

Articles

Ricardo Real P. Sousa - *Genealogy of behaviourist peace research* - pp. 1-22

Gilberto Carvalho de Oliveira - *Pacifist approaches to conflict resolution: an overview of the principled pacifism* - pp. 23-43

Teresa Almeida Cravo - *Peacebuilding: assumptions, practices and critiques* - pp. 44-60

Patrícia Galvão Teles - *The ICC at the centre of an international criminal justice system: current challenges* - pp. 61-73

Susana Abelho - *Yanukovych's decision to postpone the signing of the agreement with the EU: a poliheuristic analysis* - pp. 74-87

Miguel Santos Neves - *Economic diplomacy, geo-economics and The external strategy of Portugal* - pp. 88-118

Pedro Velez - *Constitution and religiosity of/in the constitutional order of the National Socialist Empire* - pp. 119-142

GENEALOGY OF BEHAVIOURIST PEACE RESEARCH

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Abstract

This paper presents the behaviourist “non-normative” Peace Research (PR) tradition with two objectives. One objective is to locate this field in relation to closely related fields of research. PR specificity is: the dependent variable of peace and conflict when compared with Political Science and International Relations; the normative concern with the causes of war when compared with Strategic Studies; and the rejection of the “practicality” of research and a restraint on normativity when compared with Peace Studies (defined as peace research, peace teaching and peace action) and Conflict Resolution. Also, PR is considered here as one of the sub-fields of International Security Studies. The second objective of the paper is to present the history of PR. Since its creation in the 1950s, with a focus on inter-state conflict as an alternative to Strategic Studies, PR had two defining periods: one in the late 1960s labelled as the “socialist revolution”, with the conceptualisation of peace as more than the absence of war (positive peace) and a challenge for normativity in research; and a second period in the 1980s that brought the broadening of the referent object to intra-state conflict and liberal peace, and the emergence of other social sciences dedicated to the study of issues in, or close to, PR, broadly defined as security with some of them adopting a normative stance in research. The epistemological community of PR kept its behaviourist approach in spite of these two normative challenges, and its distinctiveness and unity is much due to its method.

Keywords

Normativity; Peace Studies; Peace and Conflict Studies

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GENEALOGY OF BEHAVIOURIST PEACE RESEARCH ¹

Ricardo Real P. Sousa

Introduction²

This paper presents more than 60 years of Peace Research (PR) evolution and has two main objectives. The first objective is to identify major changes to what PR studies and how it is studied. This is done with reference to the behaviourist PR approach, which is considered as the backbone of this paper.³ We share King et al.'s (1994) perspective that the characteristics of good research include: making descriptive or explanatory inferences on the basis of empirical information; research that uses explicit, codified and public methods to generate and analyse data whose reliability can be assessed; qualitative and quantitative methods that are necessarily imperfect and, therefore, the conclusions are uncertain; and the "unity of all sciences consists alone in its method, not in its material" (Pearson, 1892, p. 16). These characteristics minimise the normative bias or influences of the researcher on knowledge.

There are three defining periods in PR.⁴ PR starts in the late 1950s in the aftermath of the behaviourist revolution that is characterised by a focus on the causes of inter-state violent conflict (deadly conflict normally associated with war) researched through behaviourist approaches, with the predominance of Political Science.

In the late 1960s peace is conceptualised as more than just the absence of war by distinguishing between war (violent conflict), negative peace (the absence of violent conflict, but where non-violent conflict is present) and positive peace (the removal of structural or cultural violence, absence of violent and non-violent conflict with non-violent means of conflict resolution) (Galtung J. , *Violence, Peace and Peace Research*, 1969). This is a period with a predominance of Political Science and Economy where there is a claim for the use of normative approaches in what has been labelled the "socialist revolution" (from 1968 to 1978) (Gleditsch N. P., 2008).

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² I would like to thank comments by Luís Moita, Carlos Branco and two anonymous referees; any remaining errors are my own. The term "genealogy" in this article refers to the study of the origins and development of Peace Research and is not used in the sense that Michel Foucault uses it, which is as a historical approach to research with an underlying critique of the present.

³ See David Easton (1965) for a classical definition of the behaviouralists approach.

⁴ Gleditsch (2008) identifies four periods in PR: the pre-history before 1959; the behavioural revolution between 1959 and 1968; the socialist revolution between 1968 and 1978; the wilderness years between 1979 and 1989; the post-Cold War years and liberal peace; and a question mark on the topic of the "clash of civilizations" since 2001.



In the late 1980s PR broadens its focus to intra-state conflict and liberal peace and is challenged by a set of new disciplines that study peace and conflict and more broadly defined security through different ontological and epistemological approaches. Broadly speaking, from the 1980s onwards a distinction can be made between the behaviourist PR committed to rationalism and positivism and the new disciplines following reflectivism and post-positivism. In this period PR is multidisciplinary.

Table 1: Periods of Peace Research

	Late 1950s–late 1960s	Late 1960s–late 1980s		Late 1980s onwards	
What is studied <i>(dependent variable)</i>	Inter-state (nuclear) conflict	Inter-state conflict	Positive and Negative Peace and structural violence	Inter- and intra-state conflict	Liberal Peace
How it is studied <i>(method of research)</i>	Behaviourist	Behaviourist	Behaviourist and Normative	Rationalist Positivist (behaviourist)	
Disciplines	Political Science	Political Science and Economics		Multidisciplinary	

The second objective of the paper is to identify the main characteristics of PR vis a vis closely related fields. PR is considered distinct from Political Science and International Relations (IR) due to its exclusive focus on the dependent variable of peace and conflict.⁵ The main distinction between PR and Strategic Studies is the former's normative⁶ concern with the causes of war. PR's distinction from Peace Studies and Conflict Resolution is its restraint on the "practicality" and normativity of research. Finally PR is considered as one of the sub-fields of International Security Studies (ISS).

The article starts by identifying PR's distinction in relation to other fields, then each of the three periods of PR identified in Table 1 are presented. The article concludes with a brief overview of the contemporary focus of research in PR.

Positioning Peace Research

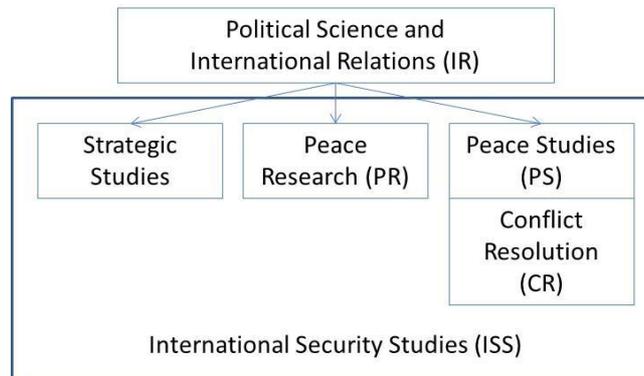
The academic boundaries of PR are not easily drawn, especially in relation to closely related areas of research: Political Science, International Relations, International Security Studies, Strategic Studies, Peace Studies and Conflict Resolution.

⁵ The dependent variable is the phenomenon being under research that is "dependent" on other factors to explain it – the independent variable(s).

⁶ This normativity (values the researcher brings to the research) occurs at the level of selecting the research question and not in the research method, which is neutral. In this way it is different from the normativity of the "socialist revolution" or of post-positivism and reflectivism, as presented ahead in the paper, which are more critical and reflective with researchers identifying values and preferences in research questions as well as research methods.



Picture 1: Positioning Peace and Conflict Studies⁷



Political Science is a core discipline with a focus on politics: the exercise of power within and by the state. But it is with its sub-discipline of IR – also referred to as International Politics – that the first academic discipline is created in order to systematically study the exercise of power between states, in particular the causes of conflict and prospects of peace. The Woodrow Wilson chair of International Politics created in 1919 is a landmark reference in the establishment of IR as an academic discipline. PR is an offspring of IR that emerges in the 1950s as an alternative way of thinking to the dominant field of Strategic Studies.⁸

Political Science, IR and PR are multidisciplinary, have common epistemological approaches, recognise agency for both state and non-state actors, can use the same levels of analysis (micro, macro, meso levels) and share similar issue areas (economics and politics, global governance, terrorism, international organisations, among others).

The main distinctive feature of PR in relation to Political Science and IR is that peace and conflict is a main dependent variable, even if it has different conceptualisations and proxies for peace and conflict. In Political Science and IR there can be other dependent variables, such as finance and economics, development, sustainability, environment, justice, ethics, civil society or democracy. An additional distinction is that Political Science deals primarily with intra-state processes and IR deals primarily with inter-state processes, while PR deals with both.

The scope of the two leading journals in PR are illustrative of this focus. The American-based *Journal of Conflict Resolution (JCR)* calls for papers on “the causes of and solutions to the full range of human conflict . . . [with a focus on] conflict between states and within states, but also explores a variety of inter-group and interpersonal conflicts that may help in understanding problems of war and peace.”⁹ The European-based *Journal of Peace Research (JPR)* has “a global focus on conflict and peace-making . . . [and] encourages a wide conception of peace, but focuses on the causes of violence and conflict resolution”.¹⁰

Strategic Studies became institutionalised post-Second World War based on the classical realist approach of war studies, military strategy and geopolitics. The main actor is the

⁷ Because PS and CR share the questions that structure ISS (see below) they are represented as part of ISS.

⁸ See Viotti and Kauppi (2012) and Dunne et al. (2013) for reviews of IR theories.

⁹ <http://jcr.sagepub.com/> consulted on September 5, 2016.

¹⁰ <http://jpr.sagepub.com/> consulted on September 5, 2016.



state and the statesman primary objective is to secure the survival of the state – state sovereignty - which is pursued through diplomatic or military means. The main threat to the state is not internal but external and is a result of the fact that states live in an anarchical world system characterised by the absence of a supra-national authority to regulate the conflicting interests of states.

At its inception, PR shared many characteristics of Strategic Studies, in particular its focus on inter-state conflict and the use of a behaviourist approach. The main distinction between the two is the different normative underpinnings. Strategic Studies dealt with the issue of achieving victory or avoiding defeat mainly through the use of military force, while PR deals with the issue of identifying the causes of conflict.¹¹ In the early days of PR its focus on peace per se is influenced by Marxist concerns with structural social injustice, but it would later become primarily characterised by influences from liberal traditions and democratic peace theory.

Table 2: Peace research and related traditions

Strategic Studies <i>(1950s onwards)</i>	PR <i>(1950s onwards)</i>	Peace Studies <i>(1970s onwards)</i>	Other social sciences <i>(1980s onwards)</i>
Game theory, formal models, mathematics	Mainly economics and politics but also other social sciences Conventional constructivism from the 1980s onwards	Sociology, psychology, anthropology, politics, economics, conflict resolution, trans-disciplinary	Critical constructivism, the Copenhagen School, critical studies, feminism, human security, strategic studies, post-colonialism, poststructuralism
How to win or not lose a war?	What are the causes of war?	How to transform war into positive peace through research, teaching and action?	What forms of power relations exist (and how to overcome them)?
Non-normative, positivist, rationalist		Normative, post-positivist, reflectivist, participative action research	Normative, post-positivist, reflectivist,
Focus on explaining the phenomenon in order to be able to predict and control it		Focus on understanding or reconstruction of the phenomena, its critique and transformation, and restitution and emancipation.	

ISS (or security studies) is a sub-field of IR that emerged after the Second World War and is characterised by three novelties: a conceptual shift from war and defence to security (broadening the set of relevant political issues); a concern with Cold War issues and in particular nuclear weapons; and the relevance of civilian expertise (physicists, economists, sociologists or psychologists) in studies of war. During the first decades of the Cold War ISS could be distinguished from IR by its focus on the use of force in international relations as consubstantiated in the field of Strategic Studies. From the late 1960s onwards the agenda of ISS broadens and security increasingly becomes not only about politics and the military – the “use of force” – but also about economics, the

¹¹ For this reason, it is called “Peace Research” instead of “Peace and Conflict Research”.



environment and society. ISS' main distinction from IR becomes its focus on the concept of international security (Buzan and Hansen, 2009).

Buzan and Hansen (2009) identify four questions that structure ISS: whether to privilege the state as the referent object; whether to include internal as well as external threats; whether to expand security beyond the military sector and the use of force; and whether to see security as inextricably tied to a dynamic of threats, dangers and urgency. All these concerns are closely matched with the concerns of PR. Defined this way, ISS is an "umbrella label to include work of scholars who might refer to themselves as being in . . . 'peace research', or various other specialised labels" (Buzan and Hansen, 2009: 1). Therefore, PR is a sub-field of ISS alongside other approaches to security.

PR is also intrinsically conceptualised and associated with peace action and peace education, a triad referred to as Peace Studies (PS). PS is defined as related to

the human condition in general, concerned with our fulfilment... as humans through positive peace, and the reduction of suffering... through negative peace, regardless of how the causal chains or circles and spirals, or what not, spin or weave their ways through the human manifold (Galtung J. , 2010, p. 24).

PS can be characterised by: transdisciplinarity in integrating different disciplines of social sciences (for instances sociology, psychology sociology, political science, economics); trans-level by relating micro, meso, macro, mega levels of analysis; trans-border, where no geographical region or system should dominate; empirical but equally critical and constructive in solutions; and practical, implemented by scholars and practitioners (Galtung J. , 2010; Galtung J. , 2008).¹²

PS' origins can be symbolically associated with the ground-breaking work of its "father", Johan Galtung, which was started in 1958. But normative work on peace and its promotion precede this decade, particularly within religiously inspired scholarly work and action.

PS scholars and practitioners engage in experiential, participative action research that "affirms the primary value of practical knowing in the service of human flourishing" (Heron & Reason, 1997, p. 1) and they have a compromise with transformative emancipatory action for the realisation of human potential. Emancipatory action follows a non-violent approach, either in the form of principled pacifism such as with Mahatma Gandhi and Martin Luther King, or in the form of pragmatic pacifism as identified in Gene Sharp (1971) (Oliveira, 2016).

The aims and scope of the journal of *Peace and Change* are illustrative of the focus of PS:

¹² Two of the organizations that combine at least two corners of the research triad, teaching and action (consultancy), are TRANSCEND (the Transnational Foundation for Peace and Future Research), founded by Johan Galtung, and INCORE (the International Conflict Research Institute).



*Peace and Change publishes scholarly and interpretive articles on the achievement of a peaceful, just, and humane society. International and interdisciplinary in focus, the journal bridges the gap between peace researchers, educators, and activists. It publishes articles on a wide range of peace-related topics, including peace movements and activism, conflict resolution, nonviolence, internationalism, race and gender issues, cross-cultural studies, economic development, the legacy of imperialism, and the post-Cold War upheaval.*¹³

Some scholars would consider Conflict Resolution (CR) as a sub-field of PS. Generally speaking PR, PS and CR share the normative commitment that solutions to the causes of conflict are to be found through non-violent means – “peace by peaceful means”. Therefore, conflict, and particularly violent conflict, is considered the malady to be eradicated, both as an end and as a means.

CR as a field of study started around the same period as ISS and PR. In the 1950s and 1960s scholars start studying conflict as a specific phenomenon in international relations, domestic politics, industrial relations, communities and families and individuals.¹⁴ Research or practice in CR is conducted by, or is much closer to, the actual actors of the political process – very often in long problem-solving workshops or mediation initiatives. Since its inception CR has been defined as: multilevel; multidisciplinary, multicultural, analytical and normative as well as theoretical and practical (Ramsbotham, Woodhouse, & Miall, 2011).

The practical and normative foundations of PS and CR for the transformation of war into sustainable peace are in tension with behaviourist academic considerations over scientific method. Peace and conflict scholars would also become split over these issues in the “socialist revolution”. Behaviourist PR scholars recognise that academic research should be relevant to world affairs, but at the same time that knowledge can only be reached following specific scientific requirements that guarantee objectivity and cannot be compromised by the practicability or applicability of knowledge. Generally speaking, these scholars focus on identifying the causes of war firstly as a contribution to knowledge and only after with a concern for its subsequent use in public policy. In the early years of the *JPR* there was a requirement for articles to have a final section with policy recommendations, but the requirement was soon abandoned because the policy produced had little relevance when considering that it was not the focus of the article but a sub-product (Wiberg, 2005). Also, behaviourist PR scholars consider that normative considerations over what is good and bad should be circumscribed – if considered at all – to the choice of subject (the research question) and that the research process should be neutral to political influences. Finally, PR scholars opt for a multidisciplinary that follows the established scientific methods of research of each discipline instead of the transdisciplinarity advocated in PS.

¹³ [http://onlinelibrary.wiley.com/journal/10.1111/\(ISSN\)1468-0130/homepage/ProductInformation.html](http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1468-0130/homepage/ProductInformation.html), accessed September 27, 2016. The journal *Peace and Conflict Studies* is also defined along the same lines as the definition of Peace Studies.

¹⁴ For an account of CR’s evolution see Kriesberg (2009) and Ramsbotham, Woodhouse and Miall (2011).



Normative PS and CR scholars (and practitioners) consider that one can never be politically neutral and value judgements over what is good and bad underpin not only the research question but also permeate through the research process. Because researchers are bound to have values, they have some individual responsibility for the practical implications of the research. Therefore, the researcher is morally bound to be practical, which may mean engaging in policy prescriptions and, in some cases, policy implementation.

It is this normativity and concern with research applicability or practicality that most distinguishes PS and CR from PR. See Table 3 for a resume of the distinctiveness of PR.

Table 3: Distinctiveness of Peace Research vis a vis other approaches

	Peace research	Political Science/ International Relations	Strategic Studies	International Security Studies	Peace Studies	Conflict Research
What it studies:						
Peace and Conflict	x	x	<u>x</u>	x	x	x
Other focus		<u>x</u>				
How it is studied:						
Neutral/objective	x	x	x	x		x
Normative/subjective		x		x	<u>x</u>	x
Practice					x	<u>x</u>

Note: Neutral/objective refers to the focus of the research on "how things are". Normative/subjective refers to the focus of "how things should be". Underlined crosses identify the distinctiveness of the approach in relation to PR. For Strategic Studies the underlined cross with a dot in "Peace and Conflict" refers to different concerns about the same dependent variable. We follow Buzan and Hansen (2009) characterisation of ISS.

Late 1950s to late 1960s

PR's inception is associated with the development of an epistemological community of scholars, in both the US and Europe, which systematically studied peace and conflict through a behaviouralist approach.

By the 1950s and 1960s the behaviouralist approach had enough advocates for it to be considered that a "second great debate" within IR was occurring, which opposed "traditionalist" and "behaviouralist" approaches.¹⁵

Traditional scholars followed the approach of classical political philosophy based on historical interpretations, legal philosophy or theories of causality related to unobservable dynamics of human nature. Scholars are considered as inevitably normative in research, used mainly qualitative methods and there was no requirement for theories to be validated by empirical evidence.

Behaviouralist scholars defended a more objective, neutral (non-normative) and empirical research that could rationally account for the "observed" behaviour of states (or other actors). They defended the adoption of methodologies from the natural sciences, in particular its focus on hard theory, quantification and identification of

¹⁵ The main references of the debate are the critique of behaviourism by Bull (1966) and its defense by Kaplan (1966).



causality. This was considered as the “scientific” revolution, which gained expression in realist and liberal IR traditions as well as in PR.

One of the theoretical developments of the behaviourist approach was to conceptualise three levels of analysis to identify the causes of war: the individual, the national state and the international system (Waltz K. N., 1959; Singer, 1961).

The individual level focuses primarily on human nature and on individual political leaders and their belief systems, psychological processes, emotional states and personalities. The nation-state (or national) level includes factors such as the type of political system (authoritarian or democratic, and variations of each), the structure of the economy, the nature of the policymaking process, the role of public opinion and interest groups, ethnicity and nationalism, and political culture and ideology. The system level includes the anarchic structure of the international system, the distribution of military and economic power among leading states in the system, patterns of military alliances and international trade, and other factors that constitute the external environment common to all states (Levys, 2011, p. 14).

The PR epistemological community was mainly Western (North America, West Europe and Japan) with the two most significant initiatives coming out of Michigan in the United States and Oslo in Norway.¹⁶

At the University of Michigan in the United States Kenneth Boulding and a group of academics founded in 1957 the multidisciplinary, empirically focused, *Journal of Conflict Resolution*,¹⁷ started in 1959 the Centre for Research on Conflict Resolution; and in 1964 the Correlates of War (COW) project started, headed by J. David Singer and Melvin Small, which begins to systematically collect data on inter-state and extra-systemic conflict.¹⁸ The COW project would set the standards for much of the empirical work in the area of conflict developed ever since.

In Oslo, Norway, the Peace Research Institute Oslo is established in 1959 and the *Journal of Peace Research* is founded in 1962. Johan Galtung was an instrumental founder of both and his work in the 1960s would conceptualise “peace” in a way that can be considered to have led to the first challenge in PR and the birth of PS.

The choice of “conflict” in Michigan and “peace” in Oslo reflects the controversy surrounding the word “peace”. Not only were “Peace” movements seen, at the time, as upholding Soviet interests, but “peace” also was perceived as detached from the “hard

¹⁶ For a more complete review of the emergence of institutional initiatives in this field see Buzan and Hanse (2009).

¹⁷ Emanating out of the Center for Advanced Studies in Behavioural Sciences established in Stanford in 1954. From 1971 onward the journal is based at Yale University.

¹⁸ The interstate datasets are first published in 1972. Previous work collecting quantitative data on conflict had relied mostly on individual initiatives such as Sorokin (1937), Wright (1942) or Richardson (1960). Extra-systemic conflicts refer to colonial wars of independence.



politics” of conflicts. Institutes established ever since would opt for a focus on peace and/or conflict, often reflected in their designation.

Late 1960s to late 1980s

In 1969 Johan Galtung redefined the concept of positive and negative peace (proposed in 1964), introducing the distinctive concept of structural violence. Negative peace is defined as the cessation of direct violence (war resulting from violent conflict by actors), while positive peace is defined as the removal of “structural violence” – a concept close to social injustice where violence is not actor oriented but resulting from the structure of the social system. Initially focused on economic inequality, structural violence would also come to be associated with violence in social and cultural systems. Furthermore, achieving positive peace does not mean only the cessation of conflict but also the management of conflict through non-violent means.

Table 4: Negative and Positive Peace and War

Positive Peace	Negative Peace	War
Non-violent conflict		Violent conflict
Social Justice	Structural violence	Direct violence

Source: Based on Pfetsch and Rohloff (2000, p. 382)

This is a significant conceptual shift from the traditional focus on conflict to a focus on the conditions of peace. The referent object is changed to human collectivities (instead of states), allowing for an analysis of conflicts not only at the inter-state level but also at the intra-state and trans-state level. Also, it focuses not only on the military sector as a source of violence but also on economic sectors. This conceptualisation establishes a link between the classical liberal idealist tradition and the Marxist tradition (Buzan & Hansen, 2009) and has been labelled as the “socialist revolution” in PR (Gleditsch N. P., 2008).

The concept of negative peace is criticised for still being defined in relation to conflict (as the negation of conflict) and for being of a less urgent character than war. While the concept of “structural violence” in positive peace is criticised for being too broad and loosely defined (Boulding, 1977).¹⁹

The concept of structural violence was “an academic tool to shift focus away from the exclusive attention given to East-West conflict towards North-South conflict.” (Gleditsch, Nordkvelle, & Strand, 2014, p. 148). This reflected shifting concerns in Europe where post-Second World War concerns with economic reconstruction and growth were followed in the 1960s by concerns over justice, autonomy and equality, also in relation to the post-colonial world (Kriesberg, 2009). This political period, sometimes referred to as “1968”, is characterised by the US war in Vietnam, the USSR invasion of Czechoslovakia and civil society movements – in particular student protests in the US, Europe and some Eastern European countries (Wiberg, 2005).

The scholarship following this approach was mainly located in Europe, labelled as the maximalist or structuralist European approach, and some work would go into the

¹⁹ The concept of structural violence would be applied in several areas: development studies, imperialism, domestic conflict, environment, human rights and economic exploitation (Buzan & Hansen, 2009).



operationalisation of “structural violence” for empirical and statistical validation, among them Wallesteen’s (1973) research relating trade structures with war structures (Wiberg, 2005). In North America, scholars maintained a focus on studying (the causes of) war, labelled as the pragmatist approach.

The broadening of the referent object would be reflected in the *JCR* and *JPR*. The *JCR* enlarges its focus in 1973 to not only deal with interstate war and nuclear (deterrence and disarmament) issues but also justice, equality, human dignity, ecological balance and intrastate conflict (Russett & Kramer, 1973). In the *JPR*, structural violence and positive peace would gain a significant expression in the 1970s and 1980s (Gleditsch, Nordkvelle, & Strand, 2014).

Structural violence was also an epistemological shift by Galtung, abandoning the initial non-normative, behavioural and empiricist “invariance seeking” orientation, concerned with “what reality is” (adopted until 1958), in favour of a normatively oriented “invariance breaking” research, concerned with the search for another reality - “the potential”. In structural violence, violence is defined as the cause of the difference between “the potential and the actual, between what could have been and what is” (Galtung J. , 1969, p. 168). This normative commitment anticipates the new epistemological approaches that emerge in the 1980s with reflectivism and post-positivism, and it particularly influenced feminist studies and critical theory (Pureza, 2011).

This epistemological change occurs in the context of a plural-peace activist movement, that is some groups influenced by Marxism (mostly of a Maoism inclination), which considered the neutral tone of behavioural science unacceptable (Gleditsch, Nordkvelle, & Strand, 2014). By the end of the 1960s, peace activists would be divided not only in methodological issues but also in substantive positions. Some peace researchers and idealists recognised the legitimacy of Soviet concerns while traditional IR and PR scholars focused on the maintenance of liberal democracies. In both Europe and the United States, a debate emerged over the possible use of overt conflict in situations when marginalised groups challenge the status quo in search for a more just and lasting peace following the revolutionary Marxism-Leninism (Rogers & Ramsbotham, 1999). For some the use of violence was in contradiction with what PR meant – that is the transformation of war into non-violent political processes – even if only reaching a “negative peace”. North-South structural violence was the non-violent emancipatory compromise proposed in this debate, a characteristic of the evolutionary Marxism of social democracy.²⁰

The normative challenge would divide peace and conflict researchers to this day into two epistemological communities with little cross-fertilisation. “Non-normative” positivist researchers (following the behaviourist tradition) – here defined under the umbrella of PR – are more associated with the Peace Science Society (founded in 1963 by Walter Isard) in the United States and the International Studies Association and journals like the *JCR* and *JPR*.

More normative researchers and activists, here defined in the umbrella of PS, are associated with International Peace Research Association (established in 1965) and journals like *Peace and Change*, *Peace Review* or the *Journal of Social Justice*.²¹

²⁰ For more details see Schmid (1968).

²¹ The defining events of this split occurred over the position of scholars on the Vietnam War debated in two conferences, one in 1968 in the United States and another in 1969 in Copenhagen (Gleditsch, Nordkvelle, & Strand, 2014). The Peace Studies section is created in International Studies Association in 1972.



Although both approaches have led to research and teaching programmes in academia, the scientific orientations of PR's behaviourist approach lead to its recognition within scientific research evaluations, while the normative PS is less recognised scientifically but more recognised at a grassroots level.²²

The conceptual and normative challenges in the "socialist revolution" of the 1970 lead to a period of conceptual overstretch. Gleditsch (2008) characterises PR in the 1980s as the "wilderness years" – weak methodologies and peace being anything – a "black hole" where "no social problem . . . does not have its legitimate place within peace research" (Tromp, 1981, p. xxvii).

Late 1980s onwards

With the novelty of the Cold War gone and the realisation that humankind had learned to live with the threat of nuclear war, in the 1980s PR was further questioned. The mainstream concept in PR during the Cold War defines the state as the referent object, is mainly concerned with the use of force and focuses on external threats to be dealt with through emergency measures studied through non-normative positivist, rationalist epistemologies (Buzan & Hansen, 2009).

The broadening of PR in the 1980s relates mainly to the nature of threats, considering internal alongside external threats. Other types of internal violence are considered, like democides, and the *JPR* expands its focus to terrorism, police and paramilitary repression, and to issues of injustice in the division of labour both internationally and nationally. *JCR* reflects an interest in intrastate conflict, including it within the scope of the journal, and the COW project publishes its first intra-state conflict dataset in 1982.

In the post-Cold War era intrastate conflicts become the most relevant type of conflict, with a peak of occurrences in 1991. Two debates are illustrative of the research focus, one on the initiation of civil war and another on the nature of war.

The debate on the initiation of civil war opposes the feasibility of conflict hypothesis to the grievances of groups' hypothesis. The feasibility hypothesis suggests that civil war is more likely to occur if it is financially and military feasible, with factors of economic greed also found to be significantly associated with the initiation of civil war (Collier, Hoeffler, & Rohner, 2009). The grievance hypothesis suggests that horizontal inequalities²³ are a significant predictor of rebellion (Buhaug, Cederman, & Gleditsch, 2014), building on the longstanding research linking conflict to ethnic groups.

The debate on the nature of civil war relates to the distinction between "old" and "new" wars (Kaldor, 1999).²⁴ Old wars were: fought by regular armies over geo-political issues or ideology, aimed for the control of territory, and were financed by states. While new wars involve more state and non-state actors (regular armed forces, private security contractors, mercenaries, jihadists, warlords, paramilitaries); are fought in the name of identity (ethnic, religious or tribal); are not characterised by battles but by territorial

²² The 2015 SCImago Journal Rank that measures the scientific influence of scholarly journals lists *JPR* and *JCR* in the top quartile, while of the three normative journals mentioned only *Peace Review* is listed in the fourth quartile.

²³ Where inequality, social exclusion and poverty occur in tandem with identity or regional boundaries.

²⁴ Other classifications include: wars among the people (Smith, 2005), wars of the third kind (Holsti, 1996), hybrid wars (Hoffman, 2007), privatisation of wars (Munkler, 2005) or post-modern wars (Hables Gray, 1997).

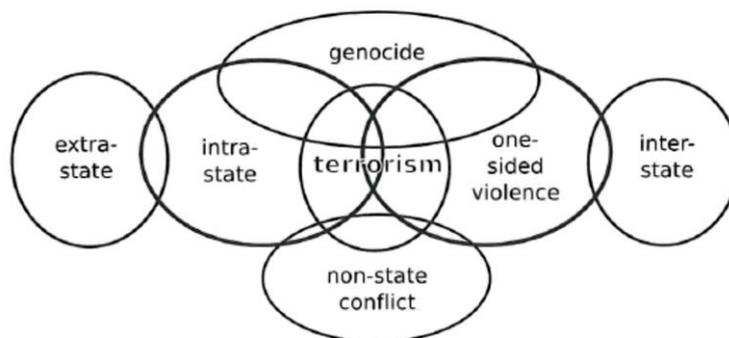


control achieved through population displacement; and are financed through a myriad of different sources of revenue secured through continued violence (looting, pillaging, “taxation” of humanitarian aid, diaspora support, kidnapping or smuggling of oil, diamonds, drugs or people) (Kaldor, 1999; 2013).

Dataset projects followed the changing patterns of civil wars and technological advancements in data gathering. Among others, The Minorities at Risk project, initiated by Ted Gurr in 1986, provides information on politically active ethnic groups and the University of Uppsala in Sweden developed the one-sided violence dataset in 2007²⁵ and non-state violence dataset in 2012²⁶ – both closer to “new” war characteristics – adding to the established state-based violence dataset (intra-state)²⁷ first released in 2002, which is closer to the concept of “old” wars. Although state-based conflict continues to be the most deadly type of conflict, other types of violence have become more recurrent. For instance there is a stable increase in the number of ongoing non-state based conflicts, with its ratio in relation to state-based conflict increasing from 1.07 in 2011 to 1.4 in 2015 (Melander, Pettersson, & Themnér, 2016). See Picture 2 for a typology of armed conflict.²⁸

Data coding has become ever more disaggregated due to new technologies: in terms of the identification of the actors involved; geographically going below the state level to be geo-coded to the village level; and temporarily moving from the year unit to the individual days of events – the Uppsala Conflict Data Program’s Georeferenced Event Dataset is a prime example (Sundberg & Melander, 2013).

Picture 2: Typology of armed conflict



Source: Eck (2008, p. 35)

The economic agenda of PR proposed by the “socialist revolution” in the 1970s is partly taken over in the field of Development Studies and International Political Economy, and

²⁵ Where violence by the state or non-state groups targets civilians.

²⁶ Where violence occurs between non-state groups.

²⁷ Where violence occurs between the state and non-state groups.

²⁸ Extra-state conflicts are wars of colonial independence. There are a series of other violent events in conflict that are not identified in the picture: riots, violent demonstrations, repression, indirect violence against civilians, organized crime, gang wars, warlordism, banditry, assassinations (Eck, 2008).



in the 1980s PR becomes characterised by the apprehensions of political science (Gleditsch N. P., 1989).²⁹

The study of peace within PR is mostly represented by research on liberal peace, where it is proposed that democracy and justice are essential for sustainable peace within and between nations. The idea is that democracies are more responsible to citizens who are less keen to engage in inter-state wars than their leaders and that democracies have mechanisms to deal with intra-state conflict in a peaceful manner. The democratic peace theory debate was opened with the proposal that democratic states are unlikely to go to war with each other (Doyle M. W., 1983; 1986), but 20 years on the debate is still not settled (Doyle M. , 2005; Rosato, 2003).

Broadly speaking, PR outlived the end of the Cold War (associated with the fall of the Berlin Wall in 1989) and its focus would adapt to the new reality. The *JPR* in the 1990s and 2000s would focus on the classical issues such as the reduction of armed violence and shifts attention from inter-state to intra-state civil war, other forms of internal conflict and the democratic peace debate. In the 2000s, in both the *JPR* and *JCR*, there is a growing interest in human rights, democratic peace and peacebuilding/peacekeeping, and both journals kept publishing game theory and formal modelling. The focus continues to be on conflict with articles in 2000 with the word "conflict" having above-average citations and the word "peace" being less cited than the average in the *JPR* (Gleditsch, Nordkvelle, & Strand, 2014).

A new debate that attracted significant attention, both in academia and in the public sphere, was if with the end of the Cold War meant that the liberal democratic peace agenda had become the "only game in town" to the point of being identified as an "end of history" moment (Fukuyama, 1989), or if the sources of conflict would now come from a "clash of civilizations" (Huntington, 1993) based on religious and cultural identities.

A development of the 1980s, and of the post-Cold War era in particular, is the increase of epistemological approaches in the social sciences. Two main dichotomies grouped the different approaches: the rationalist versus reflectivist and the positivist versus post-positivist.

Kehoane (1988) proposed a distinction between the rationalist and reflectivist approaches. Rationalist approaches use rational choice theories to explain the behaviour of actors based on their individual preferences. Reflectivists argue that rationalist accounts fail to identify the context-dependent aspects of decision making. They considered that the behaviour of actors is the product of "conjuncture": the historical combination of material constraints, social patterns of thoughts and individuals initiatives. The reflectivist approaches account for these factors and consider that individual and social reflection and learning lead to changes in preferences and even shape views of causality.³⁰ Unlike rationalism preferences are not assumed to be fixed; values, norms and practices will vary in time and across cultures. Therefore one needs to take into account changes in "consciousness". "Reflexivity" in social action means that there is a bi-directional relationship between cause and effect in which neither can be assigned causes or effects. It is considered that there is a need not only to explain and

²⁹ For an extensive literature review on civil war from an economic perspective see Blattman and Miguel (2010).

³⁰ Reflective approaches comprehend: interpretative approaches based on historical and textual interpretations, materialist historico-sociological approaches following a Marxist tradition, political theory based on classical political philosophy and international law.



measure the behaviour of actors but also to understand the intersubjective meanings and discourses that informed actors' choices.

Lapid (1989) would bring to the forefront the subject-object problem of social sciences. In social sciences the separation between the researcher (subject) and phenomena (object) is much less clear than in the natural science. In social sciences, human beings create theories about themselves and the positivist behaviouralist aspiration for a neutral researcher detached from the phenomenon is considered impossible to achieve. Instead Lapid highlights the post-positivism approach where the proper unit of analysis in social science is paradigms, constituted by a triad of the phenomenon (empirics), analysis (theory, hypothesis, explanations) and the thematics (assumptions, epistemological premises). At the centre of the triad is the social-intellectual-ethical scientist (Hooker, 1987, p. 10; Lapid, 1989, p. 240). Following from these constituted and constitutive roles of the scientist, there should be a focus on the premises and assumptions of the research: the perspectives the scientists adopt when they construct phenomena. Positivist empiricism (observable regularities) is in this way challenged in different degrees by post-positivism in that: a) empiricism is to be subordinate to the perspectives adopted by the researcher; b) perspectives should not be bound by their possible empirical verification; and c) perspectives may have a normative capacity to create the empirical realities envisioned by it. This preponderance with perspectives over empiricism means that objectivity and truth are relative, dependent on the socially and historically situated paradigm, the perspectives of the researcher and the diverse methodological approaches that can be used.³¹

Rationalist approaches, committed to rational choice theory, normally have a positivist stance – search for objective causal-effect mechanisms that are empirically verifiable. Such is the case of behaviourist PR scholars. Reflectivism approaches normally have a post-positivism stance, closer to normative PS scholars.

The new epistemological approaches of the 1980s onwards would be applied to the study of peace and conflict, leading to new fields of study within the broader umbrella of ISS. Linguistics highlights the importance of language and discursive representation of the object of analysis. Post-structuralism underlines how all phenomena exist only through a discursive representation that is permeated by power relations. Feminist theory, which emerged in 1980s, was inspired by the women's liberation movements of the 1960s and 1970s and highlights the dynamics of patriarchy. Critical theory builds on the normative approach proposed by Galtung in the "socialist revolution" (Pureza, 2011). In particular, critical security studies challenges realism's military-focused, state-centred and zero-sum understanding of security, which is to be replaced by a project of human emancipation (Collective, 2006). Constructivism (both conventional and critical) brought to the forefront the relevance of ideas, culture, norms and identities, adopted by Critical Security Studies and the Copenhagen School. Post-colonialism focuses on power relations between the "West and the rest" and shares the Marxist conception of "structural violence". Human security broadens the concept of "structural violence" to link security with development (Collective, 2006). The Copenhagen School identifies how there is a "securitization" process in which an actor constitutes, through discourse, an issue, another actor or phenomenon as a threat to a referent object (state, society, individual).

³¹ This post-positivism relativism and methodological pluralism puts into question the Kuhnian version of scientific progress (Kuhn, 1962) where scientific revolutions lead to the adoption of a new (better) paradigm that replaces an older one. Instead post-positivism argues for a diversity of equally legitimate paradigms.



