the words of Lord Palmerston in 1848 in the House of Commons : "*We have no eternal allies and we have no perpetual enemies. Our interests are eternal and perpetual, and those interests it is our duty to follow*".

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SOCIAL PROBLEMS: THE DEMOGRAPHIC EMERGENCY IN URUGUAY

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Abstract

This article focuses on Uruguay in a context of highly publicized external image through its recent former president Jose Mujica. It covers government policies related to the problems that all societies must face, addressing, in particularly, the demographic problem it is experiencing, since it differentiates the country both in a regional and in the entire Latin American context.

Keywords:

Uruguay; social problems; demography: emigration

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SOCIAL PROBLEMS: THE DEMOGRAPHIC EMERGENCY IN URUGUAY

Virginia Delisante Morató

I. Introduction

Uruguay has been on the front pages of major international newspapers in recent years since the last government of Jose (Pepe) Mujica, either due to his high media profile or the three most progressive laws passed under his government, namely the equal Marriage Act, the liberalization of marijuana and the law allowing abortion. However, in the context of the country's external image, it is relevant to mention other government policies related to the problems that all societies must face, particularly the demographic problem it experiences and differentiates it both in a regional and in the entire Latin American context. The urgency is clear: a country without people lacks viable development. On the other hand, public policies and country indicators in general are elements that are difficult to measure in relation to its neighbours, since the latter are large countries with huge populations by comparison and very different policy implementation systems, as both Argentina and Brazil have federal administration systems. Thus we can say that Uruguay makes itself visible not due to its size (whether geographic, demographic, economic or all together) as happens to some regional powers, but due to its difference as described by Joseph Nye[1], through soft power, and, in this case, based on a person with a high media profile, its leaving president, Mr. Mujica.

The speed with which information flows today justifies introducing a clear definition of globalisation in this analysis because of its influence on human groups, incorporating changes that are not always easy, either due their complexity or the speed at which they occur.

Anthony Giddens[2] wrote that

> *"globalisation can thus be defined as the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events many miles away and vice versa. This is a dialectical process because such local happenings may move in an obverse direction from the very distanced relations that shape them. Local transformation is as much part of globalisation as the lateral extension of social*

1 NYE, Joseph. 2010. *The future of power*. United States. Public Affairs.
2 GIDDENS, Anthony. 1991. *As conseqüências da modernidade*. São Paulo. Ed. Unesp

> *connections across time and space. So, whoever studies cities today, anywhere in the world, is aware that what happens in a local neighbourhood tends to be influenced by factors such as global money and commodities markets operating in an indefinite distance from the neighbourhood in question"*.

Latin American economies suffer from globalisation in the form of vulnerability and external dependence. The advantages described by the countries that lead it, presented as a worthy phenomenon of equalization of benefits and opportunities, have not reached all latitudes, including our American Southern Cone.

We are facing a situation of international free market, but globalisation finds other ways to manifest itself through technological advances at an uncontrolled speed that have led to increasing social segmentation with its consequent labour, cultural and educational duality, for which reason the impacts of globalisation fall on the democratic systems of the societies that suffer from them, creating or highlighting various social problems that those economies must face and solve.

According to Baylis[3], globalisation is dividing citizens between the educated and cosmopolitan inhabitants and the economic and social outcasts. It is in this new form of global behaviour that countries have had to seek common strategies to safeguard the real problems they face, including economic ones, social and class structure issues, political systems and parties, state format, social movements, the level of material development and social equity, professionalism and creativity of state elites and civil society, the configuration of the system of social actors, cultural models and the collective imagination, as well as several other issues, including, naturally, the new global reality.

II. Concept of social problem

It is necessary to provide a theoretical framework to what is meant here by social problem that will justify the topics chosen for this work.

Thus, the doctrine defines social problem as the result of conditions or practices that lead to a lack of harmony with the social values of a given society.

Social problems exist when there is an imbalance in the forms of social organization that has negative effects on the group and also when their competence appeals to the responsibility of this group[4].

To the question what is a social problem? Pablo Kreimer, Director of the Doctorate in Social Sciences at FLACSO Argentina, tells us that

> *"a first level of answer refers to the existence of objective conditions that relate directly to human suffering (...) for example, malnutrition, illiteracy, poor sanitary conditions, lack of work,*

[3] BAYLIS, John. 2011. *The globalization of world politics*. Oxford. Oxford University Press
[4] MONTENEGRO, Marisela. 2001. *Otredad, legitimación y definición de problemas en la intervención social: un análisis crítico*. Universidad Autónoma de Barcelona.

> *among others, are socially perceived as problems with no further requirement than awareness of the living conditions of the individuals involved. Problems that affect one part of the population are thus "social" by the mere fact of their emergence within a given society".*

For his part, Juan Sandoval Moya[5], of the University of Valparaiso, Chile, adds that

> *"the process of construction of social problems is symbolic and involves interaction of categories typical of a social psychology linked to subjects and social discourse, which are intended to account for the subjectivity and historicity processes which intervene in all human communities through the production of discourse in the definition, prioritization and characterization of what they define as social problems at a period of time".*

In short, the actual social history of peoples and their own identity define social problems and their priority according to their own characteristics.

In this line of reasoning, the problems that cross our societies, and specifically Latin America, emphasize the urgency that causes inequality, leading the trend in the use of resources on policies that work together to address these problems, giving priority to the social sectors in a condition of extreme poverty[6]. It should be noted that this poverty has various origins according to the sub-regions we refer to, taking into account the existence, or not, of indigenous communities, economic and development policies applied throughout recent history and the actions, in many cases, of dictatorial regimes that many of these countries have experienced, with marked differences in the Southern Cone. These are issues that go beyond the goal of this analysis but which we must not fail to consider as part of the context in which some of the social problems presented here arise.

Not only poverty and marginalization are part of what can be defined as a social problem, or can be perceived as such by a group. The issues related to them must also be mentioned, such as, illiteracy, hunger, health problems, education and child labour, in addition to abuse. Other examples of social problems include an ageing population, migration (in the case of Uruguay, as discussed below, particularly emigration), the social, economic and political consequences of these demographic problems; environmental problems (which in Uruguay is a social problem through the conflict with Argentina for the setting up of a pulp producing company on the margin of the Uruguay River); unemployment; HIV/AIDS; all sorts of violence, among others.

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[5] In his work "*Producción discursiva y problemas sociales*" published in the journal Última Década n 007-1997.

[6] OIT/Cinterfor.1995. *Las Políticas Sociales en Uruguay*. Report prepared by Centro Interamericano para el Desarrollo del Conocimiento en la Formación Profesional
The term "social policy" is used here as the political form that society (through the State) has to "solve" the social question, that is, social problems.

III. Main social problems in Uruguay

Uruguay is a country located in a geographic context which, despite its 176.000km2, is of little importance. Its small dimension not only refers to territorial aspects, but also to its demographic and economic indicators.

It has just over 3 million inhabitants[7], of whom 46% live in the capital, Montevideo, the smallest of its 19 departments. 38% live inside the city and only 16% in rural areas.

Figure 1 - Map of Uruguay

Source: www.lahistoriadeldia.wordpress.com

Within Latin America, it is a country historically known for its egalitarian distribution of income, the strength of its democracy and level of social integration. In recent decades, however, "there have been cracks that manifest themselves through marginal behaviours, i.e. behaviours which are not governed by socially accepted patterns. The reason for such behaviour is understood as a cultural mismatch between cultural goals, structures of opportunities for achieving the goals and the creation of individual capacities to take advantage of them"[8].

In the late 1950s, when Uruguay took advantage of the economic benefits of war (especially as an exporter of meat and wool) which led it to be called the "Switzerland of America", a decline started slowly but without pause, bringing it closer, even today, to the parameters of its Latin American context. A product of Europe's and global

[7] 3:285.877 according to the last census conducted in 2011.
[8] KAZTMAN, Ruben. (1997). *Marginalidad e integración social en Uruguay.* Journal of CEPAL n 62. Montevideo.

resurgence after the war, of the dwindling dependence of the belligerents on its primary products, Uruguay failed to reconvert, although the 11-year dictatorship (1973 -1984) clearly also contributed to this scenario.[9]

According to this background, the main social problems facing the country can be identified as follows:

III.1 Poverty, inequality and social exclusion

The indicators are not encouraging because the data tells us that poverty mostly affects young people. In a prematurely ageing society and with an overall very low birth rate, this constitutes a serious social problem, as child poverty is a serious challenge to any project one may want to carry out in the country. According to the UNICEF 2013 country report, 24.5% of children under six years live in poverty in Uruguay. Poverty affects 13% of the population, while 0.5% is indigent. With respect to inequality, although the country has historically stood out for having, in the Latin American context, a more even distribution of wealth than its neighbours, and has a still valid and important middle class, the gap has not stopped widening since the last crises of the late 1990s and the last one that affected it directly in 2002. While poverty has declined in the last five years, there has been an increase in inequality that manifests itself both in the distribution of income and access to social services. In this regard, the process of urban and residential segmentation, particularly in the city of Montevideo and its metropolitan area must be mentioned, where "neighbourhoods became increasingly more homogeneous within and more heterogeneous among themselves, thus losing a relative capacity for social integration that had been a distinguishing feature of Uruguayan society"[10]. "Poverty and inequality in Uruguay are closely linked to unemployment, which affects mainly people with low skills. According to the Human Development Report on Uruguay (PNUD 2005), in Montevideo the income of the better off is fourfold that of the disadvantaged. In terms of social exclusion, and in the definition proposed by Manuel Castells “the process by which certain individuals and groups are systematically blocked from accessing positions that would allow them to have an autonomous livelihood within certain social levels determined by institutions and values in a given context. Exclusion situations vary depending on education, demographic characteristics, social prejudices, corporate practices and public policies, and can affect both individuals and territories. In this sense, it can be said that the most affected sector is that of women heads of household, who run 32.7% of households in Uruguay, of which 11.7% are poor[11]. Another major problem that the country must solve in terms of inequality is the very high school dropout level: according to data provided by UNICEF, only 4 in 10 young people between 21 and 22 years of age manage to complete secondary education and only 37% of young people between 21 and 22 years completed upper secondary education, with the remaining 63% leaving before completing compulsory education[12]. On the other hand, poverty

[9] It must be pointed out and emphasized that in international terms Uruguay qualifies well but the grim scenario arises when the information and data are broken down as attempted in this paper.
[10] CEPAL. 2007. Serie Mujer y Desarrollo N°88. *Las metas del milenio y la igualdad de género. El caso de Uruguay*. United Nations. Santiago de Chile.
[11] Data from 2002, Instituto Nacional de Estadística (INE), gender statistics.
[12] UNICEF. 2013 Annual Report. Available at http://www.unicef.org/uruguay/spanish/InformeAnualWeb.pdf#Informe Anual 2013

and unemployment make it difficult to have access to decent housing, causing the appearance of irregular settlements, especially in the capital. There are 562 slums in Montevideo, with 61 000 households and an estimated population of 257 thousand people[13]. Most of the land occupied by these settlements is illegal. Over time these settlements have become true neighbourhoods but lacking the services that a neighbourhood should have. The previous government began a process of regularization, which continues today, providing basic services like electricity, running water and sanitation to the settlements where such measures are possible, which is not always the case. The problem is to move people occupying areas that for various reasons are uninhabitable, as they are not always willing to leave the places they occupy, and where to put them so that they improve their situation and abandon often criminal and clandestine activities. In this regularization process, it was found that many of these houses were built in unsuitable areas such as under high voltage aerials or exposed to high concentrations of lead. In this sense, lead poisoning is linked to the land and poverty, although it is not the only determinants factor, and children end up being the worst hit, with blood lead concentrations that exceed twice the tolerable amount, according to the Ministry of Public Health.

III.2 Environmental problems

In the same vein, the serious problem affecting the country by exposure to high concentrations of lead must be stressed. For decades lead has been considered to be one of the most important environmental pollutants. In Uruguay, occupational exposure to lead is linked to the metalworking and the automotive battery manufacturing industries[14]. However, as stated earlier, lead exposure is also, above all, closely linked to poverty and land problems, where the slums are usually located, the most disadvantaged being the most affected. Settlements are often located in flood zones that have been filled with industrial waste, where underground cables are burnt and clandestine foundries are made, in addition to the population lacking hygiene education. The problem is severe in children and young people, because, depending on the level of intoxication, lead poisoning has irreversible consequences in all that relates to learning and psychomotor apparatus, especially when affecting people with a poor diet. The removal of leaded petrol from the market in December 2003 was an important first step but insufficient when dealing with this problem. Another environmental problem that has caused serious damage to the country is the one opposing Uruguay to the Republic of Argentina regarding the building of a cellulose pulp producing plant of Finnish origin called Botnia, UPM today, on the margin of the Uruguay River. This plant was set up in the Río Negro department, in a free trade area, opposite the city of Gualeguaychú in Argentina. While the conflict goes beyond the environmental issue and is now part of the political agenda, it began with the complaint made by Gualeguaychú citizens, with the approval of the government of Argentine President Néstor Kirschner, that the plant would pollute the river and the air. Despite assurances given not only by the Uruguayan government and the business itself, but by several international audits, these citizens organized themselves in what they call an

[13] Data from 2010, from Asociación Un Techo para mi País relevado por el Portal 180, available at http://www.180.com.uy/articulo/13392

[14] Revista Médica Uruguaya. 2006. Article: *Estudio epidemiológico de una población expuesta laboralmente al plomo*. Departament of Toxicology, Faculty of Medicine.

"assembly" and cut the border crossing the international bridge linking the two countries, claiming for the plant location to be moved. BOTNIA started production on 12 November 2007 and although the conflict has lost strength, it reignites every time the company is allowed to increase production. The conflict had serious consequences for Uruguay with job losses in the Río Negro department and a substantial reduction in national tourism, which lasted at least five years, not to mention the costs for the regional economy, since tons of goods used that route per year heading to Uruguay, Argentina, Paraguay, and Bolivia, with a loss of millions of dollars. Although it is a one-off, and not a structural problem, whose solution does no longer depend on Uruguay, its timeliness, the dimension it has taken, opposing the two countries, their governments and their citizens, makes it mandatory to mention it, even though today for Uruguay it is probably more of an economic and political problem than a social one.

III.3 Health

Uruguay has a health status whose indicators differentiate it in the region due to the low rates of infant and maternal mortality. However, as in the rest of the continent, the risk of dying, getting sick or cured is not evenly distributed. The main cause of death in the country is cardiovascular diseases, with 322 deaths per hundred thousand inhabitants, according to the Ministry of Public Health (2007).

However, again people in poverty and women are the most vulnerable[15]. Uruguay has a population with marginal rates of malnutrition, but it should be mentioned that it mainly affects children under two years of age and, according to data of the President's Office, 15% of pregnant women begin their pregnancy with low weight, this percentage increasing to 40% in teen mothers. In this sense, despite the low fertility rate and a downward trend (which, as discussed below, is now on the edge of the population replacement rate), an increase is detected in teenage pregnancies in disadvantaged sectors, with the social consequences involved in the risk of reproducing cycles of poverty. 17% of births in 2008 were to teenage mothers (15 to 19 years of age). The problem is that these young people are forced to abandon their studies early, which reduces their chances of entering the labour market with better conditions, retaining them in a poverty environment. Following this line of reasoning, the literature suggests that adolescent fertility and education are closely linked: 71% of teen mothers have completed primary education but only 6.4% completed secondary education[16]. Data from the Ministry of Public Health of 2011 indicate that 73% of these mothers do not work or study, 15% study and only 12% work[17], so 88% of these mothers are not involved in any economic activity. In a country with few active young people, an ageing population and high emigration rate, where the ones who emigrate are mostly young people with high academic qualifications, these signs are alarming. Moreover, the HIV/AIDS issue should be mentioned, although it cannot be considered a social problem in the country under the given definitions. This is a topic that seems to be controlled and is not urgent as the other issues raised here. Uruguay has one of the lowest

[15] CEPAL. 2007. Serie Mujer y Desarrollo N°88. *Las metas del milenio y la igualdad de género. El caso de Uruguay*. United Nations. Santiago de Chile.
[16] VARELA, María del Carmen. 1999. *La fecundidad adolescente: una expresión de cambio del comportamiento reproductivo en el Uruguay*. En Salud Problema. Universidad Autónoma Metropolitana-Xochimilco. México.
[17] MSP 2011. Report available at file:///C:/Users/Virginia/Downloads/Informe_Embarazo_Adolescente.pdf

numbers of AIDS patients in the region, with a rate of 25.4 per 100,000 inhabitants, according to the Ministry of Public Health (2012). It does not even qualify for the Global Fund to Fight AIDS, Tuberculosis and Malaria. By the end of 2012, the cumulative number of AIDS cases totalled 8,000, of which 36.5% were women. According to data from the Ministry of Public Health, the age of highest incidence of the disease is between 25 and 54 years. Cases of perinatal transmission from mother to child fell sharply from 26% in 1995 to 4% in 2007 and to 2.14% in 2012, which is significant. The country has embarked on a major health reform, in force since 1 January 2008, which, among other things, extends the coverage of quality health care to all children under 18, children of active parents who contribute to social security. This reform aims to alleviate, if not eliminate, equity issues associated with access to health care quality differentials and inequities in funding. The new integrated health system aims to eliminate the existence of a "health for the poor" (public) and a "health for the rich" (private) through a mixed and homogeneous system in terms of accessibility with respect to quality care. It is an important matter in terms of health, which, if well managed, can help reduce some of the most pressing issues experienced in Uruguay. Unfortunately, what is conceptually presented as a good public policy did not anticipate that the most disadvantaged would eventually return to the public sector given that in the mixed sector, under the new system, they must face mandatory testing costs, such as paediatric costs, which public health offers them for free. Often, the mere transfer to the mixed system can be expensive in the light of the family income, so people choose to go to the neighbourhood clinic, which depends on public health. In short, in the mixed/private health sector, one notes a drop in the quality of service after the reform, due to the amount of people that the various services had to absorb without generating a real benefit to those who really need it most. Finally, with regard to health professionals, one perceives that a *feminization* of the medical career has occurred, leading to a massive expertise in paediatrics[18], which has transformed Uruguay into a paediatricians "exporting" country, and an "importer" of doctors specializing in other areas, such as ophthalmology, and accounts for the lack of other such specialties, such as neurosurgery, which has only 32 professionals to serve the entire country.

III.4 Violence and crime

To finish this brief summary of the main social problems affecting Uruguay, it should be noted that the main problem, and perhaps the most urgent, is related to domestic violence. In this country, one woman dies every 14 days at the hands of her partner, and if we add the deaths of children and adolescents as a result of violence the number of days is reduced to 9[19].

These figures do not include suicides committed by victims of violence who could no longer bear it. Domestic violence brings with it serious consequences for the family environment and for society as a whole, and despite being a major social problem, there is no state policy that attempts to modify social and cultural patterns that are at the basis of this problem and somehow justify or allow the existence of domestic violence. It is a problem that does not distinguish between class, political or

[18] A fact stressed by Romero Gorski in 1999 in his work *Caracterización del campo de la salud en Uruguay* en Salud Problema. Universidad Autónoma Metropolitana-Xochimilco. Mexico.
[19] Data disclosed by the Uruguayan network against domestic and sexual violence.

philosophical beliefs, affecting the physical and psychological health of sufferers and which causes work absenteeism with the consequent economic cost, not only individual but also social. Regarding crime, the feeling of insecurity among citizens is increasing in recent years. The figures indicate that crimes against people increased by 8% in 2007 compared to the previous year[20]. In its 2013 report, the Ministry of Social Development stated that an estimated 54% of Uruguayans fell victim to a crime in the last five years[21]. One notes, above all, an increase in the violence of the crimes committed and a decrease in the age of offenders, which is somewhat driven by the increase in the consumption of drugs, such as crack, by children and young people.

IV. One of the problems for analysis: the demographic problem

The demographic problem is dealt separately because we believe that in all the serious problems Uruguay is facing, this is perhaps the most urgent.

As a conceptual introduction, demographics is defined as the social science that studies the events occurring to members of a population along their life. This study has two dimensions: measurement (how many there are, how many are born, how many die) and explanation (why so many children, why so many emigrants, why the increase in life expectancy)[22]. Thus, the demographic issue in Uruguay becomes an urgent and important problem due to two of its fundamental variables: the low fertility rate and the high emigration rate.

Uruguay has kept its demographic indicators low for an extended period, with growth and age structure similar to countries in Western Europe, which are different from the overall context of Latin America. In this sense, according to Varela Petito[23], "the reconstruction of the historical process that explains the demographic behaviour of Uruguay in the Latin American context is complex. The available evidence allows ascertaining the main impact factors:

a) the cultural impact of European immigration on a sparsely populated territory;

b) early incorporation into the Western model;

c) early urbanization that has led to 91% of the population living in cities today;

d) an economic activity fundamentally based on livestock produced extensively;

e) The form of land distribution in large estates, which has prevented the development of a rural population, which often have high levels of reproduction;

f) A form of land use that does not require high demand for labour;

g) The characteristics of the economic activity do not stimulate the growth of intermediate towns and consolidate the growth of the city's capital, which is the main exporting port".

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[20] Ministerio del Interior. Observatorio nacional sobre violencia y criminalidad. *Evolución de la violencia y la criminalidad en el Uruguay*. 2007.

[21] Report available at http://www.mides.gub.uy/innovaportal/file/23497/1/reporte_social_2013.pdf

[22] ORTEGA Osona, José Antonio. 2001. *Revisión de conceptos demográficos*. In *Contribuciones a la economía*: http://www.eumed.net/cursecon/colaboraciones/Ortega-demograf.htm

[23] PETITO VARELA, Carmen. *Fecundidad* En *Importante pero urgente. Políticas de población en Uruguay*. 2007. Montevideo. UNFPA – Ed. Rumbos

These characteristics occurred because Uruguay is a country that was left with no indigenous population and was the recipient of significant numbers of Europeans in the second half of the nineteenth and early twentieth centuries (mostly Italian and Spanish, but not only), with low population levels despite its territorial extension.

From the 1960s, in the words of Pellegrino[24], "Uruguayan emigration turned out to be a growing issue and the departures became a factor of concern at all levels of national life". Whether due to the sluggish economy, as noted above, or due to repression and exile, emigration reached very high rates during the 1970s and early 1980s. The end of the dictatorship (1984) did not improve the situation because, although the first period of democratic transition meant a return to the country, emigration continued and increased again in the 1990s, above the number of homecomings in that period. After the crisis of the late 1990s and, especially, the 2001-2002 crisis, emigration became the most widely used tool to address the lack of opportunities and unemployment, although the balance of emigration had been negative since 1963. Data indicates that since 2000 an average 20,000 people emigrated each year in the country, a figure that peaked in 2002 with 29,000 departures[25] and reached 17,000 in 2007. Given the size of Uruguay's population, these are huge numbers that should get our attention: if we consider that our natural increase (difference between births and deaths) is 20,000 people a year on average, this means that we have barely grown and that, in fact, between 2000 and 2002 we have had negative growth. It is reckoned that the Uruguayan population living abroad represents 13% of the population. Therefore, in the words of Pellegrino, "the migratory phenomenon has a weight on Uruguayan society that must be among the highest in the world." Emigration in general has economic causes, especially at the beginning and during the crises mentioned earlier, and also political, mostly during the period of the coup d'état (1973-1974), but it is also caused by the lack of horizons and opportunities that are not always connected to strictly economic problems. Emigration ceased to be the quick reaction of the Uruguayan society to specific economic problems, becoming a target for young people when they complete secondary education. Emigration has become the most serious structural problem in Uruguay: 77% of *recent immigrants* (between 2000 and 2006) are aged between 15 and 34 years[26]. They are usually young people with skills or who continue their education abroad, whose biggest problem is the lack of opportunities they have in the country, where their skills are undervalued in terms of the wages they are offered.

In addition, there are the recruitment programmes offered by countries like Canada to bring human resources to Quebec, training (and taking) dozens of young professionals per year, or the recruitment programmes for specific professionals in the areas of technology and computing, as offered by Germany, which, along with India, takes on almost the entire supply of labour in this area through one of its major multinationals located in one of the free trade areas next to the city of Montevideo, training young graduates in the topics they need and sending them abroad; the technical emigration, for example in the area of health, to countries such as England and Switzerland, must

[24] PELLEGRINO, Adela. 2007. En *Migración uruguaya: un enfoque antropológico*. UDELAR

[25] PELLEGRINO, Adela. 2003. En *La emigración en el Uruguay actual ¿el último que apague la luz?* UNESCO Report Montevideo.

[26] Data from the Report *Informe sobre migración internacional en base a los datos recogidos en el módulo migración* de la Encuesta Nacional de Hogares Ampliada 2006. UNFPA – PNUD – INE
The same report states that the data confirms that 50% of emigrants in the period under study (2000 – 2006) had a job when they emigrated, which confirms and strengthens the argument advanced here that nowadays emigration is done for reasons other than economic or unemployment.

also be stressed. The destinations of Uruguayan emigrants are varied: initially they used to go to Australia, United States, Argentina, Brazil, Venezuela, Mexico, Sweden, and Spain, but today most young people continue to emigrate to Europe (mainly Spain and Italy) and the US (although this destination fell slightly once Uruguayans began to be asked for a visa to enter the country, after the 2001-2002 crisis).

Another point of concern is the increase in the number of entire family groups emigrating, parents who decide to join their children abroad, which happened a lot prior to the US starting requesting an entry visa, or adults between 30 and 45 years who lost their jobs and decided to emigrate with their children, in block. This is important because it affects the remittances that Uruguay could receive from the outside, further minimizing any benefit to the country that might be found in emigration. In this regard, we note that even for those remaining, remittances fail to be an incentive. Cabella and Pellegrino point out, using data from a 2006 study, that

> *"among the poor classes the departure of a member abroad tends to deepen their vulnerability, rather than improving material and social living conditions. (...) The emigration of a member diminishes access to welfare, and sustained economic transfers do not offset this loss. Remittances received by these households are rather off-the-cuff and are sent when the household is facing extreme situations*[27]".

Moreover, there is the sense that the *country is becoming empty*, which Laura Pastorini mentions in her article "Not all of us are here and not all of us who are here are all of us" adding that "the massive exodus feeds emigration, because a country that is emptied of its younger population, who are more dynamic and more educated, becomes less attractive to the educated, dynamic young population. In the imagination of those social groups, Uruguay is becoming an ageing country, stagnant, boring and without prospects". And she goes further to say that "this is a country one should leave"[28]. The massive emigration of the last decade means that everyone has family or acquaintances living abroad, which, in turn, mean that at the time of leaving, emigrants feel less uprooted. These networks of family and friends abroad act as support and facilitate the decision to leave the country.

The charts presented in the Annex illustrate the population pyramid age and the age pyramids of recent immigrants. They show Uruguay as a country with an ageing population pyramid, with few young people and where most children are born in the poorest sectors of society, and that migration is concentrated in the 15 to 30/40 years belt, which is not a very bright future. With respect to the second variable under analysis, it should be mentioned that the general fertility rate (the number of children women have in the absence of changes in mortality and fertility rates by age, GFR) in Uruguay stood at 2.04 in 2005 and 2.03 in 2006 (latest available data), according to data from 2006 and 2007, respectively, of the National Statistics Institute. According to the same source, the growth rate for the whole country in 2006 was 0.284% and life

[27] CABELLA, Wanda. PELLEGRINO, Adela. *Emigración*. En *Importante pero Urgente. Políticas de población en Uruguay*. 2007. Montevideo. UNFPA – Rumbos

[28] In *Migración uruguaya: un enfoque antropológico*. 2007. UDELAR

expectancy stands at 75.72 years for the total population (72.12 for men and 79.52 for women). If we take the definition of *population replacement* as "the ability of a population to replace itself through the numerical replacement of women, the future procreators"[29], and if it corresponds to a total fertility rate above 2.1 children per woman, we conclude that Uruguay has been under this capacity for at least the past 3 years. The decline in fertility and the ageing population is a global issue that applies to Latin America. The difference is that it is still a relatively new phenomenon in this continent, which started to be noticed in the 1970s, when Uruguay had already been experiencing it for two decades. The data indicate that in the 1950s, when the TFR was 5.9[30] in Latin America and the Caribbean, in Uruguay and Europe it stood at 2.7. This exceptional performance of Uruguay is linked to its own historical process. The level of social and economic development in the first half of the twentieth century made the country adopt early reproductive behaviour that generalized the small family model. At a time when the country was doing well and poverty levels were still low, this phenomenon did not catch anyone's attention (perhaps it was even considered to be *advanced*) and was perceived as being in line with developed countries in Western Europe. It must be emphasized that, in historical terms, the demographic issue in general was never part of any government's policy, neither general nor specific, as it was never considered or expected that it could be a problem.

However, the *golden* age has gone, and the general trend in the continent, to which Uruguay was no stranger, of resorting to an economic policy based on import substitution in an attempt to industrialize a country that did not have the resources (material or human) required for it, provoked a crisis that deepened political problems, enabling a dictatorship that left the country impoverished and in debt in just over a decade. Since then, the total fertility rate remained relatively stable between 1985 and 1996, above 2.4 children per woman. But the scenario was different, disparities and inequalities among the population had worsened, poverty rates had increased and births were very different depending on sector of the population that was taken into account.

Thus, in this period, it can be said that the low fertility in the richest quintile of the population was offset by rising teen pregnancy (whose maternity peaked in 1997 at 74.2 ‰ in women between 15 and 19 years of age[31]) and the number of children per woman in the poorest quintiles. From there on, the TFR falls again gradually reaching the below the population replacement rate milestone in 2004. This continuous decline is explained by two phenomena: on the one hand, despite the increase in teen pregnancy, the number of children fell (specifically from the third son onwards) per woman in the poorest quintiles and, on the other hand, the high emigration in the ages who reproduce the most.

The ageing of the population, given the high life expectancy in the country and the low fertility and population growth, coupled with high emigration rates, mean that we are facing a problem that cries out for governmental urgent action, especially in regard to emigration.

[29] Definition advanced by Varela Petito in his article *Fecundidad*, in *Importante pero Urgente*. 2007.
[30] Data from CEPAL (www.cepal.org)
[31] Data taken from Varela Petito in *Fecundidad*, after statistics of the Ministry of Public Health.

Although the State facilitated the return of those who, as a result of the 2009 crisis, lost their jobs in Europe or, due to their social situation, decided to return, this does not change the situation described above, as the country continues to provide few opportunities for qualified young people and the technological developments that can bring new challenges are not being implemented. Rather conservatively, the country rejects them for fear of changes, which is typical of an idiosyncrasy that has been anchored in the 1950s and the success which represented the Maracaná.

Births are few and almost half of them occur in the poorest sectors of society, with repercussions in education, which although still good in terms of access to early childhood education (3-5 years), has high rates of grade repetition and dropout, and very high dropout rates in secondary education (among the highest in South America, according to UNICEF Uruguay). Our demographic indicators also affect health because it causes diversion of resources to address the needs of the population at the expense of maternal and child health, although the sexual and reproductive health policies undertaken by the state since 2000 have been successful to the extent that it has succeeded in reducing the average number of children in the poorest sectors of society.

V. Conclusions

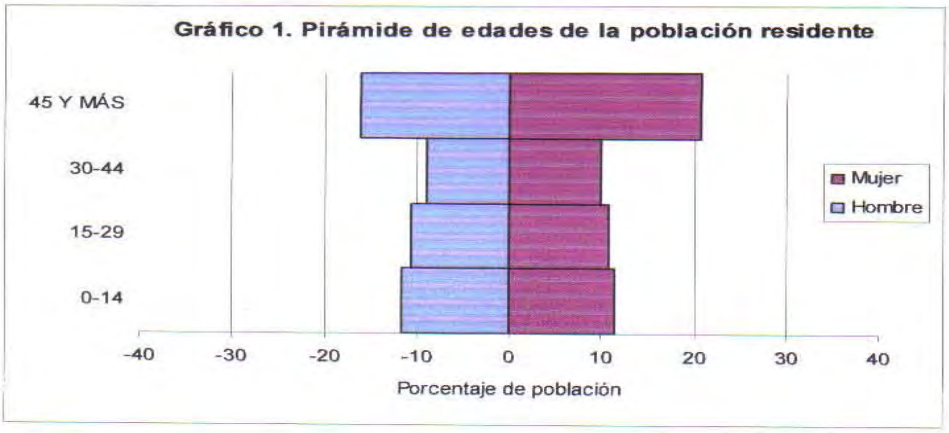
In a society that historically looked outwards, mainly to Europe, in constant contact with its Spanish and Italian origins, whose migratory waves did nothing but reinforce those ties, it does not seem strange that young people, who are also the result of additional factors such as those described in this work, have as a natural goal to leave the country and emigrate. On the other hand, "it is a commonplace that in recent decades the globalisation process has accelerated and that we are witnessing a revolution in communications. Access to information has led to the homogenization of aspirations and values, raising expectations of lifestyles and consumption patterns like the ones present in developed societies. The impossibility of accessing these lifestyles was an additional stimulus to trigger the emigration potential. It is also true that the world is connected like one could never have imagined it in the past and that emigrants can communicate in real time with family and friends. In other words, while facilitating transfers, the new technologies reinforce the links and sense of belonging to the places of origin"[32].

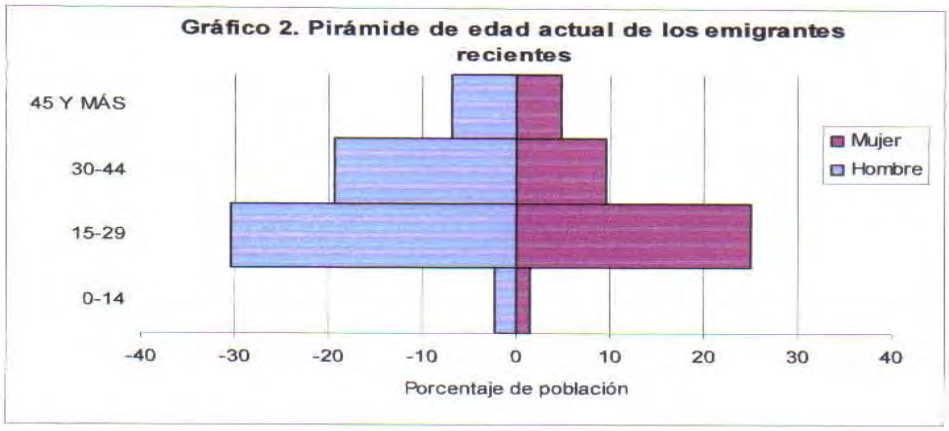
As we have seen, Uruguay suffers from many of the social problems that globalisation has exposed, for which reason it is perhaps no surprise for the unsuspecting reader of its history that until the mid-twentieth century, it was out of the parameters in the Latin American context. The social problems that the country must face arise as a result of the implementation of misguided policies and excessive dependence on erratic neighbouring economies, especially from the 1990s onwards with the creation of MERCOSUR. The high emigration rate and, as a result, the "brain drain", due to the fact that highly qualified young people are leaving the country, is leaving Uruguay without human resources capable of replacing the next generation that will retire, turning the environment into something mediocre, impoverishing the country and creating a scenario that allows the development of political radicalism and populist movements that have historically jeopardized the development of the region.

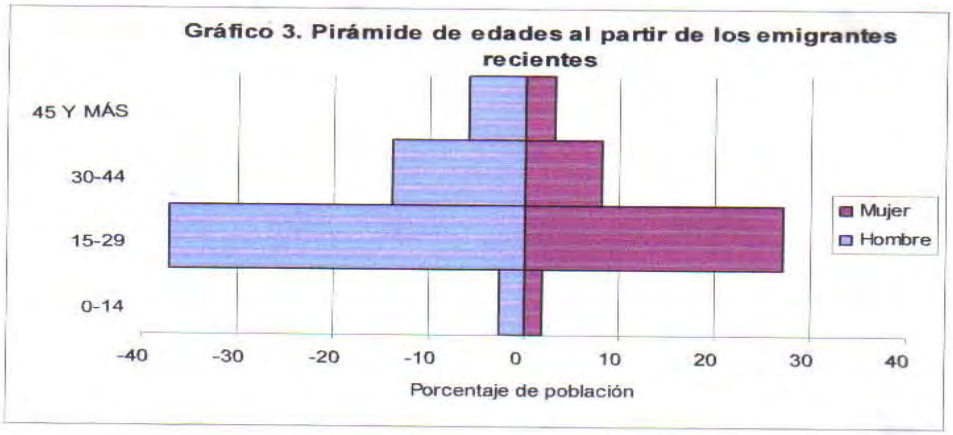
[32] Adela Pellegrino in the Prologue of *Migración uruguaya: un enfoque antropológico*.

It would appear that a small country like this, which once had a place in the world as the cutting edge in terms of its social policies and the first to organize a World Cup and win it twice, could have avoided getting back in the world, but this time to enter the list of countries worthy of international cooperation for development. However, the individual idiosyncrasy component of the Uruguayans has facilitated and still accounts for the path of decline the country has entered, and this fact should not be underestimated. However, what is important today is that the problems are there and that the state is delaying addressing them. What is worse, in some cases the state barely recognizes the necessity to address them. It is clear that beyond the social problems of poverty, inequality, health, education, etc., whose importance is not denied here, the demographic problem is the most urgent and important because without people, without capable young people, no project in the country can have sustenance.

ANNEX







Source: *Informe sobre migración internacional en base a los datos recogidos en el módulo migración* de la Encuesta Nacional de Hogares Ampliada 2006. UNFPA – PNUD – INE

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CYBERSPACE REGULATION: CESURISTS AND TRADITIONALISTS

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Abstract

In the amazing *Code and Other Laws of Cyberspace*, Professor L. Lessig writes "that something fundamental has changed" with cyberspace with regard to the state's ability to enforce the law.

On the one hand, the structure and characteristics of cyberspace pose some difficulties related to jurisdiction and the choice of applicable law. On the other, it raises questions about the very concept of sovereignty as we know it.

This paper examines the arguments of those who advocate a regulation of cyberspace on the edges of state sovereignty or within a new concept of sovereignty and capacity to enforce the law, and the arguments of those who reject this exceptional treatment of cyberspace.

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Keywords:

Cyberspace; Regulation; Self-regulation; Sovereignty; Utopia

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Introduction

There is no doubt that cyberspace has brought about profound changes in the way citizens, organizations and states relate to each other.

The capillarity of Internet, along with its large geographical coverage in terms of access and the advent of the personal computer, gave rise to the globalisation of information and knowledge, creating new spaces for interactivity, sharing and storage of market products, among which we highlight the leisure and culture immersive virtual environments (virtual worlds), the product of information technology-mediated social interactions (social networks), or the place where information is stored and processed (cloud). This diversity of spaces representing the wealth of cyberspace applications is the basis of its success and of the rapid growth of its use.

This group of spaces is based on the global communications system – the Internet - to which information systems and personal electronic devices connect to perform their function. If not originally created for military purposes but certainly developed to be used with that objective, the Internet penetrated the academic network in the late 1980s and quickly took over as a means of mass communication in the mid-1990s. In its military origin, the main concern in the Internet's design was resilience to partial failures[1], resulting in a fully distributed physical architecture and management without any connection with the administrative map of nations.

Soon cyberspace was perceived as a space of freedom, a kind of new global Far West where no state could enforce the law and maintain order. In this context, two opposing academic trends emerged.

The first suggests the failure of the legal system to deal with cyberspace and advocates the creation of new forms of regulation adapted to its specificities.

The second supports a treatment of nonexceptionality regarding cyberspace and argues that the challenges in its regulation are no different from those posed by other areas where there are cross-border transactions.

[1] One of the requirements asked to the creators of the Internet, then called ARPANET, was to ensure tolerance to communication failure between military operational bases in a scenario of partial destruction of their infrastructure. Consisting of a "*web*" of connections among the various "nodes", information within this network should always reach its destination as long as there was a path available to do so, thereby reducing the criticality of each individual "node" for the global context of communications.

This article intends to present and discuss these two currents in the light of developments since their initial formulation, and ascertain whether there is a trend or primacy in the use of cyberspace regulatory mechanisms.

Characteristics of cyberspace

Some characteristics of cyberspace architecture pose serious challenges to the governance of this new medium, as well as to the regulation of the various activities conducted within in. To begin with, cyberspace dramatically increases the speed and amount of communications, while reducing or eliminating the gap between institutions, between individuals or between nations.

Emails or SMS are sent and received almost instantly, photographs, videos and opinion articles are shared and disseminated globally in near real time, buying a book over the Internet is now as easy and convenient as to do it in a bookstore. In this context, cyberspace and the conversion from analog to digital brutally increased the frequency and the speed of some existing unlawful behaviour. Examples include copyright infringement, which has always existed but that digital technologies have facilitated and carried to the extreme.

On the other hand, cyberspace is non-territorial. Unlike natural areas (air, sea, land, and space) where states, within their capabilities, exercise sovereignty and enforce the law within a relatively well defined physical territory, in cyberspace that exercise raises demarcation problems.

In the same vein, B. Posen refers to it as another global common, comparing it to the sea, air and outer space (Posen, 2014: 64). Therefore, classical concepts such as "jurisdiction" or "property" - to give just a few examples - become fuzzy when applied to cyberspace. The provision of online services will hardly ever comply with the legal framework of all the states where they are available[2], creating difficulties in their exercise of sovereignty, starting with the very choice of which applicable law to apply - the law where the service is provided, or the law where the effects are produced?

Finally, this virtual space ensures some degree of anonymity to those using it, which again raises difficulties regarding the allocation of acts performed or the identity of the authors. A Portuguese cybernaut or located in Portuguese territory may use a blog service in the US to slander another Portuguese citizen. This same Internet user can play an online game allowed in the country where the server is located but which is banned in Portugal. He may also remotely practice a profession regulated in Portugal, but which is not regulated in the country where the service is provided.

Cyberspace has also brought about a set of new legal protection objects, expanded the protection scope of some existing ones, and facilitated the emergence of new illegal types. Figures such as digital identity, multiple identities, avatar, virtual money, or Internet domain, and professions such as systems administrator, programmer or blogger, still do not have rules that grant them rights and responsibilities.

[2] J. P. Trachtman states that the big novelty of cyberspace is that “it will lead to more situations in which the effects will be felt in multiple territories at once” (1998: 569).

Similarly, traditional concepts such as privacy had their legal protection range extended to include, for example, the right to be forgotten[3], and actions

classified as unlawful in the context of juvenile pornography have started to include ownership of this sort of material in digital format or merely viewing it. [4] One must also refer the need, perceived early, for the legal protection of actual computer systems that constitute cyberspace to be treated separately in cybercrime law.

These and other challenges were evaluated at the turn of the century by various scholars from the field of law. Discussion then allowed identifying two diverging trends with regard to the regulation of cyberspace.

The first trend believes that some of the distinctive characteristics of cyberspace are sufficient to justify the impossibility of using existing legal instruments and jurisdiction, advocating a new paradigm of cyberspace regulation. Johnson and Post, among others, share this view, defending cyberspace regulation for Internet users through self-regulation (1996, 2002). In turn, Lessig advocates regulation through "code" and cyberspace architecture (1999; in this as in all cases that follow, the translation is mine).

On the other side there are those who argue that the challenges posed by cyberspace to the law are not very different from those placed by other technological developments, and that the transactions carried out within cyberspace are no different from other transnational transactions conducted by other means. The main supporters of this view are Goldsmith (1998) and Trachtman (1998), who reject the exceptionality of cyberspace and defend an evolution within the framework of international law and through strengthening supranational regulatory instruments.

The academic debate around the topic has led JP Goldsmith to dub "regulation sceptics" those who, like Johnson and D. D. Post, emphasize the extraordinary nature of cyberspace and ask for a new regulatory model (1998, pp. 1199). In turn, Post calls “unexceptionalists” (2002: 1365) those who advocate that the problems posed by cyberspace to the state's ability to exercise and enforce the law are not that different or new. Without wishing to sound unkind to the authors, henceforth I shall refer to the former as “cesurists” and the latter as “traditionalists”.

Taking advantage of the distance in time of this discussion, this paper will begin by addressing the arguments advanced by "cesurists" and "traditionalists", and then will analyse the two dominant solutions for a better regulation of cyberspace: self-regulation and the additional supranational approach.

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[3] Article 17 of the European Commission’s proposal for the regulation of Personal Data Protection states that “the data subject has the right to obtain from the controller the erasure of personal data concerning him”. See *Proposal for a European Parliament and Council Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (general regulation on data protection)*, available at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_pt.pdf, accessed in September 2014.

[4] See point f) of Article 20 of *Convenção para a Protecção das Crianças contra Exploração Sexual (Convention for the Protection of Children against Sexual Exploitation)*, Resolution of Assembleia da República (Portuguese Parliament) no. 75/2012, of 28 May, stating that “[...] consciously accessing child pornography through the use of communication and information technologies constitutes a crime”.

Cesurism vs. Traditionalism

The term "cesurism" - coined by Herminio Martins (Garcia, 2006) is used here as a reference to a line of reasoning that tends to deal with phenomena as being specific and unprecedented, somehow renouncing time and history. This is precisely the thinking of those who, like Johnson and Post, focus their attention on the novelty cyberspace represents to justify the failure of the current regulation model based on the law and the break with the past.

The argument of the "cesurists" focuses on the non-territoriality of cyberspace and, more specifically, on the fact that clear boundaries are a necessary attribute for effective law enforcement. The relationship between space and law, Johnson argues, has multiple dimensions. On the one hand, it is the law that allows a state to exercise sovereignty and control over its territory - a well delimited space recognized by all - as well citizens to defend themselves from state action. In other words, the border concept works as the limit within which the state enforces its law, as well as the limit outside which citizens are safe from state action[5]. On the other hand, the legal significance of the effects of an action - or absence of it - is the same within the same judicial area and, most likely, different between different legal areas.[6] Conversely, the legitimacy of the law comes from a state's citizens direct or indirect participation in drafting the law, this legitimacy being lost when applied otherwise. Finally, the preventive effectiveness of the law results from prior knowledge of the law applicable to the area where we practice relevant acts, or the law where such acts occur (Johnson & Post, 1996).

Given this relationship between area and law, the "cesurists" argue that the geographical location within known physical limits – borders - is essential to determine the set of rights and responsibilities of legal entities, concluding that cyberspace "radically undermines the relationship between legally significant phenomena and physical location" (Johnson & Post 1996: 1370).

Under this assumption, "cesurists" question the competence of any state to enforce law and justice for acts committed in cyberspace and have reservations about the choice of applicable law. Johnson and Post envision cyberspace as a *single medium*[7], as a new action plan or parallel dimension whose border with our physical world is "made of screens and passwords" (1996, 1367) where, once inside, there are no other barriers. Once inside this cyberspace, communicating with the next door neighbour or someone in the antipodes is exactly the same – actually, there is no concept of antipode within

[5] It is through law that a rule of law state governs the freedoms and responsibilities of its citizens and institutions. The effective enforcement of this regulation is an act of sovereignty.

[6] Once again the call for the principles of a rule of law state, where the law must be equal for all. Obviously this equality applies to all legal objects of that state, since the law can be different between states.

[7] M. Libiki suggests that cyberspace is not a single medium but rather a "multiplicity of media – at least yours, theirs and of the others" (2012: 326). Also L. Strate, in his brilliant article on cyberspace concepts, proposes the existence of a multitude of cyberspaces centred on the experience of each individual (1999). It should also be noted that in the ideological framework of a single cyberspace, the concept of "national cyberspace" commonly used in the various national cybersecurity strategies would not make sense. See *The National Strategy to Secure Cyberspace* (2003), available at https://www.us-cert.gov/sites/default/files/publications/cyberspace_strategy.pdf, accessed in September 2014; *or Italy's National Strategic Framework for Cyberspace Security* (2014), available at http://www.sicurezzanazionale.gov.it/sisr.nsf/wp-content/uploads/2014/02/italian-national-strategic-framework-for-cyberspace-security.pdf, accessed in September 2014.

cyberspace - and the legal framework governing such communication either does not exist or is difficult to identify .

The case which opposed the International League against Racism and anti-Semitism to the US giant Yahoo illustrates these difficulties. In 2000, French citizen Marc Knobel, an activist in the fight against neo-Nazism, found that Yahoo's auction portal was selling neo-Nazi material. Through the aforementioned NGO, Knobel took Yahoo – a company based in California - to court for violation of the French law banning Nazi goods trafficking. The first reaction of one of the co-founders of Yahoo, Jerry Yang, was to consider that the French court intended to impose a judgment in an area over which it had no control. Regardless of this opinion, the trial continued, with the defence focusing its arguments on the technical impossibility of distinguishing what was presented to Yahoo French customers from what was presented to the other ones. For its part, the prosecution defended the sovereignty of the French state to defend itself from the sale of illegal Nazi goods from the United States and to question the reason for the existence of an exceptional regime for Yahoo and cyberspace. The court ruled that Yahoo violated French law and ordered the company to take all necessary measures to dissuade and render impossible French citizens' access to such contents. Yahoo's claim about the technical impossibility of fulfilling the court order, based on the idiosyncrasies of the Internet architecture, was surpassed after several Internet gurus, including Vint Cerf, advanced technical solutions that enabled Yahoo to comply with the court order (Goldsmith & Wu, 2006: 1-10).

In line with Johnson's and Post's argument regarding the uniqueness of cyberspace, authority can only be exercised within a territory. These authors questioned the legitimacy of a nation to regulate activities carried out in another country. They also argue that international disputes over choice of a legal framework can be solved by choosing the framework of the location where the unlawful acts are committed. These assumptions guarantee uniformity, predictability and certainty in the application of laws, which are values of rule of law. However, the above case suggests otherwise and supports the views of the "traditionalists".