With the exception of conventional constructivism, to a more or less extent the new approaches have in common a normative commitment to research: to expose power relations and identify a more just and human peace.³²

These epistemological developments also had an expression in PR, mainly in the concern with the security of humans at a societal, group and individual level (besides the state level). These expressions can be seen as focusing on intra-state conflict and topics such as ethnicity, democide and politicides, non-state violence and, in some cases, the study of the security of individuals made possible by the availability of disaggregated data.

The most significant event since the end of the Cold War is the 2001 September 11 attacks, which had a significant impact on the agenda of Strategic Studies, ISS and PR even if part of their agenda continues unaffected. The centrality of the state and rationality assumptions were questioned by the relevance of networked non-state actors. Politically, it empowered in the West realist perspectives of security (closer to Strategic Studies) in detriment of liberal internationalism. It reopened discussion on the use of force, reinforced the 1990s debate on the transformation of war and the processes of war and fighting and led to increased concerns about nuclear proliferation. Specifically, US foreign policy (and of the countries in the coalition involved in the war in Iraq) were scrutinised mainly from post-structuralist, feminist and post-colonialist scholars with a focus on the discursive conceptions of security and the new Western technologies of war-making. But many of the issues of the research agenda remained unchanged: the causes of war; regional security; great power politics; technology of war; or classical issues such as arms racing or deterrence (Buzan & Hansen, 2009).

The 1990s saw a continuation of the institutionalisation of PR and, broadly speaking, most institutes survived the end of the Cold War. PR is now characterised by a broad network of researchers, schools and journals with a higher degree of theoretical and epistemological specialisation.

Conclusion

PR survived two epistemological challenges, the “socialist revolution” and the reflectivist and post-positivist challenges, and outlived the end of the Cold War. In its 60 years of existence it adapted its referent object and evolved its methods within a behaviourist approach to feat the reality of the phenomenon under study as well as methodological and technological developments.

At the beginning of the new century conflict is principally at an intra-state level but, overall, the world has more peace than in the preceding century, a peace based on the liberal model (Gleditsch N. P., 2008).

Behaviouralist PR, as illustrated by the *JPR*, came to become: multidisciplinary (involving fields like political science, sociology, geography or economics); doing analysis with more disaggregated units like time, space, institutions, actors and issues; engaged in

³² In conventional constructivism the agency for order and peace is significantly associated with the state (its main referent object), with limited recognition of institutional or individual agency, and adopts a “soft-positivist” epistemology. Therefore, conventional constructivism is an exceptional case of a reflectivist approach, which is positivist. Conventional constructivism is concerned with explaining the link between the social constructions of identity (frequently associated with ethno-linguistic groups), the political mobilisation of that identity and civil violence (Sambanis, 2002). Critical constructivism affords agency to collectivities (the main referent object) and adopts a narrative and sociological post-positivist epistemology.



forecasting models; significant empirical quantification; and is concerned with scientific transparency through replication (Gates, 2014).

Analysis of inter-state conflict has, in some cases, adopted a multi-method research design (game theory with case studies and quantitative tests) and moved away from the systemic level to the dyadic level of interaction between states, incorporating societal-level variables (for instances regime type, the political security of elites, public opinion) to explain decision making. Theories of international conflict became more complex due to the: difficulties of identifying the right level of analysis; developments in theoretical game models, in particular the ones incorporating incomplete information; incorporation of sequencing in decision making leading to war; and the need to deal with endogeneity issues (Levy J. S., 2000).

Research on peace as the prime referent object has been less present in PR with the exception of studies on liberal peace, democratic peace or capitalist peace. Research focuses on the causes, duration and endings of civil wars, post-war reconstruction, contributions of institutions to peace and other forms of violent conflict such as terrorism, coups, communal violence, political repression or crime. This is analysed with increasingly sophisticated statistical methods and disaggregated analysis.

PR's "non-normative" behaviourist approach is its main distinctive epistemological characteristic – alongside its focus on peace and conflict – one that continues to congregate the work of researchers in a growing epistemological community.

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PACIFIST APPROACHES TO CONFLICT RESOLUTION: AN OVERVIEW OF THE PRINCIPLED PACIFISM

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Abstract

This article explores pacifist approaches to conflict resolution based on principles, justifying the pacifist standard grounded in actors' belief systems (spiritual and ethical principles). This article gives a brief overview of the history of the main traditions that shape the debate on pacifism and non-violence, highlighting the central references of principled pacifism (Mahatma Gandhi and Martin Luther King) and its main techniques and methods of conflict resolution.

Keywords

Non-violence; principled pacifism; conflict resolution; *satyagraha*; creative tension

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Introduction

Interests – not always convergent – of different individuals and groups that coexist in various spheres of political and social life make conflicts arise as an almost inevitable result of interpersonal, inter-community and interstate relationships. It does not mean that conflict is necessarily synonymous with aggression and violence. Although attempts to overcome or resolve conflicts often involve the use of force, it is important to remember that there are ways of dealing with conflict using alternative logics and approaches. Pacifism – or the broad spectrum of pacifist approaches, as this article intends to show – adopts a particularly critical and contesting perspective about conflict resolution through violence. As an alternative, pacifist approaches seek to actively defend peace, reject the use of force and identify radical ways to resolve problems caused by political oppression, social injustice and war through the non-violent means.

From this perspective, it can be said that pacifist approaches are defined by an essential standard: *before interpersonal, inter-community or interstate antagonisms, adopt non-violent social behaviour.*² From a moral point of view, this position seems more coherent and justifiable than the spiral of death, destruction and other evils caused by violent conflicts. However, the prevailing view in dominant social construction, at least in Western culture, is that the use of violence – and war as its most extreme form of expression – is a fact of nature, a reflex of the struggle for survival that is part of the essence of things and, as such, an event that is not subjected to moral considerations. Even when Western thought relativises this realist warmongering through the just war tradition³ – introducing the notion that war must be morally justifiable (*jus ad bellum*)

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² For a more elaborated discussion of this pacifist standard from a sociological point of view, see Galtung (1959).

³ The just war tradition basically establishes two sets of constraining principles of war in order to prevent it from reaching extreme and absolute proportions. The first set is concerned with the moral justification of resorting to war (*jus ad bellum*) and involves principles such as the need for a just cause and legitimate authority to decide on war, the commitment to the right intention, the choice of war as a last resort, a reasonable expectation that peace is a plausible result of war, and a general expectation of greater or proportional benefits to the possible damage caused. The second set of principles concerns the conduct of war and seeks to establish limits for it to be justly (*jus in bello*) fought, such as the discrimination between combatants and non-combatants and proportionality when using force (for a detailed discussion, see Cady, 2010, Chapter 2).



and that, once justified, it must endure constraints when using force (*jus in bello*) – war does not cease to be seen as a legitimate instrument of state purpose.

Thus, on the one hand, the realist view of war and moral constraints introduced by the just war tradition occupy dominant intellectual positions and policies. On the other hand, pacifist attitudes are on the opposite side of this spectrum of positions, seen as an idealistic stance and a naive and misleading view of reality. From this angle the preference for non-violence is often confused with passivity. This makes the pacifist standard seem conceptually incoherent and devoid of practical sense, since this supposed passivity can make peace even more distant by stimulating, rather than discouraging, the aggressiveness of antagonists willing to act violently. Therefore, for most critics of pacifism the use of force is a necessary evil and the only realistic shortcut to avoid a greater evil (Alexandra, 2003, p. 589). Approaches committed to non-violence, in turn, seek to challenge this perspective by showing that, even though conflicts are part of social and political life, violence can be avoided and peaceful means can be converted into active instruments of political action (Björkqvist, 2009). By defending protests, blockades, non-cooperation, civil disobedience and a range of other non-violent means to overcome conflicts, such approaches try to make violent interventions lose legitimacy and popular support. They also induce violent political actors to adopt attitudes that are more conciliatory and prone to restoring dialogue and negotiation. It is here where the greatest potential for convergence between pacifism and the field of conflict resolution lies.

Nevertheless, this convergence does not occur on a friction-free surface. On the one side, common sense tends to see pacifism through a caricature based on fundamentalist positions and a radical anti-military fanaticism. Conflict resolution, on the other side, tries to consolidate itself as a "science of peace", seeking to produce a consistent knowledge base that overcomes the supposedly "naive" and "idealistic" answers of pacifist activism. Despite this tension between the scientific agenda of conflict resolution and the usual caricature of pacifism, which hides the complexity and diversity of its broad spectrum of positions, one must note that conflict resolution, as an academic discipline with a strong practical sense, owes much to the pacifism and non-violence traditions (Dukes, 1999, p. 169; Ramsbotham, Woodhouse, and Miall, 2008, p. 38-39). Gandhi and Martin Luther King's ideals and activism against various forms of oppression, domination and social injustice, as well as Gene Sharp's efforts to typify and systematise non-violent action, have inspired some scholars of peace over the past five decades. They provided an alternative source of knowledge that offers significant contributions to the search for methods, procedures and non-violent mechanisms to deal with social and political conflicts.

By bringing the discussion on pacifism into the field of conflict resolution, some initial clarifications are needed regarding how pacifism is conceptualised and what the particularises of pacifist approaches in the field of conflict resolution are. Two crucial aspects must be highlighted for these questions. First, it is important to keep in mind that there is not one pacifism but different perspectives that can be defined within a continuous spectrum of positions, ranging from a side based on principles (where pacifist standards are justified by spiritual and ethical foundations) to a more pragmatic side (where pacifist standards are justified by its strategic effectiveness). An important consequence of this spectral view of pacifism is that it accepts a variety of positions. If it is possible to reject violence based on principles of what is right or wrong (principled



pacifism) it is equally possible to opt for non-violence based on practice (pragmatic pacifism), taking into account not what is absolutely right or wrong, but what is better or worse from a strategic perspective in certain circumstances (Oliveira, 2016, p. 3-7).

Secondly, it is important to understand how the pacifist approaches differ from traditional approaches of conflict resolution. In this sense, two defining elements of pacifism are decisive: its non-institutional character and activist momentum. According to Oliveira (2016, p. 7-8),

"pacifist approaches are born in civil society and conducted in the form of social movements outside the field of conventional politics and institutionalised state channels, thus distinguishing itself from the official and diplomatic procedures of conflict management".

Moreover, unlike formal and institutionalised techniques of conflict resolution (such as negotiation and mediation), a large part of pacifist activism seeks to create tensions and confrontations in order to give visibility to the conflict, obtain popular support and pressure the opponent to compromise. Although nothing prevents eventual pressures from also being applied in conventional processes of conflict resolution, it is important to note that formal methods of negotiation and mediation, in general, are directed to the convergence and production of a peace agreement and not to the creation of tensions, confrontations, protests, blockades, non-cooperation and resistance that are part of the conflict resolution mechanisms advocated by the pacifist activism (Oliveira, 2016, p. 8).

One can say that what particularises pacifist approaches within the field of conflict resolution are non-violent activism, its non-institutional character, civil society mobilisation and direct action. This combination of characteristics allows the less powerful to expose the conflict and attract popular support for its cause, working as a mechanism of pressure and resistance. Thus, pacifist approaches to conflict resolution do not refer to a comprehensive debate on peace, institutional models and organisations for the maintenance of peace, or structural mechanisms of peace and conflict prevention. They refer to the particular type of approach derived from activism and traditional currents of thought on pacifism and non-violence.

This article provides an overview of pacifist approaches to conflict resolution based on principles. This means that focus lies in pacifism's spiritual or moral basis, since pragmatic approaches have been addressed by this author in another article (Oliveira 2016). Within this purpose, in the first section, this article makes a brief overview of the history of the main traditions that shape the debate on pacifism and non-violence. The second section focuses on principled pacifism, analysing its central references – Mahatma Ghandi and Martin Luther King – and highlighting its techniques and main methods of conflict resolution. The conclusion emphasises the main challenges and the needs for future development of this research agenda.

A brief history of pacifist approaches

Pacifism and the tradition of non-violence are born deeply immersed in the belligerent context of ancient cultures and evolves by trying to challenge the realist view of war,



based on moral or religious principles. The successive conflicts between the Greek city-states, Alexander the Great's campaigns and Rome's expansion seem to prove the realist propensity for domination through war. This tradition is confronted in practice by those who may be the first pacifist activists in Western history: the early Christians. With rare exceptions, early Christians abhor war, refuse military service and deny any kind of subservience to the Roman emperor, taking their pacifist position to the extreme of non-resistance, even if it costs them the cruellest persecution (Cady, 2010, p. 6). However, this original strand of Christian pacifism is far from reflecting the notion of peace stated with the consolidation of Catholic Church power in the medieval world. The alliance between the empire and the church makes the soldiers, converted to Christianity, start fighting in the so-called just wars and holy wars. In the medieval period, the wars spread not only within the very Christian world, between princes who justified their causes as "just", but also between Christians and Muslims in the Crusades, where the motivations went beyond just causes and were justified in the name of God and his representatives on earth. Thus, between early Christianity and the end of the Middle Ages, the Christian position regarding war, as synthesised by Bainton (1963), involved three main attitudes: pacifism and non-resistance, reluctant involvement in just wars and passionate participation in the holy wars.

If the just wars and holy wars dominate the medieval world, leaving the pacifist attitude in the past and attached to the original context of Christianity, the emergence of some reformist sectors of the church in the sixteenth century leads to the revival of Christian pacifism. By examining the senses of non-violence, Sharp (1959, p. 46-47) observes that the resurgence of pacifism among these reformist sectors – which still inspires groups such as the Mennonites for example⁴ – produces an attitude of rejection of the dominant social order and the coercive apparatus of the state, resulting in attitudes such as the condemnation of military service and participation in war, renunciation of serving official government structures and participation in elections, and the rejection of the state's judicial apparatus. These groups condemn, in principle, any form of physical violence and disapprove of any kind of resistance against oppressive situations, even through non-violent techniques. They consider that the best way of influencing and transforming the world results from their acts of goodwill, exhortations and example.

This Christian pacifist tradition significantly reappears in the fight for the abolition of slavery and the American Civil War. Adin Ballou is a classic reference of this pacifist position through the work *Christian Non-Resistance* published in 1846. The author defines Christian pacifism, or more precisely Christian non-resistance, through a set of behaviours, among which the absolute rejection of any act that results in death or injury of human beings stands out, whether as self-defence, family protection or defence of any good or value. From this first rule, Ballou derives a number of other behaviours such as: not being part of any armed force or militia as an officer or soldier; not electing, approving or being part of any government whose constitution or legal apparatus authorises or tolerates war, slavery, the death penalty or any attitude that causes damage or injury to people; and not participating in any official corporation or political body whose

⁴ The Mennonites, originally known as Anabaptists, emerged in the context of the Protestant reformation in Europe in the sixteenth century. Since the beginning, they were committed to peace and non-violence inherited from the non-resistance of the early Christian, rejecting the use of any Type of weapon, even for self-defence or protection of family and neighbours. For a history of the Mennonite Church see Miller (2000, p. 3-8).



regulations allow or oblige its personnel to provide mandatory services to violent governments (Ballou, 1846, p. 26-28).

Ballou's pacifism, which according to some authors is the first to adopt the term "non-resistance" as a label (Koonts & Alexis-Baker, 2009, p. 254), interplays not only with other American pacifists – such as William Garrison, who absolutely rejects war and the use of military force, whether offensively or defensively (1966, p. 125) – but also with the work of the Russian writer Leon Tolstoy, with whom Ballou discusses his ideas in letters exchanged in 1889-1890 (Carpenter, 1931). Similarly to Ballou, by interpreting the Christian message that condemns not only murder and injury of human beings but all forms of violence, Tolstoy considers that the very governments and their social control mechanisms are founded on the use of violence through their armed forces (1966, p. 161). For this reason, he associates the primary source of commitment to non-violence with the level of consciousness of each individual and not with the level of politics and government structures. According to the words of the Russian writer, "the refusal of individuals to take part in military service" is "the easiest and rightest way to universal disarmament" (1968a, p. 113) and represents the "key to the solution of issues", such as war and other forms of violence (1968b, p. 15). Tolstoy says that if nothing defies God's will more than killing someone, one cannot obey a man who gives an order to kill: "a Christian cannot be a killer and, therefore, cannot be a soldier" (1968c, p. 37).

Still in the American context of the mid-nineteenth century, Henry Thoreau also appears in the pacifist movement by defending the idea of "civil disobedience" or, as the title of an essay published in 1849, *Resistance to Civil Government*. Through a discourse that emphasises disobedience and non-cooperation, Thoreau advocates the removal of government, renunciation of official positions and refusal to pay levies and taxes, which he sees as vital sources of resources that finance war and slavery. As observed by his biographer Robert Richardson (1986, p. 127), Thoreau comes close to Ballou's idea that the government is nothing more than "the will of a man to exert absolute authority over another man", but he differs regarding the basis for this assertion: Thoreau's emphasis, both from a logical and rhetorical point of view, is not religious but moral. For the author, people do not force themselves to blindly follow their governments if they believe the government's rules and laws are unfair.

Based on what has been shown so far it is important to note that, for religious sectarian pacifism, non-violent attitudes are a matter of personal vocation and individual consciousness founded on the Holy Scriptures and authority of ecclesiastical sources. This pacifism, under the terms defended by Ballou and Tolstoy, is often associated with a kind of anarchism because it sees the state as a form of institutionalised violence, a political organisation that uses oppression and aggression – and war as its maximum expression – and instruments of domination and social control. For this reason, this pacifism rejects the state and its coercive apparatus as well as participation in institutionalised politics, and advocates a kind of civil disobedience founded on the primacy of divine authority. Muste, another known pacifist American Christian, forges the term "Holy disobedience" as a necessary individual virtue for spiritual self-preservation, in an era in which consent, conformism and alignment are "the instruments used by the totalitarian government to subordinate men and engage them in a permanent war" (1992, p. 208).

The rejection of the hierarchical, centralised state and the abandonment of political life defended by Christian non-resistance have been seen by some analysts, such as Atack (2012, p. 172), as a kind of escapism; this cannot actively challenge the social structures



that constitute the systems that produce oppression, injustice and war. What these analysts want to emphasise is that there is a gap between the "pacifism of individual consciousness" and social and political criticism of the war system that cannot be overcome by Christian non-resistance. Regarding this aspect, the subsequent developments in the tradition based on principles show less-absolute positions of pacifism, as observed in the activism of Mahatma Gandhi and other proponents of non-violence in the mid-twentieth century, like Martin Luther King. These iconic figures of the pacifism of the last century provide important examples of how individual religious consciousness can be creatively combined with a universalising ethical-philosophical inspiration and a radical social and political criticism of the status quo, leading to a more complex, nuanced and integrated approach to pacifism than absolute positions try to provide. Gandhi, perhaps more than any other activist, through a creative synthesis process of several references – ancient Indian asceticism, Hinduism, anarchism, Sermon on the Mount, Bhagavad-Gita and political pragmatism (MacQueen, 2007, p. 329) – can elicit a comprehensive and complex philosophical system that goes beyond Christian non-resistance and has a significant impact on world politics in the mid-twentieth century. Gandhi's approach that he himself called *satyagraha*, provides an important link between the spiritual and moral commitment to non-violence and the pragmatic possibilities of mass non-violent resistance against political and social oppression, without implying an absolute denial of instruments of force (Atack, 2012, p. 173). Unlike Tolstoy's short-sighted pacifism and other Christian pacifists, Gandhi advocates, according to Atack (2012, p. 159) and Roberts' (2009) interpretations, a pacifism of "progressive replacement" that involves accepting that the replacement of violence for non-violence is a long-term transformative process. From Gandhi's perspective, Atack notes that until a pacifist or non-violent society is achieved (an objective that he considers viable through the increased expansion of non-violence practices to all spheres of social and political life, including international relations), the existence of armed forces and the state's right to use violence can be tolerated in certain circumstances (e.g., self-defence against external aggression in societies that are not yet ready for non-violent resistance; or situations of maintenance of social order and the rule of law, when it benefits all citizens and does not violate the social contract).

Martin Luther King resumes Christian pacifism in his campaign for the civil rights of black Americans in the 1950s and 1960s. In a synthesis with Gandhi's *satyagraha* and the philosophy of unconditional love expressed in the Greek word *ágape* (1957; 1961), he advocates non-violent resistance and civil disobedience and forges the central concept of his philosophy of social change by non-violent means: the creation of the "beloved community". In this regard, King considers that non-violent resistance and civil disobedience must not be used as a way to humiliate or defeat the opponent, but as a way to gain its friendship and understanding. The goal, according to King, is to create what he calls "creative tension". It relates to bring tensions and contradictions to the surface in order to publicly expose the deepest resentments, show the situation's injustices, touch the consciousness of opponents and the public in general and – from the discomfort caused by this crisis – create a situation in which people start wanting to resolve conflict and value negotiation (King, 1963). Therefore, the expected consequence is the reconciliation and creation of a "beloved community", united by an unconditional affection even among those who previously opposed and tried to challenge each other. Civil disobedience and non-violent resistance, from this perspective, must be used against oppressive and unjust systems, not against individuals; and the victory, when



achieved, is of a just system over an unjust system and not of a man over another man (King, 1957, p. 12-13).

What this brief historical reconstruction shows is that, even within the pacifist tradition based on principles, its ideas, non-violence and relation to war cannot be reduced to a single denominator. There is a spectrum of different points of view that make these ideas complex and full of nuances. Within the spiritual foundations from which the non-resistance of the early Christians emerges – groups of sectarian reformist, such as the Mennonites and the Amish, and Christian pacifists such as Ballou, Garrison and Tolstoy – a kind of "absolute pacifism" arises that is seen as an inevitable consequence of the word of God and of a particular interpretation of the sacred texts, according to which the murder of human beings and violence are sins that attack the core principles of Christianity.⁵ Some interpretations of Asian philosophies or spiritual traditions, such as Buddhism for example, expand this pacifist standard to reject not only any form of physical and psychological harm to humans beings but also violence against all other living creatures and, in some cases, against the global ecosystem as a whole. A clear example of this type of positioning is provided by Dalai Lama, whose Buddhist spiritual foundations not only prohibit the use of any form of physical violence against the ongoing Chinese occupation in Tibet (Howes, 2013, p. 429) but also nourish an absolute reverence for living beings, resulting in a conception of universal non-violent responsibility for humanity and nature as a whole (Jah, 2003, p. 12). If these examples show that absolute pacifism derives from a morality founded on spiritual traditions and sacred texts, nothing prevents the same kind of conviction from deriving a secular morality based on reason. As Cady argues (2010), Kant's⁶ "categorical imperative" – according to which all men must treat each other with dignity and never as a means to other ends – can be interpreted as an absolute repudiation of any physical or psychological violence against human beings, justified by an objective and rational standard of conduct and not by a divine principle. Regardless of the claimed basis to justify these positions, the key point is that the adoption of absolute pacifism depends on a kind of individual conversion and personal awareness deeply rooted in a spiritual or philosophical doctrine: the supreme value of life.

Although highly influenced by their respective spiritual heritages and ethical ideals about life in society, both Gandhi and King depart from this absolute pacifist position. In this sense, they are committed to non-violence in their more immediate social and political struggles. At the same time, they nurture a more cosmopolitan and long-term commitment for peaceful world to be achieved through the progressive expansion of non-violent practices to all spheres of social and political life, including as a means of national

⁵ It is important to emphasise that it is a particular interpretation because, in the same way that it is easy for some to find in the Scriptures passages that guide the pacifist consciousness, it is possible for others to find quotes that justify the use of violence on behalf of a deity (the Crusades is a good illustration of this). This does not only occur in the interpretations of Christian texts (the Old and New Testaments), but also in the interpretation of other sacred books, such as the Koran, Lun Yu, Wu Ching, Bhagavad Gita, Tanakh, Talmud, Tao-Te-Ching, Guru Granth Sahib and Vedas (Johansen, 2009, p. 145).

⁶ The "categorical imperative" is conceived by Kant as the "supreme principle of morality". This principle is not derived from any divine order but from reason. It was conceived by the philosopher as an objective, complete and unconditional law that guides the actions of all rational beings. This makes each individual a moral, free and independent agent able to derive a universalised standard to guide practical conduct from one's own rationale without the need for any external authority, including the divine. The categorical imperative is formulated through several maxims; in the sense mentioned in this article, according to Cady's argument above, it is expressed by Kant by the following formula: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end but always at the same time as an end" (Kant, 2007, p. 69).



defence (Gandhi, 2005, p. 95, 98) and conflict resolution tool on an international scale (King, 1967, p. 253). While societies have not reached this more advanced stage, both admit that the adoption of non-violent means through civil society organisations and social movements in their local struggles have to live together with the eventual use of force by states in specific situations – such as self-defence or maintenance of the rule of law – in strict accordance with the national constitution and international law (Atack, 2012, p. 160). Thus, the commitment to non-violence on a religious and moral basis not always imply an absolute and immediate rejection of all forms of violence. "Progressive replacement" reflects this position by showing that non-violence philosophy can involve a long-term vision that does not require an immediate and complete rejection of all forms of state violence, while it has not completed the process of social learning able to forge a fuller and more comprehensive consciousness that favours non-violent society.

Trying to overcome and simultaneously contest principled pacifism, the latest stage of this historical narrative has tried to emphasise the pragmatic and strategic character of non-violent action. Unlike the rejection of violence with a spiritual or moral basis, this more pragmatic perspective resorts to political arguments and theories of power sources to understand the logic and effectiveness of non-violence. In this sense, Gene Sharp's pioneering work from the late 1960s clears the way for a current of thought that focuses its efforts on theorising non-violence based on the political effectiveness of its means, and not on actors' belief systems. As Sharp highlights, "non-violent struggle is identified by what people do, not by what they believe" (2005, p. 19). Therefore, through a pragmatic reassessment of Gandhi's writings and qualitative and quantitative analysis of a large number of historical cases of non-violent action – colonial rebellions, international conflicts, struggles for independence, resistance against dictatorships, genocides and foreign occupations, anti-slavery movements, and movements for worker, women and civil rights – the pragmatic tradition has sought to identify elements to construct a theory of non-violence focused on people's potential power and possibilities of converting this potential into effective power. This is done in order to cause social and political changes outside conventional institutional channels without using physical violence (Sharp, 2005, p. 19; Howes, 2013, p. 428). Considering the focus of this article is principled pacifism, this pragmatic tradition will not be examined here.⁷

Techniques and methods of principled pacifism

In order to provide a more organised and didactic explanation of the techniques and methods used in pacifist approaches, this section focuses on the tradition based on principles, although it is important to recognise that principled pacifism and pragmatic pacifism are not irreconcilable or mutually exclusive. As discussed in the previous sections, pacifist approaches form a continuous spectrum of positions that admits not only absolute points of view, but also more nuanced, flexible and merged positions. Although this section is structured around the central references of principled pacifism, it does not mean that the means defended in each approach should be seen in an isolated and independent form. There is a porosity between these approaches, so that their techniques and methods are often coincident, partially coincident or complementary. Thus, it is important to bear in mind that what fundamentally changes between the approach based on principles and that based on pragmatism includes the reasons

⁷ For an overview of this pragmatic perspective see Oliveira (2016).



mentioned to justify the pacifist standard and strategies advocated for its implementation, and not necessarily their techniques and methods.

Mahatma Gandhi and Martin Luther King are generally considered the most representative authors of principled pacifism. Although both Gandhi and King incorporate a pragmatic bias to their approaches to resolve conflicts, their attitudes and writings are strongly influenced by their respective spiritual traditions, views and ideals about life in society and ethical commitment to the emergence of a new social order. Therefore, while the multifaceted positions of these authors should be recognised, this section follows the dominant trend of pacifist approaches in the literature, classifying them within the tradition based on principles. At the end of this section, a comprehensive view of their approaches – the *satyagraha* techniques advocated by Gandhi and the "creative tension" techniques proposed by King – is achieved.

Before proceeding, it is important to clarify the meanings of the terms "technique" and "method" adopted in this section. Although these words are often interchangeably used, some dictionaries define technique as knowledge, processes and practical principles to obtain a result, while method is defined at a lower operational level as a way of doing or a way of proceeding. In this perspective, technique is seen from a broader angle, encompassing a set of methods (see, e.g., Porto Editora or Michaelis dictionaries). Gene Sharp uses these two terms in a way that reflects these definitions. According to the author, non-violent action is a technique that encompasses a wide range of methods of protest, non-cooperation, and intervention (2005, p. 49). Other authors define Gandhi's *satyagraha* as a social technique of non-violent action that involves various methods, such as non-cooperation, civil disobedience, strikes or blockades (Bondurant, 1988, p. 3-4, 12; Jah, 2003, p. 27), indicating a similar understanding of the relationship between technique and method. This section follows these aggregates, using the term technique in a broader sense to denominate knowledge, means and skills for a particular end; while the term method is understood in a more specific operational sense to designate each type of particular procedure employed when carrying out a technique.

Mahatma Gandhi and the truth force: the Satyagraha

Gandhi's activism has deep roots in civil disobedience, but it goes far beyond how this notion is developed within the Christian non-resistance tradition and Thoreau's pacifism of moral conscience. As discussed in the historical panorama of the previous section, civil disobedience appears strongly associated with the idea that people do not force themselves to blindly obey their governments if they believe, for religious reasons or moral convictions, that the rules, laws and social control practices of these governments offend the supreme principles of the sacred scriptures (as advocated by Ballou and Tolstoy) or seem unjust (as advocated by Thoreau). Within the work and activism of these authors, civil disobedience is usually treated as a consideration of individual order: the refusal or resistance to certain laws is justifiable as far as they offend the personal conscience or seem questionable in the light of a "superior law" that, in the view of each individual, adopts an absolute priority (such as the law of God or some absolute moral principle). Therefore, the idea of civil disobedience arises, according to Bondurant (1988, p. 3), in a context of competition between conflicting spiritual and moral values, and the solution of this spiritual or metaphysical dilemma is found, as the so-called conscientious pacifists defend, in an intimate and individual choice.



What is absolutely significant in Gandhi's activism throughout his experiments with non-violent action – first in South Africa and later in various social movements and in the struggle for India's independence – is that civil disobedience is no longer a matter of individual conscience to be reformulated within the collective consciousness in the context of large and popular mobilisations. Within this conceptual expansion, a much more complex and comprehensive technique arises, baptised by Gandhi as *satyagraha*. This technique goes beyond passive resistance and places civil disobedience in a broader assemblage of methods that includes protests, boycotts, strikes, non-cooperation, usurpation of government functions and building of parallel institutions. Derived from Sanskrit – "*satya*" (truth) and "*agrah*" (strength, insistence) – *satyagraha* (truth force) is conceived as a technique of conflict resolution through conversion mechanisms. It means that *satyagraha* is not limited to the dimension of resistance, but intends to act in the self-transformation of the parties involved in the conflict by converting their "hearts and minds" through sincerity and truth. It is, therefore, a non-violent technique of conflict resolution that seeks the conversion of the parties through the pursuit of truth (Jah, 2003, p. 27), eliciting what seems "wrong" or remains invisible in the situation (injustice, inequality, oppression, restrictions on freedom, etc.). According to Jah (2003, p. 25), what is particularly unique in Gandhi's contribution is that principles traditionally restricted to an intimate and individual sphere, such as the pursuit of truth and rejection of violence, are transformed into a tool of mass-mobilisation.

There is a clear pragmatic dimension, but there is also a commitment to the truth that, for Gandhi, has a strong spiritual dimension. *Satyagraha* is literally based on the "truth force" and it is through a spiritual notion of truth – bequeathed by the religious mosaic that influences him and which is perceived as an absolute and divine concept – that Gandhi justifies non-violence: "Truth is perhaps the most important name of God" and "where there is truth, there is knowledge" (Gandhi, 2005, p. 39-40); man, however, is unable to know the truth in this pure state, to achieve the truth in such perfection (Gandhi, 1996, p. 37). Thus, "because man is not capable of knowing absolute truth," he is not "competent to punish" (Gandhi, 1996, p. 51), that is he cannot justify violence in the name of what he cannot absolutely know. For Gandhi, therefore, non-violence (*ahimsa*) and truth (*satya*) are so interconnected "that they seem to be the two sides of the same coin": non-violence is the means and truth is the end (1996: 46). According to Bondurant's (1988, p. 16-17) interpretation, what Gandhi means is that, with the inability of knowing the truth in its state of perfection, people must be permanently open to those who think differently; for this reason, instead of trying to resolve differences by using violence against an opponent, men must try to get rid of the error through the practice of patience and compassion. It is how people move nearer to truth (i.e. God). In short, *satyagraha* is a force in the direction of truth, an impulse to follow the truth as a matter of principle in order to reduce the negative impact of errors and try to get as close as possible to perfection (Gandhi, 1996, p. 37). Although unattainable in its absolute sense (i.e. the divine), truth works as an operating principle, as a regulatory standard of the conduct of the parties involved in conflict.

If Gandhi's approach is based on foundations heavily cemented in spiritual and moral principles, it is interesting to note that his experiments with *satyagraha* are developed within a context that is equally pragmatic and strategic. *Satyagraha* does not appear ready in Gandhi's work and activism. By contrast, it is developed over nearly half a century through progress and setbacks in the resistance experiences conducted in South



Africa and India. The birth of *satyagraha* takes place in South Africa around 1908 in the context of the resistance movement led by Gandhi against the discriminatory policies of British colonisers directed to the Indian community in this African country. After this initial experience in South Africa, *satyagraha* is implemented in India, not only in various movements for social reforms but mainly in the struggle for the country's independence and in the civil war between Hindus and Muslims in the late 1940s. One of the central arguments of Gandhi's activism, as he explains in all its simplicity, is the following:

When my father imposes a law that seems repugnant to my conscience, I think the less drastic way to take it is to respectfully tell him: 'dad, I cannot obey this'... I have submitted this argument to the acceptance of the Indians and all people. Instead of feeling angry with my father, I should respectfully tell him 'I cannot obey this law'. I see nothing wrong with that. If it is not wrong to say this to my father, it does not seem wrong to me to say this to a friend or a government (Gandhi, 1996, p. 62-63).

What Gandhi proposes with *satyagraha* is a resistance technique based on "respectful disobedience" of the oppressors. It implies to be transparent and true (i.e. to be sincere and honest in purpose), never use physical violence, replace hatred with love and compassion, not to humiliate the opponent and take eventual punishment and suffering that can result from this attitude (Gandhi, 1996, p. 80-83). For Gandhi, *satyagraha* is a "sincerity test" that involves "a solid and silent self-sacrifice". The greatest strength of *satyagraha* is in "humility", "self-restraint" and "attitude correction", because it is through these attitudes that the truth and sincerity of purposes are shown to the opponents (1996, p. 48-49).

From these indications, some conceptual delimitations are important. First, *satyagraha* should not be confused with passive resistance as a non-violent action technique. Although Gandhi adopts the term passive resistance at the beginning of his activism in South Africa, he soon rejects this nomenclature for two main reasons. First, the term passive resistance does not reflect the active power of non-violence; second, passive resistance – that Gandhi observed in the Women's Suffrage Movement⁸ and the non-conformist movement⁹ in the late nineteenth century and early twentieth century in Great Britain – instrumentalises non-violence as an opportunistic tactic that, from his point of view, serves selfish interests and changes according to convenience (Gandhi, 1996, p. 51-52). When commenting on these aspects, Dalton (1996, p. 10) explains that Gandhi's intention is to show that passive resistance is non-violent only in its form but not in

⁸ Activism in defence of women's suffrage in Great Britain, led by the movement called National Union of Women's Suffrage, also known as the suffragettes, in the first decade of the twentieth century.

⁹ Here, Gandhi refers to the passive resistance campaign led by the so-called non-conformist churches of England and Wales, formed by Protestants who, not being members of the Anglican Church (such as Methodists, Baptists, Congregationalists, etc.), challenged the Education Act of 1902. This law, which merged religious schools into the state education system and started charging taxes for its maintenance and operation, was perceived by non-conformist churches as a source of privilege in the educational system for the official Anglican Church. Organised around the National Passive Resistance Committee, the non-conformist resistance movement, which was primarily characterised by the refusal to pay these education taxes, remained active for about four years, producing reactions from the British authorities that led, depending on the case, to the confiscation of assets, properties and arrest of people involved in resistance acts (Hunt, 2005, p. 167-171).



substance. The passive resistance movements criticised by Gandhi usually incorporate hate speech and disrespect to the opponent, which does not conform to his vision of non-violent action – hence his option to develop his own technique, compatible with his spiritual and moral foundation. However, this criticism seems motivated by a mere matter of principles and its strategic implications are crucial within Gandhi's perspective of conflict resolution. Considering that *satyagraha* operates through the mechanism of conversion, the characteristics advocated by Gandhi – sincerity, humility, civility, discipline, respect for the opponent, personal control and willingness to sacrifice one's self – are fundamental virtues for the effectiveness of this mechanism. It is through the expression of these virtues that resistance groups can "dismantle the anger and hatred" of the opponent willing to use force (Gandhi, 1996, p. 47).

The second important concept to delimit refers to the relation of *satyagraha*, civil disobedience and non-cooperation. Although Gandhi does not literally refer to *satyagraha* as a "technique" and civil disobedience and non-cooperation as "methods", it is in this sense that he ranks these terms. For him, civil disobedience (understood as civil violations of legal decrees that are considered amoral) and non-cooperation (understood as the popular refusal to cooperate with States considered corrupt and oppressive) are "branches" of *satyagraha*, which, in turn, encompasses the entire range of forms "of non-violent resistance that claim the Truth" (Gandhi, 1996, p. 51). In this sense, it is possible to state that *satyagraha* is a social technique of non-violent action that has the truth as a matter of principle and that can be put into practice through a set of methods, including non-cooperation and civil disobedience.

In his comprehensive study on *satyagraha*, Bondurant highlights the fact that Gandhi's writings form a fragmented set of speeches, statements, sermons and responses to critics often motivated by immediate issues related to his experiments with *satyagraha*, failing to provide a systematic explanation of his technique, methods and action strategy. In addition, it is important to note that Gandhi's assassination in 1948, when he was still carrying out his experiments with *satyagraha* in the context of religious conflicts in India, prevented him from reaching a complete view of his non-violent action technique. For these reasons, Bondurant (1988, p. 7) considers that Gandhi's texts must not be interpreted in terms of a political theory, but as integral parts of his political activism in a long process of experiments that failed to produce a systematic explanation of his technique and his non-violent methods of action. Thus, resorting not only to Gandhi's writings, but mainly to the detailed study of the main *satyagraha* campaigns conducted in India, Bondurant tries to complete this effort of theorising, identifying nine steps in the application of this technique, where many non-violent action methods can be identified (see Table 1). Among these methods, negotiation, protest, boycotts and strikes, non-cooperation, civil disobedience, usurpation of governmental functions and the creation of parallel institutions stand out. Even though the steps involved in *satyagraha* and the choice of methods are determined by the specific circumstances of each situation, Bondurant considers, from the cases studied, that the technique of *satyagraha* can be explained through this set of nine steps, serving not only as a general parameter of the technique proposed by Gandhi, but also as an analysis frame for the study of each *satyagraha* campaign in particular.

**Table 1: Key steps in the implementation strategy of *satyagraha***

(1)	Negotiate with the opponent
(2)	Prepare resistance groups for direct action
(3)	Get involved in protest acts (demonstrating the level of opposition)
(4)	Issue an ultimatum
(5)	Implement economic boycotts and strikes
(6)	Implement non-cooperation campaigns
(7)	Implement civil disobedience campaigns
(8)	Usurp government functions
(9)	Build parallel government institutions

Source: Bondurant (1988, p. 40)

Although the difficulties pointed out by Bondurant in Gandhi's writings are recognised, it is possible to identify in his work some clear indications about two methods: non-cooperation and civil disobedience. Gandhi considers these methods particularly relevant in *satyagraha* and that they must be applied in this sequential order due to the higher degree of complexity involved in civil disobedience, in terms of organisation, discipline and training of the population as well as in terms of willingness for self-sacrifice in front of the possibility of the opponent having violent reactions. The resolution on non-cooperation issued by Gandhi in 1920 that originated a resistance systematic campaign of the Indian population against British domination in 1920 and 1921 illustrates how the method of non-cooperation is conceived and unfolded in several other methods (see Table 2).

Table 2: Synthesis of the resolution on non-cooperation with the British colonial government issued by Gandhi

(a)	Handover of titles and honorary positions and renunciation of positions appointed in local bodies
(b)	Refusal to attend government meetings and other official and unofficial events
(c)	Gradual withdrawal of children from schools and colleges owned, supported, or controlled by the colonial government and transfer of children to schools and colleges of local provinces
(d)	Gradual boycott of British courts and establishment of private courts for resolving disputes
(e)	Refusal of the military, clerics and Indian workers in British recruitment to serve abroad
(f)	Withdrawal of candidacy for elective offices and refusal of voters to vote for candidates who volunteer for the election
(g)	Boycott of goods from Great Britain

Source: Gandhi (1996, p. 59-60)

Given the success of this non-cooperation campaign in 1921, Gandhi starts to consider the possibility of escalating the non-violent action for a mass civil disobedience campaign, which, from his perspective, is a more challenging and complex method of non-violent action. For a number of reasons, including his arrest between 1921 and 1924, Gandhi is led to postpone this project and conduct, in the years following his release, a programme of social reforms on a smaller scale – such as the abolition of untouchability for example¹⁰ – until the success of a small resistance campaign for the non-payment of taxes in the Bardoli district, in 1928, prepares the ground for a long civil disobedience campaign on a national scale that began in 1930. This historic action, which Dalton considers the

¹⁰ Untouchability involves a set of discriminatory practices against members of the lowest caste of the Indian social structure (the so-called "untouchables").



biggest civil disobedience campaign ever seen (1996, p. 72), is known as "salt *satyagraha*" because it involves resistance to the payment of high taxes for the salt exploited in India under Britain's monopoly. After a long march of twenty-two days that assembled thousands of participants, Gandhi arrives at his destination on the west coast of India, gathers a handful of natural salt, which is legally prohibited due to it countering of the British monopoly, and before the eye of the American, British and other European countries' presses, declares: "With this, I undermine the foundations of the British Empire" and "ask for the world's sympathy in this battle of Right against Power" (cited by Dalton, 1996, p. 72). The extraordinary repercussions of this symbolic act results in a mass civil disobedience campaign that leads to millions of Indians breaking the laws on salt taxation. The campaign triggers a wave of mass arrests that, far from discouraging popular mobilisation, further strengthens the resistance through protests, marches, general strikes, boycotts of British products, symbolic acts of independence declaration, occupation of municipal government premises and the creation of parallel government institutions. This leads to a complete paralysation of the British colonial government and clears the way for negotiations that culminate in the independence of India in 1947 (Nepstad, 2015, Chapter 3).

From the perspective of conflict resolution, it can be said, in short, that *satyagraha* is experienced by Gandhi through a relentless pursuit of a peaceful society at all levels – interpersonal, inter-community and international. For Gandhi, a peaceful society can only be achieved by resolving the conflicts inherent in all these spheres, which requires an ongoing effort; his biography is the greatest testimony of this endless pursuit. It is also important to observe that Gandhi's technique and the methods mobilised by him should not be understood only at operational and strategic levels. The use of *satyagraha* and his methods of action requires a strong foundation in sincerity and the correction of attitudes so that the "hearts" of the parties involved in the conflict are free of hatred and filled with truth and compassion. Therefore, non-violence is a matter of principle and not just a practical way to achieve a certain goal. Finally, it is important to point out that Gandhi's legacy goes beyond the particular context in which he lived. Jah (2003, p. 28) mentions a number of cases of application of *satyagraha* outside the Indian context: the resistance of the Danish people against Nazi occupation in 1940; Norwegian teachers' resistance campaign in 1942; the campaign "Challenge the Unjust Laws" in South Africa in 1952; the strike in Vortuke prison in the Soviet Union of 250,000 political prisoners in 1953; the campaign for the independence of Ghana, completed in 1960, after ten years of non-violent actions clearly inspired by *satyagraha*. It is important to mention that Gandhi greatly influenced Martin Luther King's activism for equal rights for black Americans, whose main aspects are addressed in the next subsection.

Martin Luther King and the "creative tension" technique

Martin Luther King's activism has strong roots in his Christian faith, but it is also significantly influenced by the legacy of Gandhi. As it was already mentioned, King proposes a synthesis between Christian pacifism, Gandhi's *satyagraha* and the philosophy of unconditional love expressed in the Greek word *ágape* (1957; 1961), providing a technique of conflict resolution that, according to his writings, can be called "creative tension". The goal of the creative tension, according to King, is to bring tensions and contradictions to the surface in order to expose the deepest resentments, show the injustices present in conflict, touch the conscience of opponents and the public in general



and, from the discomfort generated by this crisis, create a situation in which people want to resolve the conflict and value negotiation (King, 1963).

It is possible to note that King's perspective, as well as Gandhi's, has a pragmatic dimension but is founded on spiritual and moral foundations that make the application of his technique and methods of conflict resolution necessarily anchored in principles. The analysis of one of his main writings – *Letter from Birmingham City Jail* (King, 1963) – provides a broad overview of his approach, constituting, along with the interpretation of this text by McCarthy and Sharp (2010), the central references used in this subsection. *The Letter from Birmingham City Jail* was written by King in 1963 in the period that he was in prison due to the protest march led by him on the streets of Birmingham, Alabama, as part of his campaign against racial segregation. In prison, King sees a newspaper report in which a group of white clerics criticise his campaign, saying that although "technically peaceful", this form of protest is hasty and untimely and promotes hatred and violence (McCarthy & Sharp, 2010, Introduction). The letter is a response to these clerics, where King seeks not only to show the structural violence that keeps the blacks in a condition of injustice, segregation and oppression, but also to explain and justify his "creative tension" technique and the methods of non-violent action employed.

When explaining how his technique intends to work, King points out that non-violent action seeks to create a crisis and cause a tension in such a disturbing way that a community that systematically refuses to negotiate is, forcefully, led to deal with the issue. On this technique, King writes in his letter:

Non-violent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatise the issue that it can no longer be ignored. My citing the creation of tension as part of the work of the non-violent resister may sound rather shocking. But I must confess that I am not afraid of the word "tension." I have earnestly opposed violent tension, but there is a type of constructive, non-violent tension which is necessary for growth. Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, so must we see the need for non-violent gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood. The purpose of our direct-action program is to create a situation so crisis packed that it will inevitably open the door to negotiation. I therefore concur with you in your call for negotiation. Too long has our beloved Southland been bogged down in a tragic effort to live in monologue rather than dialogue (King, 1963, p. 291-292).

Therefore, from King's point of view, the community needs to be led to see the need to resolve its contradictions and social tensions that, although present in the situation, are often hidden or refused. "Creative tension" or "constructive non-violent tension" is the



direct action technique proposed by him to create a crisis so uncomfortable and disturbing that it ends up making the parties involved want to negotiate and resolve the conflict. However, King emphasises that this crisis is not taken out of nowhere:

Actually, we who engage in non-violent direct action are not the creators of tension. We merely bring to the surface the hidden tension that is already alive. We bring it out in the open, where it can be seen and dealt with (1963, p. 293).

It is also important to note that non-violent direct action, which is the core of "creative tension", is conceived by King as a last resort and its application must be preceded by three steps – the investigation of facts that allow one to assess if injustices really exist, followed by negotiation and self-purification (Table 3). Using the situation of the blacks in Birmingham as an illustrative case, King seeks to show, first, the facts that demonstrate the existing injustices. In this sense, King draws attention to the fact that Birmingham is probably the most segregated city in the country (it included segregating practices on transport and in commercial establishments) and for the historical record of brutality against the blacks (including unjust treatment in courts and bomb attacks on black people's homes and churches without any police efforts to resolve the cases). In the second step, King seeks to highlight the negotiating initiatives taken by the leaders of the black community, members of the business community, religious authorities and local leaders of the Christian human rights movement in negotiating in good faith. Given the disappointment generated by a succession of broken promises, King argues that direct action becomes an alternative on the horizon, starting the third step, self-purification (i.e. preparation for the difficult times to come and maintenance of the group's discipline). In this step, King says:

"We began a series of workshops on non-violence, and we repeatedly asked ourselves: Are you able to accept blows without retaliating? Are you able to endure the ordeal of jail?"

After this process, King says that the start of direct action is finally scheduled for the Easter period, when the marches on the city's streets and boycott of trade – in the key sales period – would be a good way of pressuring traders into changing segregating practices. This action is postponed twice due to municipal elections, which according to King could shift the focus of his non-violent action campaign, until actions finally begin in April 1963, resulting in King's arrest under the allegation of leading an illegal march (King, 1963, p. 290-291).

Under the accusation of the march being conducted without permission – that is being illegal – King emphasises in the *Letter* the difference between the just and unjust laws. Evoking the notion of civil disobedience, King argues that there is a clear distinction between covertly breaking the law for malicious reasons and, on the other hand, openly challenging unjust laws according to one's consciousness and assuming the arising



penalties with the clear objective of arousing collective consciousness about the injustice of this law (1963, p. 300).

Table 3: Preparatory steps of the non-violent action campaign according to Martin Luther King

(1)	Evidence of injustices (investigation of facts that allow one to assess if injustices really exist)
(2)	Negotiation with the opponent
(3)	Self-purification (preparation for the difficult times to come and the maintenance of the group's discipline)
(4)	Non-violent direct action (protests, marches, boycotts, civil disobedience)

Source: King (1963)

In another text written by him, King points out that the expected outcome from this disobedience is not free confrontation and anarchy, but the creation of a more just society and the construction of a "beloved community" united by unconditional affection, including among those who were previously opposed. Civil disobedience, in this perspective, should be used against oppression and injustice systems, not against individuals, and the victory, when it occurs, is of a just system over an unjust system and not of a man over the other (King, 1957, p. 12-13).

According to McCarthy and Sharp's (2010) findings on the technique of "creative tension", King's propositions can be summarised by the following seven main aspects: some crucial steps must be taken to prepare a consistent basis for direct action (evidence of injustice, initiative in negotiation and self-purification); non-violent direct action (through methods such as marches, protests, speeches, boycotts, civil disobedience, etc.) brings out the "creative tension" that leads the opponent to face the issue; one must realise that this tension is already part of the situation and that direct action is only in charge of bringing it to the surface; the crisis created clears the way for negotiation; pressure must be maintained with obstinacy and discipline in order to show the opponent that reactionary attitudes will not be successful; imprisonment and other forms of punishment of activists must be faced without resistance, because this provision for self-sacrifice touches the conscience of citizens in general and the opponent with regard to existing injustices; according to the previous attitudes, non-violent protesters cannot be blamed for the violence, but actually those who really use force in the attempt to prevent or block the efforts of conflict resolution. Although King's propositions express a pragmatic concern that results in political effects, they are anchored in a spiritual and moral foundation that, like Gandhi, aims to sustain a kind of conversion mechanism able to bring the parties involved in the conflict closer and create what King calls the "beloved community".

Conclusion

The purpose of this article was to present a conceptual overview of pacifist approaches, seeking to highlight the tradition of the principled pacifis. In this sense, the central references within this tradition were analysed – Mahatma Gandhi and Martin Luther King – as well as their techniques and main methods of conflict resolution. What is crucial to note, based on what was discussed, is that both Gandhi and King stem from a transformative vision that conceives non-violent direct action as a means of conflict resolution through the mechanism of conversion. From this perspective, both authors



believe that conflicts can be resolved by transforming the "hearts and minds" of opponents through the force of truth, love, fraternity and compassion. However, it is important to note that this conversion mechanism is not confused with passivity or non-resistance advocated by a traditional segment of Christian pacifism. Instead, non-violent direct action involves some form of pressure that, while rejecting the use of physical violence and not aiming at annihilation, humiliation or destruction of the antagonist, is sufficiently active and disruptive to the point of leading the opponent to recognise the social injustice and political oppression and adopt a more friendly and conciliatory attitude, prone to dialogue and negotiation.

This new century, mainly driven by the peaceful revolutions of the so-called "Arab Spring", begins to witness a renewed academic interest in Gandhi and King's activism as well as a growing concern with the issues involved in empirical analysis and production of theories of pacifism and non-violence. However, it is necessary to note that much work remains to be done and that a number of important issues, still little explored, continue to challenge the research agenda of principled pacifism. In the introduction of their research guide on non-violent action, McCarthy and Sharp (2010) suggest some of these questions: Can King's technique (and one could also think of Gandhi) work in situations where there is a lack of spiritual and moral leadership of the dimension of these personalities or where the ethical and religious basis of one or another party is less clear? Do the techniques of principled pacifism work in societies where constitutional guarantees are fragile? Do the techniques of principled pacifism operate in the same way in different contexts, in different political systems and conflicts over different issues? Can the application of principled pacifism be comparatively tested in different scenarios? To these questions, it can be added: To what extent can the conversion mechanism, which is central to principled pacifism principles operate in extremely acute and polarised conflicts? The answers to these questions, which obviously go beyond the limits of this article, not only indicate the need for further development, but they also inspire those who have been motivated to extend their knowledge on the pacifist approaches to conflict resolution addressed here.

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PEACEBUILDING: ASSUMPTIONS, PRACTICES AND CRITIQUES

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Abstract

Peacebuilding has become a guiding principle of international intervention in the periphery since its inclusion in the *Agenda for Peace* of the United Nations in 1992. The aim of creating the conditions for a self-sustaining peace in order to prevent a return to armed conflict is, however, far from easy or consensual. The conception of liberal peace proved particularly limited, and inevitably controversial, and the reality of war-torn societies far more complex than anticipated by international actors that today assume activities in the promotion of peace in post-conflict contexts. With a trajectory full of contested successes and some glaring failures, the current model has been the target of harsh criticism and widespread scepticism. This article critically examines the theoretical background and practicalities of peacebuilding, exploring its ambition as well as the weaknesses of the paradigm adopted by the international community since the 1990s.

Keywords

Peacebuilding; Interventionism; Liberal peace; Galtung; Criticism

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PEACEBUILDING: ASSUMPTIONS, PRACTICES AND CRITIQUES¹

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Introduction

Peacebuilding has become a guiding principle of international intervention in the periphery since its inclusion in the United Nations' (UN) *Agenda for Peace* in 1992. With the objective of creating the conditions for a self-sustaining peace in order to prevent a return to armed conflict, peacebuilding is directed towards the eradication of the root causes of violence and is necessarily a multifaceted project that involves political, legal, economic, social and cultural institutions and security practices, which are understood as complementary and mutually reinforcing.

However, the transition from armed violence to lasting peace has not been easy or consensual. The conception of liberal peace proved particularly limited, and inevitably controversial, and the reality of war-torn societies far more complex than anticipated by international actors that assume activities in the promotion of peace in post-conflict contexts today. With a career full of contested successes and some glaring failures, the current model has been the target of harsh criticism and widespread scepticism.

This article critically examines the theoretical background and practicalities of peacebuilding, exploring its ambition as well as the weaknesses of the paradigm adopted by the international community since the 1990s. In this sense, it first addresses the intellectual origins of the concept to then focus on its co-optation as a canon for UN action. The exploration of peacebuilding with regards to the institutionalised pattern of international interventionism is divided into three parts: assumptions, institutional practice and critical assessment. Its principles and objectives are discussed, followed by a brief explanation of its implementation on the ground in terms of four dimensions – military and security, politico-constitutional, socio-economic and psycho-social. The article finishes by reflecting on recurrent and most damning criticisms of peacebuilding, highlighting the problems and limitations that have plagued this intervention model over the last twenty years.

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1. Johan Galtung and the intellectual origins of peacebuilding

The concept of peacebuilding was introduced in the academic lexicon long before it became consensual in the world of policymaking. Johan Galtung, a Norwegian who is considered the founder of Peace Studies, first introduced this term in his 1976 article "Three Approaches to Peace: Peacekeeping, Peacemaking and Peacebuilding", setting the tone for the theoretical and operational exploration that would follow a few years later and which still remains prolific today.

To understand the origins of the concept in question, we have to, however, take a step back in relation to the theoretical contribution of this author. The three approaches to peace developed in the article are intimately and directly related to his innovative proposal to redefine peace and violence, presented in the 1960s.² Galtung defines peace as the absence of violence; and defines violence as any situation in which human beings are being influenced so that their actual somatic and mental realizations are below their potential (1969:168). This definition intended at the time to go beyond the dominant notion of violence as a deliberate act by an identifiable actor to incapacitate another, which the author considered too limited: "if this were all violence is about, and peace is seen as its negation, then too little is rejected when peace is held up as an ideal" (ibid.).

For conceptual clarification, Galtung begins by exploring a dual definition of peace: negative peace as the absence of violence and war and positive peace as the integration of human society (1964: 1-4). Research for peace would be, in this perspective, the study of the conditions that bring us close to both, which ultimately produce what Galtung calls "general and complete peace" (ibid.: 2).

This conceptualisation was not without criticism – particularly for being considered too vague and of no practical use – and, later, Galtung presents what can be considered as his greatest contribution to the theoretical assumptions of Peace Studies: the identification of the triangle of violence and the respective triangle of peace. In the triangle of violence the author distinguishes three aspects: direct violence, structural violence and cultural violence – the first two concepts presented in 1969 and the latter in 1990. For the author, direct violence is the intentional act of aggression with a subject, a visible action and an object. Structural violence is indirect, latent and deriving from the social structures that organise human beings and societies – for example, repression in its political form and exploitation in its economic form (Galtung, 1969). And lastly, cultural violence is a system of norms and underlying behaviours of – and which legitimise – structural and direct violence; that is, the social cosmology that allows one to look at repression and exploitation as normal or natural and, therefore, more difficult to uproot (Galtung, 1990).

With this formulation, Galtung points out the problems and limitations of the definitions of violence that only cover social conflicts of a large scale (war), and encourages the understanding of peace in its broadest sense as a direct, structural and cultural peace, exposing and studying the global structural dynamics of repression and exploitation as well as the symbolic violence that exists in ideology, religion, language, art, science, law, the media and education.

It is not surprising, therefore, that the next step in the conceptual path of the Norwegian author was to confront this understanding with the concrete practice of international

² For a more detailed analysis of Galtung's conceptual contribution see Almeida Carnation, 2016b.



intervention, specifically in his article that develops the concepts of peacekeeping, peacemaking and peacebuilding. According to Galtung, peacekeeping constituted a "dissociative" approach, whose goal was the promotion of distance and a "social vacuum" between antagonists through the assistance of a third party (1976: 282). This strategy is sinned for understanding conflict as an interruption of the *status quo* and for prescribing the return to *status quo ante* as a solution. It did not question whether this *status quo ante* should effectively be regained and preserved; it merely aimed for the maintenance of the absence of direct violence between actors in conflict, and therefore inadvertently contributed to continued structural violence (ibid.: 283-284). Since the preservation of structural violence ultimately promotes direct violence – and thus the likely return to open conflict in the long term (ibid.: 288) – this was not a satisfactory approach for Galtung.

Peacemaking, on the other hand, represented a more comprehensive approach, anchored in conflict resolution, whose aim went beyond the cessation of hostilities to focus on ways to transcend inconsistencies and contradictions between parties (ibid.: 290). However, while recognising the potential "radicality" of the conflict resolution approach, Galtung claims that this is usually directed toward preservation – and not at the dispute – of the (violent) *status quo*, and oriented towards actors – and not necessarily to the system (structure) – that (re)produces violence (ibid.: 294-296). Peacemaking and conflict resolution are thus primarily understood as residing in the "minds of the conflicting parties" and achieved as soon as an agreement is signed and ratified – a conception that Galtung denounces as "narrow", "elitist" and negligent when considering the structural factors that are essential in building a sustainable peace (ibid.: 296-297).

Galtung's understanding of peacekeeping and peacemaking leads him to develop a new concept: peacebuilding. Unlike the other two approaches, peacebuilding is *necessarily* an associative approach to conflict, able to cope with the direct, structural and cultural causes of violence in their broadest sense – and hence in line with his concept of positive peace. The removal of the root causes of violence would focus on principles such as "equity" (as opposed to domination/exploitation and towards horizontal interaction); "entropy" (as opposed to elitism and towards a sense of inclusion); and "symbiosis" (as opposed to isolation and towards a sense of interdependence) (ibid.: 298-100). While acknowledging the difficulty and complexity above, Galtung's conception of peacebuilding is undoubtedly maximalist, ambitious and anchored in the idea of the struggle for peace as comprehensively covering "several fronts" (ibid.: 104).

This theoretical discussion proposed by Galtung on different ways of understanding violence and peace went far beyond a mere academic exercise – having had clear practical implications, especially once it was adopted by the UN in 1992, as we shall see below.

2. The theoretical assumptions of the model

Galtung's reflection inspired Boutros-Ghali, a United Nations Secretary-General enthusiastic about the prospect of a more dynamic and interventionist world organisation, following the profound change in global affairs. It was essentially a combination of three factors that prompted a strong reaction from the international community and, in particular, the UN in the early 1990s. First, the end of the Cold War resulted in the easing of relations between the major powers within the Security Council and a renewed



commitment to the founding principles of the organisation (Miall, Ramsbotham & Woodhouse, 1999: 2), as well as the triumph of liberalism (Jakobsen, 2002) and its emphasis on human rights and democracy. Second, the dramatic increase in the number of violent conflicts in the periphery, which affected 50 countries on different continents in 1991 (Wallensteen & Sollenberg, 2001: 632), finally gained visibility and prominence on the international agenda. And lastly, the nature of these same conflicts – particularly devastating civil wars that challenged centralised state power (Ayoob, 1996), considered immoral and destabilising for the regional and international system – created, mainly in the West, a public opinion favourable to interventionism.

Taking advantage of this historic moment of “multilateral optimism” and facing these wars of the 1990s as “wars of the international community” that required the organisation to respond with determination (Almeida Cravo, 2013), Boutros-Ghali presented an ambitious proposal to address the challenges to international peace and security in the post-Cold War period, embodied in the *Agenda for Peace* (1992). This document practises an institutionalised model of peace that gives the UN a more consistent, dynamic and bolder remit, as well as a considerable increase in international importance in relation to previous decades.

There are four interrelated strategies proposed by the Secretary-General: preventive diplomacy, peacemaking, peacekeeping and, ultimately, peacebuilding (UN, 1992). Preventive diplomacy has two goals: first, to prevent a situation of latent conflict developing into a *de facto* violent situation; and, second, to contain the potential spread of a *de facto* situation of violent struggle to other regions and social groups. Peacemaking aims to support conflicting parties in peace negotiations toward an agreement, making use of the peaceful means contained in Chapter VI of the Charter of the United Nations.³ Peacekeeping involves sending UN forces – so-called peacekeepers – to the ground, after an agreement between parties and with their expressed consent, to stabilise volatile areas and ensure that the peace process is effectively fulfilled. Novelty is undoubtedly in the concept of “post-conflict peacebuilding”, announced then as a new priority of the organisation.

Objectives and principles

Defined as “action to identify and support structures to strengthen and solidify peace in order to avoid a return to conflict” (UN, 1992: para 21), peacebuilding thus encompasses two different but simultaneously complementary tasks: on the one hand, the negative task of preventing the resumption of hostilities; and on the other, the positive task of “addressing the root causes of the conflict” (ibid.: para 15). This articulation closely follows Galtung’s theoretical proposal on peace and violence discussed above that promotes a maximalist agenda for positive peace as essential to a lasting negative peace – that is the end of direct violence (Ramsbotham, 2000: 171, 175). Boutros-Ghali is indeed clear in his ambition: the model he proposes ultimately wishes to deal with “economic despair, social injustice and political oppression” as sources of the violence plaguing the system (UN, 1992: para 15). And to achieve this goal, the UN stands ready and willing to be involved as an “external guarantee” at all stages of conflict situations.

³ The *Agenda for Peace* also refers to peace enforcement, included in the UN Charter, as an instrument available within this new framework for action (UN, 1992: para 42-45).



The four strategies contained in the *Agenda for Peace* are therefore seen as complementary, where the various stages of the transition from violent conflict to peace share common goals that require an integrated approach. Peacebuilding begins to take shape within the framework of peacekeeping operations that are, in turn, sent to the ground as a result of negotiated peace agreements. Progressively, the responsibility of peacebuilding moves to nationals of countries emerging from conflict, with the help of external actors, so that foundations are built for a self-sustaining peace and, thus, new conflicts are prevented.

Reflections in individual reports that followed – among them, *Supplement to the Agenda for Peace*, 1995; the *Brahimi Report*, 2000; *United Nations Peacekeeping Operations: Principles and Guidelines*, 2008; and *Peacebuilding: an orientation*, 2010 – continued to emphasise this idea of interconnection:

"peace operations are rarely limited to a single type of activity", and "the boundaries between conflict prevention, peace-making, peacekeeping, peacebuilding and peace enforcement have become increasingly diffuse", highlights the 2008 report (UNDPKO, 2008: 18).

Peacebuilding is understood as a preventive tool (UN, 1995: para 47), essential to "heal the wounds" of conflict (ibid.: para 53) and significantly reduce the risk of return to hostilities (UNPSO, 2010: para 13). Peacekeeping and peacebuilding are dubbed "inseparable partners" (UN, 2000: para 28) and peacekeepers as "early peacebuilders" (UNPSO, 2010: 9), since peacebuilding cannot act without peacekeeping and the latter does not have an exit strategy without the first. In other words, the central idea, then, is of *continuum*: between negative peace and positive peace, between stabilisation and development, and between structural prevention and consolidation.

Liberal peace

If the adoption of a *maximalist* vision of peace – coinciding with Galtung's theoretical proposal – was clearly due to the intellectual and political environment triggered by the end of the Cold War, the specific *conception* of the model to implement in conflict zones also reflected those who emerged triumphant from the bipolar confrontation.

In fact, the approach that gave shape to this new ambition to promote peace in the periphery, and was subsequently integrated in the new collective security instruments, was the Western approach of so-called liberal peace (see Doyle, 2005). As explained by Clapham, the winners of the bipolar conflict – not only capitalist, liberal democracies but also their civil societies, and the great mass of non-governmental organisations and international institutions that they control – sought to restructure the international system in accordance with the values that emerged victorious at that time (1998: 193-194) and presented liberal democracy and the market economy as the "global recipe for development, peace and stability" (Yannis, 2002: 825).

In relation to this, Paris states that peacebuilding is effectively "an enormous experiment in social engineering – an experiment that involves transplanting Western models of



social, political and economic organisation into war-shattered states in order to control civil conflict: in other words, pacification through political and economic liberalisation" (1997: 56). The fall of the Communist Bloc and its alternative model meant that this interventionist approach was readily encouraged, and it was imposed without rival in the four corners of the world – something Lizée (2000) calls the "end of history syndrome". By introducing political and economic conditionalities through peace operations and development assistance programmes, the model of market democracies spread throughout the Third World (Jakobsen, 2002).

The great potential for opening the concept of peacebuilding to numerous definitions based on different understandings and approaches – which could have gained a multitude of concrete forms in post-conflict contexts – was instead reduced to the specificity of the Western and liberal worldview, and therefore closed to other experiences and alternatives.

3. The model in practice

There was, since its beginning, a convergence around what Kahler called the "New York Consensus" (2009), despite the absence of a central organ for all peacebuilding activities within the UN during the first decade, on the one hand, and the constant presence of several other international actors who arrogated responsibilities under international interventions on the other. The "New York Consensus" reflected the *liberal dream* of creating multiparty democracies with market economies and strong civil societies, as well as promoting Western liberal practices and values, such as secular authority, centralised governance, the rule of law and respect for human rights (Newman et al., 2009: 12).

As Richmond explains, peace is thought by Western international community as an "achievable ideal form, the result of top-down and bottom-up actions, resting on liberal social, political and economic regimes, structures and norms" (2005: 110). To think of "peace as governance" (ibid.: 52-84) also involves looking at peacebuilding as a means to an end: that is, as an institutionalised model embodied in a set of steps needed to build liberal peace. No wonder, therefore, that the practice of peacebuilding has involved a standardised framework for action that sought to take on a universal and hegemonic character.

Multidimensionality

It is the involvement of the UN in Namibia in 1989 that represents the first attempt to implement this paradigm. This peace operation goes far beyond the traditional supervision of ceasefires and is mandated to assist the establishment of democratic political institutions as well as monitor elections that would ensure the country's independence. The relative success of the mission attested the organisation's capacity and willingness to undertake more ambitious and large-scale peace operations, with activities going far beyond those until then undertaken, and in a variety of countries emerging from armed conflicts in Asia, Africa, Europe and Central America (Han, 1994: 842-845). We therefore witnessed, during the nineties, a dramatic expansion of the liberal peace model that Ramsbotham calls the "UN's post-settlement peacebuilding standard operating procedure" (2000: 170), which is embodied, on the ground, by four



interdependent dimensions: (1) military and security, (2) politico-constitutional, (3) socio-economic and (4) psycho-social.

The military and security dimension

The security dilemma that assaults groups involved in intrastate conflicts is considerably higher than among countries involved in interstate conflicts, to the extent that the strengthening of state authority involves the recovery of the monopoly of the legitimate use of force and control of the entire territory; that is, it entails precisely the reconstitution of a central political power with the capacity to impose itself over the remaining political and military powers. It is therefore necessary to institutionalise safeguards to neutralise the understandable feeling of insecurity that pervades the various actors who fear exclusion and fear that the centralisation of political and military power favours the opposing group to their detriment. The military and security dimension of the peacebuilding model therefore has two objectives: to establish a balance between the warring parties and to restrict the ability of combatants to return to hostilities. There is, accordingly, a programme specifically aimed at soldiers, which includes the standardised phases known as "DDR": (1) demobilisation, (2) disarmament and (3) reintegration into civilian life or the national armed forces.

The international community's attention is later focused on security sector reform (SSR), which covers military, police and intelligence services, and seeks to establish more transparent, efficient and democratic control (see Sedra, 2010). Pointing to a generic notion of good governance and the rule of law, SSR is a long-term, comprehensive approach, concerned not only with the *capacity* to provide security to citizens but also *accountability* through civil and democratic supervision.⁴

The politico-constitutional dimension

This dimension seeks to carry out a political transition that involves the legitimisation of government authority; reform of the State's administration dismantled during the conflict; and the transfer of tensions among conflicting groups to the institutional level – that is the idea of politics as a continuation of the conflict through non-violent means, a notion which comes from Michel Foucault and that Ramsbotham calls "Clausewitz in reverse" (2000: 172).

The political regime that underlies these changes is liberal democracy, which is considered more prone to peace both internally and internationally.⁵ As the "dominant political philosophy" (Barnes, 2001: 86) of the international post-Cold War community, it was successively promoted and imposed on intervened societies, focusing primarily on reform and promotion of the rule of law and of those elements with the most impact on the process of democratisation and the creation of a democratic culture: political parties, media and civil society.

The introduction of this democratic model in post-conflict scenarios can, however, take different forms. A first approach was to hold short-term multi-party elections, which symbolised the immediate responsibility of national actors and the legitimacy of new

⁴ On the link between peacebuilding, the rule of law and SSR see Almeida Cravo, 2016.

⁵ For the democratic peace theory see Hayes, 2012.



political power (such as in Angola in 1992). The winner-takes-all logic of the zero-sum game in highly unstable contexts led, however, to the emergence of a second approach considered less destabilising: coalition governments, which aimed to socialise actors in terms of sharing negotiated power and the practice of consensus before holding first elections (e.g., in Afghanistan in 2002). One last way – only for cases where there is a large commitment from the international community in terms of financial provisions, human resources and time – is the "international protectorate", in which the transitional administration is upheld by an external actor (e.g., East Timor with the UN between 1999 and 2002).

The socio-economic dimension

This dimension aims to reverse the particularly devastating impact of armed conflict on a country's socio-economic fabric, drawing upon international financial aid. Following a *continuum* between relief, recovery and development (Macrae, 2001:155), the international community usually begins with humanitarian aid and also has a crucial role in medium- to long-term support for the reconstruction of basic infrastructure and the application of macroeconomic stabilisation policies. It should be noted that the understanding of this economic recovery, as well as monetary and fiscal (im)balances, has been guided by neoliberal ideology (see Harvey, 2005). During the eighties and nineties, this economic philosophy materialised in the so-called structural adjustment programmes, applied all over the developing world by international financial institutions loyal to the so-called "Washington Consensus" (Williamson, 2008). These economic policies advocated liberalisation, privatisation and deregulation of countries' economies, opening them to the market; they were accompanied by weakening and concomitant cutbacks in the interventionist role of the State in a context of strict fiscal discipline and tax reform aimed at attracting foreign investment.

Devastating criticism of this neoliberal model related to difficulties in favourably integrating these post-conflict economies into the world market and in a sustainable manner led to strong calls for the easing of economic practices, the regaining of the State as a development agent and the need to reconcile the imperatives of short-term stabilisation and long-term imperatives of growth and development (see Stiglitz, 2008). In general, however, the reforms of the "post-Washington Consensus" that followed, mainly in the late 1990s, were towards a "neoliberal-light package" rather than a real challenge to the model's assumptions.

The psycho-social dimension

One of the most serious costs of war is the enduring nature of the impact of the culture of rooted violence in societies plagued by conflicts over a long period (Lederach, 2001). The restoration of the social fabric of war-torn countries depends on the deconstruction of stereotypes and the conditions that fuelled the conflict and polarised communities, requiring, therefore, a change of individual attitudes and, more generally, the behaviour of society as a whole towards reconciliation.

Different societies have dealt with their psycho-social trauma resulting from conflicts in different ways. Some opted for what we call here the "Amnesia formula" – that is burying the past – through amnesties lest to cause instability. This path is difficult to follow since



sufferers are normally cursed with good memory. There are fundamentally three other recurring practices in dealing with the past in these contexts (which may exist simultaneously or even be associated with amnesty laws): through (1) truth and reconciliation commissions, as in El Salvador; (2) the courts (judicial settlement, either domestically or internationally), such as in Rwanda; and (3) traditional reconciliation practices (rituals entirely dependent on local cultural resources), as in East Timor.

This is, ultimately, a painful and slow process that involves readapting to each other and rebuilding peaceful relations. Reconciliation in its broadest sense is thus ultimately the end goal of a transition to peace.

Consensus on peacebuilding's institutional practice was generalised. The global organisation sought to strengthen it and streamline monitoring missions through administrative reforms such as the creation of the Department of Peacekeeping Operations as early as 1992, and also through the more systematic use of the Special Representatives of the Secretary-General. In particular, the creation of the Peacebuilding Commission in 2005 intended to fill an institutional gap with regards to the UN's capacity to act in contexts of violence and state fragility, as well as to learn from its mistakes and best practices within a framework of liberal peace.

Given the growing complexity of threats to international peace and security, the logic of complementarity between the work of the UN and multiple regional organisations and civil society also gained momentum. Putting into practice what had been envisaged by Chapter VIII of the UN Charter, partnerships with regional organisations – considered a privileged space for crisis resolution and peace promotion – became stronger. Institutions such as the OECD, the EU, NATO and the African Union began to play an increasing role in peacebuilding, following, in general, the institutionalised model. In particular, the enlargement of both NATO and the EU on the European continent and, subsequently, the expansion of their operations beyond Europe intensified the application of the paradigm and further legitimised the liberal peace model as a standard action. Simultaneously, the prominence on the international agenda of the concept of human security (see UNDP, 1994) and subsequent appeals for intervention provided more space for civil society organisations in the discourse and practice of peace and conflict. Viewed as more focused on individuals and tending to be bottom-up in their approaches, these organisations gained momentum and their participation in the various stages of the promotion of peace have become regarded as essential to the success of a sustainable peace process.

As pointed out by Newman et al., this understanding of both the challenge and the most appropriate response, which quickly spread to other organisations, reflects not only the dominant consensus but also normative progress towards weakening the inviolability of territorial integrity and, concomitantly, the growing acceptance of international interventionism (2009: 5).

4. Criticism of the model

Expectations for this new era of global interventionism were high and soon dashed, giving rise to widespread pessimism, in large part because of the dramatic and newsworthy failures of missions in Angola, Bosnia, Somalia and Rwanda. Statistics on the recurrence of violent conflicts in societies previously ravaged by war – about 50% in the first five years following the signing of peace agreements (Collier, 2003: 83) – led the favoured



model being openly questioned. But even where there was no blatant return to hostilities, the materialisation of formal peace faced serious difficulties and, in many cases, the initial effusive statements of *success* proved premature.⁶

The main protagonist of this ambitious interventionist project attracted much of the responsibility for the setbacks and failures. In fact, the complexity of the problems faced in peace and security with the end of the Cold War egregiously defied the institutional capacity of UN missions of this scale on several levels: financial resources; qualified and experienced staff; information gathering and planning; communication; coordination; and operational knowhow (see Roberts & Kingsbury, 1993). The undeniable difficulty of operationalisation of the UN proposal – evident right from the start – confirmed glaring weaknesses and difficult dilemmas that were undermining the credibility, legitimacy and intervention capacity of the organisation.

It would, however, be criticism of the model of peacebuilding itself, advocated both by the UN and by other more interventionist actors of the international system, that would prove to be more forceful. Of these, it is possible to distinguish two groups of critics through their analytical positions: (1) reformist critiques (the problem-solvers⁷) – who, while recognising relevant defects in the model, advocate its continuation, refining the process without challenging its ideological foundation; and (2) structural critics – who question the legitimacy of the model itself, its values, interests and the reproduction of hegemonic relations, challenging, thus, the order accepted as an immutable reality.