As opposed to "cesurists", "traditionalists", whose motto could be "nothing new under the sun"[8], advocate that cyberspace is not an exception. For the "traditionalists",

> *"transactions in cyberspace are no different from cross-border transactions occurring in the real space. [...] Both involve people in real space in one territorial jurisdiction transacting with people in real space in another territorial jurisdiction"* (Goldsmith 1998: 1250).

For J. P. Trachtman, cyberspace is the medium. Conduct still occurs inside a territory, its authors still reside in a territory, and, most importantly, effects, although more dispersed than in the past, also continue to be produced in a territory (1998: 568)[9]. As

[8] Ecclesiastes 1:9 "That which has been, is that which is to be, and that which has been done, is that which will be done, and there is no new thing under the sun".

[9] Trachtman rejects the "cesurist" view about the states' reduced sovereignty as a result of cyberspace: "It is not the state that has died, but the long-moribund theory of absolute territorial sovereignty." (1998: 562)

a result, the existing set of principles and traditional legal instruments are able to solve the problems of choice of law and jurisdiction.

The idea that cyberspace brings nothing new is supported by Goldsmith using the analogy with other communication and transnational transactions contexts. The author accepts that the world is changing and that cyberspace is an expression of this change, but notes that international law has evolved to meet these changes, namely "it is commonly accepted that [in the absence of consensual international solutions] a nation regulates the local effects of extraterritorial conduct" (Goldsmith 1998: 1212) and gives industrial property as an example.

By way of conclusion, the other key idea of the "cesurists" is that the legal difficulties mentioned above, combined with the technical difficulties posed by the characteristics of cyberspace, render it impossible for states to regulate it. For Johnson and Post, cyberspace ''creates a totally new phenomenon that needs to be subject to clear legal rules, but it cannot be regulated satisfactorily by any sovereignty based on the concept of territory'' (1996: 1375). The states' technical and legal inability to exercise their sovereignty over cyberspace will, initially, lead to the emergence of self-regulating mechanisms (1996: 1387).

Traditionalists", in turn, argue that the technology exists and that, as demonstrated in the case involving Yahoo, but also in many cases involving content filtering done for various reasons, states can exercise their sovereignty and protect citizens from offensive content or illegal activities (Goldsmith & Wu, 2006: viii). The information involved in a transaction "appears in a territory, not by magic, but due to hardware and software action located within that territory" (Goldsmith 1998: 1216), so acting on that hardware and software makes it possible to perform the regulatory function.

Self-regulation of Cyberspace

This duality of views over a new issue that has not yet been understood in its fullness is recurrent. Throughout history, the emergence of new technologies has led to stances in support of their uniqueness and future role in breaking with the past and creating a better world - instruments of universal peace - as well as to more conservative views that immediately identify affinities with other past episodes. Armand Mattelart (2000), in his *History of Planetary Utopia*, lists a series of historical examples where the emergence of a new technology has led to the emergence of a liberating hope: the printing press, the telegraph, the railways, or television.

As already mentioned, "cesurists" are convinced that cyberspace is one of those liberating technologies. A technology that is sufficiently different from the real world to prevent regulation of human behaviour in that space from being done through existing mechanisms[10]. Lessig argues that "something fundamental has changed" (1999: 126) to support his thesis that in cyberspace "code is law", while Johnson and Post argue that cyberspace belongs to Internet users and therefore "those who have defined and use online systems have interest in preventing the security of their electronic territory and in preventing crime" (1996: 1383), setting the mood for self-regulation of cyberspace.

[10] Lessig argues that the regulation of human behaviour is achieved through the convergence of four forces – four regulators: the law, the market, social norms and, with regard to cyberspace, architecture (1999).

The idea that cyberspace dilutes the concept of state sovereignty, and also that problems in cyberspace should be left to Internet users, fits perfectly the "Internet-centrism" profile as conceived by E. Morozov (2012). The belief in the liberating effect of the Internet, mainly in the idea that it all comes down to, and that everything can be explained or done via the Internet, enables understanding why Johnson and his supporters defend different rules for cyberspace[11].

The theses of the "cesurists" are clearly part of an Internet euphoria context and did not predict the societal changes triggered by the social networks over the past decade or the concentration of power in the mega corporations in the sector. They fall within the spirit and ideology of the Internet in its beginning and its users' wish to keep it free from regulation and intervention by states or to keep alive the idea that cyberspace "can hold its promise of profound liberating leverage " (Post, 2000: 1439). This wish has been expressed by groups like the Electronic Frontier Foundation, and in manifestos like John Barlow's (1996) *A Declaration of the Independence of Cyberspace*.

In this spirit, Johnson and Post point out some practical examples of self-regulation. The authors suggest that the DNS system – a global system for allocating and managing Internet naming, coordinated by a non-profit international organization called ICANN[12], was being redesigned in a process of self-regulation to accommodate a set of safeguards demanded by the "industrial property" (1996: 1388). Nearly twenty years later, we can evaluate how this process took place. Although DNS management remains in the hands of Internet users, almost all European countries have liberalized Internet domain registration rules, putting more pressure on the management of industrial property rights and creating phenomena such as financial cybersquatting - financial speculation with the most desirable Internet names. There is actually a self-regulation system in this area, according to a model of international best practice. However, this self-regulation proves to be insufficient and resorting to industrial property law to resolve conflicts is recurrent. However, it should be noted that, as suggested by Johnson, some countries created specialized arbitration courts[13] with the needed know-how to address cyber particularities (1996: 1387). With regard to the growing number of unsolicited email messages, commonly known as spam, Post gives another example of self-regulation as a way of resolving concrete cyberspace issues. Post presents us one of several initiatives to create a reputed centralized database for email addresses or email servers (Realtime Blackhole List), remotely powered by volunteers whom he calls activists (2000: 1440) as a good example of self-regulation or of how the network will operate in the future. This group of volunteers establishes, together, a set of rules which all participants in cyberspace adhere to. It is indeed a beautiful ideal, but which history has not confirmed. Firstly, not one but several similar initiatives have emerged, creating a problem of choice for email services administrators. Then, the volunteer system has become a constraint in terms of the

[11] "Internet-centrists like to answer every question about democratic change by first reframing it in terms of the Internet rather than the context in which change is to occur" (Morozov, 2012: xvi). One of Morozov's favourite targets is North American writer Clay Shirky, (2009), who he describes as cyber utopian.

[12] *Internet Corporation for Assigned Names and Numbers*. See https://www.icann.org, accessed in September 2014.

[13] In Portugal's case, the rules for the registration of Internet names includes the possibility of appealing to a specialized arbitration court See .PT Domain Registration Rules, Chapter VI, available at http://www.dns.pt/en/domains-2/domain-rules/chapter-vi/, accessed in March 2015.

quality of service, for which reason it led to the commodification of some of these services - the current model[14]. Furthermore, other forms of solving the spam problem have arisen. The market saw the opportunity and cloud giants like AO, Microsoft and Google created the Sender Policy Framework, Sender ID, or the DKIM - to name only the most well-known – so the "collective consensus "advocated by Post (2000: 1456) does not exist, to date. In short, as far as the treatment of spam is concerned, we can say that we suffer from "too much" self-regulation.

In another perspective of the meaning of self-regulation, Lessig's thesis about the code's role in cyberspace regulation is ambivalent. On the one hand, it supports the idea that the production of the standards governing cyberspace lies in its architects and programmers rather than the state. In this scenario, the regulatory power is both in the hands of the telecommunications industry and those of the media and Internet applications industries, which through their products govern and shape behaviours in cyberspace. By keeping untouched the principles of net neutrality and the non-duty to watch over the contents transmitted through or stored in their infrastructure, digital media giants have been introducing in their applications reporting mechanisms for the removal of offensive content or reputation mechanisms for risk assessment in commercial transactions between strangers. On the other hand, creating norms also lies in the hands of ordinary people, who can create a new application and thus produce standards. In both cases this form of producing standards may conflict with other regulatory authorities. Good examples of this self-regulation include: Skype, a global system for voice communications created by two Nordic young people outside the regulatory framework for telecommunications and which violates criminal law provisions in various jurisdictions, such as the telephone interception regime; or the Pretty Good Privacy, an encryption platform developed by Phil Zimmermann, who infringed, among others, the US law on the export of encryption algorithms. On the other hand, Lessing's thesis defines code as the means to comply with the law in a more effective way:

> *"code displaces law by codifying the rules, making them more efficient than they were just as rules"* (Lessig, 1999: 206).

In other words, the state can take advantage of code to exercise its sovereignty. Just as companies have codified their business processes, reducing arbitrariness and employee error, states are beginning to codify some of their functions - particularly those where interaction with citizens is required - with efficiency gains. The current model of tax collection in Portugal is an example of this, where codifying traders' behaviour to issue invoices and codifying taxpayers' behaviour for completing their tax returns constitutes the very law, with the term "statement" starting not to make sense. In the opposite direction of self-regulation, cyberspace architecture also created a set of opportunities for the control and surveillance of society. Authoritarian states were the first to realize this possibility[15], but quickly passive surveillance, indiscriminate

[14] The business model of many of these RLBs involves charging a fee for removing entries from the list.

[15] Perhaps the most obvious example of this control is the *Great Firewall of China*, which is a technological infrastructure allegedly able of monitoring and selectively blocking communications and content within Chinese cyberspace and between the latter and the rest of the world, a kind of virtual censorship "blue pencil" operating in real time.

collection of metadata and the concept of big data in supporting the functions of sovereignty attracted supporters all over the world. States have realized that for better control of cyberspace - theirs and of others, as MC Libiki (2012) put it - the major Internet industry companies can play a key role, whether in the architecture of information flows' topology or in the design of the service's specific functions. To give just one example, the physical location of the Google global search engine is geopolitically relevant. This strategic interest thickens up when we talk about information storage. For example, in the dispute between Google and the government of the PRC in 2010, the latter saw the former as a component of American power (Klimburg 2011: 52).

Disaggregated sovereignty

Aware of the limits of the cyberspace self-regulation process, several authors suggest that traditional regulatory mechanisms should be complemented by a supranational approach to more complex problems. In a more traditionalist perspective – the one that does not advocate an exceptional regime for cyberspace – sharing power with other institutions to better meet the various challenges of global governance, not just those posed by cyberspace, is commonly accepted. The best known examples of this network governance are the various institutions of the United Nations, such as the World Health Organization or the World Trade Organization.

These response structures to contemporary problems of transnational governance have been theorized, among others, by WH Reinicke, who named them "global public policy networks" (1999) or by A.M. Slaughter, who called them "disaggregated sovereignty" (2009). The objectives of these networks fall within the concept of soft-power and determine the transposition of the concept of sovereignty centred on the administration of the territory into a combination of powers established in the states and supranational decentralized mechanisms for coordination among them. These mechanisms are based on structures that bring together the stakeholders – from the government, the economy and also from the civil society - to take advantage of the benefits of networks in knowledge management, to share information and ideas and to coordinate policies among themselves without the negotiated formal nature of a treaty (Mueller, 2010: 40). These forms of government coincide with the concept of multi-stakeholder approach advocated, for example, in the Internet Governance Forum, or in the various working groups of the European Union.

Supporters of this approach do not see it as a loss of state sovereignty, but as inevitable for solving global problems. As Slaughter states,

> *"however paradoxical it sounds, the measure of a state's capacity to act as an independent unit within the international system – the condition and objective of sovereignty – depends on the breadth and depth of its links to other states"* (2009: 268).

Cyberspace's regulatory problems are no exception to this rule. As stated by JS Nye Jr. (2010: 3),

> *"cyberspace will not replace geographical space and will not abolish state sovereignty, but the diffusion of power in cyberspace will coexist and greatly complicate what it means to exercise power along each of these dimensions".*

In this regard, various authors advocate a global solution to a global problem. HH Perritt Jr. suggests that

> *"taking into account the potential of [cyberspace] requires an evolution of international public and private institutions so that the rules for responsibility assignment can be enforced effectively, even in relation to conduct that cannot be located territorially in a particular state"* (1996: 113).

Trachtman also insists that "it is worth devising a stronger institutional solution" (1998: 569) for the regulation of cyberspace.

One area where this disaggregated sovereignty has been producing effects is in fight against cybercrime. The need for a transnational approach to the challenges posed by crime in computer networks was perceived very early. In 1990 the United Nations General Assembly adopted its first resolution on the need to develop international cooperation forms and instruments for combating cybercrime[16].

Again within the United Nations, the 11th Congress on Prevention and Criminal Justice held in 2005 produced a declaration expressing the need for legislative harmonization in the fight against cybercrime[17].

This objective was attained in 2004 at the meeting of the G8 Ministers of Interior held in Washington, which produced an action plan to combat high-tech crime, encouraging all countries to adopt the Convention on Cybercrime of the Council of Europe, 2001[18].

This Convention is often referred to as the first international working document resulting from deep reflection on the subject (Verdelho et al., 2003). One of its main objectives is to harmonize the various national laws concerning crimes committed

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[16] Resolution A/RES/45/121, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, available at http://www.un.org/documents/ga/res/45/a45r121.htm, accessed in May 2014. This resolution resulted in a guide on the prevention and control of computer-related crimes. See *United Nations Manual on the Prevention of Computer-related Crime*, available at http://www.uncjin.org/Documents/irpc4344.pdf, accessed in May 2014. In 2000, the same Congress adopted a new resolution on fighting the criminal use of information technologies, reinforcing the need for member states to ensure that legal systems did not create free zones for the exercise of this type of criminal activity and calling for increased transnational criminal and legal cooperation. See Resolution A/RES/55/63, *Combating the criminal misuse of information technologies*, available at http://www.unodc.org/pdf/crime/a_res_55/res5563e.pdf, accessed in May 2014.

[17] See *Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, "Bangkok Declaration", available at http://www.unodc.org/p df/crime/congress11/BangkokDeclaration.pdf, accessed in May 2009.

[18] Full text available at http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm, accessed in May 2009. For a summary on the origin and objectives of the Convention on Cybercrime, see http://conventions.coe.int/Treaty/en/Summaries/Html/185.htm, accessed in May 2014.

against computer networks or content crimes in computer networks. In addition to the criminal law, the Convention also aimed at a more effective transnational cooperation, contributing to that effect with a set of criminal procedural law institutes and the creation of instruments for transnational judicial cooperation.

Also in the context of the United Nations, some unsuccessful attempts were made to conclude an agreement to limit the use of cyber weapons by a state. Due to distrust in the efficacy of such an agreement, in particular regarding the possibility of checking it, or simply because there is no strategic advantage for the US, this country has consistently rejected this agreement (Clark & Knake, 2010: 219-225).

In the same direction and in response to the growing centrality of cyberspace in terrorist activities, either as an instrument or as a potential target, the European Union is about to adopt measures to better control and monitor jihadist activities on the Internet. Among these, the creation of a special unit within Europol stands out, with a view to monitoring the Internet and strengthening public-private cooperation with social media major giants such as Facebook or Twitter, to ensure the effectiveness of such monitoring[19].

Another example of disaggregated sovereignty for better regulation of cyberspace will arise with the new EU directive on network and information security which, predictably, will also be approved in 2015. The draft directive[20] includes the creation of *fora* to share information and best practices, to combine efforts in response to cyber security incidents and strengthen the relationship between national cybersecurity authorities, in a multi-stakeholder approach.

Conclusions

Repeatedly, the emergence of a new technology has originated stances in support of its exceptionality and break with the past. As suggested by Trachtman,

> *"perhaps because the technology is so exhilarating, there is a tendency to claim that the changes we do observe in sovereignty, the state, jurisdiction, and law all are caused by cyberspace"* (1998: 561).

The same had happened with the advent of the telephone, the telegraph and radio.

Much of the difficulties in regulation and law enforcement in cyberspace are due to profound changes in society - catalysed by that very same cyberspace - such as the deepening of globalization and the consequent increase in cross-border transactions or the speed of technological development. On the other hand, cyberspace has distinct and ambivalent features that pose great challenges to states in terms of its regulation,

[19] See *EU proposes terror unit to tackle online jihadism*, Financial Times, 11 March 2015, available at http://www.ft.com/intl/cms/s/0/4d93b7f0-c804-11e4-9226-00144feab7de.html, accessed in March 2015.

[20] See *COM(2013) 48 final, Proposal for a Directive of the European Parliament and of the Council concerning measures to ensure a high common level of network and information security across the Union*, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0048:FIN:PT:PDF, accessed in September 2014.

but also opportunities for greater surveillance of society. Therefore, we are not faced with an exceptional problem, but rather with a libertarian, economic and political opportunity for the various stakeholders involved.

After almost twenty years after the work of Johnson and Post, *Law and borders: the rise of law in cyberspace*, the path set for its regulation is not absolutely clear. Depending on the interests of each state (economic or security) we have situations where greater self-regulation (economic interest) prevails and others where there is growing surveillance and control of society (security interest), resulting in the fragmentation cyberspace into cyberspaces.

We can also say that under these two trends, cyber-utopianism is exactly that: utopia.

> *"It's too easy to argue that the regulation of cyberspace belongs to the cyberspace society."* (Trachtman 1998: 568)

The two approaches examined here - self-regulation and disaggregated sovereignty - coexist and most likely will continue to coexist. As stated in the chapter on guiding principles of the 2011 Dutch Cybersecurity Strategy: "Self-regulation if possible, legislation and regulation if necessary"[21].

Finally, and considering the difficulties discussed here for a state to carry out, *per se*, this regulation, we observe the emergence of transnational governance networks and the strengthening of their role on the political agenda. The concept of absolute sovereignty centred on the administration of the territory is becoming diluted and global issues are addressed in these transnational structures. A global approach to global problems is required.

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[21] See *The National Cyber Security Strategy (NCSS)*, available at https://www.enisa.europa.eu/media/news-items/dutch-cyber-security-strategy-2011, accessed in September 2014.

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ENERGY ON THE PUBLIC AGENDA: CHANGES IN BOLIVIA WITH IMPACT ON ADJOINING COUNTRIES

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Abstract

This paper focuses on the rise of the energy issue in the relations of Bolivia with Argentina and Brazil during the first decade of the twenty first century from a comparative viewpoint. In this context, the nationalization of Bolivian hydrocarbons decreed by Evo Morales on 1 May 2006 became a central point of the analysis in that it became a target and a political tool of the Movement for Socialism party (MAS). It proposes to investigate, on the one hand, the actions derived from this Decree within Bolivia and, on the other, the similarities and differences that have arisen in the negotiation processes and their results in the Argentine-Bolivian and Bolivian-Brazilian ties.

Keywords:

Argentina; Bolivia; Brazil;Hydrocarbons; Agreements

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Natalia Ceppi

Introduction

On 18 December 2005, Bolivian society went to the polls in a context marked by uncertainty, the advancement of social movements that questioned the prevailing economic and political model and the constant tension between continuity and change that is characteristic of all presidential elections. In this race, Evo Morales, leader of the Movement for Socialism (MAS), won against seven other political forces with 53.74% of the votes, leaving behind the system of government coalitions that had characterized democracy for more than two decades[1].

This absolute majority victory was a significant sign that much of the population welcomed a government programme that was highly critical of the neoliberal period, excluding the state from controlling the production system and the lack of care paid to social demands, whose triggering axes were poverty and inequality (Government Programme MAS-IPSP, 2005). Unlike the proposals of the traditional political parties, the MAS project focused on revaluing the role of the state, seeing it not only as a major player in the process of 'rupture' with the past but also as the main driver of a more distributive and inclusive socio-economic model. In order to fulfil this commitment, 100 days after his stay in power, Morales decreed the nationalization of Bolivian hydrocarbons through the stock recovery of the Yacimientos Petrolíferos Fiscales Bolivianos (YPFB), a company that, one behalf of the state, was responsible for the entire national energy chain for decades[2].

The nationalization of hydrocarbons was not a measure taken at random. Quite the opposite, Decree 28.701 "Heroes of Chaco" is part of the social demands that hatched in the Gas War - October 2003 - and one of the priorities of the MAS political programme, namely to gain control of a sector that is strategic within a poorly diversified economy so that income could be allocated to the country's economic and social development (MAS-IPSP Programme, 2005: 14). Due to the fact that Bolivia's

[1] Apart from the MAS, the political parties contesting the elections were: Nueva Fuerza Republicana (NFR), Unión Social de los Trabajadores (USTB), Unidad Nacional (UN), Movimiento Indígena Pachakuti (MIP), Movimiento Nacionalista Revolucionario (MNR), Frente Patriótico Agropecuario de Bolivia (FREPAB) and Poder Democrático y Social (PODEMOS).

[2] This company was created in 1936. According to Gordon & Luoma, an issue inherited from the Chaco War – a conflict of the first half of the 1930s that opposed Bolivia to Paraguay- was "understanding the importance of the role of the state in the development of the country's hydrocarbon resources, of which 85% are now in the Chaco region" (2008: 92). With the founding of the YPFB belief in the economic and symbolic significance of the energy resources under state control was reaffirmed.

hydrocarbon production has historically focused on feeding external trade, the nationalization was a turning point in the connection with transnational corporations involved in the exploitation of energy and adjoining states such as Argentina and Brazil, whose consumption is supplied largely by Bolivia.

Based on the above, this paper starts from the idea that at a time of high international prices on commodities, including energy, as was the first decade of the twenty firs century[3], Evo Morales sought to comply with a dual aim through the nationalization of hydrocarbons: to increase the weight of the state in the sector, particularly in terms of tax collection, and plan different social policies to address the needs of the poorest and most vulnerable population groups. Thus, control of the national energy industry became the driving force for consolidating the political project of MAS at home, while in the external agenda it revitalized the role of the YPFB in existing energy contracts. Accordingly, this paper intends to unravel a series of questions that are intrinsically related: What are the most significant aspects in the nationalization of Bolivian hydrocarbons? How will this decision impact on the Argentine-Bolivian and Bolivian-Brazilian ties? And in connection with the previous point, what were the key similarities and differences in the negotiations undertaken by Argentina and Brazil?

The nationalization of hydrocarbons: politics & energy, a complex binomial

The report of the World Trade Organization (WTO) in 2010 dedicated a special section to the trade of natural resources. It describes natural resources as "stocks of materials that exist in the natural environment that are both scarce and economically useful in production or consumption, either in their raw state or after a minimal amount of processing" (Report WTO, 2010: 5). This definition suggests the strategic feature of nature's goods in general, especially when it comes to energy resources. Within the group of non-renewable products, natural gas is considered to be the fuel of the twenty first century in that it has a number of positive factors, such as positive global indices in levels of reserves/production; it is cleaner than coal and other petroleum-based products; it has an efficient combustion in the generation of electricity and its use is very important in the production of basic petrochemicals, among others (Ríos Roca, 2013: 16-18).

Compared to other regions of the world, natural gas reserves in Latin America and the Caribbean are not significant since they represent only 3.8% of world reserves. However, this figure takes another meaning when evaluating the actions of governments in the sector. As advanced by Linkohr, Latin America is one of the regions where power and politics have a special connection. This does not mean ignoring the existence of this relationship in other parts of the world, but it must be stressed that in the case of Latin American countries, energy is significant when it comes to politics (2006: 90-91). This argument can be clearly seen in Bolivia where, after the collapse of the tin industry in 1985, "gas became the most important natural resource of the country" (Gordon & Luoma, 2008: 89) and therefore the main source of government

[3] On this matter see the research conducted by Acquatella, et. al. (2013), Rentas de recursos naturales no renovables en América Latina y el Caribe: evolución y participación estatal, 1990-2010 for the seminar CEPAL *Gobernanza de los recursos naturales en América Latina y el Caribe: desafíos de política pública, manejo de rentas y desarrollo inclusivo*.

revenue. As expected, thereafter the exploitation of hydrocarbons has been central, with varying connotations, when making decisions on political and economic matters.

As happened with its neighbours, Bolivia was not without its own neoliberal wave in the nineties and YPFB was one of the first public companies to be in the hands of foreign operators during the first presidency of Gonzalo Sanchez de Lozada (1993-1997). According to Campodonico, Bolivia, together with Argentina and Peru, became leaders on the privatization of their energy industry in South America. While recognizing that each country had specific features, their respective governments reformed the legal framework to encourage foreign investment in the upstream and downstream sector (2007: 40-42)[4]. Furthermore, Sanchez Albavera & Altomonte argue that the energy reforms carried out in Latin American countries during this period were 'similar' in their origins and motivations. There was widespread belief that the state-led management model was agonizing - many state enterprises were in a serious financial situation due to the debt crisis of the eighties - and that the supply and demand game would make the industry efficient (1997: 29).