More and better interventionism: the reformist critiques

Both in terms of numbers and influence in the world of policymaking, most authors who focus on the theme of promoting peace in peripheral States belong to the so called mainstream and may be labelled problem-solvers. They are authors who advocate the existing order and whose concern is to increase the practical relevance and efficiency of the liberal peace model.⁸ Believing ultimately that, despite the disappointing results, external intervention is more beneficial than harmful and that the alternative is the abandonment of millions of people from the periphery to a condition of insecurity and violence, this line of thinking accuses the "hyper-critics" (Paris, 2010) of widespread scepticism and focuses on the improvement of the model in order to minimise its destabilising effects and improve its capabilities.

Paris and Sisk (2009) generally represent this position and point to five contradictions inherent in the model that hinder its applicability: (1) external intervention is used to promote self-government; (2) international control is required to create local ownership; (3) universal values are promoted to tackle local problems; (4) the break with the past is concomitant with the affirmation of history; and (5) short- and long-term imperatives often conflict. These tensions materialise in practical challenges to peacebuilding in the field of: (1) international presence (i.e. the degree of interference in the internal affairs of the host State – size of the mission, nature of the tasks, consent versus compliance/enforcement, combination of violent and/or non-violent means); (2) duration of the mission (post-war reconstruction as necessarily a long-term activity versus

⁶ See, for example, criticism of operations in Mozambique (Weinstein, 2002) and Cambodia (Lizée, 2000).

⁷ For the concept of "problem-solver" see Cox, 1986.

⁸ See, for example, Fukuyama, 2004; Paris, 2004; Doyle and Sambanis, 2006; Call and Cousens, 2008; Jarstad and Sisk, 2008.



accountability of national actors); (3) local participation (elites versus population, international priorities versus local priorities); (4) dependence (on international actors versus self-sustaining peace); and (5) consistency (organisational coordination and normative clout) (ibid .: 306-309).

The realization of these dilemmas does not lead to rejection of this kind of response from the international community; on the contrary, this analysis is seen as a "realistic" way of trying to *manage* contradictory imperatives in order to improve performance and efficiency of missions, adjust expectations and thus "save" the liberal peace project (Paris, 2010). The ideological foundations of liberal peace in transforming countries devastated by civil wars into liberal market democracies are therefore not questioned. Over the years, the incorporation of reformist critiques entailed only some adaptation in terms of methodology, with the adoption of more gradual reforms – of "institutionalisation before liberalisation" (Paris, 2004: 179) – in order to build and strengthen autonomous governance institutions that are effective and legitimate before the introduction of winner-takes-all elections and drastic reforms to open up markets. This strategy, more sensitive to the adverse effects of "shock therapy", maintained, however, the two global goals governing the implementation of the paradigm since the early nineties: (1) the reproduction of the Western Weberian State in the periphery – with the strengthening of the SSR, the rule of law and good governance (the three most prominent pillars of the model in its second decade); and (2) the integration of these spaces in the world capitalist economy – generally preserving the neoliberal framework, while safeguarding against its most devastating socio-economic impact by supporting development and poverty reduction programmes (Harrison, 2004).

The challenge to the global power structure: structural critiques

Structural critiques are mainly concerned with the ideology behind the thought and practice of peacebuilding and what this (re)produces in terms of the functioning of the international system. Unlike the perspective analysed above, the aim of the authors is transformative, looking to explicitly resist hegemonic forms of power.⁹ This normative commitment aims to transform the model itself – as opposed to an adjustment in line with the preservation of the dominant paradigm of liberal peace – as well as the broader system of power relations – as opposed to the preservation of the *status quo*.

Among the sharpest critiques are those who emphasise the Western hegemonic model of peacebuilding and its hierarchical, centralised and elitist nature. From a postcolonial perspective, liberal peace is understood as promoting Western culture, identity and norms over others (Lidén 2011: 57). The analogies between the peacebuilding and colonialism are therefore recurrent, considering both as contributing to power asymmetries between the Global North and the Global South. The structural problems of the design and implementation of peacebuilding models are thus seen in their relationship with the inequality of the international system: interventions impose a top-down model, create and reinforce a clear hierarchy between intervenors and the intervened and act as an instrument of global governance of the West in the periphery, consolidating its hegemony, defending its geostrategic interests and promoting its values (Chandler, 2010). Its function is then the legitimacy of the world order which followed the victory of

⁹ See, for example, Duffield, 2001; Pugh, 2005; Chandler, 2006; Richmond, 2006; Darby, 2009.



the Western Bloc in the Cold War, while serving the interests of Western states and international financial institutions controlled by them. Furthermore, the supposed *technical* solutions proposed and imposed by the Global North, such as the neoliberal strategies of post-war reconstruction, reproduce the conditions of conflict and cause the very violence they intend to solve (Duffield, 2001; Pugh, 2005), ultimately contributing to the system's instability.

Looking to overcome this logic of the international imposing on the local, several authors have more recently explored the idea of a "post-liberal peace" model. The contribution, for example, of Richmond (2011) and Mac Ginty (2011) focuses mainly on the theory of hybrid peace, where peace is a cumulative and long-term hybrid of endogenous and exogenous forces. Refusing both the universality of liberal peace (as a principle and practice) as well as the romanticised "purity" of the local, the hybrid perspective notes local agency in resisting, subverting, renegotiating, ignoring, delaying and producing alternatives to the current paradigm. Recognition of this heterogeneity opens the way to think about Southern epistemologies (Sousa Santos, 2014) and, in particular, about forms of State-building and societal governance that are distinct from those proposed by the hegemonic model. The central idea is that, paying attention to worldviews that are culturally different from the Western, is it possible to recognise and create a multiplicity of "peaces" that are not exhausted by the overwhelming hegemony of liberal peace.

Notwithstanding their different characteristics and intentions, these critiques effectively put in question: (1) the *goodwill* of the intervention model – drawing attention to the imperialist features of the paradigm and the way it serves the interests and particular agendas of Northern countries in the South; (2) its nature – challenging the centrality of security (which favours order and stability at the expense of emancipation) and its elitist, technocratic and standardised essence; (3) its legitimacy – questioning the presumption of the universality of Western liberalism as well as its Eurocentric, imposing and curtailing approach to local participation; and (4) its efficacy – stressing the maintenance of conflicting relationships, dependency on external actors and the adverse consequences of downplaying endogenous contributions.

Conclusion

There is no doubt that the model of peacebuilding undertaken by the various actors who today take the lead in international interventionism is a particularly ambitious project. From the mere freezing of armed conflicts, we have moved rapidly to attempt to settle their root causes through an institutionalised paradigm that dramatically changed the objectives and traditional functions of promoting peace in the periphery.

The results of this interventionist project were, however, far short of the desired, particularly for those who enthusiastically foresaw a new era able to solve the challenges to international peace and security of the post-Cold War. Two decades of internal and external criticism of the peacebuilding model did produce some reforms towards a *modus operandi* that is occasionally more flexible and more sensitive to other approaches. These adjustments did not, however, truly question the cultural and ideological assumptions of this paradigm, neither the global North's interests underlying the international action in conflict and post-conflict contexts. In fact, they could not even suitably solve most of the problems identified by the problem-solvers, as shown by the successive reports and



assessments of peace operations led by international actors themselves. Indeed most of the criticism over the past twenty years remains valid today.

The appreciation of peacebuilding as a response to extreme levels of violence plaguing the system cannot, in this sense, fail to reveal an impact that is at least disappointing and often counterproductive. Although praising the will to go beyond the militarised model of negative peace – as well as how the fact translates into a renewed commitment of the international community towards the periphery devastated by violence and in need of help – scepticism about international efforts have clearly been justified. Serious limitations in the way the concept has been conceived and materialised on the ground – to which complaints can be added regarding the agendas and interests that are truly served with these interventions – are particularly serious problems that are still, in fact, far from being resolved.

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THE ICC AT THE CENTRE OF AN INTERNATIONAL CRIMINAL JUSTICE SYSTEM: CURRENT CHALLENGES¹

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Abstract

The International Criminal Court (ICC) has entered into its second decade of operations and has established itself at the centre of an international criminal justice system, comprising also domestic jurisdictions and other international courts and tribunals. However, many challenges continue to face the ICC and, indeed, such challenges are part of its own features and stem from the specificities of international law and relations. In this article, we shall discuss, in light of recent events, four of such challenges: 1) Universality; 2) Complementarity; 3) Cooperation; and 4) the Crime of Aggression. These challenges illustrate how the ICC and international criminal justice inhabit both the cultures of justice and politics and how these two aspects have to be taken into account in order for such challenges to be overcome, so that the mission of a permanent and central instrument for the fight against impunity, that historically started in Rome in 1998, becomes an inherent part of today's world.

Key-Words

International Criminal Court; International Criminal Justice.

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THE ICC AT THE CENTRE OF AN INTERNATIONAL CRIMINAL JUSTICE SYSTEM: CURRENT CHALLENGES

Patrícia Galvão Teles

I. Introduction

In 2016, the International Criminal Court (ICC) witnessed an unprecedented level of judicial activity. This trend is expected to continue in 2017. Preliminary examinations are being conducted in 10 different situations in all regions of the world (including Afghanistan, Colombia, Iraq/UK, Palestine and Ukraine), there are 10 ongoing investigations (including Georgia) and 3 judgments were concluded in 2016.

At the same time, the ICC is experiencing a delicate moment from a political point of view, with the withdrawal from the Rome Statute of 3 African States (South Africa, Burundi and the Gambia) and antagonistic signals coming both from Russia and the new American administration.

Concurrently, due to the lack of universality of the Rome Statute and deadlock in the Security Council, some situations where serious international crimes are being committed cannot be brought before the ICC and *ad hoc* mechanisms continue to have to be created, in spite of the existence of a permanent criminal court, such as for the cases of South Sudan and possibly Syria.

As to the issue of complementary, the conclusion of the Malabo Protocol in the African Union context has raised the novelty of, besides national jurisdictions, a "regional" complementarity and the question of its compatibility with the Rome Statute.

On the cooperation front, difficulties continue and they affect the capacity of the Court to accomplish its mission given the high level of dependence from cooperation from Member States. This has been especially evident concerning the outstanding arrest and surrender of persons indicted by the Court, in particular of Omar Al-Bashir of Sudan, a sitting Head of State, highlighting the tension between the traditional law on immunities and international criminal justice.

Another element of tension that will resurface in 2017 is related to the crime of aggression, since a decision on the activation of the Court's jurisdiction with regard to this crime can now be taken and the crime of aggression has been a contentious element of the ICC Statute, in particular for the Permanent Members of the Security Council.

These four challenges continue to put on the spot the difficulties of operation of a judicial mechanism in a political environment. If all judicial work is done against this background, in no Court like the ICC this dichotomy of justice vs. politics seems more evident.



II. Current Challenges

1) Universality

The quest for universal ratification of the Rome Statute of the ICC has been a constant goal since the adoption of the Rome Statute. In 2016, 124 States were parties to the Statute, including the State of Palestine. Out of them 34 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

In October/November 2016, South Africa, Burundi and the Gambia notified the Secretary-General of the United Nations (UN), who is the depositary of the Rome Statute, of their intention to withdraw from the ICC – a decision that, according to the Statute, only produces legal effect one year after notification. These countries have acted upon different reasons, including internal political reasons, but these decisions share an open criticism to the Court's functioning.³

In recent years, many African States developed a growing negative perception of the ICC, especially in view of the fact that the first cases brought before this Court were all concerning African situations, although most of them were sovereign self-referrals from the States themselves. This negative perception and concerns of selectivity were voiced in meetings of the African Union, of the UN General Assembly and Security Council and also at the Assembly of States Parties of the ICC.⁴

Though a mass exodus of the Rome Statute is not to be expected and while it may still be possible that these withdrawal decisions are reversed, they affect the credibility and legitimacy of the Court.

Another aspect that affects the credibility and legitimacy of the ICC and imperils its quest for universality, is the fact that out of the 5 Permanent Members of the UN Security Council (P5), only 2 are parties to the Rome Statute: France and the United Kingdom. The United States, Russia and China are not parties and this has made the ability of the Court to fully perform its functions very much dependent of the attitudes taken especially by the US and Russia in the context of the Security Council and more in general, which have varied over time, but risk at the moment to enter a particularly antagonistic phase.

Moreover, after the Bush years, the US may be headed toward a new showdown with the ICC. The ICC is reportedly launching an investigation into possible war crimes in Afghanistan that could include acts of torture committed by the US military from 2003-2014. Even if this does not materialize, given the signs given by the incoming President

³ For South Africa's full arguments see "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court" available at <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>.

⁴ Cf. N. Waddell and P. Clark, *Courting Conflict? Justice, Peace and the ICC in Africa*, The Royal African Society, 2008; A. Arieff *et al*, *International Criminal Court Cases in Africa: Status and policy issues*, Diane Publishing, 2010; E. Keppler, "Managing setbacks for the International Criminal Court in Africa", *Journal of African Law* (2012-56/1) 1-14; A. Guerreiro, *A resistência dos Estados Africanos à jurisdição do Tribunal Penal Internacional*, Almedina, 2012; and P. Galvão Teles, "The International Criminal Court and the evolution of the idea of combating impunity: an assessment 15 years after the Rome Conference", *Janus.Net* (2014-2015-5/2).



on issues of foreign policy, the UN and human rights, a defensive and hostile position towards the ICC could be expected.⁵

Russia, on its part, has in November 2016 formally “withdrawn its signature”⁶ from the Statute of the International Criminal Court – as the US⁷ had done a few years earlier in 2002⁸ –, after the Court published a report classifying the Russian annexation of Crimea as an occupation. Besides the ongoing investigation into the crimes committed in Georgia in 2008, Russia may also be concerned about a possible criminal investigation in Syria, where its forces have been repeatedly accused of carrying out war crimes in recent months. Russia had signed the Rome Statute in 2000 and cooperated with the court, but had not ratified the Treaty and thus remained outside the ICC’s jurisdiction. This means that this move, though highly symbolic, will not change much in practice, but is a sign of a more hostile future attitude towards the Court.

Besides withdrawals and antagonist positions that threaten the universality aspiration of the Rome Statute, the fact that the Statute is not universally ratified entails that the necessity for continuing to create *ad hoc* mechanisms – as it was done in the past for the Former Yugoslavia, Rwanda, Sierra Leone, Cambodia or Lebanon – continues to be present. Although more difficult to implement, due to political and financial difficulties, it is possible that such *ad hoc* mechanisms will come into play in, at least, in two pressing situations: South Sudan and Syria.

Since December 2013, serious violations of international humanitarian law and human rights have been committed in South Sudan, with crimes including extrajudicial killings, ethnically targeted violence, rape and other forms of sexual and violence, and attacks on schools, places of worship, hospitals and United Nations and associated peacekeeping personnel. Calls for accountability have been made in numerous fora, including the Security Council, the Human Rights Council and the African Union Peace and Security Council, as well as by civil society. In August 2015 the parties to the conflict adopted an Agreement on the Resolution of the Conflict, in which they agreed to establish a Hybrid Court for South Sudan. The Hybrid Court shall be “an independent hybrid judicial court” and it “shall be established by the African Union Commission to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law” committed after 15 December 2013. In October 2015, the Security

⁵ Cf. United Nations University Center for Policy Research, “The UN in the Era of Trump”, available in <https://cpr.unu.edu/the-un-in-the-era-of-trump.html>.

⁶ In a communication received on 30 November 2016, the Government of the Russian Federation informed the Secretary-General of the following: “I have the honour to inform you about the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court, which was adopted in Rome on 17 July 1998 and signed on behalf of the Russian Federation on 13 September 2000. I would kindly ask you, Mr. Secretary-General, to consider this instrument as an official notification of the Russian Federation in accordance with paragraph (a) of Article 18 of the Vienna Convention on the Law of Treaties of 1969.” See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

⁷ In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following: “This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.” See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en.

⁸ Legally, the act of “unsigneding” a treaty or “withdrawing the signature” does not exist. What Russia and the US have done is a communication of their intention not to become party to the Rome Statute, so as to avoid the good faith obligations that arise from signature as foreseen in Article 18 of the Vienna Convention on the Law of Treaties of 1969.



Council requested the Secretary-General to make available technical assistance for the establishment of the Hybrid Court. This is the first time the United Nations has been tasked with providing technical assistance to a regional organization in the establishment of a hybrid tribunal. The United Nations has a wealth of expertise in the establishment and operation of international and United Nations-assisted criminal courts and tribunals and is liaising with the African Union Commission to share lessons learned from past experiences.⁹

After a Security Council Resolution to submit the Syrian situation to the ICC was vetoed by Russia and China in 2014, the United Nations General Assembly on 19th December 2016 voted to establish a special team to "collect, consolidate, preserve and analyze evidence" as well as to prepare cases on war crimes and human rights abuses committed during the conflict in Syria. According to General Assembly Resolution A/RES/71/248, the team will work in coordination with the UN Syria Commission of Inquiry, which was established by the Geneva-based UN Human Rights Council in 2011 to investigate possible war crimes. The Commission of Inquiry, which has developed a confidential list of suspects on all sides who have committed war crimes or crimes against humanity, has repeatedly called for the UN Security Council to refer the situation in Syria to the International Criminal Court. The special team will "prepare files in order to facilitate and expedite fair and independent criminal proceedings in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes." A crackdown by Assad on pro-democracy protesters in 2011 led to civil war and Islamic State/Daesh militants have used the chaos to seize territory in Syria and Iraq. Half of Syria's 22 million people have been uprooted and more than 400,000 killed.¹⁰

The quest for universality of membership and for making the ICC the effective centre of the global international criminal justice will certainly continue in the future, despite recent setbacks. Nevertheless, it has to continue to be borne in mind that the ICC is only a court of last resort, for the most serious of the most serious international crimes and that it will never have the capacity, nor it was intended to replace national jurisdiction and States' primary responsibility for accountability for atrocity crimes. This is why complementarity – at the national level or eventually at the regional level – continues to be a fundamental feature of the international criminal justice, as it will be discussed at the next section.

2) Complementarity

The ICC is based on the principle of complementarity according to Article 17 of its Statute. It is a Court of last resort¹¹ that shall only intervene when the territorial or nationality State is "unable or unwilling" to prosecute the serious international crimes that may have been committed in its territory or by its nationals.

For the complementarity system to work, States have to have adequate national legislation and capable judicial institutions. This is, of course, a challenge on its own.

⁹ Cf. http://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS-ILC-statement-17-May-2016-EN-FR.pdf.

¹⁰ See <https://www.un.org/press/en/2016/ga11880.doc.htm> and <http://mobile.reuters.com/article/idUSKBN14A2H7?il=0>.

¹¹ E. Mendes, *Peace and Justice at the International Criminal Court: A Court of last resort*, Elgar, 2010.



Central African Republic and Sri Lanka are two countries now developing, with the assistance of the United Nations and other organizations, their ability to promote judicial accountability for the crimes committed during their civil wars.

But if complementarity was initially seen as complementarity between the ICC and national jurisdictions, the possible creation of an African Regional Criminal Court, has raised the issue of “regional” complementarity.¹²

In June 2014, the African Union (AU) Assembly of Heads of State and Government meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) and called on AU member states to sign and ratify it.¹³

The Malabo Protocol extends the jurisdiction of the African Court of Justice and Human Rights (ACJHR) to crimes under international law and transnational crimes. The original plan for the ACJHR was a court with two sections - a general affairs section and a human rights section. The Malabo Protocol introduces a third section: the international criminal law section. Thus, if the Malabo Protocol comes into force, the ACJHR will have jurisdiction to try the following 14 crimes: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.

Thus the international criminal law section of the ACJHR could serve as an African regional criminal court, with the same objectives of the International Criminal Court but within a narrowly defined geographical scope, and over an expanded list of crimes.

The adoption of the Malabo Protocol is apparently a step in the right direction. The regional criminal court could potentially play a positive role on a continent persistently afflicted by the scourge of conflict and impunity for international crimes. In recent and ongoing conflicts, thousands of civilians have lost their lives or have been maimed and displaced from their homes. There are many accounts of killings, torture, rape, mutilation of bodies, recruitment of child soldiers, and wanton destruction of property. Armed groups and government forces alike are responsible for the abuses and violations.

Impunity is a common denominator in Africa’s conflicts, with those suspected of criminal responsibility for crimes under international law rarely held to account. Often national governments are unwilling or unable to conduct prompt, independent, impartial, and effective investigations into allegations of international crimes and to bring all those suspected of criminal responsibility to justice in fair trials. A regional criminal court, as envisaged under the Malabo Protocol, has the potential to fill this accountability gap.

However, there are concerns about the motivations behind the proposal to establish the criminal chamber of the ACJHR. Some commentators¹⁴ have argued that the proposal is an attempt by the AU to shield African heads of state and senior state officials from being held to account when there are reasonable grounds to believe that they are criminally

¹² F. M. Jackson, “Regional complementarity: The Rome Statute and Public International Law”, *Journal of International Criminal Justice* (2016-14/5) 1061-1072.

¹³ On this issue see Amnesty International, *Malabo Protocol – Legal and institutional implications of the merged and expanded African Court*, 2016.

¹⁴ See, among others, <http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf> and <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>.



responsible for crimes under international law. Furthermore, there are doubts as to the compatibility with the Rome Statute on the issue of complementarity, envisaged as a national complementarity, but also given the express provision on immunity of process regarding sitting heads of state, government or other seniors state officials.

An immunity clause is indeed considered to be the most controversial provision in the amended ACJHR Statute. The relevant provision (Article 46Abis) reads as follows: "No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office."

So far the Malabo Protocol is not yet in force, having been signed only by 9 States and ratified by none. A possible expansion of the Malabo Protocol of the African Court on Human and People's rights should be achieved in a way that it ensures greater accountability, but does not undercut the ICC's contribution to criminal justice. Such an extension of the African Court must be developed in full respect and in conformity with the Rome Statute that does not foresee immunity from jurisdiction for sitting Heads of State. But it is precisely the issue of the irrelevance of the official capacity for criminal prosecution that is the most problematic aspect of the Rome Statute for African States, as it will be discussed in the next section.

3) Cooperation

Out of the 23 arrest and surrender requests issued by the ICC, 12 are still to be executed: (a) Ivory Coast: Simone Gbagbo, since 2012; (b) Democratic Republic of Congo: Sylvestre Mudacumura, since 2012; (c) Kenya: Walter Barasa, since 2013; (d) Lybia: Saif Al-Islam Gaddafi, since 2011; (e) Darfur (Sudan): Ahmad Harun and Ali Kushayb, since 2007; Omar Al Bashir, since 2009; Abdel Raheem Muhammad Hussein, since 2012; and Bahar Idriss Abu Garda, since 2014; (f) Uganda: Joseph Kony, Vincent Otti and Okot Odhiambo, since 2005.

The arrest and surrender of indicted persons depends on the cooperation of the States Parties to the ICC, but also on the overall UN Members in the cases submitted under Chapter VII of the UN Charter by the Security Council, as it was the case of Sudan and Libya, that are not State Parties to the ICC. The ICC has asked, without success, the Security Council to act upon the non-cooperation with regard to these two situations.

These outstanding arrests have also significantly affected the credibility of the Court and of the system designed by the Rome Statute.

The Bashir case has been the one where tensions have been more evident. In particular, in June 2015 while attending an African Union Summit in South African, President Bashir's arrest and surrender was object of an ICC request of cooperation to South Africa. The High Court of South Africa issued an order requiring that he should not be permitted to leave the country, but the South African government permitted him to do so before the High Court could consider the request on the merits and the High Court subsequently held that this was unlawful. Under Part IX of the Rome Statute, States Parties – including South Africa – have obligations to cooperate with the Court. This is also so regarding South African nation legislation implementing the Rome Statute.



South Africa's government¹⁵ has argued that there is an unresolved legal question arising from the fact that international law provides that serving heads of state are immune from criminal jurisdiction of other states, including immunity from arrest and personal inviolability. The question that arises is whether this immunity persists in cases in national authorities are asked to arrest a head of State wanted for prosecution by the ICC. The matter is further complicated when the head of state is that of a State not party to the ICC Statute, though the case has been brought by a Security Council Chapter VII Resolution.

According to South Africa, Article 27¹⁶ and Article 98¹⁷ of the Rome Statute represent the intersection of the law on immunities applying to Heads of State and Government, and the cooperation obligation of States Parties to the Statute. The relationship between State Parties and non-State parties continues to be governed by customary international law that bestows on a Head of State immunity *ratione personae*. Arrest of such a person by a State Party pursuant to its Rome Statute obligations, may therefore result in a violation of its customary law obligations.

This argument has been rejected by the ICC¹⁸ (though not in a fully consistent way in terms of the legal arguments), many States and scholars, arguing *inter alia* that Article 27 of the Rome Statute, following the Nuremberg precedent, has made irrelevant the official capacity and customary law immunities for the purposes of prosecution by international criminal tribunals for States Parties to the ICC. Moreover, since Sudan's situation was brought to the ICC by the Security Council in a binding Chapter VII Resolution, the obligations of cooperation arising out from this case would also be binding upon all and with regard to all UN Member States and not only ICC States Parties.¹⁹

These different legal views on this question have persisted and it has been suggested by commentators and even by the African Union that this matter should be the object of an

¹⁵ Cf., among others, "Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court" available at <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf>.

¹⁶ "1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

¹⁷ "1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

¹⁸ Cf. Decisions on Malawi (ICC-02/05-01/09-139-Corr of 13 December 2011), Chad (ICC-02/05-01/09-151 of 26 March 2013) and South Africa (ICC-02/05-01/09-242 of 13 June 2015).

¹⁹ Cf., among others, the discussions on this issue by D. Akande, "International Law Immunities and the International Criminal Court", *American Journal of International Law* (2004-98/3) 407-433; P. Gaeta, "Does President Al Bashir enjoy immunity from arrest?", *Journal International Criminal Justice* (2009-7/2) 315-332; and C. Jalloh, "Reflections on the indictment of sitting Heads of State and Government and its consequences for peace and stability and reconciliation in Africa", *African Journal of Legal Studies* (2014-7/1) 43-59.



advisory opinion of the International Court of Justice.²⁰ Even if this is not the case, it would be important legally and politically to clarify this question in a definitive and consensual manner in order to alleviate some of the current tensions relating to the ICC.

4) The Crime of Aggression

In the run-up and during the Rome Diplomatic Conference in 1998 the discussion was rather about the inclusion or not of the crime of aggression along the other 3 core international crimes: genocide, crimes against humanity and war crimes. The dispute was not so much about the possibility of criminally prosecuting aggression at the individual level, since there were post World War II precedents (namely Nuremberg and Tokyo) concerning the then called “crimes against peace”, but whether to include a more narrow crime covering only “wars of aggression” or a broader one relating to “acts of aggression” contained in the 1974 General Assembly Resolution adopted in the meantime. The other thorny issue was the relationship between the ICC and the Security Council, namely if the ICC should only prosecute crimes of aggression once the Security Council had determined the existence of such act, or not.²¹

During the Rome Conference, proposals were made for the inclusion of the crime of aggression by several delegations. Many States supported the inclusion of this crime in the jurisdiction of the Court, as long as it was possible to agree on a definition and on the conditions for the exercise of such jurisdiction. In order not to jeopardize the overall result and derail the negotiations, a compromise was found in Articles 5/1 and 2, to include the crime of aggression, but leave the definition and the conditions for the exercise of jurisdiction for later consideration, namely at the first Review Conference. A mixed outcome was there the possible compromise: the crime was in the Statute, but the Court could not exercise jurisdiction until further negotiations and agreement on the two tracks of definition and conditions for the exercise of jurisdiction.

Resolution F of the Final Act of the Diplomatic Conference confirmed that this was an issue to be continued and mandated the Preparatory Commission for the ICC, or Preparatory Commission, to further work on the issue of aggression. Resolution F mandated the Preparatory Commission to prepare proposals for a provision on aggression, including the definition and the elements of crimes, and the conditions under which the ICC shall exercise its jurisdiction. It also stated that the Commission should submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in the Statute.

Following the 1998 Rome Conference, the Preparatory Commission for the ICC (PrepComm, 1999–2002) and later the Special Working Group on the Crime of Aggression (SWGCA, 2003–2009) continued negotiations on the outstanding issues regarding the crime of aggression. In February 2009, the SWGCA found a consensus agreement on the definition of the crime of aggression. The 2010 Kampala Review Conference used that definition and could thus focus on other outstanding issues, i.e. the

²⁰ Cf. <http://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/> and http://au.int/en/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf.

²¹ See S. Barriga and C. Kreß, *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, 2012.



“conditions for the exercise of jurisdiction”. States Parties seized the historic opportunity and adopted Resolution RC/ Res.6 by consensus. The resolution amended the Rome Statute to include, inter alia, new Article 8bis containing a definition of the crime of aggression and new Articles 15bis and 15ter, containing complex provisions on the conditions for the exercise of jurisdiction. Notably, the compromise included a clause that prevented the Court from exercising jurisdiction over the crime of aggression immediately. Instead, the Assembly of States Parties would have to take a further one-time decision to activate the Court’s jurisdiction, no earlier than 2017, by a 2/3 majority of the States Parties. Also, one year must have passed since the 30th ratification, already accomplished in June 2016, before the Court could exercise its jurisdiction over the crime of aggression.²²

The Assembly of States Parties is thus now in a position to take a decision on the activation of the ICC regarding the crime of aggression. The Permanent Members of the Security Council, including ICC parties France and UK, have always questioned this crime, especially the relationship between the Security Council, who has the political prerogative of declaring that an act of aggression has been committed, and the ICC who will have to do a judicial, and not political, analysis. Although the Kampala Amendments have safeguarded many of the P5 concerns, it is expected that the activation of jurisdiction on the crime of aggression may bring another layer of tension in the ICC realm in the current political context. It is, therefore, of utmost importance that this process continues to be built upon a solid basis at the next Assembly of States Parties and that the Kampala compromise is not reopened.

III. Some Conclusions: Justice vs. Politics

The Rome Statute of the ICC was, undoubtedly, one of the most significant international treaties to be signed in the post cold war period, at a moment where international law and international institutions lived a very positive moment. It was at the centre of the political discourse in the reaction against the gravest atrocities committed since World War II, namely in the Former Yugoslavia and in Rwanda.

Today, it would most likely not be possible to repeat this feat and create on the most innovative institutions in the international arena, breaking away from the Westphalian model of sovereignty, but at the same time strongly anchored in that model, given the dependency on State voluntary participation and cooperation.

The ICC, together with States, strives to promote the rule of law, the respect for human rights and sustainable peace, in accordance with international law and the purposes and principles of the Charter of the United Nations.

With the increasing workload of the Court, all cooperation efforts are fundamental for the credibility of the Court and for the ICC to perform the role it was given by the Rome Statute, not only to ensure accountability of the perpetrators of the most serious crimes of concern to the international community as a whole, but also to assure that the rights of the victims prevail.

²² See C. Kreß and L. von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, *Journal of International Criminal Justice* (2010-8/5) 1179-1217 and S. Barriga and L. Grover, “A Historic Breakthrough on the Crime of Aggression”, *American Journal of International Law* (2011-105/3) 517-533.



It also has to be highlighted that the ICC has a complementary nature and was not created to replace States. Bringing those responsible for the most serious crimes to justice is, first and foremost, a responsibility of States and the Court should only act where national authorities fail or are not in a position to take the steps necessary to ensure accountability for such crimes.

However, one cannot forget that the ICC, though a judicial institution, inhabits the world of *realpolitik*. As it has been said: "This is a harsh environment for the delicate plant of international justice. But it is also a world where the demand and need for accountability has never been greater."²³

As we have briefly seen, the challenges are immense and the political moment a delicate one for the institution. But the ICC is here to stay and is becoming an inherent feature of today's world. Both aspects of justice and politics have to be taken into account in order for such challenges to be overcome, so that the mission of a permanent and central instrument for the fight against impunity, that historically started in Rome in 1998, becomes a definitive part of today's world.

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²³ <http://blog.oup.com/2015/11/three-challenges-international-criminal-court/>.



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YANUKOVYCH'S DECISION TO POSTPONE THE SIGNATURE OF THE AGREEMENT WITH THE EU: A POLIHEURISTIC ANALYSIS

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Abstract

President Yanukovich's decision to postpone the signing of the Association Agreement and the Deep and Comprehensive Free Trade Agreement with the European Union triggered a strong reaction in Ukrainian society. One of the consequences of the crisis that ensued was the removal of the president himself. What prompted Yanukovich to postpone the signing of the agreement with the European Union?

In seeking the answer to this guiding question, poliheuristic theory was used, in the light of which this decision process was analysed in two stages. The first stage identified that the option not to be selected was the signature of the agreement with the EU, and the threats that internally led to this decision were analysed. Yanukovich felt that his survival in power was not at issue and sought to solve Ukraine's immediate financial problem by highlighting the problems that industrialists in the south-east of the country were experiencing with Russian trade blockades and avoiding essential structural reforms in the country.

Although the decision was already identified, we analysed how it maximized the advantages and minimized the disadvantages, which corresponded to the second stage of the analysis.

Dismissing the civic and political mobilization of the Ukrainians, believing he could have talks with the European Union and Russia concomitantly and valuing the immediate financing needs, answers the question initially posed, that is, what prompted Yanukovich to postpone the signing of the agreement.

Keywords

Ukraine; Russia; European Union; Poliheuristic Theory; Financing

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YANUKOVYCH'S DECISION TO POSTPONE THE SIGNATURE OF THE AGREEMENT WITH THE EU: A POLIHEURISTIC ANALYSIS¹

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Introduction

In the light of Poliheuristic Theory (PH), this reflection aims to analyse the decision of the Ukrainian President Viktor Yanukovych in November 2013 to postpone the signing of the Association Agreement (AA) and the Deep and Comprehensive Free Trade Agreement (DCFTA) with the European Union (EU).

Both agreements resulted from a rapprochement between Ukraine and the EU, which began in 1998. With the AA, the EU wanted a political association with Ukraine, as well as to promote the highest possible level of economic integration (EU, External Action, 2013). As regards the DCFTA, the objective was to establish a free trade area that would allow Ukrainian access to the European market (estimated at 500 million consumers and 17.6 billion USD), as well as increased foreign investment in the country (Nupi Institute, 2013).

At the same time, Yanukovych expected Russian pressure against this rapprochement with the EU. In July 2013, Russia imposed restrictions on Ukrainian imports, which although not official², had a significant impact on Ukraine's exports (Cenusa et al., 2014, pp. 1-3). Attempts to negotiate the price of gas were not accepted by the Kremlin, which translated into a burden for Ukrainians. Russian President Vladimir Putin considers Ukraine a state that is naturally under Russian influence and should be part of the Eurasian Economic Union (EAEU), a customs union that encompasses Russia, Belarus and Kazakhstan.

After the announcement that Yanukovych would postpone signing the agreement, thousands of Ukrainians demonstrated in Kiev, demanding the rapprochement of their country with the EU. The police charge on the demonstrators was strong, resulting in dozens of deaths and hundreds of injured, as well as a strengthening of the protesters' willingness to continue their protests, which eventually spread to other Ukrainian cities.

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² The Russian authorities argued that Ukrainian products did not comply with their national regulations in the case of agri-food products and were technically flawed in the case of railway carriages.



As such, in view of the importance of this event, it is important to analyse the Ukrainian President's decision and try to answer the question: What prompted Yanukovych to postpone the signing of the agreement with the European Union?

The first part of this paper presents the theoretical framework that underpins the analysis, PH Theory, more concretely the two stages that characterize it and its corresponding dimensions. It is followed by a brief economic and political overview of Ukraine, which supports the analysis. The third part examines the foreign policy decision episode that led to the crisis and consequent Yanukovych's removal.

It should be noted that this work is based essentially on the analysis of official documents concerning international institutions' resolutions and communiqués and electoral and economic data; of scientific papers on the Ukrainian crisis, as well as news published by various media. The fact that it was not possible to interview former President Yanukovych or any of his closest collaborators specifically on this decision is a limitation in the context of this reflection.

Finally, the main conclusions of this study are presented, namely the answer to the question initially posed and that guided this reflection.

Poliheuristic Theory

History is replete with decisions of political leaders that determined its course, as they affect the balance in international relations. In this context, there are several models that are a reference to be used in the analysis of the decision-making process in international relations. PH theory is one of them. As the etymology of the word poliheuristic indicates ("poly" means many and "heuristics" means shortcuts), it is a process that simplifies decision-making through several "shortcuts" (Mintz et al., 1997, p.554).

In the light of PH theory, the decision-making process consists of two stages, in which the first one identifies the possible options and eliminates the options that do not meet the non-compensatory principle. According to this principle, the options under analysis are evaluated by the decision-maker in several dimensions, although only one of them is considered to be the most important. If the evaluation shows that in this primordial dimension the option is not strong or even impracticable, the evaluation in the other dimensions, even if very favourable, does not make this result worth it and the option is not selected for the next step (Redd & Mintz, 2013).

Within the options that go through to the second phase, the one that best maximizes the advantages and minimizes the disadvantages, the result of being rationally compared³, is selected (Redd & Mintz, 2013).

When making foreign policy decisions, leaders cannot be aware of only the external aspects of that decision. The internal context, although not the background, plays a very important role in the first stage of the process, since national interests have to be met, as well as the political interests of the leader or his/her regime. Therefore, in the first

³ In the study of the decision-making process in international relations, there are two approaches to consider: the cognitive and the rational. In the first, the focus is on the process itself, seconding the result to be achieved. To this effect, knowledge, judgment, beliefs, among other characteristics or tools of the decision-maker are fundamental. In the rational approach, the focus is on the results that are intended to be achieved, using a comparison between the options. The latter aims to ensure the selection of the option that best meets one's needs or objectives (Brulé, 2008).



stage, where the process aims to identify which options do not comply with the non-compensatory principle, the following threats are taken into account: the survival of the political leader or even of the regime itself; the loss of popular support associated with the political decision in question; decrease in popularity; chances of electoral defeat; rising internal opposition; political fragmentation of the leader's supporters or within his/her party; internal or external challenges to the regime; collapse of the government or coalition; legitimacy, power and political credibility of the leader; demonstrations and social contestation; parliamentary vetoes (Mintz, 2004, pp.6-9).

In the second stage of the analysis in the light of PH theory, the selected options are evaluated from a foreign policy perspective, in their economic and diplomatic aspects, seeking to maximize their advantages and to minimize their disadvantages (Breuning, 2007, pp.65-67).

Although PH theory has already been used to analyse several decisions in international relations⁴, and evidence has been obtained that corroborate it through several methods (Mintz, 2005) and (Brulé, 2008), some limitations have been identified.