The YPFB trans-nationalization was made possible by Capitalization Law 1544 of 1994 and the 1689 Hydrocarbons Law of 1996, which laid the legal basis for going from "a state vision of the oil and gas economy, which was in force for 60 years, to one of total privatization" (Villegas Quiroga, 2004a: 74). The capitalization of YPFB resulted in three operating units established as joint stock companies: Chaco and Andina - responsible for exploration and production- and Transredes, which brought together the transport capacity. Therefore YPFB, an emblematic company for Bolivian society, went through a process of dismemberment that limited its action to the provision of hydrocarbon to export markets (Villegas Quiroga, 2004a: 76). It should also be added that its capitalization - justified in the pursuit of economic growth and welfare of the population - had no positive impact on national socio-economic indicators. On the contrary, statistics show that from an overall perspective, the policy of openness and economic liberalization had favoured the construction of a poorer and more unequal society (Nogales Iturri, 2008). At the end of 2005, *i.e.*, coincident with the first electoral triumph of Evo Morales, moderate poverty reached 60.6% of the population; extreme poverty affected 38.2% and the Gini coefficient was 0.60 (UDAPE, Statistical Information: s/f). These data are similar to the information provided by the Economic Commission for Latin America and the Caribbean (ECLAC). After two decades of neoliberalism, in 2004 63.9% of Bolivian society was mired in poverty, which was much higher in rural areas, affecting 80.6% of the population. Nationally, indigence stood at 34.7% and in rural areas it emulated the behaviour of poverty, that is, had higher rates (58.8 of the total population). As for inequality, the statistics showed a Gini coefficient of 0.56 for the same year[5].

These indicators show that the privatization of the energy industry focused on strengthening hydrocarbon production for the foreign market without income from commercialization, or at least most of it, being reinvested in the country. Under the slogan that repositioning the state against transnational energy traders was a 'historical

[4] Among the most important general reforms, the following stand out: reducing the percentage of royalties to be paid by the multinationals, the relaxation of investment conditions, the no obligation to share the findings with the state, and the liberalization of the fuel market.

[5] These data correspond to the CEPAL Database and Statisticla Publications (CEPALSTAT), where statistics and indicators per country can be consulted interactively. Available at: http://estadisticas.cepal.org/cepalstat/WEB_CEPALSTAT/Portada.asp. Accessed on 17/04/2015.

imperative', on 1 May 2006 Evo Morales, accompanied by ministry officials and representatives of social movements - and a large deployment of the Armed Forces in the San Alberto field in Tarija - decreed the nationalization of hydrocarbons, stating:

> *"The much awaited day has come, a historical day for Bolivia to resume absolute control of our natural resources […] No more looting by international oil companies"* (Clarín: 02/05/2006).

From the overall analysis of Decree 28.701 "Héroes del Chaco", the following considerations emerge: First, its most salient provisions are aimed at laying the groundwork for YPFB, which from now on will be acting on behalf of the state – to have a higher manoeuvrable capacity, offsetting the place of foreign companies in both the upstream and the downstream sector. To this end, at least 51% of the shares of the companies resulting from the process of trans-nationalization of the nineties (Decree 28,701: 01/05/2006) was recovered. In practical terms, this was achieved by paying compensation – either by agreement or request - to companies affected by the measure.

Secondly, as a sign that Morales' nationalization did not exclude the participation of foreign investment, energy operators were given 180 days to comply with the provisions of the Decree and sign new contracts, otherwise they would be barred from continuing the activity. Accordingly, international agents should respect the requirement mentioned above and comply with Hydrocarbons Law 3058 that was passed during the brief tenure of Carlos Mesa Gisbert (2003-2005) following the resignation of Sanchez de Lozada. That law had ensured a higher percentage of revenues from the sector than Hydrocarbons Law 1689 (1996). While the latter reduced taxes for transnational companies from 50% to 18% on royalties and participations (Gandarillas Gonzales, 2008: 72), Law 3058 set again this percentage, i.e. 50% of the value of production as a result of the sum of 18% of royalties and of 32% of the Direct Tax on Hydrocarbons (IDH). The IDH is of great importance in economic and socio-political terms because income is shared among producing departments, non-producing ones and the General Treasury of the Nation. The government allocates the balance to municipalities, universities, the Indigenous Fund, and the Armed Forces, among others (Law 3058: 17/05/2005)[6].

The 44 signed contracts had in common the fact that YPFB ensures a levy of 50% of production value and retains ownership of the deposits and production at control point. Foreign companies continue to be part of the exploitation of gas fields as 'remunerated contractors' due to YPFB's inability to conduct proprietary trading (Zaratti, 2013). The companies assume the costs of activities as well as risks, but benefit from the clause 'recoverable costs', which cover items such as staff costs, materials, transportation, depreciation of fixed assets, insurance, and foreign exchange differences, among others. These costs vary according to the contract and are percentages that YPFB

[6] It must be added that during the transition period – up to the signing of contracts between YPFB and international companies – energy operators must also pay 32% of the value of production for the additional participation of YPFB in the fields. In 2005, the certified production of natural gas was over 100 million cubic feet per day (article 4 Decree 28.701).

reimburses to transnational operators (Medinaceli Monroy, 2010: 26). In the words of Molero Simarro *et. al.*, existing contracts

> *"rarely pose a risky scenario for foreign companies [because] they continue to exploit the concessions on deposits with proven and probable reserves they already knew about, and also with markets assured by the state"* (2012: 167).

Thirdly, the writing of the Decree shows that the nationalization of hydrocarbons was a goal in itself but also a tool to make viable a set of decisions and actions that are part of MAS' government programme. If, as Linkohr argues, in Latin American countries the control of energy resources enables political actions, this nationalization largely confirms that assertion. It suffices to see the areas the government has allocated the bulk of the revenue derived from the external gas trade.

Since 2007, fiscal resources have grown significantly thanks to a higher tax burden - Decree Law 28.701 and Law 3058 - and a favourable international context in energy prices, with the exception of 2009 due to the impact of the global financial crisis. In the period 2007-2013, oil revenues nearly quadrupled from US $ 1,533 million to US $ 5.5856 billion (YPFB Special Report: 06/08/2013). This had a direct impact on the evolution of the annual Gross Domestic Product (GDP), which in the same period rose from 4.56% to 6.78%, experiencing a slight decrease in 2009 (INE, Press Release, 04.23.2014).

This situation of greater economic well-being has allowed the Morales administration to deploy a set of social policies designed to alleviate poverty, inequality and shortcomings in the areas of health and education that are financed from the central government through resources from the General Treasury of the Nation and the IDH (Morales, 2010). Social policies are tools that governments implement "to regulate and supplement market institutions and social structures" (Ortiz, 2007: 6). While not new to this century, what indeed has changed is the design and the purposes that they pursue. Unlike the eighties and nineties when social policies had a purely charitable nature and sought to cover market failures, at present Latin American countries see them as part of the primary functions of the state because they bring economic growth to population groups who do not automatically benefit (Ortiz, 2007: 9).

Within these policies, the conditional cash transfer (TEC) programmes stand out, which are aimed at the poorest populations, where the benefits and conditions - the requirements to be met by the recipients - vary according to politics and country (Sauma, 2007: 5). Other policies must be added to this set, such as social pensions and labour inclusion and production programmes. The most important fostered by the MAS include the Juancito Pinto and Juana Azurduy Bonuses, the Universal Old Age Pension or Dignity Pension, the Zero Malnutrition Programme, and My First Decent Job.[7] Their main differences, however, are the social protection strategies they pursue and the purpose behind the regulation. The following table summarizes these aspects:

[7] Reference to these programmes is merely illustrative of the mentioned social policies. This does not mean ignoring the existence of other programmes that also seek to address issues related to poverty and vulnerability. Examples include the literacy programme Yo sí Puedo (Yes I Can), the professionalisation of

Figure I: Social Policies

Social Programmes	***Recipients***	***Strategies to adopt***	***Purpose of the regulation***
Juancito Pinto Bonus	Children and Adolescents	Building human capabilities	Education: encourage school enrolment and retention
Juana Azurduy Bonus	Mothers and children up two years of age	✓	Health: reducing maternal and child mortality
Zero Malnutrition	Families with minors	✓	Nutrition: fighting hunger and poverty
Dignity Pension	Bolivians over 60 who receive or not an income from the social security system	Increasing and improving income	Long-term social security: expanding social protection
My First Decent Job	Young people from urban and suburban areas with low income	Building human capabilities	Labour inclusion: to facilitate insertion and expand the number of jobs

Source: Own calculations based on data from Morales (2010); Plurinational State of Bolivia - Ministry of Planning and Development-UDAPE (2011).

It should be emphasized that programmes in Bolivia are not an isolated event but have a parallel in multiple policies currently being developed in Latin America and the Caribbean. Some of them have been in force since the early years of this century and even since the nineties. Examples include the Previdência Rural Program – Rural Welfare Programme (1993, Brazil); the Pensión Mínima de Vejez - Old Age Minimum Pension (2001, Peru); Más Familias en Acción - More Families in Action (2001, Colombia); Chile Califica - Chile Qualifies (2002, Chile), and Jóvenes con Oportunidades - Youth with Opportunities (2003, Mexico)[8].

When analysing the results of such social policies in Bolivia, one finds that they are preliminary in nature but are, at the same time, associated with reducing poverty and inequality. The latest official data from the Analysis of Social and Economic Policy (UDAPE), which provides technical assistance to the government – indicate that in the 2005-2011 period, moderate poverty increased from 60.6% to 45% and extreme poverty dropped from 38.2% to 20.9%, the whole Gini coefficient declined from 0.60 to 0.46 (UDAPE, Statistical Information: s/f). The ECLAC statistical information also reflects an even more significant falling movement. By 2011, the poverty rate was at 36.3% of the population and indigence stood at 18.7%. In turn, the Gini coefficient was 0.47[9].

interim teachers, community incentives, the school breakfast programmes, etc. See "Programas de Transferencias Condicionadas en Bolivia: Bono Juancito Pinto, Bono Juana Azurduy" (2011). Available at: http://www.rlc.fao.org/es/prioridades/seguridad/ingreso6/documentos/Presentaciones/Países/BOLIVIA.pdf. Accessed on 13/11/2014.

[8] I recommend consulting the CEPAL database, which contains dozens of social programmes operating in Latin American and Caribbean countries in the areas of Conditional Transfers, Social Pensions and Labour and Productive Inclusion Programmes. Available at http://dds.cepal.org/bdptc/. Accessed on 18/04/2015.

[9] CEPAL Database and Statistical Publications (CEPALSTAT). Available at http://estadisticas.cepal.org/cepalstat/WEB_CEPALSTAT/Portada.asp. Accessed on 17/04/2015.

In short, the nationalization of hydrocarbons understood as an objective and policy tool presents positive aspects and questions to resolve. Considering the circumstantial limitations, the Morales administration undertook the state recovery of YPFB, seeking to place the state in control of the energy income but without letting go of foreign investment as guarantor of the exploration and exploitation activities. As mentioned earlier, the high international prices during the first decade of the twenty first century and the payment of higher taxes than in the nineties generated growing revenues and a steady increase in the GDP and FDI, highly concentrated on the oil and gas activity to the point that in 2012, it accounted for 62.9% of the total FDI that entered the country (BCB, 2014: 22). This economic boom was useful for MAS' goals of establishing a more distributive model. The poverty and inequality levels responded positively to the many social programmes that have been put into operation. However, they did not directly solve these problems, especially because the revenues supporting them are volatile. Integral actions that fall within a national development strategy are required. In addition, these measures have some shortcomings, particularly the conditional transfer policies. As programmes with little experience, there are difficulties in implementing them. There is lack of complementarity and coordination between the actors and the different levels of government, weaknesses in their monitoring and assessment and incompatibility between the information systems of the central government and rural municipalities (Morales, 2010: 6).

On the other hand, this cycle of growth and economic stability following the nationalization has reaffirmed the country's dependence on the exploitation of energy without added value. Advances in the industrialization of the sector are still not significant and there are notorious delays regarding the expansion and modernization of refineries operating in the country (Zaratti, 2013). These are no minor points if the government wants to work on a vision of economic development in the long term that goes beyond an economy anchored in the extractive economy.

Argentina and Brazil: regional partners against nationalization

Nationalization as a political tool was also part of Bolivia's external agenda. In a country where the foreign trade of hydrocarbons sets the direction of the economy, the Morales administration had to use its bargaining power to agree on new rules in the sector without losing investments or markets. In this context, the governments of Argentina and Brazil, which are top destinations for Bolivian exports, had to renegotiate the terms of hydrocarbon imports and exports. This indicates that the energy issue plays an important role in the relations Bolivia maintains with these two neighbours. However, its rise in the bilateral agendas and its subsequent treatment had more differences than similarities.

From March 2004, Argentina's government began to experience a major energy crisis that manifested itself in difficulties in domestic supply and problems to meet natural gas exports to Chile, agreed in the mid-1990s. Faced with this critical situation, the government of Nestor Kirchner (2003-2007) asked his Bolivian counterpart Carlos Mesa Gisbert for the temporary secondment of natural gas to mitigate the negative consequences of the lack of self-sufficiency. On 21 April 2004, the two leaders signed a purchase and sale agreement in Buenos Aires for an initial volume of 4 MMm_3 per day for a period of six months, which was subsequently renewed twice until 31 December

2006 for an amount of 7.7 MMm_3. On the one hand, this agreement opened a new era of rapprochement in bilateral relations due to the import and export needs of each of the actors involved. On the other hand, it was an indication of the errors committed by the Argentine governments since the nineties in the treatment of energy, considering that natural gas represents over 50% of the national energy matrix. The purchase of Bolivian hydrocarbon resurfaced a project that had been launched by the Argentine government in 2003: the construction of the pipeline in north-eastern Argentina (GNEA). This infrastructure project was intended to transport Bolivian natural gas to the provinces in the region that do not have access to it (Federal Agreement for launching the pipeline in north-eastern Argentina, 24/11/2003). As expected, former President Gisbert explicitly endorsed the project as it would help increase sales and thus the country's tax revenue. However, the marketing of energy in Bolivian-Brazilian relations today did not ascend unexpectedly and was motivated by a national energy crisis scenario. Efforts to market natural gas began in the seventies after the first oil shock, which enhanced the strategic nature of energy in the state agenda, but did not result in definitive agreements. The arrival of Petrobras in the nineties to San Alberto and San Antonio mega fields was crucial at the beginning of the export of natural gas to Brazil, particularly because the company had information about the existence of reserves to supply the main cities of the country (Villegas Quiroga, 2004a: 89-94). In 1996, YPFB and Petrobras signed two agreements: a natural gas purchase and sale for a period of 20 years, with a projected daily sending of 30.08 MMm_3[10] and another for the construction of a bi-national gas pipeline (natural gas purchase and sale contract between Petrobras and YPFB, 16/08/1996, Villegas Quiroga, 2004b: 41-42). The latter, whose inauguration was in 1999, connects the Bolivian gas fields with south-eastern Brazil, from São Paulo to Porto Alegre. The Cuiabá pipeline that feeds a power station in the State of Mato Grosso derives from this pipe.

Although the contractual motivations were different, namely the crisis in Argentina's case and a political decision in the case of Brazil, the 1996 and 2004 agreements consolidated a clear situation of exporter/importer 'dependency'. This commercial binomial was evidenced by: a) the role of gas in Bolivian exports to both countries. In Argentina and Brazil, this hydrocarbon corresponds to over 90% of total imports from Bolivia; b) Argentine purchases have had a rising trend in less than 24 months, from 794.790 Mm_3 2004, and when the agreement was signed to 1,734.946 Mm_3 in late 2005 (IAPG, Statistical Information, s/f); c) the percentage of Bolivian natural gas consumed in Brazilian cities located southeast stands at between 50% and 100% (Carra, 2008).

Despite the surprise that the announcement of the nationalization caused, the government of Nestor Kirchner and Lula Da Silva lent it their support. They understood it as a sovereign decision and in face of it expressed their willingness to renegotiate the purchase-sale of natural gas under the current legal framework – Law 3058 and Decree Law 28.701- but seeking to ensure state and corporate commercial interests involved in the hydrocarbon import. As expressed in the Declaration of Iguazú, "energy integration [is] essential to regional integration [although] discussion on the price of gas should take place within a rational and fair framework" (Joint Declaration of the Summit of Puerto Iguazu, 04/05/2006).

[10] Usually known as the Gas Supply Agreement (GSA).

When Decree 28.701 was announced, Argentina's energy context was in a quite unfavourable situation: the domestic consumption of natural gas grew about 12% between 2003 and 2005 but not the reserves, due to lack of upstream investments. They fell from 612.291 MMm_3 to 438.921 MMm_3 in the same period (IAPG, Statistical Information, s/f). In addition, Argentina had no impact on the phases of the Bolivian energy industry since hydrocarbon imports were the responsibility of international companies, especially Repsol, operating in Bolivia, that had participated in the privatization of Argentina's state company Yacimientos Petrolíferos Fiscales (YPF)[11].

For its part, Brazil offered a different picture. For the first five years of the twenty first century, natural gas played a reduced role in the national energy matrix, of around 9% (EPE, 2030 National Energy Plan, 2007). The power crisis the country went through in 2001 acted as a trigger and led the Ministry of Mines and Energy to foster the expansion of the domestic supply of natural gas (De DICCO, Deluchi & Lahoud, 2008, 1-4). To undertake this measure, the Lula administration was counting on the YPFB-Petrobras contract and in parallel decided to foster exploration and exploitation activities.

Unlike Argentina, whose reserves fell between 2003 and 2005, Brazil saw a slight improvement from 245.340 MMm_3 to 306.395 MMm_3 (ANP, 2013). Thus, in the face of Bolivia's nationalization, Brazil showed signs of reduced domestic consumption, rising reserves and Petrobras's presence in the energy industry of its neighbour. By 2005, Petrobras was operating 45.9% of total proven and probable gas reserves and monopolized refining activities after buying the Gualberto Villarroel (Cochabamba) and Guillermo Elder Bell (Santa Cruz) refineries in 1999 (2004a: 146-147 ; YPFB Technical Report, 01/01/2005).

The differences in the contexts of Argentina and Brazil meant that the negotiation processes undertaken by both administrations had their own characteristics. Lacking influence in Bolivian production and exports, the government of Nestor Kirchner set about negotiating the price and the quantities of natural gas. As a first step, they signed a macro agreement with Evo Morales on 29 June 2006 which defined the contractual relationship until the end of that year and anticipated a future purchase and sale agreement under Decree 28.701. A value of $5 million per million BTU was negotiated for the period between 15 July and 31 December 2006, with a commitment to send 7.7 MMm_3 per day. This amount had been agreed in a 2005 addendum[12] (Framework Agreement between Argentina and Bolivia, 29/06/2006). In that same meeting, the representatives set as a goal the signing of an agreement with a term of 20 years that predicted the gradual expansion of shipment, namely 7.7 MMm_3 per day from 2007 to 27.7 MMm_3 by day between 2010 and the end of the agreement. Such commitment exposed the need to undertake the construction of the GNEA in the absence of infrastructure between the two countries to transport the agreed quantities (Framework Agreement between Argentina and Bolivia, 29/06/2006). The contract between the two countries was signed on 19 October 2006, with YPFB and Energía Argentina Sociedad Anónima (ENARSA), which was created by government decision in

[11] YPF was created in 1922. The privatization process began in 1992 and a few years later the entire stake was acquired by the Repsol group (Gadano, 2013).

[12] The price issue was the subject of several meetings, since Evo Morales demanded a price of US$ 6 per million BTU, which the government of Argentina could not afford.

December 2004, being responsible for the hydrocarbon purchase and sale (Contract between ENARSA and YPFB, 19/10/2006).

In the first term of Cristina Fernandez (2007-2011), the ENARSA-YPFB contract had to be adjusted through an amendment agreed on 26 March 2010 because neither company could meet its obligations, which prevented the trade link from proceeding normally. Due to difficulties inherent to the adjustment process after the nationalization, YPFB sent shipments lower than those agreed in October 2006 (La Razón, 26/09/2006) and Argentina's government delayed the start of the bi-national gas pipeline construction due to lack of funding. Therefore, the administrations of Fernández and Morales reviewed the weakest points of the agreement: the transportation capacity and supply and reception volumes. Where did this addendum lead to? According to existing possibilities, the implementation of a smaller infrastructure called Juana Azurduy Integration Gas Pipeline was negotiated to expedite the import of hydrocarbon. The pipeline was inaugurated in 2011 and was designed to join the GNEA once the Argentine government completes its construction. As a second step, ENARSA and YPFB officials changed the contracted daily production (CDC) to gradually add larger volumes of hydrocarbon. According to the addendum, a 27.7 MMm_3 CDC per day was predicted as from 2021 (Annex D First addendum to the ENARSA-YPFB contract, 26/03/2010). These changes have enabled a greater stabilization in the export of natural gas. The data provided by ENARSA show that as of the signing of the addendum, the amounts have increased every year from 1851 million MMm_3 in 2010 to 5690 MMm_3 in 2013[13].

Negotiations between the governments of Morales and Lula were not expeditious as in the Argentine case because the continuity of the energy supply to a region of great economic dynamism - very dependent on gas - and the presence of Petrobras in Bolivian territory as a transnational operator were at stake. The sensitivity of the issue caused a reactionary stance on sectors like the company itself, the opposition political forces and much of society, who demanded the Brazilian State and Petrobras to be assertive when evaluating the requests of the Morales administration (Neiva Santos Magalhães, 2009). In particular, the Brazilian Social Democracy Party (PSDB) claimed vehement action without concessions from the Workers Party (PT), which was also criticized for its foreign policy performance in general and especially for its attitude towards the nationalization of Bolivian hydrocarbons.

> *"[...] It is vital that the authorities of the Federal Government clarify the consequences of the nationalization of PETROBRAS in Bolivia [...] The situation is very serious, Mr. President. The Brazilian government underestimated the crisis and has been behaving incompetently [...] PETROBRAS is a heritage of Brazil. We must care for this company*" (Feijó -PSDB- Journal of the House of Representatives, 04/05/2006*).*

[13] ENARSA, Evolution of purchases of natural gas from Bolivia. Available at http://www.enarsa.com.ar/index.php/es/gasnatural/125-gas-de-bolivia. Accessed on 19/04/2015.

> *[...] "The best picture of President Lula's erratic foreign policy was the Bolivia episode [...] Lula did not condemn Evo Morales, he justified the act and accepted the breach of contract*" (Alckmin in PSDB Note, 06/05/2006).

The government was not a supporter of radical statements and opted to favour the use of diplomacy to negotiate with the government of Bolivia and YPFB executives. The negotiating process was complex because the aim went beyond the signing of a purchase and sale agreement as had happened with Argentina. It had the difficult task of defending the interests and safeguarding the achievements of Petrobras in upstream and downstream activities of Bolivia. Finally, the agreement between YPFB and Petrobras was signed on 28 October 2006, a few days before the deadline set by Decree 28. 701. The MAS argued that after the nationalization, Petrobras and other oil companies in the country were service providers to YPFB (Los Tiempos, 19/05/2008).

Instead, the board of the Brazilian company argued that the 2006 agreement was more like a production sharing contract because "according to the contract, company receives for its share of the sales and additional profit, besides costs. The risk of additional profit continues to remain with the consortium (formed by Petrobras, Repsol and Total), which, therefore, has the market risks. Accordingly, it is not a services provision contract "(Agência Câmara Notícias, 6/12/2006). Other points illustrating the distance from the ENARSA-YPFB Agreement are: a) the main objective - adjusting the exploration and production of Petrobras in Bolivia, especially in the San Alberto and San Antonio fields; b) – the assets belong to Petrobras until the end of the contract-; c) Petrobras investments are guaranteed and some of these may be considered in the provision 'recoverable cost '- (Petrobras Agency, 21/11/2006).

The price treatment and the sale of refineries Petrobras had acquired in the late nineties were negotiated at the beginning of Lula's second term. At the signing of the Act of Brasilia on 14 February 2007, Petrobras agreed to pay international prices for the so-called 'rich gas', i.e. hydrocarbon fractions such as propane, butane and natural gasoline included in the exports of Bolivian hydrocarbon (Act of Brasilia, 14/02/2007). The price of gas feeding the Cuiaba power station had a rise of US $3 per million BTU. This sparked criticism from the opposition although the arrangement was positive for Brazil because it reinforced its status as a 'strategic partner' and received a lower amount than what Morales claimed - US$5 less -, which, in turn, was lower than the price negotiated by Nestor Kirchner in 2006. The refineries were transferred to YPFB in June 2007 for the amount of US $ 112 million. Morales publicized the recovery of the refineries as an achievement of the nationalization. However, the sale was a decision of the Brazilian company to concentrate its efforts - in terms of investment and resources -in the phases of exploration and exploitation that allow ensuring the delivery of natural gas to Brazil (Petrobras Agency, 26/06/2007).

Conclusions

The nationalization of Bolivian hydrocarbons in 2006, as a pillar of the process of redefining the link state-foreign investment, is a clear example of the synergy between politics and energy. By repositioning the state in a strategic sector of Bolivia's

economy, the MAS has fulfilled a goal that was present since its presidential campaign and transformed it into a political tool.

The official nature of the act could exert a higher tax pressure on multinationals operating in the country and a more centralized control of income generated by the commercialization of energy. Much of that revenue is allocated to the implementation of several social policies - conditional and non-conditional cash transfers – aimed at fighting poverty and inequality. The consulted statistics show that these programmes, by bringing the most vulnerable populations closer to several areas of social protection, have helped improve socio-economic indicators in general. However, since these policies are almost exclusively sustained by the export of a non-renewable resource, the government should be alert to the risks faced in terms of enforcement and/or continuity, when energy prices on the international stage decline.

In terms of exporter/importer relations, the cases of Argentina and Brazil have more differences than similarities, being analogous as to the context that led to the rise of the energy issue in their national agendas, such as the impact of Decree 28.701 and negotiations and results between their companies and the YPFB. The common elements were the situation of 'gas dependence' that has been forged over the years and the confusion following the nationalization regarding the interests at stake. Argentina, during the energy crisis, had little scope for action. The deficiency in the management of energy, manifested in the decline of reserves and the absence of a state company to intervene in the Bolivian gas production, could only ensure the signing of a contract of purchase and sale, which ENARSA had little chance of exerting pressure before a possible change in the rules. Despite the aforementioned criticisms, Brazil affirmed its place as the first partner in the Bolivian trade balance and managed to adjust the provisions of the nationalization to much of its objectives, since both the sustainability of hydrocarbon shipments and the interference of Petrobras in the energy industry of its neighbour could be preserved.

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THE "ISLAMIC STATE": TRAJECTORY AND REACH A YEAR AFTER ITS SELF-PROCLAMATION AS A "CALIPHATE"

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Abstract

On 29 June 2014, the ISIS/ISIL or Daesh announced the change of its name to just "Islamic State" (IS), proclaimed itself a "Caliphate" and named its leader Abu Bakr al-Baghdadi as "Caliph Ibrahim". About a year later, this article intends to evaluate the trajectory and reach of this territorial jihadist entity. It starts by contextualizing the self-proclamation in terms of ideology and objectives and then it describes how the IS has sought to consolidate itself as a *de facto* "State" and the tragic effects of its policy of terror. The last part examines the international expansion of the IS, analysing its reach in attracting "foreign fighters", the new *wilayats* created outside Syria and Iraq, the newly affiliated local groups, and the activities of the IS in cyberspace.
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Keywords:

Islamic State, ISIS, Terrorism, Jihadism, International Security

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THE "ISLAMIC STATE": TRAJECTORY AND REACH A YEAR AFTER ITS SELF-PROCLAMATION AS A "CALIPHATE"

Luís Tomé

Introduction

The origin of the self-proclaimed "Islamic State" dates back to existing jihadist groups in the 1990s, namely the *Bayat al Imam* and the *Jama'at al-Tawid wa-al-Jihad*, both led by the Jordanian Abu Musab al-Zarqawi[1] who, following the invasion of Iraq in 2003, began to target both the "expulsion of foreign invaders" and to instigate a sectarian civil war by attacking Shiite and Kurdish communities that started to be predominant in Iraq in the post-Saddam Hussein era. Around the same time and with similar motivations, Abu Bakr al-Baghdadi[2], born in 1971 in Samarra in the so-called "Sunni triangle" north of Baghdad, helped establish another group, the *Jamaat Ahl Jaysh al-Sunnah wal Jamaa*. In 2004, while Abu Bakr al-Baghdadi was captured in Fallujah by the US military and detained in Camp Bucca where he mingled with many other jihadists, al-Zarqawi expressed fidelity to the "Emir" Osama bin Laden and his group joined the al-Qaeda (AQ), adopting the name *Tanzim al-Qaeda wal Jihad fi Balad al-Rafidain* or, briefly, "al-Qaeda in Iraq" (AQI).

In June 2006, Zarqawi was killed by the Americans and the AQI came to be led by Ayyub al-Masri, former member of the *Zawahiri's Islamic Jihad Group* in Egypt. Meanwhile, in October of that year, some jihadist factions grouped in the *Mujahideen Shura Council* created the "Islamic State in Iraq" (ISI), and Abu Bakr al-Baghdadi was made responsible for the overall supervision of the *Shariah* Committee, while the group's leadership was given to another al-Baghdadi, Abu Umar. The ISI was conceived as an independent group and not as a subsidiary of AQ, which was not even consulted on the process (Bunzel, 2015:20), with the ISI continuing the sectarian attacks in order to achieve the goal of having a "pure" Islamic State. In 2010, after the death of al-Masri and Umar al-Baghdadi by American bombing, Bakr al-Baghdadi took the leadership of a very fragile ISI (Fishman, 2011) and, like his predecessor, the title of "Commander of the Faithful", claiming to be a descendant of the tribe.

From 2011 onwards, a new combination of factors favoured the prominence of ISI and Abu Bakr al-Baghdadi:

i) the American withdrawal from Iraq, leaving a fragile country led by Prime Minister Nouri al-Maliki (May 2006-September 2014), who pursued a pro-Shiite agenda and

[1] Or Ahmad Fadeel al Nazal Al Khalayeh.
[2] Or Ibrahim Awwad Ibrahim Ali al-Badri or Ibrahim al-Badri al-Qurashi al-Sammarai.

alienated the Sunni minority, which allowed the ISI to strengthen among Sunni tribes, former insurgents and also former members of the Baath Party and Iraqi military and security structures seeking to regain the power they had enjoyed during the era of Saddam;

ii) Osama bin Laden's death in May 2011, which meant not only the elimination of the main reference of the jihadist movement but also the weakening of the AQ, leading to greater autonomy of its affiliate groups and to the rise of local and independent regional groups (Tomé, 2012);

iii) the "Arab Spring" in North Africa and the Middle East, unleashing huge turbulence and conflict in most of these countries (Algeria, Tunisia, Libya, Egypt, Lebanon, Syria, and Yemen), as well as the resurgence of sectarian rivalries and the expansion of extremist movements;

iv) and, in particular, the civil war in Syria from March 2011, as a result of a challenge to the regime of President Bashar al-Assad and involving multiple factions (Shiite militias, real democrats, the moderate and jihadists) and hundreds of groups (more than 1000 were referenced at some point), in a chaotic stage that quickly became the largest "magnet" for jihadists from around the world and for complex "power games" (ranging from Iran and Russia to Arab countries, Turkey, EU or the US ...).

In this context, the ISI

> «*has reconstituted [itself] as a professional military force capable of planning, training, resourcing, and executing synchronized and complex attacks in Iraq*» (Lewis, 2013: 7),

announcing, in the beginning of 2012, its "unstoppable return" and launching increasingly powerful attacks with high media impact: for example, between the summers of 2012 and 2013, it launched the violent campaign "Breaking the Walls" with truck bombs, also aiming at several prisons where hundreds of jihadists escaped[3]. Meanwhile, in neighbouring Syria, the ISI and the AQ instigated the creation of the "al-Nusra Front" (*Jabhat Al-Nusra /JN*) led by the Syrian Abu Mohammad al-Golani (or al-Julani), a former operational in Iraq sent by Bakr al-Baghdadi to create a "front" in Syria. As the ISI was again a credible force and taking advantage from the situation in Syria, Abu Bakr al-Baghdadi decided to expand the ISI to Syria, and, in April 2013, proclaimed the establishment of the "Islamic State in Iraq and the Levant" or "*ash-Sham*" (*Dawlah al-Islamiyah fil Iraq wa ash-Sham*) and the corresponding merger of JN in the new ISIL/ISIS/Daesh. Al-Golani refused this manoeuver and Ayman al-Zawahiri, the successor to bin Laden in al-Qaeda's core leadership, instructed Bakr al-Baghdadi to limit the ISI's activities to Iraq. However, al-Baghdadi reiterated that his group would also remain in *al-sham* (al-Baghdadi, 2013). After months of theological and operational disputes, on 2 February 2014 the AQ officially announced its dissociation

[3] Of the eight prisons attacked by the ISI between July 2012 and July 2013, the most high profile case was Abu Ghraib prison in July 2013, where more than 500 prisoners managed to escape, including many jihadists.

from the ISIS, referring to it as a “group” (Bunzel, 2015: 29), with the ISIS ending up getting into fratricidal conflict with AQ’s branch in Syria (see Cafarella, 2014).

More than fighting Assad’s regime, the ISIS then concentrated its efforts towards occupying and administering territories and localities in Syrian Sunni areas (Raqqa, Idlib, Deir ez-Zor and Aleppo), triggering, in parallel, a similar campaign in Iraq: after capturing Fallujah and Ramadi in January 2014, the ISIS expanded rapidly and conquered other bastions like al-Qaim, Tikit and, in early June, the strategic city of Mosul. On 29 June 2014, the ISIL/ISIS/ Daesh announced the change of its name to just "Islamic State" (IS), proclaimed itself a "Caliphate" and named its leader Abu Bakr al-Baghdadi "Caliph Ibrahim". It thus evolved from being a jihadist insurgent terrorist organization to becoming a politically organized territorial entity in Syria and Iraq.

About a year later, this article aims to evaluate the trajectory and reach of the self-proclaimed "Islamic State Caliphate". Much more than making a mere quantitative balance, it crosses information, description and analysis, relying on data as much updated as possible and essentially using open sources. For greater objectivity and a better understanding of the IS purposes, the article cites several messages of the IS itself: after all,

> «*If one wants to get to know the programme of the [Islamic] State, its politics, and its legal opinions, one ought to consult its leaders, its statements, its public addresses, its own sources*» (Abu Muhammad al-Adnani, spokesman for the IS, 21 May 2012, cit. in Bunzel, 2015: 4).

It starts by contextualizing the self-proclamation of the "Caliphate" in terms of ideology and objectives of the IS. Then it describes how the IS has sought to consolidate itself as a *de facto* "State", including its forms of "governance", territorial administration and financing, as well as the sources of its military arsenal, the growing number of militants and " foreign fighters” and the tragic effects of its persistent policy of terror. After making a brief reference to international efforts to contain and combat the IS, the last part is mainly dedicated to the international expansion of the IS, ranging from the new *wilayats* outside Syria and Iraq to its affiliated local groups, as well as referring to IS attacks and activities in cyberspace, thus illustrating the current situation of this jihadist terrorist threat about a year after its self-proclamation as a "Caliphate".

Proclamation of the “Caliphate” – ideology and objectives

Like al-Qaeda (AQ), the ISIS/DAESH/ Islamic State is based on the Salafist-jihadist ideology (*al-salafiyya al-jihadiyya*), a puritanical branch of the Wahhabi Sunni Islam that wants the Islamic community (*Umma*) to return to “pure” ancestral practices, making a clear separation between the "true believers" and the "unbelievers" considered to be "apostates" or "infidels". Refusing theological diversity, the Salafist-jihadists also base their views on the *Takfir* doctrine, which sanctions violence against

other Muslims accused of apostasy, unbelief or unfaithfulness (*kafir*)[4] (Hafez, 2010; Bunzel, 2014). Viewing themselves as the defenders of the original Islam that the Prophet Muhammad and his companions preached, and considering that Islam is under attack by the "infidels", the Salafi-jihadists claim that the use of violence or "holy war" (*jihad*) is the only way to fight the enemies and defend the true Islam. The ultimate goal of the also called "jihadism" is thus the creation of a "pure" Islamic Community in the form of "Emirate" or even "Caliphate", according to its unique interpretation of the Prophet Muhammad's tradition (*sunna*) and Islamic law (*sharia*), with "believers" taking part in the *jihad*, while the "apostates" and "infidels" must be simply exterminated (Brachman, 2009; Duarte, 2012; Rabbani, 2014; Bunzel 2015). As clearly stated by a jihadist prelate:

> *«We don't make a distinction between civilians and non-civilians, innocents and non-innocents. Only between Muslims and unbelievers. And the life of an unbeliever has no value. It has no sanctity ... We assume that the objective is to kill as many people to cause terror ... The Divine Text is clear on the need to cause "maximum possible damage." The operational must therefore make sure that he kills as many people as he can kill. Otherwise, he will burn in hell (...) The secularists say that the "Islam is the religion of Love." It is true. But Islam is also a religion of War. Of peace, but also of terrorism. Muhammad said: "I am the Prophet of mercy." But He also said: "I am the Prophet of the massacre." The word terrorism is not new among Muslims. Muhammad said even more: "I am the Prophet who laughs when I'm killing my enemy." It is therefore not just a matter of killing. It is laughing when killing».* (Omar Bakri Mohammed, 2004: 28-31):

However, ideologically, the IS adopts an even more exclusive view than AQ and other jihadist groups, being less tolerant of those considered to be "deviant Islamic sects", particularly Shi'ism:

> *«Following takfiri doctrine, the Islamic State is committed to purifying the world by killing vast numbers of people ... Muslim "apostates" are the most common victims»* (Wood, 2015).

In February 2004, in a letter sent from Iraq to the leadership of AQ, Abu Musab al-Zarqawi harshly attacked Shiism both politically and ideologically, considering the Shiites

[4] The vast majority of leaders, organizations and religious authorities of Islam reject this concept of *takfir*, considering it a doctrinal deviation (*bid'at*) or heresy. Some recent Edicts (*fatwa*) also condemn and repudiate the "Takfir doctrine".

> «*the proximate, dangerous enemy of the Sunnis…The danger from the Shi'a…is greater and their damage worse and more destructive to the [Islamic] nation than the Americans… targeting and hitting [the Shi'a] in [their] religious, political, and military depth will provoke them to show the Sunnis their rabies and bare the teeth of the hidden rancour working in their breasts. If we succeed in dragging them into the arena of sectarian war, it will become possible to awaken the inattentive Sunnis as they feel imminent danger and annihilating death at the hands of these Sabeans [i.e., Shi'a].*» (al-Zarqawi, 2004).

This vision would become one of the pillars of the ideology of the IS and hence, from its antecedents in Iraq, IS pursues a strategy aimed at instigating and instrumentalising a sectarian "holy war" within Islam, primarily between Sunnis and Shiites. In fact, even before the creation of the Islamic State of Iraq (ISI), al-Qaeda's ambitions and strategy in Iraq exceeded those of the central structure, directly attacking Shiite and Kurd Muslims with such a level of violence that central AQ warned its Iraqi branch of the risk of losing popular support in the country as well as that of the global Islamic community[5].

On the other hand, organically, the IS claims, as it has always done, that it is not just a jihadist organization (*tanzim*) but literally what its name implies: a real "State" (*dawla*). In 2006, an official document of the newly created "Islamic State in Iraq" (ISI) claimed that:

> «*This state of Islam has arisen anew to strike down its roots in the region, as was the religion's past one of strength and glory*» (cit. in Bunzel, 2014: 2). In the words of Graeme Wood (2015), «*bin Laden viewed his terrorism as a prologue to a caliphate he did not expect to see in his lifetime. His organization was flexible, operating as a geographically diffuse network of autonomous cells. The Islamic State, by contrast, requires territory to remain legitimate and a top-down structure to rule it*».

And a "State" with expansionist ambitions: on 8 April 2013, the renamed ISIL or ISIS demanded the establishment of an "Islamic State in Iraq and the Levant" or "ash-Sham", a region that includes Syria but also Jordan, Israel, Palestine and Lebanon, and, in a broader sense, covers territories in Egypt, Turkey and Cyprus. This announcement came two days after the leader of AQ-core, Ayman al-Zawahiri, called for the unification of the jihad in Syria, but between *Jabhat Al-Nusra* (JN) and other jihadist groups, and not through the expansion of the ISI to Syria and even less through the merger of JN with the new ISIS. Although the leader of the JN, al-Golani, rejected that manoeuvre and openly declared obedience to "Emir" al-Zawahiri, and the leader of the AQ-c instructed Bakr al-Baghdadi to dissolve the ISIS and limit the activities of his

[5] Letter from Ayman al-Zawahiri, then number two of al-Qaeda, to Abu Musab al-Zarqawi, leader of AQI, dated 9 July 2005.

group to Iraq, leaving Syria for the JN, ISIS reaffirmed the new designation and forced its expansion to Syria.

Moreover, since its inception, the ISI aimed at the eventual restoration of the "Caliphate", a mythical monarchic-theocratic form of government that represents the unity and the leadership of the "Islamic world", a coveted global empire ruled according to Islamic law or *Sharia* directed by a single leader, the caliph, the Prophet Muhammad's successor. Therefore, several references and maps of the ISI, ISIS and, of course, the IS suggest an ambition that includes dominating all the territories of ancient historical Caliphates, ranging from the Iberian Peninsula (Al-Andalus) to Southeast Asia. In other words, the self-proclamation as "Caliphate" embodies a «*fundamentally political rather than religious project - even though the IS insists the two are inseparable*» (Rabbani, 2014:2)

This self-proclamation came on 29 June 2014, in a document entitled "This is the Promise of Allah" produced in several languages and posted on the Internet, where the ISIL/ISIS/Daesh announced the restoration of the "Caliphate", simply called "Islamic State" (IS) and appointed its leader Abu Bakr al-Baghdadi as "Caliph", hereinafter called "Caliph Ibrahim":

> *«Here the flag of the Islamic State, the flag of tawhīd (monotheism), rises and flutters. Its shade covers land from Aleppo to Diyala…. The kuffār (infidels) are disgraced. Ahlus-Sunnah (the Sunnis) are masters and are esteemed. The people of bid'ah (heresy) are humiliated. The hudūd (Sharia penalties) are implemented – the hudūd of Allah – all of them. The frontlines are defended…. It is a dream that lives in the depths of every Muslim believer. It is a hope that flutters in the heart of every mujāhid muwahhid (monotheist). It is the khilāfah (caliphate). It is the khilāfah – the abandoned obligation of the era (…) Therefore, the shūrā (consultation) council of the Islamic State studied this matter after the Islamic State – by Allah's grace – gained the essentials necessary for khilāfah, which the Muslims are sinful for if they do not try to establish. In light of the fact that the Islamic State has no shar'ī (legal) constraint or excuse that can justify delaying or neglecting the establishment of the khilāfah such that it would not be sinful, the Islamic State – represented by ahlul-halli-wal-'aqd (its people of authority), consisting of its senior figures, leaders, and the shūrā council – resolved to announce the establishment of the Islamic khilāfah, the appointment of a khalīfah for the Muslims, and the pledge of allegiance to the shaykh (sheikh), the mujāhid, the scholar who practices what he preaches, the worshipper, the leader, the warrior, the reviver, descendent from the family of the Prophet, the slave of Allah, Ibrāhīm Ibn 'Awwād Ibn Ibrāhīm Ibn 'Alī Ibn Muhammad al-Badrī al-Hāshimī al-Husaynī al-Qurashī by lineage, as-Sāmurrā'ī by birth and upbringing, al-Baghdādī by residence and scholarship. And he has accepted the bay'ah (pledge of allegiance). Thus, he is the imam and khalīfah for the Muslims everywhere. Accordingly, the*

> *"Iraq and Shām" in the name of the Islamic State is henceforth removed from all official deliberations and communications, and the official name is the Islamic State from the date of this declaration»* (IS, 2014).

By proclaiming itself *"*Caliphate*",* the IS also claims that all Muslims - individuals, states and organizations - should pay obedience and be faithful *(bay'ah) to "*Caliph Ibrahim*":*

> *«We clarify to the Muslims that with this declaration of Khilafah, it is incumbent upon all Muslims to pledge allegiance to the Khalifah Ibrāhīm and support him (may Allah preserve him). The legality of all emirates, groups, states, and organizations, becomes null by the expansion of the Khilafah's authority »* (ibid*.).*

Bay'at is a kind of obedience commitment given to a leader of an Islamist group; for a jihad, it is as if that commitment was with the Prophet Muhammad himself, and cannot be broken under penalty of apostasy *(takfir*). Immediately following that announcement, on 1 July 2014, in his sermon at the Grand Mosque of Mosul, the very "Caliph Ibrahim" declared

> *«I have been appointed to rule over you ... And obey me so long as I obey God touching you. If I disobey Him, no obedience is owed from me to you»* (al-Baghdadi, 2014).

Unsurprisingly, the alleged obligation of *all Muslims* to pay allegiance to "Caliph Ibrahim" and the corresponding nullification of all other States and organizations before the global authority of the Islamic State is repudiated by all Islamic States and numerous Islamic religious leaders, including the Grand Muftis of Saudi Arabia and Egypt, Abdulaziz al al-Sheikh and Shawqi Allam, respectively, or the International Union of Muslim Scholars. Although for different reasons, this rejection is also made by various jihadist organizations: even before the announcement of the "Caliphate", central *al-Qaeda* (AQ-C or AQSL), presumably from Pakistan, and also the Islamic Front and *Jabhat al-Nusrah*, both in Syria, had publicly rejected the ISIS; after the self-proclamation of the IS "Caliphate", the AQ-C officially rebutted *bay'at* to "Caliph Ibrahim" again and started to promote its own proto-Caliph, Mullah Muhammad Omar, the Taliban leader of the "Islamic Emirate of Afghanistan "since 1996; meanwhile, seven other jihadist groups repudiated the authority of the IS - Caucasus Emirate in Russia, the General Military Council for Iraqi Revolutionaries in Iraq, *Katibat al-Imam Bukhari* in Syria, Al-Qaeda Islamic Maghreb (AQIM) in Algeria, Moro Islamic Liberation Front (MILF) in the Philippines, Harakat Ansar Iran (HAI) in Iran, and Al-Qaeda in the Arabian Peninsula in Yemen – while the Taliban in Afghanistan have, to date, remained neutral to the IS (IntelCenter, 2015; Azamy and Weir, 2015).

A *de facto* State and terror

The ISIS/IS has demonstrated its capacity to impose itself on government forces and opposition groups (Lister, 2014: 2). As it expanded, it sought to portray the image of being an effective administering organization in the areas where "state authority" was missing or fragile. At the end of June 2014, the renamed Islamic State controlled a vast area that ranged from Aleppo in Syria to the Diyala province in Iraq, and a population of nearly 6 million people. As such, its strategy has been to consolidate characteristics inherent to the condition of "State" - namely, territorial control (especially locations, routes and infrastructure) and political, economic and judicial administration.

Administratively, the IS operates in different *wilayats* or provinces, each with its operating structure. Although some IS *wilayats* have been proclaimed in the territories of other countries, as we shall see, most still lie in Iraq and in Syria: in mid-2015, there are twenty IS *wilayats*, twelve of which located in Iraq (Anbar, Baghdad, Diyala, Euphrates/Furat – the latter covering territories both in Iraq and in Syria - Fallujah, Kirkuk, Jnoub, Ninewa, Salah al-Din, Shamal Baghdad, al-Jazeera, and Tigris/Diglah) and eight in Syria (al-Barakha/Hasakah, Damascus, Euphrates/Furat, Halab/Aleppo, Homs, al-Khair / Dayr az Zawr, Raqqa, and Hamah).

Immediately after "Caliph" Abu Bakr al-Baghdadi, who is the supreme political, religious and military authority, the territories of the IS in Syria and Iraq are under the authority of two respective "governors" involved in the military strategy and governance of those areas in coordination with local councils (IEP-GTI Report 2014: 52). The IS political structure includes four main "councils" - *sharia*, *shura*, military and security - replicated in the chain of command down to local level by the various *wilayats* in Syria and Iraq. In its simple but effective bureaucratic organization, the IS established religious committees, a religious police, educational committees, *Sharia* courts and recruiting offices, public relations or tribal issues offices, as well as "advisers" and "coordinators" for finance, propaganda, receiving "foreign fighters", shelters, and dealing with women's, orphans' or prisoner issues, imposing its form of "governance" (Caris and Reynolds, 2014). In parallel, the IS expanded other requirements in the areas under its control that resemble a *de facto* state: security and military services, management of medical services and of "Islamic education", collection of fees and taxes, issuance of identification documents, printing of its own currency, control of services and resources (mail, transport, telephones, Internet, garbage collection, water, electricity, fuel and energy supply) and, from here, regulation of the economy and society.

The total number of IS members, activists and fighters is imprecise and difficult to calculate, varying greatly depending on the source and also on whether it refers only to militants in Iraq and Syria or whether it also includes individuals and groups operating in other countries and regions. On the other hand, in addition to Syrian, Iraqi and foreigner volunteers and jihadists, the Islamic State is known to force people from other conquered rebel groups or confined areas under its rule to fight on its behalf - so, even restricting to the territory controlled by the IS in Syria and Iraq, it is complex to distinguish between its militant members and those who exercise certain functions because they are forced to it or fear reprisals. Still, it seems clear that the number of IS members and fighters has increased continuously over the past years; it grew suddenly since the proclamation of the "Caliphate"; and it is now well above other

jihadist groups, including al-Qaeda. When the US withdrew from Iraq in 2011, the ISI had few hundreds of members; in early 2015, the IS had between 17,000 and 31,500 combatants - well above, therefore, the 1000-3000 that central AQ had at its peak in the late 1990s (Gerges, 2015). In June 2014, the number of ISIS militants in Syria and Iraq was estimated at between 5,000 and 10,000; in the following month, numbers increased thanks to the 1000-2000 militants from other jihadist groups in Syria and Iraq (such as *Jaish al-Sahabah in the Levant* and the *Faction of Katibat al-Imam Bukhari* in Syria *or Ansar al-Islam* in Iraq) who joined its ranks; in September, the CIA estimated the existence of between 20,000 and 31,500 IS fighters in Syria and Iraq; in late 2014, the Syrian Observatory for Human Rights estimated over 80,000 (50,000 in Syria and 30,000 in Iraq) IS militants, while the office of Kurdish President Massoud Barzani rose the total number of IS members to 200,000, a number that included combatants and support staff, police forces, local militias, border guards, and paramilitary personnel associated with the various groups of security guards and recruits. Crossing several sources, the current estimated number of IS fighters varies between 35,000 and 100,000, while the AQ and its affiliates is believed to have between 5,000 and 20,000 members.