According to Stern (2004), there are limitations in PH theory, since how the leader perceives the problem and conceptualizes it, and how the issues to be decided are detected and reach the decision-maker have not been analysed; the same applying to a set of contextual factors that condition the leader's action in the internal context, such as the political situation at the time (for example, the proximity of elections or results obtained recently can condition the degree of freedom in the leader's decision) or his/her political autonomy.

Stern (2004) points out another limitation in the use of this theory, which is that the analysis is static and pertains to a particular moment, when the leader can change the contours of the decision, for example when manipulating public opinion or a certain elite, or when gathering more political support, changing the internal constraints that affect his/her decision-making.

Yanukovych's decision in the light of the Poliheuristic Theory

a. Economic and political context of Ukraine

In order to better understand the analysis of Yanukovych's decision to postpone the signing of the agreement with the EU, it is appropriate to make a brief overview of the economic and political situation in Ukraine at the time.

Of the states that made up the former Soviet Union, Ukraine had the second largest economy, with agriculture and heavy industry playing a central role. After its independence in 1991, the opening of the Ukrainian economy began and a set of reforms were initiated. However, progress was limited as a result of its own internal resistance and the large size of the parallel economy. Many structural changes have yet to be made, in terms of capital markets, legislation and the fight against corruption (CIA, 2016).

⁴ The decisions of American President Eisenhower in the crises of Dien Bien Phu, Vietnam and Guatemala in 1954; of President Clinton regarding the crisis in Kosovo in 1998 (Mintz, 2004, p. 5) or the Swedish participation in Operation Unified Protector (Nilsson, 2016) are some of the examples of the application of this theory.



Yanukovich was elected in 2010, having won the second round of the election with 49% of the votes, against 45.5% of his opponent Yulia Tymoshenko (Election Resources on the Internet, not dated.). These election results, in addition to reflecting a small margin between the two candidates' votes, are extremely heterogeneous if one considers the results in the various Ukrainian regions. Their analysis reveals that in the north and west of the country, the electorate strongly supported Tymoshenko, in sharp contrast to the east and south regions, where Yanukovich's support was larger.

Figure 1 – Results of the Presidential Elections in Ukraine in 2010



Source: <http://www.polgeonow.com/2014/03/ukraine-divisions-election-language.html>

It was precisely in the southern and eastern regions that most of the Ukrainian oligarchs were concentrated, with whom Yanukovich maintained a highly dependent relationship. This group was responsible for a large part of the country's wealth creation, in several areas, which gave them power regarding the President. The President, in turn, was in power and stayed there thanks to this group's support (Matuszak, 2012).

Russia was Ukraine's main trade partner, where, in 2012, it exported 25.67% of its total exports and from where it imported 32.39% of total imports⁵ (WITS, 2016). Regarding energy, the Ukrainian economy was also heavily weakened by its high energy dependence on abroad: about 75% of its oil and gas needs and 100% nuclear fuel are imported (CIA, 2016).

In economic terms, the situation was quite fragile: since mid-2012 the economy had been in recession, the Gross Domestic Product (GDP) had contracted by 1.3% from January to September 2013 and in the former twelve months the current account deficit had been 8% of the GDP. Until December 2012, the country had had a programme of assistance from the International Monetary Fund (IMF) underway. However, negotiations to establish a new programme had not yet been successful as the IMF insisted on

⁵ In 2012, Ukrainian exports and imports to and from other countries were well below the level of transactions with Russia: Exports - Turkey (5.36%), Egypt (4.22%), Poland (3.75%) and Italy (3.61%); Imports - China (9.33%), Germany (8.04%), Belarus (5.99%) and Poland (4.21%) (WITS, 2016).



assurances that proposals for measures and reforms suggested to the Ukrainian authorities would take place (IMF, 2014).

Whereas in economic terms the Ukrainian reality was not favourable, in political terms it was not either. Since his election in 2010 that Yanukovich had been basing his power on three pillars: fear, apathy of the Ukrainian people and wealthy supporters (Mycio, 2013). Fear, according to Mytius (2013), was secured through control of the courts, the police and parliament, with the arrest of his political opponent Tymoshenko being an example of this. In the eyes of the international community, freedom of the press⁶, as well as Ukrainian democracy⁷ were being undermined by Yanukovich's rule.

After this brief outline of Ukraine's economic and political situation, we examine Yanukovich's decision, which was carried out in two stages.

b. First stage

In the first stage, the options Yanukovich had before him - signing the agreement with the EU or accepting the Kremlin's proposals - were evaluated. In the light of the theory, the option that does not respect the non-compensatory principle is removed. In this context, it is considered that the primordial dimension was Yanukovich's maintenance in power. Such consideration is due to the fact that politicians very rarely choose an option that politically harms them (Mintz quoted in Breuning, 2007, p.66) and also to Yanukovich's actions to weaken the opposition, namely the arrest of Tymoshenko and other politicians and to find short-term economic and financial solutions that would strengthen his acceptance by the electorate (Kropatcheva, 2014, p.13).

The agreement option with the EU focused above all on the political rapprochement between the EU and Ukraine and would lead to the economic integration of this country into the European area. However, this agreement contained a number of reforms that Ukraine had to comply with for the process to continue, approved by the Council of the European Union on 10 December 2012 (European Commission, 2012). The commitment to implement these reforms was taken up by Yanukovich in the joint statement made at the conclusion of the 16th EU-Ukraine Summit (EU, 2013).

These reforms covered three areas: the adoption of a reliable electoral system, due to the shortcomings observed in the October 2012 legislative elections; solving the issue of "selective justice"⁸ and avoiding its recurrence⁹; and the specific reforms defined in the Association Programme (European Commission, 2012).

The other option was the Kremlin's proposals to keep Ukraine in the Russian sphere of influence, reinforcing Ukraine's economic and energy dependence and investing on Ukrainian future integration in the EAEU.

⁶ In 2013, Ukraine fell from 116th place to 126th in the Freedom of the Press Index (RSF, 2103).

⁷ In 2013, Ukrainian democracy was considered to be Hybrid by the Economist and Freedom House, with the democracy index attributed by both to Ukraine being degraded since 2010 (The Economist Intelligence Unit, 2013) and (Freedom House, 2013).

⁸ "Selective justice" means political convictions of members of the opposition in cases that were not fair, transparent and independent in the light of international norms (European Commission, 2012).

⁹ To this end, the EU considered that all the judgments of the European Court of Human Rights should be implemented, as well as the recommendations of the Council of Europe on conditions of detention and medical care in this context (European Commission, 2012).



In this first stage of the analysis process there were internal constraints¹⁰ on the table, such as the possibility of threat to the survival of the political leader or even the regime itself; loss of popular support associated with the political decision under analysis; decreasing popularity; prospect of electoral defeat; increased internal opposition; political fragmentation of the leader's supporters or within his party; internal or external challenge to the regime; collapse of the government or coalition; threat to the leader's legitimacy, power and political credibility; demonstrations and social protest, and parliamentary vetoes.

As far as the leader's survival was concerned, it is unequivocal that Yanukovych wanted to remain in power until guaranteeing his re-election in 2015, although he knew that he needed to ensure the country's financial sustainability (Klitschko, 2013). In the short term, there was the debt that Ukraine had to honour to Russia and for which the EU did not provide a solution. According to the media (RFE/RL, 2013), the EU was willing to make available 838 million USD to Ukraine, which was clearly insufficient for immediate Ukrainian needs.

In the long-term horizon, the reforms to be carried out in Ukraine, as agreed with the EU, were still to be completed, falling short of what had been assumed (European Commission, 2013). For Kropatcheva (2014, p. 4), the Ukrainian government implemented the reforms selectively, and achieved only those that did not challenge the power of the ruling elite. As noted earlier, the IMF also called for reforms so that a new assistance programme could be negotiated. The possibility of the IMF not developing a new programme would lead to a worsening of the economic recession and financial fragility, as well as to the monetary devaluation of the hryvnia (Kuzio, 2013).

The investment needed for these reforms would be large and in the short term the Ukrainian economy could be affected, for example, unemployment would be expected to rise (Motyl, 2013). It was precisely the reforms that were still to be implemented that Yanukovych pointed out as the cause for postponing the signing of the Agreement, alleging that Ukraine did not yet meet the necessary conditions (KyivPost, 2013).

In addition to the financial requirements, the pre-election conditions were not favourable to the Ukrainian President¹¹. Since his election in 2010, Yanukovych tried to establish an authoritarian regime¹², based on personal connections and a predominance of the executive power over the legislative and judicial powers. This was not fully achieved thanks to the lack of public support and the efforts of the opposition (Sushko & Prystayko, 2014, p.651).

The maintenance of Yanukovych in power would be difficult due to the absence of charisma, ideology and material resources that make authoritarianism possible (Motyl, 2013).

The President considered the opposition, especially former Prime Minister Tymoshenko, a threat to his re-election, because a significant part, mainly young people and students, followed the pro-European orientation of his opponent (Kuzio, 2013). Yanukovych's

¹⁰ These internal constraints, identified by Mintz (2004), are unacceptable from the political point of view, that is, if they happen, they necessarily lead to the exclusion of the corresponding option.

¹¹ According to the polls, in February 2010, 28% of Ukrainians did not approve the governance of Yanukovych and in March 2013 that figure had already risen to 53% (Razumkov Centre quot. Kropatcheva, 2014).

¹² This model was supported by the amendment to the Constitution made in September 2010, when the Constitutional Court considered that the 2004 amendments had been unconstitutional, restoring the President's powers that existed before the Orange Revolution (Havrylyshyn, 2017, p.145).



strong hand with the opposition that allowed the arrest of his political opponents was also questioned by the signing of the agreement with the EU. Immediately after Tymoshenko was sentenced, the European Parliament, in its resolution of 27 October 2011, strongly criticized this and other legal proceedings, considering them to have been conducted outside European and United Nations standards and that they represented an abuse of judiciary power, in clear disrespect for human rights (European Parliament, 2011). Paragraph 7 of this resolution states that

"if Yulia Tymoshenko's conviction is not reviewed, the conclusion of the AA and its ratification will be compromised, further alienating the country from its European perspective" (European Parliament, 2011).

This European requirement was maintained and at the EU-Ukraine Summit in February 2013, it was pointed out as one of the obligatory actions to be taken by Ukraine, with concrete progress, so that the signing of the agreement was possible (EU, External Action, 2013).

Regarding internal political support, both within the Party of Regions and its supporters, it was expected that the reaction to the signing of the agreement with the EU would be one of displeasure. As a result, in addition to withdrawing their support for Yanukovych, they were expected to get closer to the Communist Party (Motyl, 2013).

Yanukovych's supporters included the Ukrainian oligarchs¹³, who were not indifferent to the decision that had to be made. The agreement with the EU represented Ukraine's entry into the European market, i.e. access to a market with around 500 million consumers and estimated at 17.6 billion USD (Nupi Institute, 2013). On the other hand, the rapprochement with Moscow was a relief for the country's south-western industry, which was paralyzed by the Russian blockade (Kuzio, 2013), combined with financial aid, gas price renegotiation and possible membership of the EAEU.

The position of the oligarchs on this matter, especially of those who had connection with Yanukovych and the Party of Regions was not clear. Whereas the protection of the internal market and the maintenance of its *status quo* were relevant to some of these oligarchs, who were not at all interested in introducing free and fair competition in the Ukrainian market, for others the opening up to foreign markets was quite important (Matuszak, 2012, pp.63-66).

Some oligarchs had interests in Europe, including in some European stock exchanges, investments and real estate, and did not want relations with European partners to deteriorate. The same could be said for Russia, given Russia's importance as a business partner. However, it should be noted that the EAEU's conditions were not favourable to the Ukrainian oligarchs, who would incur high tariffs on their exports (Matuszak, 2012, pp.66-71).

¹³ Present in the main economic sectors: Metallurgical, Media, Banking, Machinery Production, Food and Agricultural, Chemical, Transportation, Insurance, and Energy, among others (Matuszak, 2012, p. 8).



In view of these ambiguous positions regarding the rapprochement with the EU or Russia, one can only identify the interest of Ukrainian oligarchs in the prosperity of their business, and their association with any of the options is not direct (Matuszak, 2012, pp.71-73).

The internal opposition to Yanukovich, particularly the Ukrainian Democratic Alliance for Reform, saw the agreement with the EU as a historic opportunity to improve the lives of Ukrainians as well as those of future generations (Klitschko, 2013). The Fatherland Party coalition considered the agreement with the EU an opportunity to improve freedom of expression and alleviate oppression in Ukraine (Kuzio, 2013).

With regard to popular support for Yanukovich, it was not homogenous throughout the country. The civic and political mobilization of Ukrainian society in the south-eastern regions, supportive of the President, was not as strong as in the rest of the country (Motyl, 2013), but Yanukovich did not consider it to be relevant. The President believed that the Ukrainians were disillusioned and apathetic about politics, thanks to cases of corruption and political intrigues that often took place after the Orange Revolution (Mycio, 2013).

Consequently, the threat to his survival that the demonstrations and social contestations represented, after the postponement of the signing of the agreement with the EU, were not anticipated by Yanukovich.

As for to threats that the government or coalition could collapse; to the legitimacy, political power and credibility of the leader and parliamentary vetoes, no evidence has been found that Yanukovich took them into account, for which reason they were not considered in this reflection. We only know that, as mentioned earlier, the intense contestation that the population expressed shortly after the signing of the agreement was postponed was not expected. The collapse of the government, as well as the leader's loss of legitimacy, political power and credibility, could only have been regarded as very improbable by Yanukovich. This is the only reason why the President opted to postpone signing the agreement, since these threats undermined his survival in power, which was essential for him, as already demonstrated.

In short, Yanukovich yielded to Russian pressures and chose the signature of the agreement with the EU as the option not to consider. This choice was based on the fact that Yanukovich felt that his survival in power was not endangered and that this decision would increase his chances of re-election in 2015. He focused his concerns on solving Ukraine's immediate financial problems and those that industrialists in the eastern part of the country were experiencing with the Russian trade blockades.

c. Second stage

According to PH theory, in the second stage of the process, the option that the leader will choose is selected based on the maximization of the advantages and minimization of the disadvantages. In the case under consideration, the exclusion of the signature of the agreement with the EU has already been considered, leaving only the option of getting closer to Russia. Nevertheless, it is pertinent to analyse how Yanukovich will have evaluated the latter, in terms of maximizing the advantages and minimizing the disadvantages.



When Yanukovych postponed the signing of the agreement with the EU, he stated that his country had no conditions at that time to take on the compromise, emphasizing his intention to do so in future. The emphasis was placed on the assistance that Ukraine needed to meet these conditions, and the EU was a key player in this process. That is to say, Yanukovych did not cancel the agreement, only postponed it, because he did not intend to distance himself from the EU, he only tried to find another solution for his immediate financing problem. One of the advantages of this decision was to keep the rapprochement with Europe open, as outlined in his speech (KyivPost, 2013).

About two weeks after the summit in Vilnius, Yanukovych agreed with Putin an immediate loan of 15 billion USD; he renegotiated the gas price, valid from 1 January 2015 until 2019, with the price of one thousand cubic metres dropping from over 400 USD to 268.5 USD¹⁴; and he obtained assurances from the Kremlin about the end of blockades on Ukrainian exports (RFE/RL, 2013). With these results, Yanukovych solved his immediate financial problem, his decision representing a clear economic advantage.

However, Ukraine's financial fragility was not only evident in the short term, since it was necessary to secure long-term financing, which was essential to bring about the reforms the country needed. Although the option selected was getting closer to Russia, this should be only partial, since Yanukovych did not want Ukraine's accession to the EAEU, contrary to the Kremlin's intentions, as the long-term solution (Pawlak & Croft, 2013), which was a strong disadvantage of this option.

Right in the speech in which he announced that he would postpone signing the agreement, Yanukovych tried to minimize this disadvantage. To this end, he proposed holding talks between Ukraine, the EU and Russia to try to resolve the imminent economic collapse of his country and urged the EU to help Ukraine obtain financial assistance from the IMF (KyivPost, 2013).

The Ukrainian President wanted to maintain a balance between Russia and Europe, although sooner or later he would have to make a choice. Both actors would demand it and Yanukovych would make the choice that offered more guarantees of his re-election in 2015 (Kuzio, 2013).

However, the EU rejected the Ukrainian proposal, claiming that there had to be a commitment on Ukraine's part that it would sign the agreement (Pawlak & Croft, 2013). For Kropatcheva (2014), the signing of the agreement was used by the EU as a soft power instrument, but ineffectively. On the one hand, the signing of the agreement had become a matter of 'now or never', quite politicized, and a geopolitical game with Russia, pushing the actual reforms into second place. On the other hand, the EU did not have solutions that would enable Ukraine to carry out the reforms under difficult economic conditions, or even to support further reforms after the signing of the agreement. In other words, the EU's position was weak and inconsistent in the long term (Kropatcheva, 2014, pp.8-9).

The pressure exerted by these actors, notably the EU when it refused the proposed talks, certainly took place earlier than Yanukovych had in mind and it was a clear signal that

¹⁴ The impact of this renegotiation on the Ukrainian economy was considerable given the high dependence on natural gas (accounting for about 40% of energy consumption). Of the natural gas consumed in Ukraine, 60% is supplied by Russia. In 2013 alone, it is estimated that this supply accounted for about 10 billion USD (Chow & Ladislav, 2014).



the balance that he intended was not going to be possible, which nullified one of the advantages that the Ukrainian President wanted to achieve with his decision¹⁵.

In short, it can be said that the main advantages of the decision to move closer to Russia and to postpone signing the agreement with the EU were to secure the short-term financing of the Ukrainian economy, the end of the Russian trade blockade and the renegotiation of the gas price, which was a life-saver for an economy whose collapse was imminent.

The disadvantages of this decision were primarily due to the absence of a solution for the long-term financing, which Yanukovych sought to minimize with his negotiating proposal to the EU.

Conclusions

The Ukrainian President's decision to postpone signing the agreement with the EU in November 2013 not only surprised his European counterparts, but also Ukrainian society itself. Faced with this decision, the Ukrainians took to the streets and mass demonstrations, to which the authorities responded with violence. The events took such a proportion that Yanukovych was eventually removed from the presidency of Ukraine.

This reflection sought to answer the question that was raised at the time: what prompted Yanukovych to postpone the signing of the agreement with the European Union?

The answer points to the conclusion that Yanukovych wanted, above all, to remain in power and create the conditions to be re-elected in 2015. To this end, he tried to secure short-term financing from Russia and in the long term from the EU.

This need for funding was decisive, since the country's economic and financial situation was quite delicate and Yanukovych's retention in power depended on finding a solution for it.

According to PH theory, in the light of which this reflection was made, in the first stage it was identified that, for Yanukovych, the fundamental dimension of this decision-making process was his maintenance in power. Therefore, the fact that short-term funding was not ensured by the agreement with the EU and the required reforms, especially the end of so-called "selective justice", considered to be a threat to the continued presence of the President in power, led to the exclusion of this option.

Getting closer to the Kremlin solved the need for short-term financing, in addition to ending the Russian economic blockade and enabling renegotiating the gas price. However, Yanukovych did not consider this option to be the complete solution for all the problems. Long-term financing, with the inherent adherence to the EAEU, was one of the disadvantages of this option. When Yanukovych postponed the signing of the agreement with the EU, he immediately tried to minimize this disadvantage by proposing talks between the EU, Russia and Ukraine in order to obtain continued financial assistance from the IMF.

¹⁵ In an attempt to overcome this obstacle, Yanukovych attempted to minimize his dependence on Russia by getting closer to China in order to establish a new trade co-operation agreement (Polityuk & Balmforth, 2013) and hence secure long-term financing for his country.



By choosing the option that allowed him to stay in power and trying to minimize its disadvantages and maximize its advantages, Yanukovych tried to get the best of both worlds with Europe and Russia.

As events have proved, this decision was not successful: Yanukovych erred in assuming that he would continue to negotiate with the EU and Russia concomitantly and underestimated the Ukrainian society's ability to contest.

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ECONOMIC DIPLOMACY, GEO-ECONOMICS AND THE EXTERNAL STRATEGY OF PORTUGAL

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Abstract

This article examines the challenges that globalisation poses to States and societies as well as the attempted response strategies, in particular the restructuring of external action based on an economic diplomacy approach, which was consolidated in the post-Cold War period with the new relevance given to the geo-economics. A reflection on the reform of Portugal's external action is also developed. The evolution of the conceptual framework demonstrates that economic diplomacy implies a significant innovation and a paradigm shift in external action, based on a holistic approach that articulates the "3Ms" of multidisciplinary (crossing economic, political and security dimensions), multilevel and multi-actor. The text addresses the case of Portugal, analysing the dynamics of external economic relations in the 2002-2015 period, structural vulnerabilities and the various failed attempts to structure a new approach during the last decade, which was essentially centred on the State and marked by the traditional vision of commercial diplomacy. In this context, and taking into account the experiences and good practices of other States, strategic guidelines are discussed for the structuring of an effective economic diplomacy in Portugal that articulates three fundamental organizational, operational and innovation dimensions.

Keywords

Geoeconomics; Globalisation; Economic diplomacy; External economic relations; Portugal's external action

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ECONOMIC DIPLOMACY, GEO-ECONOMICS AND THE EXTERNAL STRATEGY OF PORTUGAL¹

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Introduction

Globalisation and its acceleration in the post-Cold War has generated a set of complex and diffuse effects with significant structural impacts on the Westphalian sovereign States, which has generally weakened them asymmetrically, reducing their respective room for manoeuvre in an international system characterised by increasing complexity and high levels of risk.² This trend is the result of interaction between different mechanisms that are mutually reinforcing.

The growing power and influence of non-State actors, particularly large transnational economic and financial conglomerates, and their impact on the breakdown of regulation, both at the domestic and international levels, contribute to the weakening of sovereign States. Globalisation has reinforced the logic of scale economies, triggering mergers and acquisitions that lead to the formation of large economic and financial groups in different sectors which abuse their enormous market power leading to oligopolization of the global economy. These conglomerates have an unprecedented ability to oppose and resist the mechanisms of public hetero-regulation and frustrate the regulatory action of the State through a combination of regulatory capture and "too big to fail"³ strategies. Internationally, the situation is even more problematic in the absence of a global regulatory framework for multinational corporations and other non-State actors, which take advantage of the enormous freedom of movement associated with this regulatory deficit.

To this decline of sovereignty also contributes decisively the erosion of the tax base of States, which severely limits their capacity for action and public policies implementation. This erosion is mainly a result of the increased tax evasion capacity of large multinational conglomerates⁴ – through transfer pricing, cross-border transactions of under- and over-billing, using offshore locations, tax arbitration and the fraudulent manipulation of accounts and results – exactly when their weight in economic activity is growing, and as

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² Strange, Susan, *The Retreat of the State - the Diffusion of Power in the World Economy*, Cambridge University Press, Cambridge, 1996, p.14.

³ Stiglitz, Joseph 2010 *Freefall: America, Free Markets and the Sinking of the World Economy* Norton & Company, New York.

⁴ Henry, James, 2012, *The Price of Offshore Revisited*, Tax Justice Network, July 2012.



they increasingly hold significant shares of the market should therefore proportionally pay more taxes⁵ The deterioration of public accounts and increases in public deficits are aggravated by the fact that the erosion of tax bases occurs at the same time that States are forced to increase public expenditure to offset the social costs of globalisation, increasing social spending to support those excluded from the process, as well as to meet new security challenges related to non-traditional and diffuse threats that have intensified with globalisation.

The constraints to public policies are particularly relevant in a context marked by the growing vulnerability of States with respect to the growth of non-traditional, non-military and diffuse security threats. This is a central dimension of globalisation, mainly involving transnational organised crime and international mafias, the growth of different types of trafficking (arms, drugs and people) and international terrorism, whose modus operandi becomes more and more sophisticated with the use of new information and communication technologies and of the international financial system. The new and constantly changing threat of cyberspace, where transnational organised crime has strong influence, and the new challenges of cyber security in the face of cybercrime risks, or even of cyber war, has led to increasing State vulnerabilities.⁶

On the other hand, the quality and effectiveness of State public policies and decisions tend to decrease due to the pressure associated with an increased number and complexity of issues brought about by globalisation and the increasing requirements to manage multilevel governance. In this context, States and their central bureaucracies, which have a know-how shortfall in responding to new problems, also suffer from the syndrome of fragmentation and rigid division of competencies, affecting greater interagency cooperation. This is also true for cooperation with the private and social sectors, preventing a holistic and integrated approach to issues.

Finally, the erosion of State and government legitimacy affects the exercise of power as a result not only of the emergence of new sources of citizens' loyalty – which compete with nationality and fosters multiple identities associated with different transnational social networks – but also due to the inability of political power to control economic power, or the worsening of the crisis of representative democracy.

Sovereign States have sought to meet the challenges arising from the loss of their position of power and monopoly as international system actors through a set of very diverse strategies involving:

- (i) participation in macro-regional integration processes, combining resources and efforts with other States in order to minimise vulnerabilities and better meet the challenges of globalisation;

⁵ The BEPS (Base Erosion Profit Shifting Package) process developed within the OECD/G-20 is a process of soft law that aims to strengthen coordination among states to combat tax evasion via tax arbitration, which allows the artificial transfer of profits to jurisdictions with low tax burden where there are no records effective economic activity (cfr. <http://www.oecd.org/tax/beps/beps-about.htm>, consulted 10/8/2015).

⁶ States, especially those more dependent on cyberspace, are not prepared to control and minimise the risks. On the vulnerability and lack of preparedness of the States, see the case of the US in Richard Clarke and Robert Knake, 2010 *CyberWar: the next threat to national security and what to do about it*, HarperCollins Publishers.

On aspects of regulation see an interesting reflection on the application of international law, namely *jus ad bellum and jus in bello*, for cyberwar, Michael Schmitt (ed.), 2013 *The Tallinn Manual on the International Law applicable to Cyber Warfare*, Cambridge University Press, drafted by a group of experts at the initiative of Cyber Defense Center of Excellence NATO (www.motherjones.com/politics/2013/03/can-nato-drone-computer-hackers).



- (ii) the exploration of new models of cooperation and alliances with non-State actors, adopting models of co-regulation that coexist with the traditional models of hetero-regulation, which enhance the effectiveness of rules;
- (iii) the reform and improvement of the governance system by internally promoting decentralisation, in order to create several decision centres that take advantage of regional and local dynamism as well as innovation and the consolidation of regional knowledge networks; or by promoting reform of State structures and enhancing flexibility in responding to change, transparency and accountability;
- (iv) the acceleration of structural reforms for a more robust transition to the society/knowledge economy and enhanced competitiveness in the global economy;
- (v) the reform of the political system, seeking to develop participatory democracy mechanisms in order to encourage the involvement of citizens and contribute to the strengthening of legitimacy.

The development of economic diplomacy and a new paradigm since the 1990s constituted another State response strategy in the context of a global economy that, behind an appearance of market logic and competition, has paradoxically been marked by precisely opposite tendencies. On the one hand, there is an increasing concentration of economic power and oligopoly of many sectors with conglomerates and transnational companies that abuse their growing market power by limiting and distorting competition; on the other, there is a growing interference of political factors in economic issues and the influence of different powers, including new emerging powers, as illustrated by the extreme case of China's State capitalist model.

In this context, and contrary to the optimistic discourse on globalisation, it is not enough to be efficient, competitive or solve the internal structural problems to succeed in the global economy. One must also have the connections, institutional linkages and participate in relevant coalitions. To be competitive and have an innovative economy is only a necessary, but not a sufficient condition to meet the challenges of globalisation and the knowledge society. Economic diplomacy can be seen largely as a strategy to respond to this paradox and the growing integration of economic, political and security dimensions.

The article is structured into four parts. The first part deals with the concept of economic diplomacy and the paradigm shift that it implies in terms of the approach to the international space. The second part develops a partial analysis of Portugal's external economic relations in the period 2002-2015, identifying the key trends that include the development of foreign trade in goods and services, foreign investment and migration flows and their interconnections with economic diplomacy. The third part examines the various attempts to structure economic diplomacy over the last decade and the reasons for their failure. Finally, strategic guidelines are proposed and discussed for Portugal's structuring of economic diplomacy, as an input for the debate and urgent mobilisation for action.



1. Economic diplomacy: concept and paradigm shift

The development of economic diplomacy is one of the manifestations of the new role and relevance of geo-economics⁷ in the post-Cold War international system, in contrast to the era of the bipolar world in which geopolitics prevailed. The new basis for geo-economic power – the ability to generate knowledge and human resources; transforming the agriculture sector and control over resources; consolidation of an urban middle class and governance innovations; the fiscal capacity of States to finance military capabilities and infrastructure – supported the emergence of two paradigmatic cases of geo-economic power in the post-Cold War, China and Germany, which managed to transform their economic power into political power and military capabilities.⁸

Reform of the external action of States began from the late 1990s, led by the most active and competitive States in the global economy, especially the US, China, India, Brazil, the UK, Sweden and Germany.⁹ At issue was the need to reform and adapt a model of diplomacy dominated by political and military issues, marked by tension between the pursuit of economic interests and strategic objectives, as highlighted by Gertz,¹⁰ which prevailed during the Cold War and promote the transition to a model that assigns greater relevance to economic issues and strikes a new balance with political issues. The new emphasis on economic diplomacy does not mean the exclusivity or predominance of economics, but rather a better balance and coordination of the political and economic dimensions of external action, not the emergence of a mercantilist foreign policy.

The concept of economic diplomacy goes far beyond the traditional concept of commercial diplomacy, which is focused on export promotion and subordinated to political diplomacy, and has been analysed by different authors with different perspectives.

Berridge and James¹¹ see economic diplomacy as "diplomatic work to support the business and finance sectors of a given country [through] the use of economic resources, such as rewards or sanctions, in pursuit of a specific foreign policy objective". The basic assumption is the exclusive role of the State and public structures, which does not include the new dimension of non-State actors' action. On the other hand, the essence of economic diplomacy would reside in the use of economic instruments both positive and negative, for political purposes.

⁷ Luttwak, Edward. (1990) "From Geopolitical to Geo-economics, logic of Conflict, Grammar of Commerce", *The National Interest*, No. 20, pp.17-24; Mark P. Thirlwell, "The Return of Geo-economics: Globalization and National Security", *Lowy Institute for International Policy*, September 2010. Available at: <http://www.lowyinstitute.org/Publication.asp?pid=1388> .; Sanjaya Baru, 2012, *A New Era of Geo-economics: Assessing the Interplay of Economic and Political Risk*, IISS Geo-economics and strategic programme, IISS Seminar Paper.

⁸ Sanjaya Baru, *ibid*.

⁹ For a comparative analysis of these models see Miguel Santos Neves (2007) *The Diplomacy-Cooperation-Business Triangle*, In Fernando Jorge Cardoso (coord.) *Diplomacy, Cooperation and Business: the role of external actors in Angola and Mozambique*, IEEI / iPad, Lisbon, 2007.

¹⁰ Geoffrey Gertz, *Commercial Diplomacy and the American Foreign Policy*, GEG Working Paper 119, August 2016, which argues that commercial diplomacy re-emerged as a priority in US foreign policy since 1990, particularly in the diplomatic intervention of the State Department on investment conflict resolution that involves American companies. This is in contrast to the Cold War period in which commercial diplomacy action was seen as dysfunctional, creating serious risks of conflicts in bilateral relations, shifting the priority of strategic political issues and contributing to alienate and push countries into the orbit of influence of the Soviet Union.

¹¹ Berridge, Geoff R. Alan James, *A Dictionary of Diplomacy* Ed. Palgrave Macmillan, Basingstoke, 2005, p. 38.



Other authors such as Bayne and Woolcock link economic diplomacy with international economic decision-making,¹² arguing that its characterisation is not based on instruments but on its content and the various economic issues within it. On the other hand, they point out that the concept involves a qualitative change in the face of traditional diplomacy, whose stereotypes do not apply, highlighting the interaction between domestic and international dimensions of the process, the links between political and economic dimensions and the increasing relevance of non-sovereign actors and their interaction with States, which are not regarded as unitary actors. In the view of these authors, economic diplomacy tries to manage three types of fundamental tensions: (i) between politics and economics; (ii) between State and non-State actors (iii) between international and domestic pressures, international negotiation and domestic negotiation processes.¹³

Kishan Rana reinforces this view stressing that it is a process, not structures, oriented towards responses to external challenges and maximising comparative advantages:

*The process through which countries tackle the outside world, to maximize their national gain in all the fields of activity, including trade, investment and other forms of economically beneficial exchanges, where they enjoy comparative advantage... it has bilateral, regional and multilateral dimensions, each of which is important.*¹⁴

This last reference refers to the multilevel dimension of economic diplomacy that approaches Bayne and Woolcock's position, which deals with the associated interconnection between 4 levels: bilateral, regional, plurilateral and multilateral.

The perspective of Okano-Heijmans¹⁵ highlights the fact that economic diplomacy is not to be limited neither to economy nor to diplomacy, implying a broad concept that must be understood in the light of a plurality of scientific disciplines, that is international relations, economics, international political economy and diplomacy studies.

In short, despite the consensus on the paradigm shift there are differences on the scope and objectives of economic diplomacy in the literature. The perspective that best captures the complexity and the paradigm shift is that proposed by Bayne and Woolcock which implies not only an extension of the subject but also a new logic and ways of designing and implementing external action. Indeed, economic diplomacy significantly expanded

¹² Bayne, Nicholas and Woolcock, Stephen (eds), 2007 *The New Economic Diplomacy -decision-making and negotiation in international economic relations*, Ashgate, 2nd edition.

¹³ Bayne, Nicholas and Woolcock, Stephen (eds), 2007 *The New Economic Diplomacy decision-making and negotiation in international economic relations*, Ashgate, 2nd edition, p.10.

¹⁴ Kishan S. Rana, 2007, Economic diplomacy: the experience of Developing Countries in Bayne, Nicholas, Stephen Woolcock, *The New Economic Diplomacy-decision-making and negotiation in international economic relations*, Ashgate, 2nd ed., pp.201-220.

¹⁵ Maaïke Okano-Heijmans, 2011 *Conceptualizing Economic Diplomacy: the crossroads of International Relations, Economics, IPE and Diplomatic Studies*, in *The Hague Journal of Diplomacy*, Vol.6, Paragraphs 1-2, 2011, pp.7-35.



the range of issues that were traditionally dealt with in promoting the external interests of a country, especially trade and investment, combining seven distinct dimensions¹⁶:

- (i) trade promotion, especially in exports, but also the correction of chronic trade deficits and management of multilateral trade negotiations;
- (ii) promotion of investment, both from the perspective of attracting inward foreign direct investment (FDI) and support the expansion of a country's overseas outward investment;
- (iii) Promotion of tourism;
- (iv) Management of migration flows and attracting skilled staff;
- (v) Promotion of science and technology, which aims to capture new technologies and establish strong ties with leading innovation centres;
- (vi) Development aid management;
- (vii) Promotion of country image.

However, the concept entails, in addition to this extension of the subject, a qualitative change and greater complexity that stems from three fundamental transformations that mark the economic diplomacy of the post-Cold War – the “3 Ms”: multidisciplinary; multi-actor; multilevel.

First, a multidisciplinary approach stems from a more holistic view of the relationship between different economic issues and the interaction between economics, politics and security, which reflects a new balance between geo-economics and geopolitics. Second, its multi-actor nature, as economic diplomacy is no longer an exclusive activity of States, but rather there is a multiplicity of State and non-State actors who act in two ways: firstly, influencing the public policy decision making process; secondly, acting directly in the international stage as autonomous actors. New economic diplomacy requires the adoption of a multitrack diplomacy approach implying an intelligent and flexible combination between track I diplomacy (official formal channels), track II diplomacy (unofficial, unstructured, informal channels with the participation of non-State actors, NGOs, academics) and track III diplomacy (informal initiatives at the community level – that is people to people).

Third the multilevel dimension, because action takes place simultaneously at international, macro-regional, national and sub-national levels, including the new dynamics of paradiplomacy, implies coordination and operation of the interconnections among the different levels. On the other hand, it challenges the traditional view of dichotomy between the external and internal levels with a rigid separation between domestic policies and external action, which must be seen as a unit and in a continuum.

It should be stressed that economic diplomacy is not a homogeneous and uniform reality, being a process that is subject to a gradual evolution and variety of patterns. The contribution of Rana¹⁷ is particularly relevant in characterising this diversity when

¹⁶ The link between the seven pillars expands the narrower view proposed by Rana, Kishan, 2002 *bilateral Diplomacy*, DiploHandbooks, DiploFoundation, ch.4.

¹⁷ Rana, Kishan and Bipul Chatterjee, 2011 *Economic Diplomacy: India's experience*, CUTS International, Japuir. Previously, Rana argued for a slightly different system with three phases (i) salesmanship, (ii) network and advocacy and (iii) regulatory management.



considering that there are different stages of economic diplomacy development. Four key stages, in order of increasing complexity, were identified:

- (i) first is the phase of "promotion" – focused on trade expansion, export promotion and foreign investment attraction;
- (ii) the second phase relates to "networking", which involves the mobilisation of clusters of supporters and participants either in the country or abroad (companies, universities, think tanks, chambers of commerce) in the areas of trade, investment and the acquisition of technologies;
- (iii) the third phase of "country promotion" focuses on strengthening country image and reputation as well as their companies in order to attract investment and tourist flows;
- (iv) the fourth phase, "the regulatory phase", focuses on the completion and management of bilateral and multilateral trade agreements and bilateral investment treaties.

Although these phases have a sequential logic, they tend to co-exist in time and space, being an evolution towards an increasingly complex and systemic impact. Thus, in general, a mixed picture tends to prevail, characterised by the coexistence and partial overlap between the different stages, although in different proportions depending on the degree of system development.

In this context, and in line with Bayne and Woolcock, three deeply intertwined strategic vectors to think about external action can be identified, whose implementation is a key challenge for States.

Firstly, there is the continuity of internal and external dimensions. Transnational phenomena abolished the barriers between internal and external levels and call into question the traditional divisions between domestic policies pursued by specific institutions and foreign policy developed by specialised structures with high levels of discoordination and a deficit of coherence. The new context implies thinking of the internal and external as a continuum in order to enhance coherence.

Second, there is the holistic view of issues and multi-actor approach. The complexity of the issues raised by the knowledge society and systemic competitiveness at the global level involve addressing problems in an integrated and holistic manner. However, this is not facilitated by the sectoral and fragmented logic in which States organize their machine and devise public policies. On the other hand, it involves designing the decision-making process as a participatory multi-actor process, where non-State actors interact and cooperate with the State in a partnership in order to maximise the effectiveness of external action, abandoning the traditional idea that foreign policy is a reserved realm of States.