To finance its activities, the IS has the millions of euros and dollars found and stolen in the banks and administration offices of the towns it conquered and the proceeds from the sale of oil from the dozen wells and refineries it controls. According to the *Global Terrorism Index Report 2014* (IEP, 2014: 52), the IS

> «*controls a dozen oil fields and refineries in Iraq and Syria, generating revenues of between one to three million U.S. dollars per day… As well as oil, it is believed that the ISIL has access to 40 per cent of Iraq's wheat growing land*», a situation that led K. Johnson (2014) state that «*the Islamic State is the Newest Petrostate*».

Other important IS funding sources include "donations" from individual, tribal and jihadist organizations, "tax" and "religious taxes" collection from those under its control, theft and extortion, kidnapping and ransom payments and arms, drug, historical artefacts and human organs trafficking. With this wide range of funding sources, the IS yield is estimated at about 3 to 5 million USD a day in 2014, and its total financial resources is estimated to stand at between 1.3 and 2 billion USD (Barret, 2014 : 45). That is, the IS has become «*the richest terrorist group in the world*» (Lister, 2014: 2), described by the former US Secretary of Defence Chuck Hagel as

> «*sophisticated and well-funded as any group that we have seen. They're just beyond the terrorist group ... they are tremendously well-funded*» (cit. in Keatinge, 2014).

As for the powerful weapons at its disposal,

> «*the Islamic State, like many irregular forces before it, has opened spigots from varied and far-ranging sources of supply, in this case on a grand scale*»,

including weapons previously used in the Libya, Sudan and the Balkan wars and others produced by the US, Russia, China, Iran, and Europe (Western and Eastern). The IS's military arsenal mainly includes weapons and ammunition captured from Iraqi and Syrian forces, armaments and equipment purchased, exchanged or captured from groups opposing Bashar al-Assad in Syria. On the other hand, in addition to small arms, machine guns, explosives, and grenades, the Islamic State's arsenal includes unusual war weapons held by terrorist groups, from tanks and armoured vehicles to howitzers, drones and guided anti-tank missiles (Conflict Armament Research, cit. in Chivers, 2015).

The Islamic State's attempt to affirm and consolidate itself as a "State" has been implemented through violence and extraordinary brutality by armed militants operating simultaneously as a terrorist group, army, police, guerrilla, militia, and criminal gang. According to the Global Terrorism Index Report 2014 from the IEP, in the year of ISI's expansion to Syria in 2013, the number of terrorist attacks worldwide rose 61% over the previous year, causing nearly 18,000 dead, with Syria and Iraq among the countries with the highest number of victims of terrorism and with 66% of the global total of deaths being the responsibility of only four groups, including ISIS (the others being al Qaeda, the Taliban and the Boko Haram). In Iraq alone, in 2013 there were 6362 deaths caused by terrorist attacks (an increase of 162% compared to 2012), of which 77% were ISIS' responsibility (IEP-GTI Report 2014: 52).

In line with its predecessors, the IS continues extermination practices not only against Christians and Jews, but especially against Muslim communities, namely Shiites, Kurds, Alawites and Yazidis, in what Amnesty International describes as "ethnic cleansing" and the UN calls "crimes against humanity". Hence, the expansion of the IS has contributed significantly to the barbarism and the humanitarian tragedy in Iraq and Syria, which occupy the first and second places, respectively, in the ranking of the most dangerous countries in terms of terrorist activity, according to the *Country Threat Index* of IntelCenter. In 2014 alone, the IS killed 2317 people; also according to the *Most Deadly Terrorist/Rebel Groups* of IntelCenter and adding to that number the deaths caused by other groups that meanwhile joined the IS until mid-2015, the total number of dead of the "IS Network" in 2014 exceeded 5000. Accordingly, this same source shows in its *Group Threat Index* - which examines the volume of terrorist alerts, the traffic of messages, videos and photos, attacks and victims of several dozen terrorist organizations – that the IS became the most dangerous and lethal terrorist group in the world (IntelCenter, 2015).

In fact, the IS does not recognize any Islamic interpretation and jurisdiction other than its own, imposing its brutal version of the *sharia* on all those it considers to be "apostates" and "infidels" and implementing a policy of terror which includes mass summary executions, amputations, rapes, immolations, beheadings, and crucifixions. The barbarity of the Islamic State is openly repudiated by most Islamic religious leaders, by all Islamic countries and also by the Islamic Cooperation Organization

(which brings together 57 Islamic countries), with the Secretary General of the OIC, Iyad Ammen Madani, affirming

> «*We need to condemn, particularly and in the strongest terms, the heinous and barbaric crime committed by the so-called IS terrorist group*» (Madani, 2015).

The terror perpetrated by the IS even made the Vatican, which traditionally opposes the use of force, adopt an unprecedented position in mid-March 2015, declaring that if it is not possible to achieve a political decision without violence, «*the use of force will be necessary*» against the IS in order to «*stop this genocide*» and protect Christians and other religious groups[6].

For the IS, however, "terror" is not only inherent in its *jihad* against all "apostates" and "infidels" but also a key driver of its expansion strategy due to the "demobilizing" effect that it seeks to have (and has) in the populations and opposition forces, in particular among the Syrian and Iraqi government contingents.

The alarm caused by the extension of the IS "Caliphate" and its corresponding social, economic, humanitarian, and political implications (see, e.g., Adams, 2014) led to a sudden change in the geopolitical chess in the region and brought about a very eclectic "anti-IS front" since the summer of 2014, including the creation of a broad international coalition led by the US and currently with about 64 participants[7] and the hitherto unthinkable joint positions of Western countries, Arab countries (especially Saudi Arabia, Egypt, Qatar and Jordan), Iran, Turkey, the Iraqi government, the Peshmerga Kurds, several insurgent groups operating in Syria or even the very Syrian regime of Bashar al-Assad .... According to the US State Department, in early June 2015 the IS controls less 25% of territory in Iraq than when the "International Coalition" began its campaign[8]. Meanwhile, following the Iraqi Government's request, NATO decided to reactivate the training and assistance mission to Iraqi government forces for more effective anti-IS fighting[9].

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[6] Statement made by the Vatican Ambassador at the United Nations in Geneva, Archbishop Silvano Tomasi, in an interview with the American Catholic website "Crux" (see Allen, 2015). This position came the same day that the Holy See, Russia and Lebanon presented the Council of the UN Human Rights a document entitled "Supporting the Human Rights of Christians and Other Communities, particularly in the Middle East", supported by 70 signatory countries, hoping to encourage states around the world to provide humanitarian aid to Christians and other groups persecuted by the IS.

[7] Out of the more than sixty participants of the "anti-IS international coalition," only some participate in direct military operations or provide air support and military equipment: the US, Iraq, Jordan, Bahrain, Saudi Arabia, Egypt, United Arab Emirates, France, the UK, Germany, Canada, Australia, Italy, Czech Republic, Albania, the Netherlands, Estonia, Hungary, Turkey, Belgium, Denmark, and Lebanon. Some "allies" have only been providing political support and "humanitarian aid" (including the Arab League and the European Union, as well as Sweden, Kuwait, Switzerland, Japan, Austria, New Zealand, South Korea, Ireland, Spain, Slovakia, Norway, Luxembourg, and Qatar), while with regard to others we only know their statement of support and commitment to this coalition, participating particularly in terms of sharing information - Andorra, Bosnia and Herzegovina, Bulgaria, Croatia, Slovenia, Finland, Georgia, Greece, Israel, Kosovo, Lithuania, Macedonia, Malta, Morocco, Mexico, Moldova, Oman, Poland, Portugal, Romania, Serbia, Singapore, Taiwan, Tunisia, and Ukraine.

[8] Statement made by Antony Blinken, US Deputy Secretary of State, at a meeting in Paris on 2 June 2015, with representatives from 20 countries to discuss the status of the fight against the IS in Iraq (see the BBC, 2015).

[9] The NATO Training Mission-Iraq (NTM-I) was established in 2004 to help Iraq create effective new armed forces after the overthrow of Saddam's regime, but the mission was discontinued in 2011 due to the

In addition to a significant number of IS militants, some IS leaders were also killed - including the alleged number two in the hierarchy, Abdul Rahman Mustafa Mohammed al-Qaduli[10], and the so-called "Oil Emir" Abu Sayyaf . The very "Caliph" Abu Bakr al-Baghdadi was seriously injured as a result of US bombing in March 2015. Some previous state support to ISIS was also stopped: currently, no government supports the IS, which put itself in an enemy position of all States in the region and the world. At the same time, the Internet and social networks industry became more vigilant and active in the control and removal of terrorist and jihadist oriented content conveyed by the IS and its supporters. Over the past year, and on several occasions, the Organization of Islamic Cooperation and numerous Islamic religious authorities denounced the illegitimacy of the alleged "Caliphate" and condemned the IS narrative and acts for violating all principles of Islam.

However, despite international efforts to contain, fight and delegitimize it, the IS not only continues to control a vast territory and millions of people but also launched new offensives on key fronts. In Iraq, in May 2015 the IS took possession of Ramadi, capital of the Anbar province, advanced towards the Baiji oil refinery, the largest in the country, and attacked the nearby town of Khalidya, getting closer to Baghdad. In Syria, in the same month the IS attacked Deir ez-Zor by the Euphrates River, in the east of the country, and gained control of the city of Tadmor and the ruins of the "World Heritage" ancient Roman city of Palmyra in central Syria, and unleashed offensive operations in the north, near Aleppo, close to the border with Turkey; in the West, in the provinces of Homs and Hama and near the border with Lebanon; and in the Southwest, targeting the city of Quneitra, near the Israeli border.

The International expansion of the IS

On the other hand, the IS has expanded far beyond Syria and Iraq, conducting activities which a report of the *Institute for the Study of War* organized in three circles: an "inner ring", comprising, in addition to Iraq and Syria, Jordan, Israel, Palestine and Lebanon; the “near abroad”, covering Afghanistan, Pakistan, Yemen, Saudi Arabia, Egypt, Libya, Turkey, Tunisia, Algeria, Morocco and the Caucasus; and the "far abroad" circle, referring to the activities of the IS in Europe, North America, Asia-Pacific and also in cyberspace (Gambhir, 2015).

Through its self-proclamation as "Caliphate", the IS intensified the recruitment campaign of "foreign fighters" to go to Syria and Iraq to defend an idyllic Islamic State[11]:

> «*mujahideen in Europe, Australia, and Canada…O mujahideen in Morocco and Algeria…O mujahideen in Khorasan, the Caucasus,*

absence of any agreement to give legal status to the presence of NATO military operating in the country. In 2014, as a result of the IS advance, the Baghdad government requested new assistance, education and training mission to Iraqi government forces.

[10] Or Abu Alaa al-Afari.

[11] See also *Dabiq*, issue 3 – *A call to Hijrah*.

> *and Iran…O mujahideen, we call you up to defend the Islamic State»* (Abu Muhammad al-Adnani [al-Shami][12],

IS's spokesman, 22 September 2014). In parallel, the IS propaganda machine - through messages, photos and videos channelled through the Web, virtual social networks and its official journal in English *Dabiq* - glorifies its "martyrs", publishes regular reports on the "International faithful of Allah" and highlights the fighting skills of "true believers from distant lands".

The phenomenon of jihadist "foreign fighters" has long been known in places such as Afghanistan, Bosnia, Kosovo, Chechnya, Iraq, Lebanon, Yemen, Mali, and Libya. But never before have so many "foreign fighters" been involved as in Syria and, more recently, in the territory controlled by the "Islamic State", leading the United Nations Security Council to adopt unanimously Resolution 2178 - at a meeting where more than 50 countries[13] expressed

> «*particular concern that foreign terrorist fighters are being recruited by and are joining entities such as the Islamic State in Iraq and the Levant (ISIL)*».

The resolution further calls upon all States to cooperate urgently to prevent international flows of IS fighters and other extreme groups to and from war zones (UN Security Council, 24 September 2014).

Aware of the fact that the "European jihadists" pose a serious threat to both the external and internal security of the European Union, European authorities and the governments of the 28 Member States, particularly reacting to the attacks in Paris on 7 and 8 January 2015, strengthened measures to combat terrorism, prevent movements for purposes of association with terrorist groups and detect and monitor travel to and from theatres of jihadist conflict[14].

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[12] Or Taha Subhi Falaha, his birth name.

[13] Heads of State or of Government of Nigeria, Iraq, US, France, Chad, Lithuania, Rwanda, Jordan, Chile, South Korea, UK, Australia, Luxembourg, Turkey, Qatar, Bulgaria, Kenya, Macedonia, Canada, the Netherlands, Morocco, Norway, Trinidad and Tobago and Belgium. The countries represented at ministerial level were: China, Serbia, Pakistan, Algeria, Senegal, Latvia, Denmark, Albania, Estonia, Kazakhstan, Russia and New Zealand. There were also representatives of the following countries: Singapore, United Arab Emirates, India, Spain, Malaysia, Sri Lanka and Egypt, as well as the President of the European Union and the Secretary of State of the Holy See.

[14] The many EU proposals include: deepen the understanding of the phenomenon; tighten the monitoring of social networks and increased cooperation with the Internet industry to remove extremist content, creating effective counter-discourses; punish and penalize those condoning terrorism and violent extremism, and those intending to join terrorist groups and plan or practice terrorism-related crimes; prevent travelling to join terrorist groups, detect and monitor travel to and from areas of jihadist conflict and halt the return of extremists and jihadist veterans, particularly by increasing control at the EU's and the Schengen area's external borders and by recording the names of air passengers; intensify the fight against multiple forms of financing terrorism; implement accompanying measures and monitoring of returnees; strengthen human and technological resources; implement earlier directives and strengthen the anti-terrorism legislative framework; send "security consultants" to European representations in sensitive areas; deepen and improve the sharing and exchange of information; strengthen cooperation between European countries and services and collaboration with strategic partners; etc. See Council of the EU - Counter-Terrorism Coordinator.

Despite international efforts, the number of foreign fighters ascribed to the IS has continued to grow significantly, and numbers are currently estimated at over 25,000 (twice as many as those who went to Afghanistan in the 1980s), representing about 70% of foreign jihadists in Syria and almost all in Iraq, from almost a hundred countries. About half of the "foreign fighters" of the IS come from North Africa and the Middle East (Barret, 2014: 16), namely Saudi Arabia (7000), Tunisia (2500-5000), Morocco (1500-3000), Jordan (1500-2000), Turkey (1000-1500), Egypt (600-750) and Iran (50-80). But the IS also has fighters coming from many other countries from all regions of the globe, including Russia (1000-1500), Indonesia (520-550), Turkmenistan (360-400), Bosnia and Herzegovina (350), China (300), Kazakhstan (300), Azerbaijan (100-300), Albania, Kyrgyzstan, Tajikistan and the Philippines (200 each), Canada (130), USA (100-120), Australia (80-100), and India (20-25)[15].

From the European Union alone, by mid-2015 over 6,000 jihadists had left to join the IS in Syria and Iraq (nearly tripling those who were in Syria in late 2013), from more than twenty countries, including France (about 1500), the United Kingdom (750), Germany (700), Belgium (400), the Netherlands (300), Denmark (250), Sweden (200), Spain (60-100), Austria (100-150) Italy (60), and Finland (50). This EU's figures also included Luxembourgers, Greeks, Slovaks, Czechs, Irish, Bulgarian, Lithuanian, and Portuguese (15-20) [16].

To its supporters who cannot or are unable to travel to Syria and Iraq, the IS instructs them to organize and pledge allegiances (*bay'ah*) to "Caliph" Abu Bakr al-Baghdadi:

> «*If you cannot perform hijrah (immigrate to the Islamic State) for whatever extraordinary reason, then try in your location to organize bay'at (pledges of allegiance) to the Khalifah Ibrahim. Publicize them as much as possible. Gather people in the masajid, Islamic centres, and Islamic organizations, for example, and make public announcements of bay'ah. Try to record these bay'ah and then distribute them through all forms of media including the Internet. It is necessary that bay'ah becomes so common to the average Muslim that he considers those holding back as grossly abnormal...if you live in a police state that will arrest you over such bay'at, then use means of anonymity to convey your bay'ah to the world*» (*Dabiq,* issue 2, July 27, 2014).

And the fact is that in addition to individuals around the world who have expressed allegiance to "Caliph Ibrahim," there are many other groups which, since the self-proclamation as "Caliphate", became associated with the IS. Specifically, 36 jihadist groups outside Iraq and Syria that pledged *bay'at* or expressed support for the IS have been referenced: *Mujahideen Timor* in Indonesia; *Caliphate and Jihad Movement, Jundullah, Tehrik-e-Khalifat* and *Tehrik-e-Taliban* dissidents in Pakistan; *Islamic Movement of Uzbekistan* in Pakistan and Uzbekistan; *Ansar al-Khalifah, Bangsmoro*

[15] Figures estimated from crossing various sources, including research centres on terrorism and conflict and several types of media.

[16] On the profile and route of the "Portuguese jihadists," of whom the majority are Portuguese descendants emigrated in other European countries like France or England see, for example, Franco and Moleiro, 2015

Islamic Freedom Fighters, *Bangsmoro Justice Movement, Abu Sayaaf* and *Jemaah Islamiyah* in the Philippines; *Jund al-Khalifah, al-Huda Battalion in Maghreb of Islam and Soldiers of the Caliphate* in Algeria; *Al Tawhid Battalion* in Afghanistan and Pakistan; *Khorasan Pledge, Heroes of Islam Brigade in Khorasan* and *Leaders of the Mujahid in Khorasan*, from Afghanistan; *Ansar al-Tahweed fi Bilad al-Hind* in India; *al-I'tisam of the Koran and Sunnah* in Sudan; *Uqba bin Nafi battalion* and *Jund al-Khilafah* in Tunisia; *Jund al-Khilafah* in Egypt; *Mujahideen Shura Council in the Environs of Jerusalem*, in the Gaza Strip and the Sinai Peninsula; *Jund at-Tawheed Wal Khalifah* in Bangladesh; *Ansar Bait al-Maqdis* in Egypt; *Islamic Youth Shura Council*, *Islamic State Libya (Darnah)*, *Lions of Libya*, *Shura Council of Shabab al-Islam Darnah* and *IS's "Tripoli Province"* in Libya; *Liwa Ahrar al-Sunna in Baalbek*, Lebanon; *Mujahideen of Yemen* and *Supporters for the Islamic State in Yemen*, in Yemen; *Supporters of the Islamic State in the Land of the Two Holy Mosques* in Saudi Arabia; *Boko Haram* in Nigeria (IntelCenter, 2015).

In addition, Abu Bakr al-Baghdadi himself announced on 13 November 2014 the establishment of five new IS *wilayats* outside Syria and Iraq, precisely in Libya, Algeria, Yemen, Sinai (Egypt) and Saudi Arabia, as well as the intention to create more *wilayats* elsewhere in the future. The same aim was reaffirmed in the fifth edition of *Dabiq* entitled, in good propaganda fashion, "Remaining and Expanding", where the IS recognizes those *wilayats* with

> *«either the appointment or recognition of leadership by the Khalifah for those lands where multiple groups have given bay'at and merged, or the establishment of a direct line of communication between the Khalifah and the mujahid leadership of lands who have yet to contact the Islamic State and thus receive information and directives from the Khalifah»* (*Dabiq,* issue 5).

Meanwhile, the IS has expanded its *wilayats* in Yemen (in clear competition with Al-Qaeda in the Arabian Peninsula, both combating the Huthis Shiite militias and other rebels loyal to former President Abdullah Saleh and the forces supporting President Hadi) and also in West Africa, in the latter case through the alliance agreed in March 2015 with *Boko Haram*, which has controlled the northeast of Nigeria for years and is also active in Chad, Niger and Cameroon. Currently, there are twelve IS *wilayats* outside Syria and Iraq: *Khorasan* (Afghanistan), *al-Jazair* in Algeria, *Sinai* in Egypt, *Burgah*, *Tarablus/Tripoli* and *al-Fizan* in Libya, *al-Haramayn* in Saudi Arabia, *al-Yaman*, *Sanaa*, *Lahij* and *Shabwa* in Yemen and *Gharba Ifriqiyah* in Nigeria.

Admittedly, several jihadi groups have publicly repudiated the IS, as mentioned earlier. But the reality is that the expansion of the IS has changed the balance among jihadist groups and the volatile connections with insurgent movements in various other stages of conflict beyond Syria and Iraq, including in Libya, Lebanon, Yemen, and even in Afghanistan and Pakistan:

> «*The relationship between the Taliban and the Islamic State is emerging as the most influential factor in the future of violent jihadi movements in the Afghanistan and Pakistan region…. If IS were to successfully recruit influential Taliban figures, they could upset the delicate yet volatile balance of jihadi movements and insurgents within Afghanistan, causing realignments of anti-state actors across the Khorasan region*» (Azamy and Weir, 2015).

At the same time, fierce opposition to the IS has increased the power and the role of "Shiite militias" in several theatres of conflict (Iraq, Syria, Lebanon, Libya, and Yemen), a situation described as "particularly fragile" by a French representative (BBC, 2015). Basically, the expansion and the brutality of the IS has contributed to intensify historic rivalries and sectarian conflict between Sunni and Shiite Muslims, not only inside Syria and Iraq but also within other countries such as Lebanon - where the IS faces the well-established Shiite origin Hezbollah (Holmquist, 2015) - and between regional powers such as Sunni Saudi Arabia and Shiite Iran, as also happens in the case of Yemen[17].

On the other hand, the IS calls for *jihad* in the countries where its militants are based through attacks against their enemies and other "infidels". For example, in a declaration addressed to the "soldiers of the Islamic State," the IS spokesman, Abu Mohammed al-Adnani [al-Shami], made the following appeal:

> «*So rise O mujahid. Rise and defend your state from your place wherever you may be…You must strike the soldiers, patrons, and troops of the tawāghīt. Strike their police, security, and intelligence members, as well as their treacherous agents. Destroy their beds. Embitter their lives for them and busy them with themselves…*
>
> *If you can kill a disbelieving…including the citizens of the countries that entered into a coalition against the Islamic State, then rely upon Allah, and kill him in any manner or way however it may be. Do not ask for anyone's advice and do not seek anyone's verdict. Kill the disbeliever whether he is civilian or military, for they have the same ruling. Both of them are disbelievers. Both of them are considered to be waging war [the civilian by belonging to a state waging war against the Muslims]…If you are not able to find an*

[17] Following the deteriorating situation in Yemen and the advancement of Houthi Shiite militias, Saudi Arabia set up and leads a "coalition" fundamentally composed of Arab countries which, in March 2015, began to intervene militarily in Yemen in support of President Abdrabbuh Mansour Hadi against the Houthi Shiite rebels and other forces loyal to former President Abdullah Saleh (deposed in 2011 following the protests associated with the "Arab Spring"), which, in turn, have the support of Iran. In a typical proxy war situation. - in which regional powers promote their competing interests in a Yemen torn by conflict between two rival Islamic branches, Sunni and Shia, which intersect with tribal loyalties in support of the current President or attempting to replace the previous one, coupled with the significant presence and dispute between al Qaeda jihadists in the Arabian Peninsula and the Islamic State (both attacking the government forces of President Hadi and the Houthi Shia and pro-Saleh rebels) - Saudi Arabia has launched the risky operation "Decisive Storm" with the military contribution of the United Arab Emirates, Qatar, Sudan, Egypt, and Kuwait, also counting with the support of Jordan, Morocco, Pakistan and Somalia, in addition to the alleged logistical help of the US and of some European countries to protect the population and the legitimate Government of Yemen and to safeguard international legality.

> *IED or a bullet, then single out the disbelieving... Smash his head with a rock, or slaughter him with a knife, or run him over with your car, or throw him down from a high place, or choke him, or poison him. Do not lack»* (al-Adnani, September 22, 2014).

Two months later, the magazine *Dabiq* expressly included references to attacks by its supporters in Australia, Canada and the US, claiming that

> *«All these attacks were the direct result of the Shaykh [Adnani]'s call to action, and they highlight what a deadly tinderbox is fizzing just beneath the surface of every western country, waiting to explode into violent action at any moment given the right conditions. Suddenly the muhajidin of the Islamic State weren't some esoteric concept fighting in a land nobody knew or cared about, they were on the doorstep of millions of people living in some of the biggest, most modern cities in the western world» (Dabiq,* issue 6).