Third, there is the multi-level approach, although in a different perspective from that of Bayne and Woolcock. Here, there is the need to recognise the legitimacy of different levels of external action – global, macro-regional, national, micro-regional and local – and the management of complex relationships between them, as opposed to a centralist vision based on the predominance of central government and the national level. The growth of the phenomenon of sub-national governments' paradiplomacy, particularly



active in the case of States that have been most successful in responding to the challenges of globalisation, is one of the most significant trends in the current international system. These complements and strengthens – not weakens – the external action of States.¹⁸

2. Portugal's External Economic Relations 2002-2015

External economic relations involve two dimensions: a set of economic, trade of goods and services, financial, tourism, direct investment, technology and migration flows, on the one hand; a network of interpersonal relationships of individuals and organisations with different cultures that generate and maintain these flows. The interconnection between the different political, economic, security and cultural dimensions is becoming denser, but the dominant approach remains fragmented and simplified, rearranging reality into watertight compartments that do not take a holistic view. The analysis of external economic relations means addressing interactions in terms of external trade, investment and financial flows; migration and technology flows as well as cultural aspects associated with economic exchanges; and issues related to economic security, which are an objective of great importance, but distinct from, and sometimes in conflict with, economic prosperity. The analysis developed here focuses on foreign trade, foreign direct investment, tourism and migration flows, for which there is consistent data available.

External trade

In the 2002-2015 period, Portugal's total foreign trade (imports and exports), including goods and services, increased from €90.2 billion to €145.7 billion, although with an irregular evolution registering a significant decline in 2009, as a result of the international crisis, recovering in 2010 and reaching in 2011-2012 similar levels to 2008, followed by an expansion in the subsequent years until 2015 (see Table 1).

The evolution of the import and export of goods and services showed continuous growth between 2002 and 2008 and then a significant drop in 2009 with a reduction of -18.2% for imports and -15.5% for exports.

The fall in exports in 2008 and 2009 resulted from the combined effect of the decline in demand in key markets (particularly the Spanish market) and a strong euro, which adversely affected the competitiveness of exports to non-EU markets.¹⁹ The recovery

¹⁸ On the phenomenon of paradiplomacy Brian Hocking, *Localizing foreign policy - non-central governments and multilayered diplomacy*, London, St. Martin's Press 1993; Hans Michelmann, and Soldatos (d) *Federalism and international relations - the role of subnational units*, Clarendon Press, 1990; Francisco Aldecoa and Michael Keating (eds.), *Paradiplomacy in Action: The Foreign Relations of Subnational Governments*, Routledge, 2013; Miguel Santos Neves "Paradiplomacy, knowledge regions and the consolidation of 'Soft Power'" in Janus.net e-journal of International Relations, No. 1, Autumn 2010.

¹⁹ The evolution of the euro's exchange rate against the dollar has seen an erratic evolution where it is possible to distinguish three distinct periods: (i) an initial phase of the weak euro 1999-2002, with the initial rate of decline of 1.2 to 0.9 in 2001 and 0.85 in 2002; (ii) phase of the strong euro in the period 2002-2008, registering a strong upward trend from 0.9 in 2002 to a peak of 1.6 at the end of July 2008, albeit with fluctuations and devaluation periods between 2005 to 2006; (iii) unstable phase and moderately strong euro between the end of 2008-2013, characterised by greater instability of the euro's successive gains and losses in a band ranging from 1.5 and 1.2 against the US dollar since the beginning of the financial crisis. Valuation movements between Nov 2008 - Dec 2009; June 2010 (1.2) - April 2011 (1.46); July 2012 (1.2) and February 2013 (1.33); movements devaluation between Dec 2009 - Jun 2010; April 2011 (1.46) - Jul 2012 (1.2) - see European Central Bank, ECB Statistical Data Warehouse



started in 2010: exports recovered to 2007 levels and grew significantly and continuously between 2011 and 2015, reaching €74.5 billion by the end of this period. The key driver behind this positive performance was the unprecedented increase in revenues from the tourism sector, increasing from €8.6 billion in 2012 to €11.5 billion in 2015 (accounting for 15.4% of total exported goods and services).²⁰

With regard to imports, after a recovery in 2010 they grew slowly in 2011 and registered a decline in 2012, reflecting the effects of the domestic economic downturn and the impact of the austerity programme. They then stabilised in 2013 and returned to growth in 2014-2015.

Table 1: Foreign trade of goods and services 2002-2015 (€Billion)

Year	imports	exports	Difference	Total trade
2002	50.8	39.4	- 11.4	90.2
2003	50	40.2	- 9.8	90.2
2004	55	42.7	- 12.3	97.7
2005	57.7	43.4	- 14.3	101.1
2006	63.9	50.5	- 13.4	114.4
2007	68.2	55.5	- 12.7	123.7
2008	73.4	57.1	- 16.4	130.5
2009	60.1	48.3	- 11.8	108.4
2010	67.5	55	- 12.5	122.5
2011	68.7	62.2	- 6.5	130.9
2012	64.2	64.4	+ 0.2	129.1
2013	65.4	68.6	+ 3.2	134.0
2014	68.8	70.8	+ 2.0	139.6
2015	71.2	74.5	+ 3.3	145.7

Source: Banco de Portugal. Balance of Payments Statistics; AIFTP "Portuguese International Trade in Goods and Services 1996-2011", in December 2012 and "Portuguese International Trade, evolution of Portuguese exports of goods and services in 2012 Jan/Dec", February 2013, 2014, 2015. Calculations by the author.

External trade relations were marked in the period 2002-2015 by imbalances registering two distinct phases. The first phase from 2002-2011 showed a persistent trade deficit with a negative balance of more than €10 billion, reaching its highest value in 2008 (€16.4 billion). Although, there was a slight reduction in the external deficit in 2009 as a result of a fall in imports (-18.2%) and exports (-15.5%) of goods and services, only in 2011 there was a significant correction with a halving of the value of the trade deficit in the previous year, a result of asymmetric marginal growth in imports (1.8%) and strong growth of exports (13%).

In the second phase (2012-2015), a trade surplus was registered that reached €3.3 billion in 2015. This figure is explained by the balance of services, which more than offset the persistent trade deficit in goods (-€10.5 billion in 2015). This is especially true for tourism, whose surplus of €7.8 billion in 2015 accounted for 56.6% of the total amount of the surplus in services. In 2012, for the first time, there was a marginal surplus of

(http://sdw.ecb.europa.eu/quickview.do?SERIES_KEY=120.EXR.D.USD.EUR.SP00.A#top Consulted on 10.09.2013) and <http://www.ecb.europa.eu/stats/exchange/eurofxref/html/eurofxref-graph-usd.en.html> Consulted on 11.09.2013)

²⁰ According to statistics from the World Tourism Organization (UNWTO), Portugal registered a total of 10.2 million arrivals in 2015 and strengthened its position globally, was the 26th largest tourism market and the 33rd largest in terms of revenue (UNWTO World Tourism Barometer, May 2016).



€229 million, which resulted from the combination of a drop in imports (-6.2%) and growth in exports (3.8%). This was consolidated in 2013-2015, although at low levels, reaching an average surplus of +€3 billion.

The devaluation of the euro against the dollar since 2011 and further intensified in 2015 and 2016²¹ together with the impressive increase in tourism flows, as a result of growing insecurity in the Maghreb, sharp fall in oil prices and the projection of a positive image of Portugal as a tourist destination, can be seen as two key factors that contributed positively to the new trade surplus phase.

Tourist flows

Tourism in Portugal²² (inbound flows) grew rapidly from the late 2000s and, in particular, in the period between 2012 and 2015 when they registered an increase of over 30%. This was up from 7.5 million in 2012 to approximately 10 million tourists in 2015, with growth rates of 13% in 2014 and 10% in 2015. This positive development also had a significant impact on the growth of tourism revenues, which increased even more strongly (33%) in the period from €8.6 billion to €11.5 billion in 2015 (see Table 2).

Table 2: Tourism in Portugal (inbound) and revenues (2011-2015)

	2011	2012	2013	2014	2015
No. Tourists (millions)	7.3	7.5	8.1	9.1	9.9
Sleeps (millions)	27.9	29	31.1	34	36.4
Recipes (€ million)	8.146	8.606	9.250	10.394	11.451
pour memoire					
Total tourists globally (millions)	994	1.040	1.086	1.134	1.186

Source: UNWTO Statistics and Bank of Portugal (tourism revenues)

This positive development is part of a general trend of increase in global tourism flows, which have grown at an average rate of 5% per year exceeding one billion tourists in 2012 and recording in 2015 a record of 1,186 million tourists globally. This positive trend can be partly explained by the reduction in oil prices and the expansion of the middle class in emerging economies. The difference is that the average rate of growth in Portugal has been, since 2012, twice the global and European averages, which is explained by regional and national factors. In terms of regional context, Portugal is located in the Southern Mediterranean Europe the region that attracts more tourists at the global level, accounting for 19% (225 million tourists) of total flows in 2015. There are also specific factors that favour the profile of Portugal as a tourist destination, namely the growing concern over security issues, with Portugal being perceived as a safe country and an alternative to the Maghreb region; strong cultural dimensions and country image; as well

²¹ The Euro average annual exchange rate against the US dollar depreciated from 1.39 in 2011 to 1.11 in 2015 with some fluctuations in this period: devaluation to 1.28 in 2012 with a slight recovery to stabilise at 1.33 in 2013 and 2014, and new devaluation in 2015 to 1.11 vd. Statista ECB data (available at <https://www.statista.com/statistics/412794/euro-to-us-dollar-annual-average-exchange-rate/>).

²² UNWTO Statistics Portugal: Country-specific: basic indicators (Compendium) 2011 to 2015 (09.2016), UNWTO e-library. Available at <http://www.eunwto.org/doi/abs/10.5555/unwtotfb0620010020112015201609>.



as the positive perception of quality and diversity anchored on international awards and positive feedback in digital social networks.

However, the growth of tourism has not been accompanied by a diversification of origin markets and flows remain heavily concentrated in the traditional European markets (United Kingdom, France, Spain, Germany). These represented 82% of tourists in 2012 and continue to account for 80.5% in 2015, followed by the US, East Asia and the Pacific, which increased their weight from 4% in 2012 to 6% in 2015 due to a slight increase in flows of Chinese and South Korean tourists. Considering this background, there has been no strategy of diversification to attract more Chinese tourist flows – the biggest market in the world – or exploring linkages with Spain, the second largest European tourism market.

In general, one of the characteristic of Portuguese external trade is the high level of concentration of exports and imports in a limited number of markets, which involves a low degree of diversification and hence a high level of risk with regard to fluctuations in external demand and vulnerability to external shocks. The high degree of concentration is shown in Table 3.

Table 3: Level concentration of Portuguese exports in its largest export markets (%).

YEAR	(Top 10 markets) % Total Exports	3 largest markets b) % Total Exports
2002	83.1	49
2003	82.8	49.1
2004	82.9	49.3
2005	81.7	49.7
2006	81.1	49.6
2007	79.9	49.5
2008	77.7	48.1
2009	78.3	47.8
2010	77.5	47.6
2011	77.1	46.4
2012	75.3	46.6
2013	74.7	42.8
2014	75.4	42.9
2015	75.4	44.1

Source: Calculations by the author from Banco de Portugal and AIFTP statistics, 2002-2015

a) The 10 largest export markets include, in descending order, Spain, France, Germany, the UK, Angola, Netherlands, USA, Italy, Belgium, Brazil

b) The three largest markets are, in order, Spain, France and Germany

The three largest markets, Spain, France and Germany, have absorbed, over the period considered, almost half of Portuguese exports (49% in 2002), rising to 49.7% in 2005 and slightly reducing from 2008, but maintaining a value of 46.6% in 2012.²³ In 2013 and 2014 there was a slight reduction in the concentration to 42.8%, but this trend did not continue and in fact was reversed increasing to 44.1% in 2015. This high concentration affects both the exports of goods and services. For tourism, the three

²³ To measure the degree of concentration of exports in target markets, three indicators are normally used: the Herfindahl Hirschman Index, the Gini Hirschman Index and the entropy coefficient.



largest source tourist markets – the UK, France and Spain – accounted in 2015 for 49.4% of total overnight stays (34.4 million) and 47% of total revenues (€11.5 billion).²⁴

If we analyse the data of the 10 largest markets – Spain, France, Germany, the United Kingdom, Angola, Netherlands, USA, Italy, Belgium, Brazil – for exports during the selected period, it is possible to depict a high level of concentration in these markets which absorbed about 80% of exports in the first part of the period until 2007 (83% in 2002 and 80% in 2007). This percentage decreased slightly from 2008 to 75.3% in 2012 and then remained stable in 2014 and 2015 (75.4%). There was thus a slight diversification of export markets from 2009 onwards, which is seen at the level of the top 10 markets and not so much in terms of the three major markets, although the bottom of the table is a highly concentrated index.

Investment

For Foreign Direct Investment (FDI) in Portugal, the evolution from 2002 to 2015 was erratic and rather unfavourable with modest flows both taking into account the size of the Portuguese economy and the comparative performance of other competing economies. Net FDI flows are characterised by high instability and fluctuations, as shown in Table 4. These were relatively modest in 2002 with €1.9 billion, tripled in 2003 to €6.3 billion, falling back during the following years to grow again in 2006, when they peaked to a total of €8.7 billion. The 2007-2010 phase saw a fall in FDI inflows, which was followed by a recovery phase in 2011 and 2012 to €8 billion and €7 billion respectively. The following years were characterised by a further decline in FDI flows to €2 billion in 2013 and 2.2 billion in 2014, increasing again in 2015 to €6.2 billion.

Table 4: Direct Investment in Portugal. Major investors (% of total FDI); Stocks and Investment Income (€ billion) 2002-2012

country	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Netherlands	14.8	14	13.5	13.2	14.6	14.3	16.3	17.7	12.5	22.5	8.5			
Spain	8.4	11	16.4	14.6	12.8	16.5	15.6	13	14.4	17.7	22.9			
France	18.9	11.5	11.4	14.1	13.1	10.4	12.7	17.5	16.8	16.4	18.2			
United Kingdom	14.5	13.4	15.2	12.6	14	16	15.8	20.5	10.8	13.8	15.7			
Germany	12.8	8.9	12.6	16.8	15.8	19.7	15.1	13.1	16.1	10.1	13.6			
Total 5	69.4	58.8	69.1	71.3	70.3	76.9	75.5	81.8	70.6	80.5	78.9			
Net FDI (€ billion)	1.9	6.3	1.5	3.2	8.7	2.2	3.2	1.9	1.9	8	6.9	2.0	2.2	6.2
Stocks (€ billion)							71.8	79.8	83.5	86.4	86.8	90.4	98.1	105.5

Source: Bank of Portugal and AIFTP

Interestingly, in the context of the sovereign debt crisis in the Eurozone, investment flows increased precisely in the years of the most severe economic recession in Portugal, with inflows quadrupling in 2011 compared to 2010 – a phenomenon that was registered also in Greece and Italy.²⁵ This is a paradoxical trend that can be explained by the interaction between two factors: privatisation and round-trip investment.

²⁴ AICEP, Statistics, Portugal Country Record, Sep 2016.

²⁵ World Investment Report 2012, pp. 62-63.



First, the implementation of a privatisation programme, in the context of the Memorandum of Understanding with the Troika, which attracted foreign investors. This was the case in 2011 with the privatisation of 21.35% of EDP acquired by the Chinese state-owned China Three Gorges for €2.7 billion. According to data from the International Monetary Fund, global revenue from privatisations between 2010 and 2013 generated a revenue of €7.2 billion.²⁶

The significant increase in FDI flows in 2011 and 2012 and the following years is largely due to the new phenomenon of large-scale Chinese investment in Portugal, as occurred in other EU countries, especially in Southern Europe. This investment, achieved through mergers and acquisitions, was conducted mainly by Chinese state-owned enterprises, with the exception of Fosun, who took the opportunity to acquire assets at low prices in the context of a highly fragile and vulnerable economy. A pattern of strong concentration is also seen in strategic sectors with the consolidation of dominant positions, especially in the energy sector (stakes in EDP, EDP Renováveis and REN), the financial sector (BES Investimento, Caixa Seguros Saúde/Fidelidade, and more recently BCP), the health sector (BES health), as well as real estate and utilities (i.e. water), reaching a total of €5.5 billion by 2014. This corresponds to an investment pattern with unique characteristics: high political profile, without added value in terms of technology and job creation, but with significant impact in terms of restrictions to competition and regulatory challenges.²⁷

Second, a distorting effect associated with the round-trip investment process through which the great Portuguese multinational groups have been increasingly investing in Portugal from abroad for purposes of tax avoidance has created an illusory effect since it is not real foreign investment.²⁸

It is important to note the high degree of concentration of FDI inflows in a very small number of origin countries – the Netherlands, Spain, France, the UK and Germany – which have collectively accounted for about 70% of FDI in Portugal in 2002, and whose weight further increased from 2007 onwards, reaching 80% of total FDI in more recent years (Table 4). In short, by 2011 there has not been a trend of diversification, but a greater concentration in traditional investors.

This situation has changed to the extent that the recovery of FDI flows in 2011 is associated with a diversification process, with the entry of Chinese investment diminishing the relevance of the effect of round-trip investment. However, the most intense phase of Chinese investment shows signs of having exhausted, despite new but smaller investments may still materialise over the coming years. This restores the significance of the effect of round-trip investment as is visible in the 2015-2016 investment data, where the Netherlands emerges again as the top investor (24.3%)

²⁶ Vd. IMF 2013 Portugal: Seventh Review under the Extended Arrangement, Country Report No. 13/160, June 2013, Table 4.

²⁷ On the pattern of Chinese investment in Portugal see Annette Bongardt and Miguel Neves, 2014 *The Chinese Business Community at the Crossroads between Crisis response and Global China's Assertive Strategy - the Case of Portugal*, MPC Research Report 2014/02, and Robert Schuman Migration Policy Center, European University Institute.

²⁸ Rodrigo Fernandez, Jesse & Katrin MaGauran Frederik, 2013 *Avoiding Tax in Times of Austerity - Energias de Portugal (EDP) and the Role of the Netherlands in Tax Avoidance in Europe*, Centre for Research on Multinational Corporations SOMO, the Netherlands, September 2013. About the process and mechanisms of tax evasion of large conglomerates and their impact see James S. Henry, 2012 *The Price of Offshore Revisited*, Tax Justice Network, July 2012.



followed by Spain (23%) and Luxembourg (19.3%).²⁹ This surprising new position of Luxembourg, which has never been a traditional investor, suggests a further intensification of round-trip investment, with two offshore centres now emerging as the main sources of FDI in Portugal, accounting for almost half of total inflows (43.6%).

The decline in the capacity to attract FDI is explained by a combination of external and internal factors. Externally, due to the strengthening of international competition from other destinations and the consequent redirection of these investors to other attractive locations (Eastern European EU members especially after the 2004 accession, and emerging economies, particularly China, Turkey, India, Brazil). Internal factors are mainly related to the weak performance of the Portuguese economy and above all the instability of the legal framework and the tax system, which are subject to constant changes that create uncertainty and impairs investors' long-term planning. This joins the systemic problems of the Portuguese justice system that exacerbates uncertainty and transaction costs for businesses.

However, despite these factors, it can be argued that the absence of an external strategy and structured economic diplomacy has also aggravated this negative evolution, insofar it did not allow to proactively counteract, or at least attenuate, these trends and develop an effective action to attract new investors.

As to Portuguese direct investment abroad (PDIA), after the peak reached at the end of the 1990s, which was a period of major investments dominated by investment in Brazilian privatisation programmes and in Spain, PDIA fell to more modest levels, with gross investment varying between a minimum of €7.7 billion in 2007 and a maximum of €19.6 billion in 2011. Net investment recorded modest levels and even a negative trend, with strong reductions especially from 2008 (between €1 and €2 billion) as well as a sharp decline in 2010 of € -5.6 billion. The positive trend in 2011 has an exceptional nature, explained by the large increase in direct Portuguese investment in the Netherlands, which grew by 800%. This was related to the restructuring of major Portuguese multinational groups' operations; however, this did not change the dominant pattern of decline that especially marks the second half of the decade, confirmed in 2012.

This development does not result only from the economic crisis, since there were already signs of reduced PDIA in the first half of the decade, but from the interaction between other factors, in particular the retraction of many Portuguese investors affected by the impact of the crisis and the fact that Portuguese multinational groups now invest abroad from offshore centres.

Table 5: Portugal Direct Investment Abroad – main destination countries (% of total PDIA); stocks and investment income (€ billion) 2002-2012

Country	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Netherlands	51.1	11.2	21.7	25.6	37.5	38.7	32.2	31.1	21.0	73.2	59.4
Spain	23.8	9.4	22.5	17.7	11	13.1	19.6	16.2	7.9	9.2	12.6
Brazil	9.4	1.9	4.3	3.6	4.3	4.5	4.7	6.7	17.2	3.6	7.3
Angola	0.4	0.4	0.9	2.7	2.8	0.0	6.8	8.9	6.8	1.6	3.5
Denmark	0.2	25.6	23	3.6	1.2	3.0	1.2	6.8	0.1	0.5	1.0
Total %	84.7	48.5	72.4	53.2	56.8	62.3	64.5	69.7	53	88.1	83.8
Net investment (€ billion)						4	1.8	0.6	-5.6	10.7	1.5
stocks (€ billion)	11.6	10	11.9	9.7	9.8	14.8	11.3	7.7	9.8	15.6	

Source: Bank of Portugal, AIFTP; author's calculations

²⁹ AICEP, Statistics, Portugal Country Record, Sep 2016.



Also in terms of PDIA, a significant concentration is found in a limited number of destination countries – the Netherlands, Spain and Brazil – which account for around 2/3 of the total. There is also a decreasing trend of PDIA's total in 2011 (about 86%) and in 2012 (about 80%). The most significant changes since the last decade have to do with the significant drop in investment in Brazil and a reduction in the weight of Spain as a destination market for PDIA.

On the other hand, the Netherlands has increased in importance as the largest destination of direct Portuguese investment abroad, especially in the second half of the decade. On average, it accounted for more than one third of PDIA, a trend that accentuated in 2011 and 2012 (73% and 60%, respectively). This phenomenon, coupled with the fact that it is also one of the largest foreign investors in Portugal, reflects the intensification of round-trip investment whereby major Portuguese economic groups invest in Portugal from the Netherlands. This is motivated by mechanisms of tax evasion that first justified capital outflows to the Netherlands only for re-entry in the form of FDI in Portugal later on.³⁰ It is therefore consistent with the fact that FDI in Portugal has focused on wholesale and retail sectors, which absorbed 38.9% of flows in 2011 (up from 31.9% in 2002), followed by financial activities (22.3%, compared to 19% in 2002) and manufacturing (21%, compared with 32.1% in 2002). The latter sector, which occupied the first place in 2002 with 32.1%, recorded the biggest drop in FDI flows, illustrating the process of deindustrialisation of the Portuguese economy.

In turn, the distribution of PDIA by sector reveals an overwhelming concentration in the financial sector (financial and insurance activities), which in 2012 represented 75.8% of the total, over three quarters, followed at a great distance by manufacturing with 8.2%, and consulting activities with 5.1%.

Migration

The management of migration flows, the mobility of human capital and the ability to attract highly qualified personnel is of critical importance from a geoeconomic perspective and for the consolidation of scientific, technological and innovation capabilities of a country in the context of the knowledge economy. For Portugal, the striking aspect of the evolution of migration flows was the combination of the fall in immigration flows from 2009 onwards with the expansion of emigration flows that have accelerated since 2011. This resulted in a negative migration balance, with a negative impact on demography.

Growth in immigration until 2009 was followed by a steady decline in the resident foreign population, which fell by about 15% from 451,754 in 2009 to 388,731 in 2015. This is explained by the combined effect of the low attractiveness for new flows or the return of immigrants associated with labour market worsening conditions and the granting of citizenship.³¹ As to emigration, after the 2007 peak and its reduction by 2010, there has been an increase in annual flows since 2011 that grew from 80,000 to 110,000 in 2013

³⁰ See the study on tax evasion of large multinational groups Rodrigo Fernandez, Jesse & Katrin MaGauran Frederik, 2013 *Avoiding Tax in Times of Austerity - Energias de Portugal (EDP) and the Role of the Netherlands in Tax Avoidance in Europe*, Center for Research on Multinational Corporations SOMO, the Netherlands, September 2013.

³¹ SEF Aliens and Borders Police, Immigration Reports, Frontiers and Asylum, 2010-2015.



and 2014, making up a total of about 400,000 exits between 2011 and 2014. Most of this comprised of young qualified workforce.³²

These trends are explained by the impact of the economic recession in Portugal and its effects on the labour market in terms of unemployment and salary reductions, as well as by a lack of strategy to value qualified personnel in the double perspective of attracting qualified workers from abroad and retaining existing Portuguese workers.

With the absence of consistent data on qualified personnel flows to Portugal, there are some scattered data indicators, including the percentage of residence visas and temporary residence for highly skilled immigrants. This has a marginal expression, representing only 3.3% of total residence visas and 9.5% of the total granted visas for temporary stays in 2011. In general, there is not a proactive and consistent policy of qualified foreign personnel recruitment, with only two instruments: (i) the scientific research system under the 2007 Immigration Act (Articles 61 and 90); (ii) and the 2009 Blue Card Directive that was transposed only in 2012 that gave rise to a new article introduced by Law 29/2012 of 9th August, which, along with the Blue Card Directive, has not produced significant results.

There are some exceptional cases of sectors that have implemented policies of recruitment of foreign qualified workers. These include medicine with the hiring of foreign doctors for the National Health Service³³ as well as some scientific research institutions that have actively sought to recruit highly qualified foreign staff for the development of projects.³⁴

Since 2011, qualified workers, particularly highly skilled young people, have emigrated in ever greater numbers. This "brain drain" has been seen as a loss for the Portuguese economy and society. However, in a knowledge society characterised by high mobility and circular migrations, simultaneous connection with and circulation between different knowledge networks in various territorial spaces is viable and therefore their departure should not be seen as a definitive or irreversible loss. On the contrary, it should be seen as an opportunity for the involvement of a qualified diaspora in more internationalised and denser knowledge networks that may actually promote and contribute to foster knowledge networks in Portugal.

In other words, even from a distance these Portuguese workers are still able to make an important contribution to their country of origin. Therefore, the most appropriate strategy is not to encourage immediate return as there are little chances of success, but rather to establish links to institutions in Portugal and promote participation in projects. Thus, the strategy outlined in Strategic Plan for Migration 2015-2020³⁵ seems inadequate and dysfunctional not only because it emphasises the promotion of return in the short term and reintegration of Portuguese emigrants, especially those who left after 2011, but also because there is no priority for devising a strategy to attract skilled foreign human resources.

³² Observatory of Emigration, Statistical Report 2015.

³³ SEF 2013 The National Attraction Countries qualified and highly qualified third party: the Portuguese case, in 2013.

³⁴ One example is the Champalimaud Foundation of the Centre for the Unknown that researches in the area of neuroscience, cancer and biomedicine, and has an active policy of attracting highly qualified scientists recruited worldwide.

³⁵ Approved by Resolution of the Council of Ministers No. 12-B/2015 (available at [http://jrportugal.pt/images/memos/20150125-madr-pem-consulta-publica%20\(1\).pdf](http://jrportugal.pt/images/memos/20150125-madr-pem-consulta-publica%20(1).pdf)).



Dominant trends

The evolution of the various dimensions of Portugal's external economic relations in the period 2002-2015 reveals three key trends worth highlighting due to their implications for the structuring and implementation of economic diplomacy.

First, excessive concentration of external economic relations in a small number of partners within the EU as well as non-EU countries, which creates an unfavourable environment of strong dependence and high risk that can only be reduced and controlled through an effective diversification strategy. Worse still is the evolution of this indicator, which calls into question policies: in the case of foreign trade, a high level of concentration and a very marginal reduction in the level of concentration in the 10 largest export markets is detected, but unchanged in its three largest markets; as to investment, either FDI or PFDI, the trend is to an even greater concentration, which the transitional diversification introduced by the new phenomenon of Chinese investment in the Portuguese economy failed to reverse. On the other hand, positive developments associated with some diversification of export products (tourism, food industry and agriculture) are not enough to offset the increased risk associated with persistent high degrees of concentration in a limited number of markets.

Second, a strong financialisation of external economic relations either through import and export operations, in many cases using offshore centres, or through investment flows in both directions that are fundamentally linked to financial transactions aimed at tax evasion. This is especially true for round-trip investment which Portuguese conglomerates and multinational companies practice. This financialisation process not only weakens the State, aggravating the erosion of its tax base and reducing its ability to implement public policies, including economic diplomacy, but also accentuates the speculative nature of flows and reinforces their illusory nature.

Third, there is the oligopolisation of economic flows both in terms of exports and investment, which is mostly associated with the activity of large economic groups with dominant market positions. For the export of the main goods and services – with the exception of tourism that ranks first – are sectors dominated by large groups, including machinery and equipment, vehicles and transport equipment, refined fuels and metals. Together in 2015, these accounted for almost 50% of total exports. This is well illustrated by the significant growth of the share of exports of refined fuels due to the company GALP and the fall of the share of other sectors such as clothing (whose weight halve from 11% in 2001 to 5.4% in 2012) and footwear, where the participation of small- and medium-sized enterprises (SMEs) has greater significance. The consolidation of oligopolies and the growth of monopoly rents devalues qualified human resources – feeding undesirable migration flows – and creates adverse conditions for SMEs and the growth of entrepreneurship, which is essential to strengthen innovation in the economy.

This trend reflects the fact that the level of internationalisation of SMEs is still very low and even registered a decline by the end of 2010, with exporting companies being a minority (9.7%) in 2009.³⁶ At a European level, a study based on a 2006-2008 survey

³⁶ According to the study of the National Statistical Institute, *Estudos sobre Estatísticas Estruturais das Empresas 2007-2009*, June 2011, only 9.7% of SMEs were exporting, although they were the most dynamic companies, accounting for 40% of total SME turnover.



discloses contradictory data pointing to the percentage of Portuguese SMEs that export or exported in the previous 3 years. It shows that this is three times higher with 31%, above the EU average of 25%.³⁷ However, considering that the data refer to the previous years and includes companies that have exported and stopped to do so, the study of the National Statistical Institute reflects a more accurate picture of the situation in 2009, making it possible to consider that the discrepancy is partially explained by time lag and the fact that, in recent years, there has been a trend of decline in the internationalisation of Portuguese SMEs.

Notably, the low level of SME internationalization is precisely a consequence of a lack of economic diplomacy, which should primarily mobilise and involve this sector, as well as an active clustering strategy. On the other hand, this trend of oligopoly creates obstacles for the structuring of active and participatory networks as there is a significant divergence in interests and objectives between SMEs and large multinational conglomerates, which remain highly influential in shaping public policy. This poses significant challenges to promote cooperation and additional actions.

3. External action model in Portugal

Portugal's external action model has been marked by four key features: dualism, centralisation, state-centred and reduced innovation.

First, dualism involves the simultaneous intervention of two government sectors and open competition as well as a lack of coordination between the Ministry of Foreign Affairs (MFA) and the Ministry of Economy. The model corresponds essentially to the model of "competition" identified by Rana,³⁸ which also exists in countries such as France and India, coupled with a high level of non-coordination, unaccountability and reduced effectiveness. From the analysis of concrete experiences, Rana identified five distinct types of organisational models:

- (i) unified – unification of foreign affairs and foreign trade, such as that in force in Sweden after the reform of 2001, as well as in Canada and Australia, where the union is done under the leadership of the MFA;
- (ii) partially unified – involving the creation of a joint institution operating between the MFA and the Ministry of Commerce, as in the case of the UK Trade and Investment (UKTI)³⁹ in the UK, created jointly by the Foreign and Commonwealth Office and the Ministry of Trade and Industry.
- (iii) third agency – the MFA has little involvement in economic diplomacy except in the definition of broad guidelines as in the case of Singapore, without intervention at an operational level, which is attributed to two special institutions, the Singapore Trade Board and the Singapore Economic Development Board, that are under the supervision of the Ministry of Commerce and Industry;

³⁷ European Commission, *Internationalization of European SMEs*, 2010, a study on the level of internationalisation of SMEs in the 27 Member States that concluded that, on average, 25% of SMEs in the EU-27 export or exported in the last three years (available at http://ec.europa.eu/enterprise/policies/sme/market-access/internationalisation/index_en.htm#h2-3 Consulted on 10.10.2013). They include several forms of internationalisation.

³⁸ Rana, Kishan, 2002, *Bilateral Diplomacy*, DiploHandbooks, DiploFoundation, pp.70-71.

³⁹ On the evaluation of some of the programmes see the British Parliament report (available at <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmbis/266/26607.htm>).



- (iv) competition – a model notable for its competition between the MFA and the Ministry of Economy/Trade, with both having intervention in economic diplomacy which is marked by high levels of non-coordination, unaccountability and reduced effectiveness (such as France, Portugal and India);
- (v) renunciation – the MFA has no active role in economic diplomacy, serving only as support for the Ministry of Commerce that displays a status and political weight greater than the MFA, as in the cases of China and Germany.

Portugal is currently in a phase of uncertainty after a transition from the competition model to the unified model, following the 2011 reform initiative (considered below), where economic diplomacy has to be led by the MFA. However, in 2013 there was a setback in the process with the emptying of the MFA's role and a partial return to the competition model.

Secondly, it is a centralised model with reduced autonomy of operational centres on the ground, particularly embassies, and has an almost non-existent decentralised business association structure with little input to the formulation of policies, in particular bilaterally.

Third, it is a heavily state-centric system dominated by the State, with a very low participation of non-State actors – companies, NGOs, think tanks and universities – both in policy formulation and in its implementation. There is also a lack of cultivation of multi-actor partnerships in the promotion of the country's interests externally.

Finally, it is a low innovation system with great aversion to risk and resistance to innovation which lacks a culture of effective evaluation. It is also clearly oversized when looking at the country's resources and capacity, with a network consisting of 79 embassies (71 bilateral and 8 multilateral) and 51 consulates; besides this, it incurs in heavy costs, which is largely the result of high costs with premises and human resources.

Over the last decade, changes using the concept of economic diplomacy aimed at overcoming some of these limitations and improving the effectiveness of the system were proposed and approved, though often not implemented. However, the essence of the traditional system has not changed, nor has a paradigm shift occurred, which is essential in dealing with the new challenges of globalisation and the knowledge society.

The first attempt to reform the system and launch the foundations for economic diplomacy failed in the XV Constitutional Government (2002-2004), whose programme included the objective "to promote active economic diplomacy".⁴⁰ The approach taken, despite referring to the concept of economic diplomacy, was closer to the traditional model of commercial diplomacy where the State is the only actor in external action (without any involvement of non-state actors), with economic issues being addressed in a piecemeal instead of in a holistic interdisciplinary fashion. The approach was essentially minimalist since the central issue related to an attempt to enhance coordination between the Ministries of Foreign Affairs and the Ministry of Economy, "coordinating the action of the Ministry of Economy agencies with the activity of embassies" in a system that remained essentially dualistic and dominated by competition between departments. It should be noted that, despite the concern for coordination and coherence in the same

⁴⁰ XV Constitutional Government Programme, p.21.



period, contradictory measures were adopted that went in an opposite direction, namely the establishment in 2002 of the Portuguese Investment Agency (PIA), which contributed to a further fragmentation of the system, thereby increasing coordination problems.

The implementation of the new guidelines would only begin in 2004 following the joint dispatch of the Minister of Foreign Affairs and Portuguese Communities and the Minister of Economy,⁴¹ which focused on formal coordination at the top ministerial level and the adoption of a dual protection system in which the ambassadors could indiscriminately receive instructions from either of the two ministers on economic issues (Point 1 of the dispatch), thus generating ambiguity and uncertainty. On the other hand, they should design and implement a business plan for commercial action for each individual country, which would include quantified targets on exports and tourism revenues arising from each market (Paragraphs 7 and 9). At the same time, there should be a link between the ambassadors and the president of ICEP (Point 14), a rather vague mechanism. This initiative, inspired by the French model, corresponds to the logic of the first phase of "promotion" in economic diplomacy according to Rana's classification. It was a formal approach that was not implemented and did not produce concrete results. In terms of exports, for example, statistical data for 2004 and 2005 do not reveal any trend of growth or diversification of export markets, maintaining the same high levels of concentration in a limited number of markets.

The strategy in the 2005-2010 period was dominated by the rationalisation of the State external action system in the economic area, marginally reducing fragmentation with the merger of the Foreign Trade Institute of Portugal (ICEP) with the Portuguese Investment Agency (PAI). This gave rise to the creation in 2007 of the Agency for Investment and Foreign Trade of Portugal (AICEP) that adopted a more flexible business nature and client-driven approach. However, the AICEP remained exclusively under the control of the Ministry of Economy, so this reform did not change the essence of the two-tier system or put an end to the competition model between the Ministry of Foreign Affairs and the Ministry of Economy.

In 2011, the second attempt to implement an economic diplomacy strategy was carried out in the context of the XIX Constitutional Government, whose programme included strengthening economic diplomacy as a new national strategic priority.⁴² In order to design an operational plan to implement the new focus on economic diplomacy and assess several alternative solutions, a working group coordinated by a former Finance Minister Braga de Macedo was created, to reflect on a new model of organisation and coordination of State services and agencies involved in external action, which finally delivered a report containing reform proposals.⁴³ The identification of the need for reform aimed at strengthening the effectiveness of the system, rationalise the articulation of competencies between the Ministry of Foreign Affairs and the Ministry of Economy as well as the unification of external networks were all positive aspects of a pragmatic rationalisation effort to be implemented in a difficult environment.

⁴¹ Joint Order No. 39/2004 of 6th January, the Minister for Foreign Affairs and Portuguese Communities, Teresa Gouveia, and the Minister of Economy, Carlos Tavares da Silva.

⁴² The XIX Constitutional Government Programme p. 104, in detail, in terms of operational objectives pp.105-106.

⁴³ Working group set up by Prime Minister's Order No. 9224/2011, whose report dated 19th September 2011 was publicly presented on 26th September.



However, this document had several limitations that worked as impediments to the implementation of a genuine economic diplomacy. In fact it focused almost exclusively on issues of institutional design of public actors and formal channels, overlooking the role of non-State actors, networks and informal channels in external action. A marginal reference to the participation of major business organisations in the Advisory Council is not sufficient, especially if they do not represent the interests of SMEs. The active participation of the business sector in decision-making, in a logic of true partnership, and the assumption of operational responsibility for external promotion in a pragmatic division of labour with the State seem a necessary condition to improve the system more systematically.

On the other hand, the document does not provide a real and operational strategy for external action as it set so many goals and priorities which can not be pursued all at the same time. There was a clear lack of choices and of clear definition of the relationship between all pillars or the level of economic diplomacy to be developed. Indeed, mere action at a "salesmanship" level is not enough, when the document refers to the promotion of exports and attracting FDI, as it is equally important to articulate this level with the development of more complex "regulatory management", involving, for example, the negotiation of bilateral investment treaties, which Portugal has neglected.

Third, there is a clear deficit of reference to best practices and experiences of other countries that started the reform process several years ago (e.g., there is only marginal reference to the experience of Sweden and Denmark in support of option C), while a benchmarking logic can positively contribute to the debate on potential solutions.

Finally, the document contained a mere definition of an institutional model without addressing key operational aspects and practical issues of external action that determine its effectiveness, particularly the level of decentralisation and autonomy of local structures, the profile and training of human resources, and the exploration of informal channels; nor does it ponder the implications of adopting a "multitrack diplomacy". The philosophy of action, informal practices, actors involved, the level of social capital, innovation capacity, and the quality and training of human resources are as important as the organisational model.

Following this process, the Government introduced two key changes. The first change was the adoption of a unified model for the institutional organisation of the State, inspired by the reform of Sweden 2001. This puts the Ministry of Foreign Affairs as a leader in the process, ensuring the consideration of political dimensions and the coordination of the main external action instrument – that is the network of embassies and consulates. Potentially this could help to eliminate the disfunctionality and waste of resources resulting from competition among different public actors and create conditions for a more holistic approach able to integrate economic and political dimensions.

However, what appeared to be a clear strategic option for the future with regard to the organisational model of the State was surprisingly called into question and reversed in July 2013. A new decision was adopted reversing the 2011 option insofar it promoted the return of the AICEP to the exclusive sphere of responsibility of the Ministry of Economy and assigned to the deputy prime minister the coordination of economic diplomacy, thus undermining the role of the Ministry of Foreign Affairs. This erratic evolution and return to an even more complex and competitive two-tier model – without any previous evaluation of the unified model – does not create favourable conditions for the



consolidation of an effective economic diplomacy, and represents a retrogression in relation to what was probably the first ever structural measure to break with the traditional model.

The second change involved the alleged rationalisation of the external representation network – embassies, consulates and permanent representations – in order to resize and adapt it to the new objectives, i.e. the promotion of Portuguese exports, market diversification, FDI attraction and tourist flows. This initiative resulted in the closure of seven embassies – one in Africa (Kenya) and six in Europe (Andorra, Slovenia, Estonia, Latvia, Lithuania, Malta) – five vice consulates (two in Germany and three in France). There was also the elimination of autonomous representation in two multilateral posts: UNESCO, where representation has to be assured by the ambassador of Portugal in Paris; and the OSCE (Organization for Security and Co-operation in Europe), where representation has to be ensured by the ambassador in Vienna. Still, a new embassy in Qatar was also created. As a result, the number of bilateral embassies went down from 77 in 2011 to 71 in 2012.

However, this rationalisation turned out to be a marginal exercise without substantive changes, appearing to have been more determined by short-term considerations related to the reduction of public expenditure than by the objective of implementing a new long-term external action strategy that reflects a paradigm shift. Several arguments support this view. First, the absence of greater investment in Asia, a decisive region for the global economy, which would have justified the creation of some new embassies to compensate for a clear high deficit with only eight embassies (Japan, China, India, South Korea, Indonesia, Thailand, Singapore, East Timor), as well as the closure of more embassies elsewhere.

Second, changing the list of diplomatic missions is only a formal aspect which does not by itself lead to greater efficiency as it has to be complemented with a change in operational aspects on the ground. There was no definition of a new operating model for embassies that could address key problems such as the low level of local autonomy; inadequate staff profiling, which should include more local and less expatriate staff; or poor local operational articulation with entrepreneurs and other diaspora sectors.

It should also be noted that the attempted 2011 reform has other substantial deficiencies, detected also in previous initiatives, since it assumes that economic diplomacy is essentially a State activity. In fact, even though marginal collaboration from companies and other non-State actors is admitted, it is far from adopting a multi-actor approach. Portuguese companies are seen more as clients of the State and AICEP rather than as partners. As a result, attention has focused only on the reform of State apparatus and in relations between government departments, excluding prospects for active partnerships between State and non-State actors in the planning and implementation of external action.

This means that Portugal is lagging behind and has a clear deficit in the implementation of the second phase of economic diplomacy, the "networking" phase, which is geared towards creating consistent support networks in the country and abroad. This puts the attempts to project the country image at risk as it may see its sustainability compromised insofar it is not supported by friendly coalitions and is not anchored in a robust network.

Despite the vital importance for Portugal of the development of an economic diplomacy in order to meet the challenges and threats of globalisation, take advantage of



opportunities and project interests in an increasingly complex global economy, the truth is that the last decade was a lost decade in terms of structuring and effective implementation of economic diplomacy with negative consequences for the Portuguese economy and society.

4. Challenges to strengthening the effectiveness of external action and strategic lines of economic diplomacy

The reform of external action and diplomacy in Portugal is in essence a matter of governance and should be thought out and planned whilst taking into account not only the conditioning factors referenced above, but also the strategic axis for the future in the context of a deepening glocalisation.

The analysis involves three distinct but complementary areas: the organisational dimension, the operating dimension and the innovation dimension.

4.1. Organisational dimension

The organisational dimension has a structural nature and involves a number of key changes to meet the new challenges at three different levels.

First, the definitive choice for the unification model in external action within the State, similar to the Nordic model, especially Sweden⁴⁴ and Denmark. This unifies foreign affairs and international trade/investment under the leadership of the MFA and has to be definitively consolidated. This ensures not only a more holistic approach that maximises interconnections between economics, politics, security and culture, but allows the same group of people to consistently manage and explore synergies that promote exports, foreign direct investment, attraction FDI and development aid. This option avoids the dysfunctional effects of institutional competition and high costs of non-coordination, while reducing the risk of a marginalised MFA and the rise of sectoral ministries externally that generates an underutilisation of the diplomatic representation network, which is one basic instruments that absorbs considerable resources.

Second, the challenge of adopting a true multi-actor approach involving greater openness to the participation of non-State actors – companies, NGOs, universities, think tanks, chambers of commerce – in strategy as well as the consolidation of an active partnerships for external action, combining know-how, financial and human resources. Assigning direct responsibility to these actors for the implementation of concrete actions (organisation of shows, market research, trade missions) according to their comparative advantages is fundamental and contributes to the dilution of excess State action – which may even generate resistance abroad – and to reaching out to non-State actors and civil society in target countries. The involvement of these non-State actors allows more space for more informal track II and track III diplomacy to be explored.

In this context, and in order to facilitate the team/partnership logic, it is essential to promote the circulation of human resources between companies/NGOs and the MFA/embassies, with short to medium term stays of diplomats in private firms international departments. The promotion of staff turnover is therefore essential.

⁴⁴ *Swedish Policy for Global Development* (2003).



Third, there is the challenge of the re-qualification of human resources, involving the recruitment of a greater share of diplomats with economic training and management on the one hand, and higher levels of appropriate professional experience in the economic diplomacy area on the other. In this sense, it is essential to increase the flexibility of a too rigid and traditional system and admit the possibility of direct entry of more qualified staff at higher levels of the diplomatic career without having to go through the early stages, which would quickly increase capacity for intervention and stimulate innovation.

In addition to recruitment, enhanced on-the-job training is essential at the beginning and throughout careers. The initial training of diplomats in internationalised Portuguese companies, multinational companies or sectoral ministries would go a long way to strengthen training and partnerships. Also, the creation of itinerant trainers to train staff when placed abroad in diplomatic representations should also be considered.

On the other hand, the system of "in-out" turnover through which the senior managers of public administration are involved during a certain period in external representation – dealing with dossiers in its technical areas of expertise – and later returning to the country to perform functions in the State, allows for better integration of internal and external levels. This has significant advantages at two levels: strengthening the quality of external action through technical areas where experience in national dossiers management allows them to provide crucial input to increase the credibility of international participation and, consequently, influence; and international experience of negotiation gives them a broader perspective and a sense of interconnection between the various levels of governance when managing national dossiers in Portugal.

Similarly, institutions must integrate internal and international dimensions, ending the artificial divide that still prevails in Portugal. One of the practical business implications about promoting exports and investment is that it does not make sense for the IAPMEI – which is oriented towards domestic level – and the AICEP – oriented externally – to coexist. A single structure that combines onshore and offshore initiatives starting from a support system to consolidate the competitiveness of enterprises is more effective. In the case of SMEs, much depends on clustering promotion efforts that the State has not stimulated, and face internationalisation as one step in a process. This is the positive experience of the UK with the creation of the UK Trade and Investment in 2003, which promoted the integration of onshore and offshore initiatives to support internationalisation.⁴⁵

Thus, external action should be built from internal networks of relations established with companies and sectoral business associations. External action is therefore a natural extension of domestic action depending on its consolidation. The decentralised domestic network set up for the close monitoring of business plans should discuss with the firms the internationalisation plan. This would avoid duplication and inconsistencies in public policies for entrepreneurship and strengthen the competitiveness of SMEs.

⁴⁵ Another of the innovations was the bet on the strategy of sectors with the identification of priority sectors from which to decide on the markets as an alternative to traditional strategy of focusing on markets. Vd. <https://www.gov.uk/government/organisations/uk-trade-investment>, consulted on 12.05.2015.



4.2. Operational dimension

From an operational perspective complex challenges arise when promoting effective economic diplomacy.

The reduction and rationalisation of the network of embassies and consulates, an option that started to be implemented in 2012 but only marginally, must be further deepened. The idea of creating the figure of itinerant ambassadors would introduce flexibility and partially replace permanent structures. It is not enough to reduce the network, one must change it qualitatively and ensure it does things differently. Indeed, as important as the structure of the network is how it works and take action to remove the bottlenecks which reduce its effectiveness.

In this domain two operational issues are of particular relevance. First, the challenge of enhancing decentralisation in external representation systems, strengthening the power of the local decisions of embassies and missions, after the previous definition of parameters, objectives and approval of an annual plan. This allows greater flexibility and timing for a more appropriate response, but also increases the quality of decisions given the fundamental input that embassies and other foreign representation structures should provide for the formulation of bilateral policy. One of the structural problems of Portugal's external system is its high degree of centralisation as Lisbon is required to decide both on substantive issues and on matters of detail, which becomes dysfunctional and creates an enormous burden that is overwhelming for the central structure of the MFA.

Strengthening decentralisation was one of the choices made by the United Kingdom and Sweden in the reform of the external action system. In the case of Sweden, and in relation to development aid, some foreign representative offices now have a system of "full delegation" with skills to prepare the "annual plan of the country", approved by the centre in order to monitor and evaluate results, ensure financial management and human resources, and provide inputs to the definition of the bilateral cooperation strategy.

Second, the strengthening of local recruitment of qualified staff is important, whether foreign or members of the Portuguese diaspora, departing from the current representation structures with excessive emphasis on expatriates. This has three clear advantages: (i) the reduction of costs, particularly those associated with moving expatriates; (ii) stability in the performance of functions by reducing the problem of expatriate turnover; (iii) greater knowledge of reality and local language and the ability to activate links with local knowledge networks, contributing to greater depth in action. In many cases, embassies and consulates need only to have one or two nationals, career diplomats or technical staff, while the remaining staff can be recruited locally. In this context, and considering that it can also contribute to boost relations with the Portuguese diaspora in various countries, the recruitment of qualified members of the diaspora gains a special relevance.

4.3. The innovation dimension

The third dimension is innovation, particularly in the use and promotion of essential informal channels which are crucial in the context of the functioning of the global economy and the knowledge society. In Portugal, three dimensions appear to be priority: the Portuguese diaspora, paradiplomacy and economic intelligence.



The mobilisation of the Portuguese diaspora, more than 5 million people,⁴⁶ in particular two sub-sectors, the business community and the scientific community, is a strategic factor of economic diplomacy and foreign policy in general. One of the paradigm in this matter has been the mobilisation of the Chinese diaspora, one decisive informal factor, perhaps less visible, for the successful integration of China into the global economy.⁴⁷ This has been one of the most significant shortcomings of Portuguese foreign policy strategy, wasting the potential contribution of the diaspora in promoting the image and interests of the country. Four notable aspects include: (i) entry points of Portuguese exports, especially given that many entrepreneurs of a Portuguese origin are linked to the distribution sector; (ii) direct investment sources in Portugal; (iii) provision of economic intelligence to Portugal; (iv) links to the most dynamic knowledge networks in the country and links with networks in Portugal.

Examples of practical measures to stimulate this involvement include: (i) decentralised involvement of Portuguese businessmen in the Diaspora Advisory Board of embassies in each country; (ii) greater involvement with the scientific community through demands for consultative work and foresight analysis of Portugal's relations with the country in question as well as exploration of opportunities; (iii) the recruitment of qualified local staff of the diaspora to diplomatic representation structures; (iv) better coordination with Portuguese diaspora associations with a view to strengthening the participation of diaspora members in the political life of the destination country. The recent creation of the Council of the Portuguese Diaspora globally, consisting of "300 notables", assumes a centralised logic that does not seem to be the most appropriate response nor a substitute for local coordination mechanisms. These take into account the need to create local support networks that are essential for the implementation of the second phase of economic diplomacy.

The development of paradiplomacy is another essential informal dimension, particularly in the areas of "low politics". It involves more decentralised action in target countries and has a proactive strategy and effective response to the paradiplomacy of regional and foreign local governments, many of whom are associated with the most dynamic regions of knowledge in the world. In this perspective, the highest priority should be given to the promotion of direct relations with Spanish autonomies, some Chinese provinces that have a very active paradiplomacy, some Brazilian states, US states, Indian states and a selection of one or two key partners in emerging economies.⁴⁸

This strategic shift will reverse the primacy of central government to central government relations that Portugal has followed in a mirror effect as a result of a system marked by excessive centralisation. The absorption syndrome in relations with the central government has produced scant results since the most dynamic economies have a high level of political and economic decentralisation and their central governments have less

⁴⁶ The Portuguese diaspora has grown in recent years and currently reaches a higher estimated global dimension of 5.5 million people (Portuguese and Portuguese origin) spread across different countries. The main communities are located in the USA (1,380,837), France (1,190,798), Brazil (612,203), Canada (429,850), Switzerland (288,465), Venezuela (268,500), South Africa (200,000), United Kingdom (171,497), Germany (171,166), Spain (148,789), Angola (113,194) Luxembourg (99,730) and Australia (50,157) - official data from the 2012 Emigration observatory. (<http://www.observatorioemigracao.secomunidades.pt/np4/11> Consulted on 09.15.2013).

⁴⁷ Miguel Santos Neves and Annette Bongardt, 2006 *The role of Overseas Chinese in Europe in Making Global China: the case of Portugal* INA Papers, No. 29.

⁴⁸ About paradiplomacy and knowledge regions see Miguel Santos Neves, 2010 *Paradiplomacy, Knowledge Regions and Consolidation of Soft Power*, in Janus.net, E-Journal of International Relations, no.1.



and less decision-making power in economic matters, as well as in culture, education or research. This involves betting on the conclusion of international agreements with sub-national governments and the development of close institutional relations.

The lack of organised knowledge regions with proactive leaderships in Portugal, partly the result of non-regionalisation, implies some limitations in Portugal's ability to compete in the global market and take full advantage of participating in paradiplomacy. However, even in the current centralised model framework, there are opportunities since these sub-national governments have significant interest in direct relationships with foreign central governments.

There are obvious synergies between these informal channels, since the Portuguese diaspora in some countries is strongly integrated into local communities – in some instances, diaspora members participate in regional or local governments – and can therefore play an active role in accessing and strengthening decentralised institutional ties. In many other cases, links with regions of origin in Portugal are maintained, allowing links in the reverse direction to materialise.

The third dimension involves investing in the creation and management of an effective economic intelligence system,⁴⁹ involving the collection, processing and prospective analysis and use of information and knowledge to improve the efficiency of economic actors.⁵⁰ This is a key element to support the decision and definition of an economic diplomacy strategy as demonstrated by the experience of the US, UK, France, Germany and China. A critical aspect is quality tacit knowledge, which implies face-to-face relations and trust that allow to better analyse of the behaviour of actors in foreign markets, as well as to identify and exploit opportunities and predict threats in advance. Accordingly, this dimension depends on the efficient operation of networks and capacity to articulate relations with sub-national governments and foreign investors with the diaspora, as well as alternative sources of information that allow an escape from the "cyberspace trap".

Finally, the development of soft law and hard law mechanisms of regulation, which are fundamental legal instruments guaranteeing the rights of national actors that can contribute to a reduction of risk and uncertainty. A paradigmatic case for hard law instruments are bilateral investments treaties for the promotion and protection of investment, which should frame Portuguese direct investment processes abroad, protecting investors against political risks, including expropriation. However, Portugal neglected this dimension for a long time and only recently has there been progress. Currently, there are 39 treaties out of which 11 are not yet in force; most have been signed after 2005 but the majority only became operational in 2009/2010. The conclusion of international agreements with sub-national governments in areas as diverse as trade, tourism, science and technology, and education is an essential dimension of paradiplomacy and soft law involving non-State actors. In short, it is about the development of the third most complex phase of economic diplomacy that Rana refers to as the "regulatory phase".

⁴⁹ See IEEE, 2013, *La inteligencia económica en un mundo globalizado*, Cuadernos de Estrategia 162, Spanish Institute for Strategic Studies, Ministry of the Defense.

⁵⁰ Baulant, C. 2004 *Les outils de l'intelligence économique face aux défis de la mondialisation*, colloque du 28 septembre 2004 at Angers, p.54, available at: www.master-iesc-angers.com.



5. Conclusions

Economic diplomacy developed in the 1990s during the post-Cold War as a response strategy to the interrelated challenges of globalisation and knowledge society/economy, as well as the emergence of geoeconomics. The process of multidimensional and asymmetrical globalisation has led to increasing challenges for sovereign States and their societies, which are faced with a process of economic power concentration and the formation of conglomerates that consolidate dominant positions in various sectors of the global economy and interfere increasingly in politics. This oligopoly of the global economy limits international competition, generates inefficiencies and increasing inequality and poverty, which threaten peace and social cohesion.

Failed States, primarily through the erosion of their tax base as a result of a concerted process of large-scale tax evasion, are powerless to exercise effective regulation, control the abuse of power and safeguard the interests of the majority by protecting it from the syndrome of "too big to fail". In a distorted global economy, subject to increasing restrictions to competition rules, it does not suffice to a country and its companies to be competitive and efficient in order to succeed. There are fundamental non-economic factors requiring the articulation and implementation of an economic diplomacy that is not limited to economics or diplomacy.

Contrary to the traditional view, the concept of economic diplomacy requires a new paradigm of external action not mere adjustments in a traditional diplomacy dominated by politics if challenges of geo-economics are to be met. This change involves three essential aspects: a multidisciplinary holistic approach linking the economy, politics, culture and security that considers interconnections and cross-effects; a multi-actor approach that rejects the idea that it is a single process or one dominated by the State, and, by contrast, assumes a cooperative partnership between State and non-State actors with increasing influence and domination of informal channels and networks; and a multilevel approach able to articulate different geographical levels of action and jurisdiction that actively incorporates the sub-national level.

The analysis allows support for the three key conclusions regarding the construction of economic diplomacy in Portugal. First, the central argument is that there is not yet a consolidated economic diplomacy in Portugal, despite the frequent and inaccurate use of the concept, insofar the traditional model of commercial diplomacy still prevails. Although in the last decade attempts to reform the external action system have been carried out geared towards the creation of economic diplomacy, the truth is that some have not come to be implemented. The most recent, in 2011, did not reach the threshold of paradigm change and it is still far from adopting a multi-actor approach, keeping instead a State-centric view, streamlining internal and external networks and failing to operate on a multitrack approach.

Nevertheless, as far as the institutional organisation of public actors is concerned, a correct option was adopted in 2011 in order to promote a transition from a French-inspired competition model to a unified model under MFA leadership. This was recently reversed, confirming a trend of erratic developments, hesitations and a lack of continuity of public policies in this area over the last decade. In short, the current moment is marked by a transition from commercial diplomacy to economic diplomacy, but what can be called the first phase of development of economic diplomacy the "promotion" phase.



Second, the analysis of some dimensions of Portugal's external economic relations in the last decade shows that less positive developments in foreign trade and foreign investment have structural causes and result from non-adaptation to new operating conditions of the global economy, and are not merely based on economic factors such as the recessionary impact of the sovereign debt crisis in the country. Although not the single or even the determining factor, the absence of an active economic diplomacy was certainly one important factor to the extent that it prevented the control of risks, the minimisation of negative impacts and the capacity to take advantage of opportunities.

The high degree of concentration of export markets and a small number of partners as well as the financialisation and oligopolisation of economic flows make economic diplomacy the more urgent, but paradoxically also raise obstacles to its effective implementation. The obstacles are more political than financial. They result from a lack of political will, a lack of clear objectives, bureaucratic resistance to change, as well as the continued exclusion of SMEs, rather than a lack of government funds, where the activation of networks and the participation of non-State actors also allows the pooling of resources.

Third, the progress of transition to an effective economic diplomacy and carrying out the various stages of its development requires active partnerships between government, business, NGOs, think tanks, universities, chambers of commerce and basic choices at three levels: organisational, operational and innovation. As to innovation it involves mostly informal aspects related to the Portuguese diaspora's strategic involvement, the management of paradiplomacy and the consolidation of an economic intelligence system, key dimensions that are interrelated and mutually reinforcing.

The challenge of economic diplomacy is one of the most significant and urgent for the country's future and requires significant mobilisation of the Portuguese society as well as reform of the State, which continues to play a central though not exclusive role in this process, especially in the way it relates to society. Moreover, an increase in the level of social capital is needed to consolidate levels of confidence and ability to cooperate to achieve the common goals of different relevant actors.

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CONSTITUTION AND RELIGIOSITY OF/IN THE CONSTITUTIONAL ORDER OF THE NATIONAL SOCIALIST EMPIRE

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Abstract

In this article, we will analyse the National Socialist regime as a politico-constitutional reality. We will do it from a new way of looking at politico-constitutional phenomena, interpreting them as registered in a religious grounding. It seeks to show that the National Socialist regime was characterised by having identified the political community – a racially interpreted and raised community to the Absolute – with an empirical historic personality regarded as eminently communitarian. It suggests that the regime constitutes a *sui generis* case, either in a context of regimes conventionally classified as "right-wing authoritarian and/or totalitarian" or in a larger context of contemporary politics.

Keywords

National-socialism; III.^o Reich; Constitution; Religion; Christianity

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CONSTITUTION AND RELIGIOSITY OF/IN THE CONSTITUTIONAL ORDER OF THE NATIONAL SOCIALIST EMPIRE¹

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In this work, the constitutional structuring of the National Socialist regime is examined. The aim is to show that the National Socialist regime was characterised by having identified the political community, racially interpreted and elevated to the Absolute, with an empirical historic personality regarded as eminently communitarian; and that in it and because of it, it constitutes itself as a *sui generis* constitutional case on the map of contemporary politics.

Analytical perspectives

We analyse the constitutional structuring of the National Socialist from a new way of looking at the politico-constitutional, which does not only stick to forms or institutions; nor is it limited to probing a favourable or eventual "determining" socio-political occasion or "capturing" of a "founding" axiological materiality of low intensity ("too human", so to speak) – constitutional moments that are certainly "real" and important.

When interpreting constitutional forms, we will take as grand "working hypothesis" the idea of how the "forms of public affairs"² express and lead themselves back to choices of a "Supreme Good" or "Sovereign Good". We will assume that the Supreme Good can be determined in terms of different intensities and through evaluating "axiophanic" comprehensiveness; therefore, it may or may not be interpreted as an Absolute, as a single, exclusive, unlimited, unconditional source of all normativity, values and axiological normative authority, and it may eventually be erected to a way of life or even a universal civilizational order.

In light of a certain "theoretical (re)vision", we will look at the politico-constitutional as a "place" of religiosity, *res sacrae*,³ instantiations or determinations of the "religious" or the "sacred".

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² We appropriated here a concept of Aristotelian affiliation whose meaning (the constitution as a fundamental form of the political community) we did not refrain from incorporating in this study – Maria Lúcia Amaral, *A Forma da República: Uma introdução ao estudo do direito constitucional*, Reprint, 1st ed., Coimbra Editora, Coimbra, 2012.

³ To use an expression dear to the known constitutionalist and administrative jurist Ernst Forsthoff – *vide* Ernst Forsthoff, *Res sacrae, Archiv des öffentlichen Rechts*, Vol. 31, 1940, pp. 209-254.



We will also consider Carl Schmitt's intuition, according to which modern constitutional politics has to be understood as a place of "mixed things" ("*Res mixtae*"), as decision ("negotiation") on the borders between real modern politics and "traditional religion".⁴

We adopted such an analytical framework not only because it seems the most suitable method to capture the "deep structure" of the constitutional phenomena in general but also, and mainly, because it looks at the so-called "right-wing non-democratic regimes" of the inter-war period in a way that we suggest will increase the analytical capacity available to clarify them.

We will see, then, the faces of the politico-constitutional National Socialist, trying to capture the core of its specific constitutional structuring.

Favourable occasion

In 1918, the German Reich is a recent Nation-State and still *in fieri*. In that same year, the *Kaiserreich* is re-founded in liberal-democratic moulds (the Weimar Republic).⁵

In the inter-war period, German society registers a complex of crises – economic, financial and political – which were "producing" a latent and diffuse existential crisis. In such context, a mass movement was emerging, crystallising and conveying a vision of a "new order" fully built from the idea of the "national community of the German People" – the National Socialist Movement.⁶

From 1930, under the auspices of President von Hindenburg, attempts to overcome Weimar impasses are tested; attempts between the commissarial dictatorship, repetition (non-identical) of the order of the Second Empire and construction of a new "Nationalist" State based on the presidential institution, army and public administration.⁷

With the failure of such attempts, part of the governing class associated with the executive and with a nationalist ideology would move the National Socialist Movement to power. The "National Socialist Revolution" was beginning. A "new State to support the Voegelin State" was also emerging. In January 1933, the Reich's President, Marshall Paul

⁴ Vide Carl Schmitt, *Political Theology II, The Myth of the Closure of any Political Theology*, Polity, Cambridge, 2008 (1970). [See also Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, MIT Press, Cambridge, Massachusetts/London, England, 1985, work originally published in 1922 and reissued with a new preface in 1934]. For the analytical framework presented in this text, see Pedro Velez, *Constituição e Transcendência: os casos dos regimes comunitários do entre-guerras*, Dissertação de Doutorado, FDUNL, 2013; cf. also Pedro Velez, *Sobre a ordem constitucional no/do fascismo italiano*, em *Janus.net, e-journal of international relations*, Vol. 7, No. 2, November, 2016 – April, 2017, pp. 70 ff.

⁵ On the background underlying the emergence of the National Socialist Constitution vide: Folko Arends and Gerhard Kümmel, *Germany: From Double Crisis to National Socialism, in Conditions of Democracy in Europe, 1919–39*, cit., 184 to 212; Hans Mommsen, *The Rise and Fall of Weimar Democracy*, University of North Carolina Press, Chapel Hill/London, 1995; Eric D. Weitz, *Weimar Germany, Promise and Tragedy*, Princeton University Press, Princeton/Oxford, 2007.

⁶ For this context see Carl Schmitt, *State Ethics and the Pluralist State* (1930), in Arthur J. Jacobson, Bernhard Schlink (ed.), *Weimar: A Jurisprudence of Crisis*, University of California Press, Berkeley/Los Angeles/London, 2000, pp. 300-312.

⁷ We refer to the attempts by governments of a presidential initiative (Brüning, von Papen, von Schleicher) to rebuild the Weimar constitutional order based on presidential institutions. On this politico-constitutional period, see David Cumin, *Carl Schmitt: Biografie politique et intellectuelle*, Les Éditions du Cerf, Paris, 2005, pp. 93 ff.



von Hindenburg, following the constitutional forms, would appoint the leader of the National Socialist Movement, Adolf Hitler,⁸ as chancellor of the empire.

The "National Revolution"

The referred appointment would set a time for constitutional re-foundation;⁹ a state of exception enabling deviations and emptyings in relation to the Weimar Constitution and, simultaneously, the crystallisation of a sovereign able to decide (and leave) it (to also mention here Carl Schmitt's *Constitutional Theory*, a contemporary and famously aspect "updated" by Giorgio Agamben).

On 21st March, 1933, due to the opening of the new Reichstag in Postdam, Adolf Hitler would announce the objectives of his government encapsulated in the "national recovery": "We want to restore the unity of spirit and will of the German nation. We want to preserve our ethnic personality, with all its inherent energies and values, as the eternal foundation of our life". On 23rd March 1933, a "German nation reconstruction programme" would descend again, aiming for the establishment of a "true national community" supported by "unity in the leadership of the Nation" (implying the "suppression of Marxism" and a general "elimination of opposition elements"). Incursions "on the philosophy of law" that took place on this occasion were extremely eloquent:

*The primary object of our legal organisation is to maintain the existence of the national community. Not the individual, but the whole nation must be the main concern of the law. The only possible basis of law can only be the existence of the Nation.*¹⁰

⁸ In the legislative elections of September 1930, the National Socialist German Workers' Party (NSDAP) obtained 18.3% of votes (107 parliamentary seats). Its leader, Adolf Hitler, obtained 30% of votes in the first round and 37% in the second round of the presidential elections disputed in March-April 1932. In that year, in the legislative elections of July 1932, the movement became the largest parliamentary party (38% of votes and 230 seats in the Reichstag). Once the rise of Hitler to the governance was blocked and the dissolution of the Reichstag by von Hindenburg was decreed, new legislative elections would take place in November 1932. From the representative position conquered by them – 33.1% of votes and 196 seats – and even though this did not reflected an upward trajectory. The NSDAP would then be called to power.

⁹ On the "reconstruction" of the politico-constitutional conducted by National Socialism, vide: W. Jellinek, *Le Droit Public de l'Allemagne en 1933*, in *Annuaire de l'Institut International de Droit public-1934*, 1934, pp. 43 and 76; and *Le Droit Public de l'Allemagne en 1934*, in *Annuaire de l'Institut International de Droit public-1935*, 1935, pp. 350-363; Carl Schmitt, *I caratteri essenziali dello Stato Nazionale Socialista*, in *Oreste Ranelletti/Gaspere Ambrosini/Carl Schmitt, Gli Stati europei a partito politico unico*, Panorama, Milano, 1936, pp. 17-52; and *State, movement, people: the triadic structure of the political unity (1933)*, English vers., in Carl Schmitt; Simona Draghici (Trans.), *State, movement, people: the triadic structure of the political unity (1933)*; *The question of legality (1950)*, Plutarch Press, Corvallis, OR., 2001, pp. 3 -52; Martin Broszat, *L'État hitlérien, L'origine et l'évolution des structures du troisième Reich*, Fayard, Paris, 1985; R. C. van Caenegem, *Uma Introdução Histórica ao Direito Constitucional Ocidental*, Portuguese vers., Fundação Calouste Gulbenkian, Lisboa, 2009, pp. 332 ff.; The main legal mechanisms that materialise the constitutional revolution described in this chapter can be seen in the volumes of 1934, 1935 and 1936 of the *Annuaire de l'Institut International de Droit Public*, pp. 76 ff., 364 ff., and 89 ff., respectively [entry "Allemagne"].

¹⁰ Cesare Santoro, *Hitler's Germany as seen by a foreigner*, 3rd ed., English vers., Internationaler Verlag, Berlin, 1939, pp. 35 ff. Under Chancellor Hitler's proposal, the president of the Third Reich decreed the dissolution of the Reichstag from 1st February 1933, and established that the new elections would take place on 5th March 5 1933. A decree from 4th February for the "German people's protection" facilitated its preparation, allowing the suspension of newspapers and electoral meetings that were against the NSDAP. From the known "decree for the protection of people and the State" ("*Verordnung zum Schutz von Volk und Staat*"), emanated the presidential decree of 28th February 1933, under Article 48 of the Weimar Constitution, following the famous fire of the Reichstag, which anticipated a long-term state of emergency,



With the approval by the Reichstag of a decree of 24th March 1933 "for the elimination of the people and the Reich's misery" ("*Gesetz zur Behebung der Not von Volk und Reich*"), known as the "Enabling Act" or "Decree of Full Powers" (*Ermächtigungsgesetz*). With this, the government could enact decrees in the formal sense and modify the constitution, shying away from the institutional structure of the parliamentary government model.¹¹ The new constitutional position allowed the National Socialist leadership to make a series of constitutional changes. The new German leadership would end national state construction, through the "*gleichschaltung*" of organisations and the non-national socialist powers.

The *Bundesstaat* would quickly give place to the *Einheitsstaat*, with the elimination of federalism, of German states as state realities. The "harmonisation of the Reich" decree of 31st March 1933 and the decree of 7th April 1933 "on the Reich's Governors" (*Reichsstatthalter*) would centralise the Reich's politico-administrative form of organisation. The decree of 30th January 1934, called the "reconstruction of the Reich" – enacted by the National Socialist Reichstag – would deprive the federated German states of their power and start "administering them" (*ex vi* Article 3).¹² The decree of 14th February 1934 on the abolition of the Reichsrat would put an end to the existence of the second chamber. Decrees on the Reich's governors and the municipal government on 30th January 1935 would develop and complete such a line of constitutional development.

The "pluralist party State" (C. Schmitt) ended and the National Socialist German Workers' Party (NSDAP) was erected to the institutional headquarters of support and segregation of the political leadership. For the new governing class, it was the institutional basis for defence, development and dissemination of a new civil theology referred to as the German political community. A decree on the 14th July 1933 "on the prohibition of founding new parties" declared the NSDAP as the only existing political party in Germany (§1.º). The decree of 1st December 1933 on "the identity of the Party and State", in turn, placed the Party in the State. The National Socialist Party was, then, declared representative of the "Germanic State idea" and as "inseparably merged with the State" (§1.º/1), on behalf of the "public law corporation" (§1.º/2). This legal instrument also punished those who tried to organise other political parties or form a new political party. In addition, it would make provisions for the "Vicar"/"Delegate" of the party's leader, who would replace him in the current management of the party, as well as the chief of staff

aimed, on its own terms, to protect the State against communist acts of violence that put it in danger, suspending fundamental rights such as: the right to personal freedom; not to be detained; freedom of speech, press, assembly, association; to the inviolability of correspondence and communications, property and home.

¹¹ Translating Hitler's "legal revolution" strategy, its preamble expressly stated that the law "met the requirements established for the emanation of legislation amending the Constitution". Such a normative act turned the government into a normal legislator: it provided, in Article 1, that "the laws could . . . be equally edited by the Government of the Third Reich" (laws could be "*Regierungsgesetze*"); the decrees edited by the Government should be promulgated by the Chancellor and published in the *Reichsgesetzblatt* (Article 3). After the emanation of this normative act, very few decrees were enacted by the Reichstag during the Third Reich – the Reichstag approved, namely, the renewal of the Decree of Full Powers, the Decree of Reconstruction of the Reich of January 1934, as well as the denominated Nuremberg Decrees of 1935. The Law of Full Powers also operated (*ex vi* Article 2) the transfer of Constitution amendment power to the Government, creating, however, preservation guarantees of certain institutions: decrees enacted by the government could not affect the Reichstag and Reichsrat's institutions as such, as well as the powers of the Reich's President. In the early days, there were those who, in the legal community, saw in such act a kind of "transitional constitution". The validity of such a legislative act would be successively confirmed and extended, as has been suggested and as will be seen later.

¹² However, a decree on 2nd February 2 passed on to the former federal states some sovereign rights to be exercised in the name of the Reich.



of the existing partisan paramilitary force (Assault Sections – AS) were members of the Reich's Government.¹³ To ensure "the closest collaboration of the party services and SA with the public service", the members of the NSDAP "complex" were invested with "higher duties" not only in the face of its head (the Führer) but also, the "Nation-People (*Volk*)" and the "State" – §3.^o/1.¹⁴ Later, a decree of 26th January 1937 (*Beamtengesetz*) established that a person appointed to a position in the civil service should be "imbued with a National Socialist point of view"; in such a legal act, the NSDAP was defined "as spokesman of the will of the people", the "vital force behind the concept of the German State". With the "decree on the Reich's Flag", approved in the famous Nuremberg Congress, the emblem of the National Socialist Party erects the symbol of the political community; in the words of Carl Schmitt:

[T]he German Reich now has only one flag – the flag of the National Socialist Movement – and this flag is not composed only of colour, but it also has a large, real symbol: the symbol of the swastika that evokes the people.¹⁵

The labour world would also be reorganised into a community-based national State. The unions were abolished in May 1933 (by decree on 2nd May 1933). Companies were later "re-institutionalised" as business communities (*Betriebsgemeinschafts*) to increase the "business good and the common good of the People and the State", with the emanation of the decree of 20th January 1934 on "national organisation of labour".¹⁶ The decree of 24th October 1934 created the "German Labour Front" (*Deutsche Arbeitersfront*), a unitary organisation of employers and workers that aimed at "forming a truly national and labour communion of all Germans", so that each one could have the "intellectual and physical conditions to be present in the Nation's economic life" (Article 2).¹⁷

The creation of "bodies" and professional councils¹⁸ were also being drafted. However, it was clear that, in using the constant terms of the preamble of a decree of 22nd September 1933 "the establishment of professional groups is not, as a whole, the construction of a State in a State, not even next to it, but it is the State itself in its new form". The idea of a corporate senate (bringing together, especially, the rectors of the universities and the high clergy) in the National Socialist order, proposed by Wilhelm Frick (Minister of the Interior, 1933-1943), and that remembered the detested "pluralist" *Gran Consiglio del Fascism*, would explicitly be superseded.

¹³ It would be up to the head of the NSDAP, the Führer, to decide on its statute (§1.^o/2)

¹⁴ The existence of a special jurisdiction of the party and the Assault Sections provided for the knowledge of cases related to the harm of such duties – §3.^o/2.

¹⁵ Cf. Carl Schmitt, *The constitution of Freedom* (1935), in Arthur J. Jacobson, Bernhard Schlink (Ed.), *Weimar A Jurisprudence of Crisis, cit.*, p. 325.

¹⁶ The business-community would be organised around a head, the owner of the company (typically), and his entourage of employees and workers. A board should work with the company heads, with the task of developing mutual confidence within the business community. The business regulation, the "internal law of the company", should serve "the good of the company and the national community". State employees – commissioners (*Treuhänder*) – would "tutor" the business-community.