These appeals are further enhanced by the Islamic State's threat to "export" its faithful to other areas and "inside its enemies", such as Europe, taking advantage of migratory flows from Libya…

Regardless of the propaganda content of such statements, the fact is that over the past year multiple events and attacks involving jihadists and "lone wolves" supporting the IS were referenced in dozens of countries – from Afghanistan to Germany, Saudi Arabia, Algeria, Australia, Belgium, Bulgaria, Canada, China, Denmark, Egypt, Spain, US, the Philippines, France, the Netherlands, Yemen, India, Indonesia, Iran, Italy, Japan, Jordan, Lebanon, Libya, Morocco, Nigeria, Pakistan, United Kingdom, Russia, Sudan, Tunisia, Turkmenistan, Turkey and Uzbekistan ... - causing victims around the world and forcing strengthening alerts and counterterrorism efforts.

The expansion of the Islamic State is particularly visible in cyberspace. Of course, as in all other fields and religions, the Internet opens up new horizons for showing different interpretations of Islam (Giunchi, 2014). They are also well-known situations where targeted websites, especially to the Muslim communities, take on special importance in the West, as happened during the "Arab Spring" or, more recently, to combat the ideological propaganda of the IS. But the reality is that the Islamic State is proving to be extraordinarily skilled and versatile in the use of cyberspace and new media, showcasing jihadism on the web. Indeed, the IS displays an effective propaganda machine, terror, radicalization and recruitment, particularly orchestrated by *Al Hayat Media Centre* and its videos and publications (such as the aforementioned official magazine in English "*Dabiq*") but also disseminated by thousands of "fighters "and activists in Syria and Iraq, all posted on the Internet and through virtual social networks, including YouTube, Facebook, Instagram and Twitter.

This is particularly relevant in "attracting" young people, including Westerners: this means that in addition to the "planted cells", terrorists from the "outside" and those

who have obtained their nationality in an opportunistic or fraudulent manner, there is now a stunning number of "express jihadists" who are more or less self-radicalized and were born and raised in "the West"; just as the propaganda, radicalization and recruitment in the mosques, in madrassas and prisons, there are now these activities on the Internet on an unparalleled scale throughout the history of the jihadist movement (Tomé, 2015: 13-14). Therefore, as Jeh Johnson, Head of US Homeland Security, states

> «*we're very definitely in a new environment, because of ISIL's effective use of social media, the Internet, which has the ability to reach into the homeland and possibly inspire others…. We're very definitely in a new phase in the global terrorist threat, where the so-called lone wolf could strike at any moment*» (cit. in ABC News, 2015).

On the other hand, IS supporting hackers, such as the self-called "Cyber Caliphate", have intensified cyber-attacks, aiming at all types of targets, ranging from military commands to government agencies or the media: for example, more than 19,000 cyberattacks hit French websites in the week following the attacks in Paris on 7 and 8 January 2015; on the 12th of the same month, the "Cyber Caliphate" attacked Twitter and YouTube accounts of the US Central Command (CENTCOM), which heads the anti-IS international coalition operations; in February, the same group attacked the websites of the US magazine *Newsweek*; and on 8 April, again the "Cyber Caliphate" attacked the Internet pages, social networks and broadcasts of Francophone *TV5 Monde* television group, whose eleven channels not only failed to broadcast but also showed IS' videos and propaganda messages and threats for a while.

Conclusions

Once established, the IS has intensified its propaganda and its jihadist appeals, encouraging its supporters to travel to defend a mythical "Caliphate", promoting allegiance declarations and local communities to support the IS, and instigating all kinds of attacks to "apostates", "infidels" and enemies of the IS. About a year after its self-proclamation as a "Caliphate", and despite local, regional and international efforts to contain, combat and delegitimize it, the IS has consolidated characteristics as a *de facto* State, expanded beyond Syria and Iraq and became one of the most serious threats to international security, disputing with al-Qaeda the leadership of global jihadism.

Over the past year, the IS has significantly increased the number of militants and also of "foreign fighters" assigned to it, like a true "magnet" never seen before in the history of the jihadist movement. In addition to swelling the ranks of a jihadist and terrorist entity as the IS and contributing to the humanitarian tragedy and barbarity in Syria and Iraq, the threat from the "foreign fighters" phenomenon also brings about the increased risk that they return to their home countries as members of the global jihadist movement after having been indoctrinated and received operational training (from the handling of weapons and explosives to planning operations) and combat

experience, with close ties to terrorist groups and individuals. One quickly realizes the danger that this means. Certainly not all "foreign fighters" in Syria and Iraq are jihadists and not all jihadists are terrorists. Of course, some of the returnees, or those who may return, may be truly repentant or disillusioned and even play a relevant role in IS counter-propaganda. But even in these cases or of others who return with no motivation to jihadism and terrorism (with the obvious difficulty in distinguishing the different situations), there are risks associated with exposure to violence, post-traumatic disorder, depression or social misfit. And there is a risk that, even if they do not plan and carry out attacks, they may at least conduct propaganda, recruitment or terrorist funding activities as well as engage with criminal groups and in criminal and violent activities (Tomé, 2015: 13).

On the other hand, the IS not only continues to control a vast territory and millions of people but also created new *wilayats* beyond Syria and Iraq. It has gathered dozens of other jihadist groups around the world, inspired countless "lone wolves", and multiplied the number of attacks and victims, also expanding humanitarian tragedies in various other areas of conflict – therefore requiring reconfiguring counterterrorism strategies, counter-radicalization, and combating jihadism, and repositioning in various theatres of conflict. Although the scope and the power of IS affiliate groups and *wilayats* vary - finding more resistance in consolidated countries or where jihadism is dominated by AQ – its trajectory demonstrates a particular skill in taking advantage of conflict and state fragile contexts to expand, as shown in Nigeria, Egypt, Lebanon, Libya, Yemen, Pakistan, and Afghanistan. This is also why the rise of the IS has contributed to intensify historic rivalries and sectarian conflict between Sunni and Shiite Muslims in several countries (apart from Syria and Iraq, also in Algeria, Tunisia, Lebanon, Egypt, Jordan, Pakistan, and Yemen) and, collaterally, between regional powers (namely, Sunni Saudi Arabia and Shiite Iran) as well as to strengthen the power and the role of the opposing Shiite militias and to change the volatile connections of jihadist movements and insurgents in various other stages of conflict (as noted in Libya, Lebanon, Yemen and even in Afghanistan).

With the AQ, the IS has oscillated between pragmatic cooperation and fratricidal dispute. But the competition between the two entities in terms of major global "jihadist brand" - as well as regarding financing, jihadist recruits, membership of jihadist groups or the leadership of jihadism in certain places - tends to foster or aggravate violent conflicts and to instigate large-scale attacks on grounds of affirming the supremacy of its respective "omnipresence".

In parallel, the IS has shown an unusual ability to use the Internet and new media for the purposes of propaganda, radicalization, recruitment and terror, in addition to successive and powerful cyberattacks. This aspect, combined with the impressive number of militants, "foreign fighters", jihadist groups and jihadist "lone wolves" it succeeds in attracting, makes the IS a threat not only to the communities that it directly dominates and victimizes in Iraq and Syria but also to the security and stability of neighbouring countries and many others throughout the world.

In other words, the Islamic State is currently a more serious, more diffuse and more complex threat than a year ago. It truly represents the jihadist threat post Al-Qaeda, for which reason the former counterterrorism strategy may not be sufficient to combat it, as argued by Audrey Kurth Cronin (2015).

The "military victory" over the IS may even be the simplest to achieve, despite the constraints arising from the regional complex situation: after all, the IS has a territorial base where it can and must be fought and it shows a level of barbarism to which the international community, starting with Islamic countries, cannot be indifferent. Moreover, it is present in fragile and unstable states that must be stabilized quickly, and exploits conflicts that need to be urgently contained under penalty of opening the door to the expansion of the IS. However, given the position that the IS has reached, combating the Islamic State is also ideological and has now become global. The anti-IS strategy may not be uniform and requires multiple approaches, multiple instruments, and multiple fronts based on multiple vectors. And it should not be reactive because the IS has become one of the biggest disturbing phenomena to international security and stability and also an "internal" threat in many societies all over the world. On the other hand, the fight against the IS cannot neglect the fight against al-Qaeda or facilitate the strengthening of the latter or its affiliates - because the AQ is no less dangerous than the IS, has proven to be astute in its metamorphoses and has the same goal of creating its own "Caliphate".

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Notes and Reflections

THE PROSECUTOR IN INTERNATIONAL CRIMINAL JUSTICE[1]

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Justice is an indispensable ingredient in the process of national reconciliation. It is essential for the restoration of peaceful and normal relations among people who have had to live under a reign of terror. It also breaks cycles of violence, hatred and extra-judicial retribution. Thus, peace and justice go hand in hand.

Antonio Cassese, former President of the ICTY

The duties and powers of the Prosecutor in international criminal justice to some extent can be nominally equated to the Prosecutor at a domestic level. However, there are substantial and methodological difference. The challenges posed in the investigation and prosecution of large-scale crimes and massive criminal violations committed years ago in a sovereign foreign country are unique. Thus, it is both remarkable and surprising that the legal tools of investigation available to the international Prosecutor have produced results that one can observe and quantify. Although challenges still remain, the work of the Prosecutor in international criminal justice is a considerable achievement in the fight against impunity for serious violations of Human Rights and International Humanitarian Law.

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[2] Article written as part of the research project "International Criminal Justice: A Dialogue Between Two Cultures", in progress at the Observatory of External Relations (OBSERVARE/UAL), coordinated by Mateus Kowalski and Patrícia Galvão Teles.

1. Introduction

The theme "the Prosecutor in international criminal justice" is part of the "international criminal justice" project that aims to bring together researchers, experiences and methodologies that can be found in International Relations and International Law.

Some people know the duties, powers and functions of the Ministério Público (MP) [3] at a national level, though few have a good understanding of what the Prosecutor in international criminal justice entails. The very name of the position causes some confusion due to its similarities with near national equivalents (the attorney of justice, the justice promoter, the public prosecutor, the deputy prosecutor, the prosecutor of the Public Prosecutor's Office, General Prosecutor). In today's world, the magistrate usually refers to the exercise of judicial power, and has the ability and prerogative to judge according to the constitutional rules and laws created by the legislature. The notion of *magistracy*, which in some places includes judges and prosecutors, is unknown as such in countries that have adopted common law, which extend these constitutional guarantees only to their judges, and where the word *magistrate* has a different meaning. The Portuguese magistrates (judges and prosecutors) enjoy the constitutional guarantees of life tenure.

2. The national constitutional framework

Knowing the duties, powers and functions of the MP in the national framework can help to better understand the institutional identity of the Prosecutor in international criminal justice.

All organisation and jurisdiction of the MP is the remit of the Assembly of the Republic. Article 163 of the Constitution states the

> *"Assembly of the Republic, with regard to other entities, is responsible for... electing in accordance with the proportional representation system... members of the High Prosecutorial Council".*

Article 165 establishes that:

> *"1. It is the sole responsibility of the Assembly of the Republic to legislate on the following matters, unless it authorises the Government to do so: ...*
>
> *p) organisation and jurisdiction of the courts and Ministério Público as well as the status of the corresponding judges and prosecutors and non-judicial bodies for alternative dispute resolution."*

[3] The Ministério Público is the constitutional organ empowered to start investigations on criminal violations and institutes criminal proceedings before criminal courts. The term equates, more or less, to the French Ministere Public and the English State Prosecutor's Office, Chief Prosecutor's Office or Attorney General.0

In the terms of Article 219 (1):

> *The Ministério Público represents the State and safeguards the interests prescribed by law, takes part in the enforcement of the criminal policy as defined by the sovereign bodies, carries out the prosecution according to the principle of legality, and defends democratic legality.*

Article 219 (2) also confers that the MP's has its "own statute" and "autonomy".

Article 219 (4) states that

> *"officials of the Ministério Público shall be accountable judicial officers, shall form part of and be subject to a hierarchy and shall not be transferred, suspended, retired or removed from office except in cases provided for by law".*

Article 219 (5) establishes that

> *"[t]he appointment, assignment, transfer and promotion of officials of the Ministério Público and the exercise of discipline over them shall be the responsibility of the State General Prosecutor's Office".*

On the other hand, Article 220 of the Constitution states that

> *"[T]he State General Prosecutor's Office shall be the highest authority of the Ministério Público"*

and that:

> *State General Prosecutor's Office shall be presided over by the State Public Prosecutor and shall contain the High Prosecutorial Council, which shall include members elected by the Assembly of the Republic and members whom the public prosecutors shall elect from among their number.*

These constitutional provisions derive some fundamental rules and principles that sustain the operation of the MP. They are the principles of autonomy, independence and legality of prosecution.

Article 2 (2) of the MP's Statute[4] provides that

> *"the autonomy of the public prossecutors is characterised by it being bound by legality and objectivity criteria and by the exclusive submission of public prosecutors to the directives, orders and instructions laid down by the [Statute]".*

In fact, the MP enjoys autonomy not only in relation to central, regional and local authorities, but also in relation to the judiciary. Firstly, the autonomy of the MP means that it takes no orders or instruction from central, regional and local authorities, nor can they influence its governance or administration. Secondly, the autonomy of the MP means that officials are organic and functionally separated from the judiciary, giving the MP a prerogative of stability identical to that of judges.

Thus, the MP is a constitutional body of justice organised as an independent procedural body in two ways: in terms of independence from political power in the exercise of prosecution and in terms of being separated from, and parallel to, the judiciary.[5]

Consequently, the MP is autonomous in the exercise of its duties, powers[6] and functions. This principle is based on the idea that no crime should go unpunished and, therefore, that the MP is legally obliged to act.

The principle of legality of criminal prosecution is reflected in the obligation of the MP to prosecute, provided that it has been informed of the crime and there are no obstacles preventing it from acting. This principle has a democratic character and meets the requirements of social defence in that it subjects the public body's actions to law. Thus, the action is imposed on the State not as a mere power, but as an obligation to carry out one of its essential purposes, which is to maintain and reintegrate the legal system. Therefore, the MP has the duty to prosecute without being led by political criteria of opportunity or social utility.

Prosecution is thus the most important function of the MP.[7] Moreover, the gradual democratisation of criminal proceedings has imposed the accusatorial principle that places the MP in a position of near monopoly in the exercise of prosecution.

As mentioned earlier, the State General Prosecutor's Office is the highest authority of the Ministério Público, which is organically and functionally independent. The independence of the MP lies in an organisational-institutional framework through which interference, dependences or limitations regarding other state powers such as the President, the Assembly of the Republic and the Government are neutralised.

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4 Approved by Law no. 47/86 of 15 October, republished in Law no. 60/98 of 27 August, and changed by Laws 42/2005 of 29 August, 67/2007 of 31 December, 52/2008 of 28 August, 37/2009 of 20 July, 55-A/2010 of 31 December and 9/2011 of 12 April.

5 This view is reaffirmed in several parts of Criminal Procedure Law when stating the principle of objectivity (Article 53), by applying to magistrates of the MP the provisions concerning impediments, refusals and excuses of judges (Article 54), when making it compulsory for the MP to investigate *à charge* and *à décharge* (Article 262), by exempting the MP from the rules on the conduct of lawyers and defenders (Article 326), and recognising the right to appeal in the sole interest of the accused (Article 401).

6 Article 3 of the MP Statute specifies its duties and Paragraph 3 states that "in the exercise of its duties, the Ministério Público is aided by justice officers and criminal police bodies, and has access to advisory services".

7 The magistrate is a speaking law, and the law is a silent magistrate (Cicero).

Moreover, Article 219 (4) of the Constitution states that

> *"Ministério Público agents are accountable and subject to hierarchy".*

Hierarchical subordination means that MP[8] agents receive orders and instruction from the State General Prosecutor's Office, which seems to contradict the MP's principle of independence. It is necessary to note that the independence that characterises the structure and functioning of the MP, which every MP agent benefits from, is a functional independence that has to be seen in light of the MP's unity and indivisibility.

Indeed, the agents that comprise the MP are under the aegis of a single higher body, the State General Prosecutor's Office,[9] to the extent that the MP appears as a single institution, with the division being essentially functional. Thus, the principle of unity has an administrative character. The organisation of the MP into various sectors only intends to establish a rational division of labour; however, all agents in the different sectors are guided by the same principles and goals, thus constituting a single institutional body.

The indivisibility of the MP is a direct consequence of its unity. Thus, a MP agent can be replaced by another without any practical implications, since acts are regarded as practised by the MP and not by a single individual. The entity that is present in all cases is the MP, albeit through a given agent. The term "representative of the Ministério Público",[10] therefore, is not technically correct when referring to MP agents.

This principle allows MP agents to be replaced by another during cases. However, the replacement cannot be made arbitrarily: it has to be done in line with terms provided by law (in case of promotion, transfer, suspension, dismissal, retirement, death, etc.), without constituting or implying any procedural change. Incidentally, Article 4 of the Statute envisages that

> *"agents of the Ministério Público can be replaced according to the provisions of this law".*

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8 Article 8 (Agents) of the MP Statute states:
1 — The agents of the MP are:
a) The General Prosecutor;
b) The Deputy General Prosecutor;
c) The Assistant General Prosecutors;
d) The Prosecutors;
e) The Assistant Prosecutors.

9 Article 7 (Organs) of the MP Statute
The bodies of the MP are:
a) The State General Prosecutor's Office;
b) The District General Prosecutor's Offices;
c) The State Prosecutor's Offices.

10 Article 4 (Representation) of the MP Statute:
1 — The MP is represented before the courts:
a) In the Supreme Court of Justice, the Constitutional Court, the Supreme Administrative Court, the Supreme Military Court and in the Court of Auditors, by the State General Prosecutor;
b) In High Courts and the Central Administrative Court, by Assistant General Prosecutors;
c) In Courts of First Instance, by prosecutors and Assistant Prosecutors.

Thus, the principle of functional independence means that MP agents act independently in the exercise of their duties. They base their conduct on law and personal conviction, and may refuse to comply with illegal directives, orders and instructions on the grounds of them being a serious violation of their legal conscience. Accordingly, the hierarchical subordination of MP agents exists only at an administrative level, not functionally.

In short, the autonomy of the MP is characterised by its links to legality and objectivity criteria and by the exclusive subjection of agents of the MP to directives, orders and instructions provided by law.

3. The international institutional framework

Introducing and reviewing the national constitutional framework of the MP and its agents can help understand the role of the Prosecutor in international criminal justice as perceptions are usually preceded and influenced by perceptions of the national justice. Identity and the institutional framework in which the Prosecutor stands internationally will be examined below in order to understand the evolutionary process and historical circumstances behind the positon's existence, as well as its importance today.

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia

In 1993, the UN Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY).[11] The sheer scale of human rights violations in Bosnia and Herzegovina – think of the images of destroyed cities and people looking like cadavers in the death camps of Omarska, Keraterm and Trnopolje[12] – generated huge international outcry and prompted the international community to embark on its first course of international criminal justice since the Nuremberg and Tokyo trials.

Article 16 of the ICTY Statute states that:

> *The Prosecutor shall be responsible for the investigation and prosecution of persons [allegedly] responsible for serious violations of international humanitarian law... The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.*

[11] On 25 May 1993, the UN Security Council formally adopted Resolution 827, establishing the International Criminal Tribunal for the former Yugoslavia, known as the ICTY. This resolution contained the ICTY Statute, which determined the Court's jurisdiction and organisational structure as well as criminal proceedings in general terms. This was the first war crimes tribunal established by the UN and the first international court of war crimes since the Nuremberg and Tokyo trials. This date marked the beginning of the end of impunity for war crimes in former Yugoslavia.

[12] This situation was tried at the ICTY, Kvočka et al. (IT-98-30/1) "Omarska, Keraterm & Trnopolje Camps"; in the BiH Court, Mejakić et al. (IT-02-65) "Omarska and Keraterm Camps".

A similar decision was made with regard to the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), according to Article 15 of the ICTR Statute. Paragraph 3 of the Article states that

> *"the Prosecutor of the International Criminal Tribunal for the former Yugoslavia shall also serve as the Prosecutor of the International Criminal Tribunal for Rwanda".*[13]

As shown in Articles 16 and 15 of the Statutes of the ICTY and ICTR respectively, the Prosecutor is independent and does not seek or take instruction from any government or international organisation, or from any of the other two organs of the Court. The ICTY Prosecutor's Office is mandated to investigate and prosecute those presumed responsible for serious violations of International Humanitarian Law (IHL) committed in the territory of the former Yugoslavia.[14]

> *[In early 1994] the Office of the Prosecutor has had to invent itself. Starting from nothing... a staffing plan was first formulated and qualified and experienced staff were recruited. Then an information management and litigation support system was developed... Following the work of the investigators, the final stage of the Prosecutor's task begins with the framing of indictments and the ensuing trial process*.[15]

Indeed, the ICTY Prosecutor's Office investigated many of the worst atrocities that have taken place in Europe since World War II – such as the 1995 Srebrenica massacre – and has prosecuted civilian, military and paramilitary leaders for crimes and atrocities. In 2011, the last two accused by the ICTY Prosecutor, Ratko Mladić and Goran Hadžić, were arrested and transferred to a UN detention centre in The Hague after many years on the run, thus ensuring that none of the 161 individuals accused went unpunished.[16]

The Prosecutor's Office is headed by a Prosecutor appointed by the UN Security Council for a renewable term of four years. A Deputy Prosecutor is appointed by the UN Secretary General.

In accordance with the Resolutions of the Security Council and the Statute of the Tribunal – notably pursuant to Chapter VII of the UN Charter – UN Member States are obliged to cooperate with the Prosecutor's Office in the investigation and prosecution of persons accused of committing serious IHL violations.

The Prosecutor's Office was organised into an investigation division and a prosecution division. The latter had three sections: trial, appeal, and information and evidence. The

[13] For this reason, only the Prosecutor of the ICTY is mentioned here.
[14] Since 1 January 1991.
[15] ICTY *Annual Report*, A/49/342, S/1994/1007, of 29 August 1994.
[16] In accordance with the Tribunal's completion strategy, the final charges were issued in late 2004.

Prosecutor's Office employed staff (such as police officers, investigators, forensic experts, analysts, lawyers, trial lawyers and legal advisers) from approximately 80 countries, whose experiences with national systems were combined into a single system of international criminal procedures.

When the ICTY began its pioneering work of investigating and prosecuting perpetrators of serious IHL violations, the statute only gave the Prosecutor the power to "initiate investigations" and "to question suspects, victims and witnesses, collect evidence and conduct investigations on the ground".[17] Unlike the criminal codes of national legal systems, the ICTY Statute contains a rather limited set of legal tools to investigate and prosecute crimes in the jurisdiction of the International Tribunal.

The situation that the ICTY Prosecutor faced in carrying out the mission was completely different from the one Prosecutor Robert Jackson met in the Nuremberg Tribunal. In the latter case, the accused were within reach, the archives were open and the witnesses were available; in the former Yugoslavia, everything took place at a distance (between The Hague and Belgrade, Sarajevo and Zagreb) and within sovereign countries that were unwilling to detain suspects or cooperate with the Prosecutor.

At the beginning in 1994, even those who encouraged and supported the establishment of the ICTY doubted that it would have any impact or success. Almost twenty years later, its jurisprudential legacy and its effect on peace and reconciliation remain a topic of vibrant academic debate. For the ICTY, it is generally accepted that there is a before and after, with new precedents being set for international law, international criminal justice and international humanitarian law.

Indeed, with the establishment of the ICTY, the UN Security Council hoped to deter civilian and military officials of the former Yugoslavia from committing further atrocities, sending a clear message that those responsible for atrocities would be brought to justice. Unfortunately, the establishment of the ICTY had little or no deterrent effect, with the Srebrenica massacre in July 1995 – the greatest crime of all in the armed conflict – occurring after the tribunal had been established. Following Srebrenica, the Prosecutor filed charges and arrest warrants were issued against the Bosnian Serb leader Radovan Karadžić and his Chief of General Staff, General Ratko Mladić. Again, many doubted that they would ever face justice; however, they were arrested and transferred to The Hague's detention centre in 2008 and 2011 respectively.

The ICTY was created in May 1993. The conflict began in 1991 and ended in December 1995 with the Dayton Accord. Even before that date, and during the conflict, the Prosecutor sent several investigation teams to Bosnia and Herzegovina (BiH).

In 1996, the Bosnian Serb Duško Tadić became the first to be tried for war crimes and crimes against humanity at the ICTY. This case was an important sign that the Tribunal would prosecute the perpetrators of serious international crimes. The evidence and testimonies collected for the trial of Duško Tadić proved to be very useful in the Prosecutor's guidance for other cases, a bottom-up approach that culminated on 28 June 2001 with the arrest of former President Slobodan Milošević.

[17] The statute is silent as to how to accomplish these tasks and by what means. In fact, there are more paragraphs in the Statute on the appointment and qualification of the judges than on skills and research tools.

The ICTY created a large and rich body of jurisprudence that decisively influenced international criminal justice and which, to a large extent, has been adopted by the International Criminal Court (ICC). For approximately two years (1996-1997), the Prosecutor investigated the July 1995 Srebrenica massacre. On 2 November 1998, the Prosecutor filed an indictment. The trail started on 13 March 2000 and ended on 2 August 2001. The trial took place over 98 days, with hearings lasting five hours a day. Being a first for European history, the July 1995 Srebrenica massacre was judged by the Tribunal as genocide.

The most immediate goal of the ICTY was to end impunity and prosecute those presumed responsible for the most serious crimes in the former Yugoslavia. Another more ambitious and long-term goal was to contribute to peace and reconciliation in the region and provide resolution for victims and their families.

The Prosecutor of the International Criminal Court

On 17 July 1998, the international community reached a historic landmark when 120 States adopted the Rome Statute, through which the ICC Statute was approved. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries, including Portugal.

One of the ICC organs is the Prosecutor's Office, which is responsible for receiving reports of the crimes that fall within its jurisdiction, examine them and eventually institute criminal proceedings.

The roots of the ICC Statute are close to those of the ICTY and the ICTR, although there are differences regarding several legal and structural characteristics. In fact, the ICC is a permanent judicial body with universal reach[18] and its activity complements that of national courts.[19] The ICTY and the ICTR are subsidiary bodies of the UN Security Council; the ICC was established and is maintained by the Assembly of States Parties, who acceded to the Treaty of Rome. The UN Security Council appoints the Prosecutors of the ICTY and the ICTR; in the case of the ICC, the Prosecutor is elected by States party to the Treaty of Rome. One of the major differences in the two *ad hoc* tribunals is the possibility for victims to appear before the ICC to express their opinions and to claim reparation for the injustices they have suffered.[20]

The Court's exercise of jurisdiction is dependent on referrals being made to the Prosecutor by a State Party or by the UN Security Council, whenever one or more crimes have been committed within its jurisdiction (Article 13 of the ICC Statute). Information received by the Prosecutor about crimes committed within the Court's

[18] The ICTY and ICTR are *ad hoc* tribunals with limited territorial and temporal jurisdiction. It can be said that the ICC is forever and for all. The difference between *ad hoc* and permanent justice was and still is a major obstacle to the ratification of the Rome Statue by some countries, which, having supported *ad hoc* justice solutions (in the case of some countries and if deemed convenient), are reluctant to support a permanent justice solution (for all and on every occasion).

[19] The jurisdiction of the ICTY and ICTR is concurrent with that of national courts and has primacy over national courts. The ICC operates on the principle of complementarity, i.e. exercising jurisdiction only when national courts are unwilling or unable to genuinely investigate and prosecute.

[20] In the former Yugoslavia and Rwanda tribunals, victims stood before the courts as witnesses. However, in the ICC Statute, victims were elevated to the category of procedural participants in their own right. Indeed, several provisions in the ICC Statute stipulate the involvement of victims at all stages of the proceedings. Most importantly, victims of international crimes can claim redress for violation of their rights.

jurisdiction may lead to the initiation of an investigation by itself if it is believed that there are sufficient grounds to do so and if the Pre-Trial Chamber's permission to start the investigation has been obtained (Article 15 of the ICC Statute). When conducting investigations, the Prosecutor has to trigger some preliminary decision on admissibility to ensure the functioning of the complementarity principle of intervention (Article 18 of the ICC Statute). That is,

> *"it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" (Preamble of the ICC Statute)*;

the Prosecutor may start criminal proceedings only if the State is genuinely unable or unwilling to investigate and prosecute.

The Prosecutor may, as a rule – only once and before the trial or at its commencement – ask the ICC to rule on issues related to jurisdiction and admissibility. If it is decided that an inquiry is to be transferred to a State, the Prosecutor may request the State in question to pass on information about the progress of the proceedings. This information should be kept confidential if the State so requests. If the Prosecutor thereafter decides to open an investigation, the decision must be shared with the State in question (Article 19 of the ICC Statute).

Article 42 of the ICC Statute, in its nine paragraphs, presents the ICC Prosecutor's Office as acting autonomously from the Court. It is chaired by the Prosecutor and assisted by one or more Deputy Prosecutors, who must be highly competent individuals of high moral character with extensive practical experience in the prosecution or trial of criminal cases. The Prosecutor is elected by the members of the Assembly of States Parties through a secret ballot and must gain an absolute majority. The Prosecutor and the Deputy Prosecutors are subject to the exclusivity rule and they may be subject to disqualification if their impartiality is in question.

A Victims and Witnesses Unit, established within the ICC Registry, takes protective measures and prepares security arrangements. It also provides counsel and other assistance to witnesses and victims who appear before the Court, or others at risk (Article 43 of the ICC Statute).

The Prosecutor appoints

> *"such qualified staff as may be required to [its] respective [office]", namely, investigators. In the employment of staff, the Prosecutor ensures the "highest standards of efficiency, competency and integrity".*

In exceptional circumstances expertise of seconded personnel offered by States Parties, intergovernmental organisations or non-governmental organisations may be employed (Article 44 of the ICC Statute).

The Prosecutor, Deputy Prosecutors and staff from the Prosecutor's Office, when engaged in the business of the Court, enjoy privileges and immunities that are necessary to the fulfilment of their duties (Article 48 of the ICC Statute). The primary function of the Prosecutor is to investigate and prosecute the perpetrators of massive violations of human rights and IHL.

It is possible to discern some similarities between the prosecution of massive crime violations internationally and the prosecution of organised crime at a national level. There are also important differences that make the types of procedure dissimilar. At least two in international prosecution stand out. The first has to do with a lack of external administrative structure able to carry out investigations in the territory of a State without its help – as well the absence of an international police force to make arrests, giving paramount importance to the State's cooperation.[21] The second is that the procedural model of international criminal tribunals is a combination of elements of the accusatory system (common law) and the inquisitorial system (civil law).

Several concepts and procedures from both legal traditions can be found in the Statutes of the Courts and the Procedure and Evidence Rules; in the approach of the Prosecutor, judges and defence lawyers; in the introduction of evidence; and the manner in which the case is conducted in general.

As a result of that combination of elements of the different legal systems, some general principles are acquired in relation to the international rules of evidence: national rules of evidence not binding, application of the rules of evidence which best favor a fair determination of the matter, admissibility of any relevant evidence with probative value, exclusion of evidence if its probative value is substantially outweighed by the need to ensure a fair trial, possibility of verification of the authenticity of evidence obtained out of court and reception of the evidence of a witness orally or, where the interests of justice allow, in written form[22]. Further examples of that combination in the production of evidence are the testimony of the accused[23] and a statement of the accused[24] (common law), and the possibility for the Court *proprio motu* to summon witnesses and order their attendance[25] (civil law).

Still, some methods commonly used in national criminal proceedings may be of use internationally, such as resorting to "insiders" as witnesses. Although national systems are aware of this practice, it may have a particular meaning in the context of the prosecution of international crimes, especially when the accused enjoy top hierarchical positions. It may also be relevant in certain forms of criminal participation (such as joint criminal enterprise). The testimony of an insider in a case of joint criminal enterprise is one of the best ways to prove the purpose of the criminal enterprise and its members. Insiders can and should be used in complex criminal cases, because finding evidence of a complex criminal organisation and its leaders can be difficult and consuming in terms of time and resources.

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21 Section 9 of the ICC Statute provides for international cooperation and judicial assistance of the States Parties. Article 86 (General Obligation to Cooperate) establishes that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

22 Rule 89 of ICTY Rules of Procedure and Evidence. See also Article 69 of the ICC Rules of Procedure and Evidence.

23 Rule 85 C of ICTY Rules of Procedure and Evidence

24 Rule 84 bis of ICTY Rules of Procedure and Evidence

25 Rule 98 of ICTY Rules of Procedure and Evidence

Although similar investigating tools or legal concepts can be used nationally, unique challenges arise when investigating and prosecuting international crimes. Some are obvious, such as a lack of police or enforcement officers; others are less obvious, such as the impact of the combined common law/civil law process.

Such challenges have an impact on the type of investigation methods, the recruitment of personnel as well as the legal tools used and their effectiveness. Only a mix of traditional and innovative criminal investigation tools and a balance of the different national legal cultures can ensure effective investigation and prosecution of international crimes.

Similar to what had happened with the ICTY, the ICC adopted the accusatory model, which is one of the fundamental pillars on which all functions and activities of the Prosecutor stand. Thus, it is up to the Prosecutor to investigate *à charge et à dècharge* suspicions of the existence of crimes and, where appropriate, indict suspects. However, there are at least three important exceptions in the accusatory model.

Firstly, as at Nuremberg and Tokyo, there are no technical rules for the admissibility of evidence. Consequently, all relevant evidence may be included in the process unless their probative value is substantially offset by the need to ensure a fair trial or if the evidence was obtained through serious violations of human rights.

Secondly, while in the accusatory system courts must normally be satisfied with the evidence submitted by the parties, the Court may *proprio motu* order the production of additional evidence. This allows the Court to be fully satisfied with the evidence on which it bases its final decisions. It was considered that, in the international sphere, the interests of justice are best served by this provision and that the decrease, if any, of the rights of the parties is minimal by comparison.

Thirdly, the granting of immunity and plea-bargains have no place in the Rules of Procedure and Evidence. It remains entirely a matter for the Prosecutor to determine whom to investigate and to prosecute. Cooperation of an accused person will also be taken into account as a mitigating circumstance, as well as for the purpose of granting pardon or commutation of the sentence. The Prosecutor's Office operates independently from the Court's judges. There is, however, a close and cooperative relationship between the Prosecutor’s Office and the rest of the Court in administrative, personnel and other issues related to the functioning of the Court as a whole.

The selection of personnel is a demanding and time-consuming exercise. It is no exaggeration to note that the success of the Court as a whole depends largely on the quality of the Prosecutor's Office investigation staff. Having experienced and qualified prosecutors is important: If the prosecution evidence is not exhaustive, relevant and complete – or is insufficiently prepared – the risk of failure of the charge is high, given the principle of *in dubio pro reo* and the requirement of evidence beyond reasonable doubt.

The ICC Prosecutor, as in other cases, governs actions through the principle of mandatory prosecution whenever there are elements of criminal conduct and action must be taken, and when not acting is not an option. There is no police force at an international level. Thus, the Prosecutor must rely on the support of State police in carrying out investigation, accusation and prosecution functions. There is no

international enforcement body, but the Prosecutor can count on numerous other investigation mechanisms, be them governmental or not.

The Prosecutor's Office is one of the organs that make up the Court (Article 34 of the ICC Statute). Article 42 of the ICC Statute guarantees its functional autonomy, stating that the Prosecutor "shall act independently as a separate organ of the Court". The Prosecutor is responsible for receiving, through any suitable form, *notitia criminis* about crimes within the jurisdiction of the ICC and then investigates and institutes criminal proceedings.

The Prosecutor may also propose amendments to the Elements of Crimes (Article 9 (2) of the ICC Statute) and the Rules of Procedure and Evidence (Article 51 (2) c) of the ICC Statute). For an independent and impartial ICC, the Prosecutor enjoys privileges and immunities in carrying out duties in the territory of each State party (Article 48 of the ICC Statute).

The Prosecutor's Office is headed by a Prosecutor (who holds full directive and administrative powers) and assisted by dedicated Deputy Prosecutors of different nationalities, working on a full-time basis.

4. The Prosecutor and international criminal procedure

The international criminal procedure is different from the national in several ways. One of the most striking differences is the symbolic function of international criminal procedures, which are deemed essential to the peace and reconciliation process in post-armed conflict societies; in other words, there can be no peace without justice and reconciliation. "Thus, Peace and Justice go hand in hand" (Antonio Cassese).

However, this is only possible when the communities involved give legitimacy to these procedures, and when the messages of the procedures are received and accepted by their communities. Thus, if courts are to contribute to peace and reconciliation in affected communities, there is a need to communicate with the people involved. Although much progress has been made over the past decade, outreach programmes remained a significant challenge for *ad hoc* tribunals and still remain for the ICC.

In addition to these external communication obstacles, there are also internal barriers. On the one hand, there are those who repeatedly ask for more resources to enable the court to achieve their ambitious goals. On the other hand, others question whether it is appropriate for prosecutors and judges to be involved in dissemination activities. After all, the international criminal courts are modelled on national courts, which, as a rule, do not have such a role.

Domestic prosecutors and judges focus mainly on the technical elements of crimes and procedural aspects of the case. In addition to the application of the law, any activity is considered to be "political" (a taboo term). Nevertheless, it should be pointed out that the rhetorical functions of international criminal law are fundamentally different from nation legislation. There are important reasons for international courts to carefully manage public evaluation and their image, which incidentally should also be done at a national level.

International criminal justice is still in its infancy. The ICTY, as the first *ad hoc* tribunal in recent history, was established only two decades ago. Unlike domestic criminal law

that could be centuries old in terms of history and jurisprudence, there is still a lack of understanding about what purpose the international criminal tribunals serve. The ICC also remains either unknown or unaccepted in many parts of the world.

Besides this alienation and ignorance, international criminal justice is normally intended for communities with little previous experience of an impartial and independent judiciary – otherwise they would be willing and able to investigate and prosecute the crimes by themselves. It is therefore important for international criminal law to establish a new beginning for these communities and to be an example to the national courts. This is only possible if the public has a positive and fair view of international criminal courts.

International criminal justice essentially covers genocide, crimes against humanity and war crimes. Of course, communities devastated by these crimes are traumatised, fearful, eager to find a culprit, and take revenge. In turn, in most cases, local politicians and media agitate these feelings, jeopardising the peace and reconciliation process, with no other help being available, except the intervention of international courts. National criminal law seeks mainly to punish and prevent crimes; international criminal law is intended to also contribute to peace, reconciliation, security and the wellbeing of the international community.

Being a case of massive violations of human rights and international humanitarian law, the Srebrenica massacre presented exceptional legal and logistical challenges due to the large number of victims, witnesses, forensic investigations, incidents and supporting documents involved,[26] as well as the original legal complexities of the various crimes in question.[27]

The ICTY and the ICTR were created as auxiliary bodies to the UN, which until then had never practised international criminal justice. Therefore, the need to strike a balance between the priorities of criminal operations, the detention of suspects and compliance with other UN principles posed legal, institutional and operational challenges specific to the Prosecutor in terms of fulfilling mandates to investigate crimes and initiate criminal proceedings before the Court. These challenges increase with the complexity of crimes, their size, the safety concerns of potential witnesses, and the fact that in the early years arrests of suspects often preceded the investigation.[28]

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[26] In the first instance, and after much filtering in the preparation for trial, the case had 103 witnesses called by the Prosecutor; 13 witnesses called by the Defence (including the very General Radislav Krstić). The Prosecutor filed 910 documents (some of which extensive dossiers) and the Defence presented 183 documents.

[27] See ICTY, KRSTIĆ (IT-98-33) "SREBRENICA DRINA CORPS" and other related cases: BLAGOJEVIĆ & JOKIĆ (IT-02-60) "SREBRENICA; ERDEMOVIĆ (IT-96-22) "PILICA FARM"; KARADŽIĆ (IT-95-5/18) "BOSNIA AND HERZEGOVINA" & "SREBRENICA"; MILOŠEVIĆ (IT-02-54) "KOSOVO, CROATIA AND BOSNIA"; MLADIĆ (IT-09-92) "BOSNIA AND HERZEGOVINA" & "SREBRENICA"; NIKOLIĆ MOMIR (IT-02-60/1) "SREBRENICA"; OBRENOVIĆ (IT-02-60/2) "SREBRENICA"; ORIĆ (IT-03-68); PERIŠIĆ (IT-04-81); POPOVIĆ et al. (IT-05-88) "SREBRENICA"; STANIŠIĆ & SIMATOVIĆ (IT-03-69); TOLIMIR (IT-05-88/2) "SREBRENICA"; TRBIĆ (IT-05-88/1) "SREBRENICA".

[28] When investigating and prosecuting massive violation of human rights or international humanitarian law, it is extremely important to first investigate suspected violations, then jointly indict the suspects who participated in the same criminal action, and arrest the accused in an organised manner. Those suspected of having committed war crimes are heroes to the other side of the conflict and keep communication lines and networks of relationships that can disrupt investigations, destroy evidence, intimidate witnesses, and organise escape from detention.

5. Some questions

Genocide, crimes against humanity and war crimes are, by definition, massive. International crimes can be widespread and systematic, with multiple offenders and victims. Thus, perpetrators are often coordinated and organised by senior military and/or civilian officers. Their nature requires national jurisdictions to have a different approach in terms of "selecting", investigating, indicting, proving, adjudicating, defining responsibilities, punishing, repairing, and enforcing penalties.

In short, this means that criminal theory built on common cases of individual criminal offense is unsuitable in cases of massive criminal violations. In all, prosecuting war crimes is not the same as dealing with common individual criminal cases.

In addition, a national court with jurisdiction to try war crimes must regard the cases as urgent and recognise their international impact, considering the circumstances and nature of violations of IHL. In fact, war crime trials must be timely, given the requirements of peace and reconciliation processes, and conducted by independent and impartial judges. National judges, even if they have not taken up arms in conflict,[29] in a sense have always taken the side of a party in the conflict. In principle, those who took part in a conflict cannot be completely independent and impartial or, at least, cannot be publicly perceived as such. Justice must be done and must be seen to be done.

Is there a need for strategy in the prosecution and trial of war crimes? The answer is clearly yes. The Prosecutor must act with a view of closure and completion considering that: war crimes are usually committed in the past; most criminal operations have been investigated and documented by different public and private entities; the majority of suspects have been identified; there is a risk of losing evidence; fatigue and a lack of witnesses motivation increases over time; new generations are more focused on the future; expeditious and fair trials are the only way to close the door to the past and open the door to the future[30]; and justice is about the past and reconciliation is about the future.

After considering these points, the Prosecutor is asked how many cases to investigate and prosecute and what strategy (selecting and mapping cases, establish interactive and centralised databases, and deduce accusations) [31] is being considered. The Prosecutor also needs to take into account available resources (human, financial and material) and organise interaction in order achieve the common goal of closing the door to the past.

The joint criminal enterprise is particularly applicable in circumstances when senior leaders share the intent of committing a crime and each contributes to fulfilling the

[29] Most armed conflicts that took place after World War II were not international conflicts, but civil wars. Thus, the public perception of independence and impartiality of the Court becomes even more important and decisive. Without this dimension, trials, regardless of how fair and fast they may be, will have no effect and impact on the peace and reconciliation process of communities.

[30] In Sarajevo (2008) diplomats said that the issue of "war crimes" in Bosnia was poisoning the political, social and economic environment, as well as personal relationships. It was necessary to clean up this type of poison and close the issue of war crimes as quickly as possible.

[31] See the Office of the UN High Commissioner for Human Rights, Rule-of-Law tools for post-conflict States, Prosecution initiatives, UN, New York and Geneva, 2006.

criminal purpose. The relationship among perpetrators may or may not be hierarchical, although this is not decisive.[32]

It is the practice of joint murder with shared intention that defines relationships. Even if perpetrated by others, enterprise members, and not necessarily those individuals who physically carried out the crimes, are culpable. The concept reflects a reality where large-scale atrocities are committed by the combined action of various forces or agents, and criminal purpose can only be shared by leaders who take action to achieve their ends.

In August 2003, the Security Council issued Resolution 1503, urging the ICTY to "focus on the prosecution and trial of senior leaders suspected of being responsible for crimes within the jurisdiction of the ICTY" and transfer other cases to competent national courts in Bosnia, Herzegovina, Croatia and Serbia.

The transfer of a case from an international to a national court proved to be a complex subject and raised a series of new legal and organisational issues that were difficult to foresee and solve. However, the efficient and effective manner in which the War Crimes Section of the Court of Bosnia and Herzegovina – in cooperation with the ICTY – handled the situation should be stressed.[33]

Other legal principles that were also developed as a result of the transfer process also deserve analysis. They include the development of the ICTY and Court of Bosnia and Herzegovina Prosecutors' cooperation mechanisms, the notion of "proven facts" and "documental evidence" from the ICTY proceedings. These developments contribute to the heritage of the ICTY, leaving a lasting legacy for future national courts dealing with international crimes. Despite the different legal natures of the ICTY and the ICC, this experience can be seen as supplementing the principle of complementarity and constitutes critical learning for the future relationship between international and national criminal jurisdictions.

One of the pre-project objectives of investigation in "International Criminal Justice" is "to bring about new proposals for some of the problems that currently arise in the context of international criminal justice".

Given the above, and particularly due to the nature of war crimes, some relevant questions regarding the work of the Prosecutor in international criminal justice will need to be asked in the hope that they will translate into new proposals for some of the problems that currently arise from international criminal justice.

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[32] On the contrary, the hierarchical relationship is crucial for assessing and establishing the responsibility of the superior, be it civil or military, i.e. *de jure* or *de facto* responsibility.

[33] The case of Radovan Stanković was the first to be transferred from the ICTY to the War Crimes Section of the Court of Bosnia and Herzegovina. On 10 July 2002, he was placed in custody in the ICTY detention unit. On 1 September 2005, the ICTY decided to transfer the case to the Court of Bosnia and Herzegovina, and on 29 September 2005, the accused was transferred to Bosnia and Herzegovina. On 7 December 2005, the indictment was confirmed/accepted. This was also the first "11bis case" finalised in the Court of Bosnia and Herzegovina. In fact, on 14 November 2006, the first trial sentenced Radovan Stanković to crimes against humanity and imposed a prison sentence of 16 years. On 28 March 2007, the Board of Appeal modified the sentence to 20 years. Other cases transferred from the ICTY to the Court of Bosnia and Herzegovina were Ljubičić (IT-00-41) ''Lašva Valley''; Mejakić et al. (IT-02-65) "Omarska and Keraterm Camps"; Stanković & Janković (IT-96-23/2) "Foča"; Todovic & Rasevic (IT-97-25 /1) "Foča"; Trbic (IT-05-88/1) "Srebrenica"; Stanković & Janković (IT-96-23/2) "Foča" ; Todović & Rašević (IT-97-25/1) "Foča" ; Trbić (IT-05-88/1) "Srebrenica"

Accordingly, what will be the impact on court independence and impartiality, at least in terms of public perception especially in cases of non-international armed conflict?

What criminals and crimes should be tried? How should charges of large-scale international crimes be addressed? How should cases that are investigated and submitted to trial be selected when it is impossible to try all those presumed as responsible for the crimes committed in armed conflicts?

What form of criminal responsibility (individual, command or joint criminal enterprise) does the Prosecutor choose to accuse suspects of having committed massive violations?

How should evidence be collected and taken to trail in order to build a case, given that under certain circumstances it is not possible to gather modern evidence (i.e. wiretapping, pictures, video and audio records). What if the investigation depends on the cooperation of States that are not always willing to collaborate?

What about victims and witnesses? How should reparations for victims be determined? What contribution, if any, does national law make to the process? Which concept of reparation should be used, given that not all people displaced by conflict return home? Should reparation mean collective reparation or a reconstruction of life?

How should investigation and prosecution at an international and national level should be combined, given that international crimes contain general (chapeau elements, e.g. widespread or systematic attacks) and more specific elements (underlying criminal offences, e.g. murder)?

How should the proven facts be transferred from the international tribunal to the national court and how should technical and human resources and criminal investigation materials be shared?

What kind of evidence has proved to be useful in rendering serious IHL violations? What are the challenges affecting the collection of relevant evidence? How should the presentation of evidence, including collecting and stabilising witness testimony in order to be used in different processes be optimised? For example, why subject a victim of rape to different testimonies in different cases in different places on different dates? Is it necessary and permissible to traumatise victims on behalf of justice and reconciliation?

What are the most effective means of dealing with the external factors that influence the investigation and prosecution of suspected IHL violations?

6. Conclusion

The Prosecutor in international criminal justice is an organ that is part of the International Criminal Court. To some extent, duties and power nominally equate to those at a national level; however, such powers and tasks differ substantially and methodologically in the framework of international criminal justice. Experience required nationally does help, but is clearly not enough for an efficient and effective performance of duties at an international level. A special requirement is having a good understanding of the dynamics of massive criminal violations and, consequently, approaches to investigation, prosecution and some specifics of international criminal proceedings.

The challenges posed in the investigation and prosecution of large-scale crimes or massive criminal violations committed years ago in a foreign sovereign country are unique. Thus, it is both remarkable and surprising in many ways that tools of investigation available to the Prosecutor have produced results that one can see and quantify. It is important to remember that these legal tools were developed in an environment with contributions from common law and civil law systems, and were always geared towards answering the essential question of how to execute a fair and expeditious trial. Although challenges remain, the work of the Prosecutor in international criminal justice is a considerable achievement in the fight against impunity for serious violations of human rights and international humanitarian law.

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