¹⁷ At the core of the Front, the famous *Kraft durch Freude* would work, responsible for the national-community *bildung* of the working masses, taking care of the organisation of its recreational time.

¹⁸ Note that in the German Labour Front the internal framework of its members by professions was accepted (Article 5).



"New modes and orders"

The political community would receive a specifically National Socialist ordination.

The political body was being rebuilt from the ideal of a national community based on race. The decree of 7th April 1933 on the reorganisation of the civil service, as well as the decrees of October 1933 on the professions (e.g., journalists and lawyers, on 4th and 7th October, respectively), incorporated a principle of German race exclusivity in the access to public service and such professions. Similarly, the decree of 14th July 1933 on people with hereditary diseases was introduced, which allowed elimination in reproduction processes.

With the emanation of the "decree on the Reich's citizens", one of the famous Nuremberg decrees of 15th September 1935 established a *destinguo* between two circles of citizenship, simultaneously and cumulatively meeting what was regarded as a national racial belonging and a demonstration demand of *pietas* in the face of the political community. In a general circle, rather than citizens, subjects would re-enter; according to § 1.º of the referred legal mechanism,

"it is the State citizen (Staatsbürger) who belongs to the German Reich protection association and, because of this, is required in relation to it".

A second and narrow circle expresses a proper belonging to the *civitas germanica* – in § 2.º:

"it is only the Reich citizen, the national German, who has German blood or is related and proves by his conduct to have the intention and quality required to faithfully serve the people and the German Reich". Declining a similar principle, the "decree for the protection of German blood and honour" – another Nuremberg decree, which evoked "the purity of German blood" as "the condition for the maintenance of the German people" and "an inflexible will to forever ensure the future of the German nation" prohibited "marriages between Jews and national Germans with German or related blood".¹⁹

¹⁹ According to information from Ernst Rudolf Huber, in 1941 the Great German Reich was articulated by distinguishing the following subjective and community legal positions: i) those with German blood as members of the people (*Volkszugehörige*), subjects of the State (*Staatsangehörige*) and the Reich's citizens (*Reichsbürger*), consisting on the Reich's "hard core"; ii) those with species-related blood, considered as members of the people, subjects of the State and Reich's citizens (*Vistula Veneti*, Masurians, e.g.); iii) those with species-related blood not integrated with the *Volksgemeinschaft*, but remaining as subjects of the German State and the Reich's citizens (national Polish and Danish groups in the territory of the former Reich); iv) those with species-related blood not accepted in the *Volksgemeinschaft*, but considered subjects of the German State (Walloons, Malmedy and Eupen); v) those with species-related blood who were only considered subjects of the German Reich (the Polish in the eastern territories); vi) those with species-related, considered blood subjects subordinated to the Reich – the case for the Czechs in the protectorate; vii) German blood subjects of a foreign State (are not citizens of the Reich; German national groups abroad);



On the other hand, political power was gradually transferred to the historical personality of Adolf Hitler, the *Führer* of the National Socialist Movement; a transference which also seems to have weighed a relatively spontaneous "bottom-up" movement of order construction, with the diffuse projection by the "German masses", in the figure of Adolf Hitler, of the *idem sentire de republica* and a monarchic sacral vision of power²⁰. It is important to note, for example, the generalisation, from the bottom up, of the designation of "*mein Führer*", being suitable as a "political symbol" of something distinctly German.

In 1933 there was the understanding of the unborn new order "*Führerstaat*" as a personal order; an order "materialised" not in a rule or impersonal institution but in a concrete person.²¹ In the "annihilating" purge of the SA leadership in 30th June 1934, which justified the acts that led to the "domestication" of the SA as acts of order, State self-defence acts, emerging from original authority, A. Hitler proclaimed himself "as Führer; the German people's supreme judge".²²

Article 4 of the decree of 30th January 1934 concerning "the reconstruction of the Reich", approved unanimously by the Reichstag, had given the government the fullness of constituent power. Therefore, the "decree on the Head of State" of 1st August 1934, enacted the day before the death of Paul von Hindenburg, should come into force at the time of the death of the President (*vide* § 2 of the referred to decree), which effectively happened in 2nd August 1934. This established the transfer of functions and duties of the Reich's president to the "Führer and Chancellor of the Reich", Adolf Hitler. According to §1.º: "the old duties of the Reich's President go to the Führer and Chancellor of the Reich, Adolf Hitler". Due to Hitler's express order – by letter to the Reich's Minister of the Interior – the official title of the incumbent of the new "office" should precisely be "*Führer und Reichskanzler*"²³. All civil servants, soldiers and hierarchs of the National Socialist Party must take an oath of personal loyalty to the *Führer und Reichskanzler* Adolf Hitler. From the emanation of such a decree, the designation of the National Socialist order as "*Führerstaat*" (or "*völkischer Führerstaat*") therefore "democratises itself". The concentration of power operated by this legal instrument has reached the limit where power begins to transcend formal legal rules, directly and immediately setting up its authority as *Grundnorm*. The legal order was increasingly being dominantly interpreted in terms of the idea of order emanating from the power structure and no longer in terms of the intra-systematic procedural validity of Weimar constitutional normativity, or in terms of a new unborn formal legality. The Minister of the Third Reich, Dr Frick, at a

viii) members of "foreign" racial groups considered subjects of the State but not Reich citizens (Jews in the territory of the former Reich); ix) members of foreign racial groups that do not have the status as either subjects of the State or the Reich's citizens (Jews in the eastern territories and in Eupen and Malmedy). Cf. Ernst Rudolf Huber, *Form and Structure of the Reich (1941)*, in Arthur J. Jacobson, Bernhard Schlink (ed.), *Weimar A Jurisprudence of Crisis, cit.*, pp. 330-331.

²⁰ Ian Kershaw, *Le Mythe Hitler, Image et réalité sous le III Reich*, French vers., Flammarion, 2006.

²¹ Horst Dreier, *Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus*, in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer Heft 60*, Walter de Gruyter, Berlin, New York, 2001, pp. 48-49, especially note 190.

²² However, such extraordinary actions would subsequently be normalised in formal terms by a decree "relative to national defence measures" of 3rd July 1934. This decree contained the following meaningful wordings: "the measures implemented on 30th June and 1st and 2nd July to suppress high treason attacks are legal as legitimate State defence". On this episode of the constitutional history of Third Reich and its meaning, *vide* Carl Schmitt, *Le Führer protège le droit. À propos du discours d'Adolf Hitler au Reichstag du 13 juillet 1934*, in *Cités*, No. 14, 2003, pp. 165-171.

²³ In the letter, Hitler also ordered a decree combining the functions of the Head of State and Chancellor to be submitted to a referendum.



press conference held on 9th January 1935, referring to Hitler, declared that: "all powers are concentrated in his person while he himself is only responsible before the nation". On 30th January 1936, it was written on the official *Völkischer Beobachter*:

*The Führer, wrote Wilhelm Stuckart, gathers in his hands all the rights and obligations of the Head of the Party, Chancellor and President of the Empire. But saying this is not enough; in fact, the Führer-und-Reichskanzler function goes far beyond the sphere of competence of the two former positions. The constitutional evolution turned Hitler into the People's supreme political leader, supreme head of the administration, the People's supreme court and supreme commander of the army. Legislative power exclusively belongs to him. The Führer und Reichskanzler is also legally, according to the practice of recent years that has created a customary law, the source of our law.*²⁴

The National Socialist "constitution": the *Volksgemeinschaft* and the Führer as Absolutes

From 1935, the constitutional challenge seemed to have received a definitive answer. "Attempts to constitutionally encode the National Socialist State" were definitely blocked by Hitler in such a period".²⁵ However, after that, Hitler would not refrain from making promises to the conservative national sectors regarding a future "legal formalisation of the politics". In his speech of 30th January 1937, he declared:

*"[a]nd finally the future task will be to seal for ever and eternally a Constitution, the real life of our people, as it was politically organised, and, thus, turn it into the imperishable fundamental law of all Germans".*²⁶

Continuity with legality and formal constitutional Weimar legitimacy would never be interrupted. The validity of the Full Powers Act would be successively confirmed and extended by laws voted by the Reichstag on 30th January 1937 and 30th January 1939. On 10th May 1943, the "decree of powers delegation" was enacted, declaring the duration of the Führer as limitless.

The Weimar Constitution was never formally abolished – which would happen if a new constitution were enacted – but it was un-constitutionalised, losing its old and superlative formal force, and abrogated as principled order. In Third Reich Germany, a new constitutional order, directly and immediately material, was crystallised.²⁷

²⁴ Jacques Maupas, *L'État National-Socialiste*, in *Sciences Politiques*, 53rd Year, No. 11, 1938, p. 516.

²⁵ Vide: Martin Broszat, *L'État hitlérien, L'origine et l'évolution des structures du troisième Reich*, cit., p. 19.

²⁶ Apud Marcel Cot, *La conception hitlérienne du Droit*, Bibliothèque de l'Institut de Droit comparé de Toulouse vol. IV, Duchemin, Paris, 1938, p. 247.

²⁷ At the end of the constitutional transformation process performed by National Socialism, the fragmentary linguistic utterances remaining from the Weimar text could, for example, be modified by government



In the descriptive and apologetic words of a coeval interpreter of the National Socialist constitutional order (Ernst Rudolf Huber):

*The new German Reich Constitution is not a constitution in the formal sense, as typical of the nineteenth century. The new Reich has no written constitutional declaration, but its non-written constitution exists in the Reich's basic political order... The advantage of such a non-written constitution over a formal constitution is that the basic principles do not become rigid, but remain in continuous, uninterrupted movement. They are not dead institutions; living principles determine the nature of the new constitutional order.*²⁸

Following and strengthening the lines of force of the constitutional transformation processes with the production of a new language in a constitutional asking for theory and constitutional right, a new public juridical discourse articulated the "living principles" of the order. The new order was based on the principle of national community – that the *Volk/Volksgemeinschaft* symbols evoked – and, as an implication of this principle, on a principle of personal power embodied in the Führer (*Führerprinzip*).²⁹

Volk/Volksgemeinschaft

According to the National Socialist constitutionalist Ernst Rudolf Huber:

decree, the Reichstag or considered – by the government or the judiciary – incompatible with the National Socialist ideological system. On the "destiny" of the Weimar legal mechanism, *vide* Karl Loewenstein, *Dictatorship and the German Constitution: 1933-1937*, in *The University of Chicago Law Review*, Vol.4, No. 4, 1937, pp. 545 ff. Certain legal acts (the decree of 24th March 1933, e.g.) would be recognised, officially and in the legal community, as fundamental due to the importance they obtained in the construction of the new material order of personal power – Michael Stolleis, *A History of Public Law in Germany 1914-1945*, English vers., Oxford University Press, Oxford, 2004, pp. 333-334.

²⁸ Ernst Rudolf Huber, *Constitution* (1937), English vers., in Arthur J. Jacobson, Bernhard Schlink (ed.), *Weimar A Jurisprudence of Crisis*, cit., p. 329. It has been argued that Hitler wanted the *in fieri* constitutional order to "organically" evolve, as in England, and nurtured a special aversion to lawyers and legal rules. Also Cf. Joseph Goebbels, *Journal 1943-1945*, Tallandier, Paris, 2005, p. 284, for a revealing testimony on the vision of the lawyers' National Socialist top leaders and their *forma mentis*. Regarding characters such as H. Frank (President of the Academy of German Law, from 1933 to 1945, and the Reich's Minister without portfolio, from 1939 to 1945), Thierack – President of the People's Court (1936) and the Reich's Minister of Justice (1942-1945) – Gürtner (Minister of Justice, from 1932 to 1941) and Roland Freisler (General Secretary at the Ministry of Justice since 1933 and President of the People's Court from 1942 to 1945), Hitler and Goebbels would comment: Frank "reconciles with the wife, but as a lawyer"; Thierack, "even though better than Gürtner, he has not moved from his lawyer prejudices", since "lawyers will always be lawyers"; Freisler would think that "lawyers are more comfortable when they occupy the position situated immediately below the highest one", which could turn them into National Socialist fanatics.

²⁹ On the new construction of the fundamental order of the political community and these two *vide*: Horst Dreier, *Die deutsche Staatsrechtslehre in der Zeit des Nationalsozialismus*, cit., pp. 9-72; Oliver Lepsius, *The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?*, in Christian Joerges/Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe*, Hart Publishing, Oxford, 2003, pp. 19-41; Roger Bonnard, *Le Droit et l'État dans la doctrine Nationale-Socialiste*, Librairie Général de Droit & de Jurisprudence, Paris 1936; Marcel Cot, *La conception hitlérienne du Droit*, cit.; Carlo Lavagna, *La Dottrina Nazionalsocialista del Diritto e dello Stato*, Giuffrè, Milano, 1938; Flaminio Franchini, *Lineamenti di diritto amministrativo tedesco in regime nazionalsocialista*, in *Archivio Giuridico "Filippo Serafini"*, Series V, Vol. VIII, 1942, pp. 115-141 ("la nuova concezione giuridica tedesca").



There is no people without an objective unit, but there is no people without a common consciousness of unit either... The new German Reich comes from the concept of political people, determined by natural characteristics and the historical idea of a community in itself. Political people are formed by the uniformity of its natural characteristics. The race is the natural base for people. As political people, the natural community becomes aware of its solidarity and struggle to form, develop, defend and conduct itself. 'Nationalism' is essentially this effort of a people that became aware of itself, its self-direction, self-realization and a deepening and renewal of its natural qualities.³⁰

The National Socialist political order identified itself or aspired to be identified with a national community – *Volk/Volksgemeinschaft* – interpreted as centred on a homogeneous racial, ethnic and spiritual base; the relatively original (in terms of the history of the State) racial determination of the political community seemed, however, to be interpreted along a holistic spiritual line ("we do not infer the ability of a man from his physical type, but from his achievements and race", Hitler would stress in the early 1930s), as well as in terms of union of related races, with the Nordic Aryan race as a guiding element.³¹

The national community constituted "specific and original value"(Huber).³² Such a community was considered a source of truth and value, legality and justice, and an end in itself. Hence, in public legal doctrine, the dissemination of maxims such as: "the collective utility has pre-eminence over individual utility"; "its people is everything, you are nothing";³³ "law is what benefits the people; non-law, what damages it"³⁴; "law is what befits the people and the race" (Robert Ley);³⁵ "justness is what befits the German people" (Roland Freisler); and "the purpose of law is to maintain the purity and existence, as well as the protection and progress, of the German people" (*Oberlandesgericht* by Jena). In the "spontaneous constitutional discourse" of power, the *Volk* could be described – resorting to the language that in Western metaphysics is designated *Realissimum* – as "substance" (Hitler) and a "thing in itself" (Goebbels).³⁶

The community nature of the National Socialist politico-constitutional imagination was expressed, through the negative, in a fundamental axiomatic "refusal" of the discourse

³⁰ Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, Hanseatische Verlagsanstalt, Hamburg, 1939, pp. 153-155.

³¹ On the racial conception that was part and parcel of the National Socialist politico-constitutional doctrine, *vide*: Ulrich Scheuner, *Peuple, État, Droit et Doctrine Nationale-Socialiste*, in *Revue de droit public et de la science politique*, 54, 1937, pp. 44 ff. and A. James Gregor, *National Socialism and Race* in *The European*, No. 11, 1958, pp. 273-91. For a "genealogy" of the racial idea, *vide* Eric Voegelin, *The Growth of the Race Idea*, in *The Review of Politics*, Vol. 2, No. 3, 1940, pp. 283-317.

³² Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, cit., p. 164.

³³ The first of these maxims could indeed be read in para. 24 of the National Socialist Party programme – which can be consulted in Martin Broszat, op. cit. (document attached) pp. 573-576. The second one was also a present motto on the Reich's coins.

³⁴ Hans Frank, in Hans Frank (ed.) *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, Zentralverlag der NSDAP., F. Eher nachf., g.m.b.h., Berlin, 1935, p. XIV.

³⁵ *Vide Le Droit national-socialiste: Conférence internationale tenue à Paris les 30 Novembre et 1er Décembre 1935*, Librairie Marcel Rivière, Paris, 1936, p. 63.

³⁶ Klaus Vondung, *National Socialism as a Political Religion: Potentials and Limits of an Analytical Concept, in Totalitarian Movements and Political Religions*, Vol. 6, No. 1, 2000, pp. 90 and 94, note 18.



on subjective rights ("innate and inalienable rights of the individual", "personal freedoms of the individual that are outside the State sphere and that must be respected by the State").³⁷ The statute of individual members of the people (*Volksgenossen*) was, then, understood in terms of legal positions in the community and service to the community (where "rights should be considered as duty-rights").³⁸

Führer

According to the last manual of constitutional right published in the Third Reich:

The Reich of the [German] People's Führer is founded on the recognition that the true will of the people cannot be revealed through parliamentary votes and plebiscites, but that the will of the people in its pure and incorruptible form can only be expressed through the Führer... The Führer unites all the sovereign authority of the Reich; all public authority in the State, as well as the movement.

We must speak not of State authority, but of the Führer's authority, if we want to correctly appoint the nature of the political authority within the Reich. The State does not hold the political authority as an impersonal unity, but receives it from the Führer, as the executor of national will. The Führer's authority is complete and comprehensive, unites in himself all the means of political direction, is extended to all areas of national life, covers all the people, who are bounded to the Führer by loyalty and obedience. The Führer's authority is not limited by the verification and monitoring of independent bodies or individual rights, but it is free and independent, omni-comprehensive and unlimited. However, it is not selfish, arbitrary and its ties are not within itself. It is derived from the people – that is entrusted to the Führer by the people. It exists for the people and has its justification in the people, is free from all external ties because it has its most intimate nature firmly linked with the destiny, welfare, mission and honour of the people.

The Führer has nothing in common with the employee, agent or representative that pursues a delegated mandate and that is bounded to the will of those who appointed him. The Führer is not "representative" of a particular group whose wishes should be accomplished. He is not an "organ" of the State in the sense of a mere executive official. He is, in himself, the bearer of the collective will of the people.³⁹

³⁷ Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, op. cit., p. 361.

³⁸ *Idem*, pp. 365-366.

³⁹ *Ibid*, pp. 164 and 230.



In the National Socialist constitutional imagination, the national community was embodied in the Führer – constituting or reconstituting itself in a political community.⁴⁰ The *Volksgemeinschaft* involved the communitarian epiphany segregation of a conductor, a guide, of the German People – which possessed, in a qualitatively superlative degree, the objective spirit, the essence of the community that is invested in all its members (*Volksgeist*) – and was able to express the objective will of the *Volk*. The Führer was the authentic interpreter of the spirit of the people, bearer of the "eternal spirit of Germany" (Hans Frank), "the source and the representative of law" (Hans Frank)⁴¹: "the will of the Führer is the law", Goering proclaimed;⁴² his will, sentenced and synthesised by Schmitt, "is now the *nomos* of the German people".⁴³

Just as the "matrix" and the "manifestation" of the authority of the national community, the Führer's authority constituted an exclusive and absolute original personal authority. Resuming Ernst Rudolf Huber's expressive words, a "free and independent, omnicomprehensive and unlimited" authority was at stake. In National Socialism, the community-individual, in the imagination of the order, by transposition or transfer, seems to occupy the structural place and have the characteristics of the liberalism of the individual. There is no space for a superior substantive *norm* or exterior to the will of the Führer. In relation to racial qualification, for example, the will of the Führer, ultimately, and self-referentially defined the content of the order: ponder, for example, the phenomenon of the so-called Aryanisation decrees. A specific combination of community ordinalism/institutionalism and personal sovereign decisionism, of *ordnung* and *gestaltung* – consistent syncretism, at least from an internal point of view to the ordering National Socialist idea, but carrying potentially antagonistic escape leagues – has been identified as the deep grammar of National Socialism.⁴⁴

The Führer would exercise his powers according to the spirit of the people – specifically, in a legal sense. Only the existence of internal limits of the *Führung* were admitted, which were associated with the very nature of its way of being, that is its configuration and teleology. As thinkable and acceptable guarantees of the functional assignment of the *Führung*, only the qualities inherent to the Führer as a person appeared: penetration of the spirit of the people to the Führer to an unmatched degree – by definition, the Führer

⁴⁰ Note that in sectors of a "new dogma" (Reinhard Höhn, e.g.) that completely purged the legal public discourse of inherited dogmatic legal (and judicio-theoretical) categories, constructing new operational concepts from National Socialist political symbols, the word "State", considered as intrinsically associated with an administrative and bureaucratic meaning, was not used to designate the political community (the "political people"), preferring the concepts of *Volk* or *Reich* to designate the political unity – vide Carlo Lavagna, *La Dottrina Nazionalsocialista del Diritto e dello Stato*, cit., pp. 164 ff. [On the fracture lines in the field of state doctrine and public law in National Socialism, vide Michael Stolleis, *A History of Public Law in Germany 1914-1945*, cit., p. 335]. However, in the constitutional discourse of power and National Socialist doctrine, the use of the word "State" was not infrequent, precisely giving it the sense of a politically organised, current and living national community ("the political form of a people"), and not of the bureaucratic apparatus (*Apparat*) – see, for example, Karl Larenz, *La Filosofía Contemporánea del Derecho y del Estado*, Castilian vers., Editorial Revista de Derecho Privado, Madrid, 1942, pp. 163 ff. cf. António José de Brito, *O Totalitarismo de Platão*, in António José de Brito, *Ensaios de Filosofia do Direito*, Imprensa Nacional Casa da Moeda, Lisboa, 2006, pp. 157-158, note 7.

⁴¹ Marcel Cot, *La conception hitlérienne du Droit*, cit., p. 156 and Hans Frank, *Fondamento Giuridico dello Stato Nazionalsocialista*, Italian vers., Dott. A. Giuffrè – Editore, 1939-XVII, pp. 68 and 29.

⁴² Goering, *Discurso*, in *Deutsche Justiz*, No. 28, 1934, p. 881, *apud* Marcel Cot, *La conception hitlérienne du Droit*, cit., p. 243.

⁴³ *Apud* Olivier Jouanjan, "Pensamento da Ordem Concreta" e Ordem do Discurso "Jurídico" Nazista: Sobre Carl Schmitt, in *Revista Eletrônica do Curso de Direito – PUC Minas Serro*, No. 2, 2010, p. 34. [<http://periodicos.pucminas.br/index.php/DireitoSerro/article/view/1330>].

⁴⁴ Cf. Olivier Jouanjan, *Justifier L'injustifiable*, in *Astérion*, No. 4, 2006, pp. 123-56.



the community-individual like no other of his blood fellows – and the Führer's moral qualities. K. Larenz expressively noted (in a "Christian pagan-like" image):

*[T]he relative autonomy of the individual is exceeded in the Führer. It does not follow the norm intended for it, but a vital law of the community that, with him, acquired meat and blood. His will is one with the community's, because he completely erased the private man and he wants nothing more than the common interest. All responsibility is entrusted to him, because, to him and through him, the community is the most living reality.*⁴⁵

Inside the constitutional National Socialist way of thinking, if the Führer stopped acting according to the spirit of the people, he would become a dictator. The existential and factual possibility of communitarian epiphany of a new Führer removing a Führer who had become a dictator or tyrant (which, for this quality, could de jure remove the dictator) was a limit guarantee.⁴⁶

The National Socialist order was based on the Führer personal institution.⁴⁷ Therefore, Huber understood that the "Führer does not have the combination of the former Chancellor and President positions side by side, but a new and unified position".⁴⁸ For the eminently National Socialist jurist, R. Höhn, not even the concept of position was appropriate to designate the personal matrix of the National Socialist order for being associated with a technical bureaucratic universe (a "clinical unity" – "*Anstaltseinheit*", e.g.).⁴⁹ The suggested formation, with the Führer, of a Senate that would help and advise him – and could eventually elect his successor – always remained at the level of hypotheses.⁵⁰ Despite the "multiplication" of the figure of the head in the National Socialist rearrangements of the *civitas germanica* (the *Unterführer* phenomenon), the

⁴⁵ K. Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, Mohr, Tübingen, 1934, p. 44, *apud* Olivier Jouanjan, *Justifier L'injustifiable*, cit., p. 150.

⁴⁶ On the conceptualisation of the power limitation theme in national, *vide* Roger Bonnard, *op. cit.*, pp. 81 ff.

⁴⁷ In a minority way, it was possible to such an institution as "State agency". Against the background of a national people, political State and formal legal, normative construction that represented them as coincident realities, it was sought to mean with the use of the category agency that the Führer would "exist" and "live" within a formal legal normative order (consequently, these sectors continued to use the term *Rechtsstaat* to characterise the National Socialist order). It was the case for Otto Koellreutter, for example, in the National Socialist "new dogma", the politico-legal moment was, in the opposite sense, "dissolved" in the Führer's *auctoritas*. *Vide* Carlo Lavagna, *La Dottrina Nazionalsocialista del Diritto e dello Stato*, cit., pp. 137 ff. Cf. also Peter Caldwell, *National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the debate over the nature of the Nazi State, 1933-1937*, in *Cardozo Law Review*, 16, 1994, pp. 339-427.

⁴⁸ Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, *op. cit.*, p. 208. For the author, the term "position of head of the State" ("*Stellung des Staatsoberhauptes*") from the Decree of 1st August 1934 should be interpreted as "position of Führer of the Reich and the German people" ("*Amt des Führers des Deutschen Volkes und Reiches*") – *apud* Flaminio Franchini, *Lineamenti di diritto amministrativo tedesco in regime nazionalsocialista*, cit., p. 151, note 1 (referring to E. R. Huber, *Reichsgewalt und Reichsführung im Kriege*, in *Zeitschrift für die gesamte Staatswissenschaft*, 1941, p. 539).

⁴⁹ Cf., again, Flaminio Franchini, *Lineamenti di diritto amministrativo tedesco in regime nazionalsocialista*, cit., p. 151, note 1 (which, refers to Höhn, *Volk und Verfassung*, in *Deutsche Rechtswissenschaft*, 1937, pp. 209 ff.).

⁵⁰ In the "table talk" of 31st March 1942, Hitler formulated the same idea – *Hitler's Table Talk, 1941-1944: His Private Conversations*, Enigma Books, New York, 2000, pp. 385 ff. Joseph Goebbels foresaw the future existence of a Sacred College that would bring together the National Socialist elite (recruited based on individual success, racial purity and, in a future time, heredity, and such college would represent hundreds of families that – like the British Empire – would rule the Reich *ad aeternum*) – cf. Joseph Goebbels, *Journal 1943-1945*, cit., pp. 280-281.



constitution of figures equipped with their own autonomous *auctoritas* was never at stake in such mimicry.

In formal institutional terms, the personal nature of the order also implied that either the traditional powers and State functions or "punctuated" powers in the new National Socialist institutions should be seen as springing from the Führer's *auctoritas*. The Government – *Reichsregierung (Reichskabinett)* – was reconceptualised as the Führer's council, devoted to the discussion of laws and political guidelines (appointed by him, the ministers of the Third Reich had a judicio-administrative relationship with him), and the Reichstag redefined as an organ that adhered to the will of the Führer. Administration, the Armed Forces and the NSDAP (*Bewegung*) consisted of instruments of the *Führung*.⁵¹ The formal laws were understood, in a non-legal rational way, as typical acts of the *Führung*, the expression of the will and commands of the Führer – according to Schmitt's definition, the law is "the plan and will of the Führer" (that is why the generality was not understood as a necessary property).⁵² The decisional will of the Führer, as objective communitarian will, could be expressed beyond any formal means – by oral orders, for example. According to the Chief President of the Hanseatic Appeal Court, a "representative character", "law is born from the Führer; every conversation, every statement of the Führer is in itself a source of law".⁵³

From the structure of the National Socialist order, the symbolically significant overhaul appears, prevailing in the Third Reich the motto of the Bismarckian and Wilhelmine Reich: "*Ein Reich, Ein Volk, Ein Gott*" (Second Reich)/"*Ein Volk, Ein Reich, Ein Führer*" (Third Reich). As it has been pointed out, for legal doctrine under National Socialism (Larenz, Binder, e.g.), the Führer, considered the sole participant of the communitarian Absolute, should be understood as personality endowed with an almost divine or semi-divine nature. It was possible to explicitly evoke the idea of the "divine mission of the Führer" ("*die göttliche Sendung des Führer*", W. Sauer), representing his duty (*Führertum*) as a "divine mission originated from the spirit of the nation" ("*der aus dem Geiste der Nation geborene göttliche Beruf*", Julius Binder).⁵⁴

The progressive affirmation of the National Socialist Constitution; from the *Ordnungsstaat* to the post-legal rational State

By decree on 4th February 4 1938, the Führer took charge of the direct command of the armed forces. On 1st September 1939, when speaking at the Reichstag, the Führer

⁵¹ At first, "*Führung*" and "*Leitung*" were distinguished. The last term means to be able to govern through orders and commands in the State administration framework. Such distinction would gradually be blurred. The Hitler Youth, "department" of the Third Reich directly dependent on the Führer was run by a Führer (Decree of 1st December 1936).

⁵² In theory, the legislating will of the Führer could be exposed through the so-called *Regierungsgesetze*, "government" decrees (issued according to Article 1 of the decree of 24th March 1933, previously alluded), *Reichstagsgesetze*, legislative acts approved by the Reichstag according to forms envisaged by the Weimar Constitution, as well as through *Volksbeschlossenes Gesetze*, decrees "approved" by plebiscite (in the terms of the decree of 14th July 1933 related to the plebiscite). Note that the diversity of normative "sources" (in particular, the traditional specificity of the normative source law) was always cancelled out (at least partially) by the fact that the Führer was able to "arbitrarily" choose, by stating the right, among a set of various normative sources (nominally diverse).

⁵³ *Vide Le Droit national-socialiste: Conférence internationale tenue à Paris les 30 Novembre et 1er Décembre 1935, cit.*, p. 48.

⁵⁴ See Massimo La Torre, *La "lotta contra il diritto soggettivo": Karl Larenz et la dottrina giuridica nationalsocialista*, Dott. A. Guiffre Editore, Milano, 1988, p. 414, note 132, from where Sauer e Binder's quotes were taken.



established who should succeed him, doing it "as if it were the most natural thing in the world" (Carl Schmitt).⁵⁵ In the act of modification – *Änderungsgesetz* – of 16th September 1939, he reappeared as "supreme vigilante and judge" – *oberster Gerichtsherr und Richter* – and the prerogative to overturn a criminal sentence passed through the courts was recognised. A decree from 26th April 1942 of the *Grossdeutsche Reichstag* recognised, in particular, his right to dismiss the judges through normal administrative channels.

*There can be no doubt that... the Führer must have the right to do everything that serves or contributes to the attainment of victory. He has, therefore, as Führer of the nation... supreme vigilante and party leader, to be in a position of being able to give deserved punishment without following provided procedures... to every German... that does not meet his obligations, regardless of the so-called vested rights.*⁵⁶

The Führer started legislating, normally, via other normative sources than the formal law. The Führer's Decree – *Führer-erlasse* – a new source of law originating from the prerogative of the Reich's President and initially devoted to organisational issues, is used to determine and modify the substance of laws, as an legislative power delegation instrument, for example. According to it, the Führer takes a stand manifests himself even beyond "classic" formal constraints – often in juridical acts that could be signed but not published, and they were hierarchically transmitted to the higher authorities of the Reich; in the secret affairs of the State, his orders and instructions could take an oral nature. Since the end of 1942, the denomination "Führer" has also exclusively figured in the non-military normative acts issued by Hitler.

In the constitutional air that involved and followed the initial National Socialist "constitutional engineering", presented as "legal revolution", the image of an *Ordnungsstaat* loomed as an interpretive and anticipatory image of the ongoing process. It seemed that the crystallisation of a hierarchical organisation of power that was a legal, rational hierarchical organisation for creating law was an issue. The ideal type of hierarchical legal system had, in a certain sense, been updated to an unmatched degree. The existence of a unified centre of power behind the normative production, in particular legislative production, as well as the very entry of such production in the normal regime, seemed even to announce the introduction of increasing rationalisation of the legal order.⁵⁷ The legal ideology *rechstaatlich* of certain sectors of the German national or "conservative national" tendency in the world of politics, senior management or a part of

⁵⁵ Carl Schmitt, *Apropos the question of the position of Reich Minister and Chief of the Reich Chancellery: Observations from the standpoint of constitutional law* (1947), in *Telos*, No. 72, 1987, p. 122. In case that successors appointed by the Führer die, the Reichstag should appoint his successor by choosing the most dignified and valiant from among its members. According to Huber, such a speech would constitute one of the most important laws (although the form of the law was absent here) of National Socialism – cf. Flaminio Franchini, *Lineamenti di diritto amministrativo tedesco in regime nazionalsocialista*, cit., p. 128, note 4.

⁵⁶ Cf. R. C. van Caenegem, *Uma Introdução Histórica ao Direito Constitucional Ocidental*, cit., p. 340.

⁵⁷ As Eric Voegelin observed in *Hitler and The Germans, the collected works of Eric Voegelin Vol. 31*, University of Missouri Press, Columbia/London, 1999, Cf. also Franz Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933 – 1944*, Harper and Row, New York, 1966.



the legal community was also part and parcel of the "National Socialist meeting with the constitutional" in this historical situation.⁵⁸

In the context of updating the National Socialist Constitution, a fundamental, material symbolic legality with a personnel bio-political nature, a new paradigm of modern State emerged, which was a power organisation working in "neo-feudal" and non-rigid ("fluid") bureaucratic terms, with the continuous recreation of people hierarchies, forms and impersonal institutions taking an epiphenomenal dimension in such a flow.⁵⁹ Even though the structural place of formal positive law becomes intrinsically soft, given the relativity of its internal, relatively autonomous and independent systemic logic, it was not about to disappear. In response to what K. Larenz saw as utopian desires to go beyond the law, or at least the order of rules and fixed forms, in a full future implementation of the communitarian National Socialist project (desires expressed in sectors which are self-interpreted as essentially National Socialist), he stated that:

*The community cannot exist without their right. Community and law are originated as well as content and form. The Community shapes their right and, through this, itself; it exists only in this self-organisation... Life is not thinkable without form and figure, and thus even the community of the people would disappear if they do not give form and figure to their existence.*⁶⁰

Omni-comprehensivity of the National Socialist constitution

The principle of the *Volksgemeinschaft*, which informed the National Socialist regime, implied that all areas of life should be regulated by a community metric and have the good of the *Civitas Germanica* as a reference, in order to use an expression that acquired "city forums" in the language of the National Socialist jurists.⁶¹ Therefore, in legal knowledge, for example, a judicio-theoretical and dogmatic language originally National Socialist, tended to replace the traditional judicio-theoretical and dogmatic concepts that

⁵⁸ On the subject of identity of the "legal ideology" of a certain bureaucratic world, see the work about a very central character of the Ministry of Justice's bureaucracy – the Secretary of State, Franz Schlegelberger (who, by the way, seemed to be aligned with the "legal ideology" of the Reich's first Minister of Justice, Franz Gürtner) – and documenting a way of thinking the law in which the legal ("formalistically" represented) appeared as indispensable and irreplaceable means of State control over society, cf. Eli Nathans, *Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice*, in *Law and History Review*, Vol. 18, No. 2, 2000, pp. 281-304.

⁵⁹ See Carl Schmitt, *Apropos the question of the position of Reich Minister and Chief of the Reich Chancellery*, *cit.*, pp. 116-123; John H. Hertz, *German Administration under the Nazi Regime*, in *The American political science review*, Vol. 40, No. 4, 1946, pp 46, 682-702; Robert Koehl, *Feudal Aspects of National Socialism*, in *The American Political Science Review*, Vol. 54, No. 4, 1960, pp. 921-933.

⁶⁰ *Apud* M. La Torre, *La lotta contra il diritto soggettivo*, *cit.*, p. 27, note 71. As E. Forsthoff noted, due to the organisation existential needs of the modern State, the level of positive law was indispensable (written, exterior and formal). For a description of the National Socialist State, precisely as a dual State, *vide* (note, although, that is was written in 1941) Ernst Fraenkel, *The Dual State*, Oxford University Press, New York, London, Toronto, 1941/The Lawbook Exchange, Ltd., Clark, New Jersey, 2006.

⁶¹ Although the community metric could be interpreted as "appropriate" in the sense of conservation of the "traditional" legal solutions. Thus, e.g., *in foro*, in civil liability, the damage caused should be repaired not according to the interests of the harmed party, but the community's interest, to the extent that such damage would disturb the community in a way that only the consideration of harm to party interests would stop it (decision of the High Administrative Court of Saxony of 18th January 1935).



presupposed, or were seen as, a liberal and individualistic metaphysical and ideological substratum.⁶²

There was also a new and comprehensive existential paradigm *in fieri* based on the complete identification of the individual with the political community. The new people's national order required the establishment of a mode of communitarian subjectivity, a "community character" ("*Gemeinschaftspersönlichkeit*"), community-individuals.⁶³

The following paragraph by E. Forsthoff in 1933 from the *Der totale Staat*, which referred to the figure that the new State should assume, seems to account for the full dimension of the Third Reich:

*[T]he total State should be a State of total liability. It represents the total involvement of every individual to the service of the nation. Such recruitment removes the privacy of individual existence. Everyone is responsible for everything, in their activity and public demonstrations as well as in their family and home, for the nation's destiny. It is not the fact that the State enacts its laws and commands to the smaller cells of people's lives that is important (this is the total, "social" quantitative State); it is the fact of also being able to assert a responsibility, to account for the individual who did not submit his own destiny to the Nation.*⁶⁴

A conception of the international order structuring

It is true that the National Socialist experience does not have a truly analogous component for the dimension of abstract ideological universality inherent to the fascist politico-constitutional experience. However, it has a moment of concrete universality: the people's national community in its unity and totality was not conceived as limited by territorial or geographical boundaries. As E. R. Huber stated:

[T]he German people form a closed community that does not recognise national borders. It is evident that a people has not exhausted its possibilities just in the formation of a national State,

⁶² Michael Stolleis, *Community and National Community (Volksgemeinschaft) Reflections on legal terminology under National Socialism* in Michael Stolleis, *The Law under the Swastika, Studies on Legal History in Nazi Germany*, English vers., The University of Chicago Press, Chicago/London 1998, pp. 64-83. New generic ways of legal thought (appropriate to National Socialist constitutional ecology) **acquired visibility**: observe, e.g., Carl Schmitt's theory of concrete order (*konkretes Ordnungsdenken*) – which shows an institutionalist decision inflection of the renowned thinker – or Karl Larenz's (a combination of methodological neo-Hegelianism with National Socialist content) "method" of concretely general concepts (*konkret-allgemeine Begriffe*); on these new generic ways of legal thought, vide Oliver Lepsius, *The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?*, cit., pp. 36-37; Carl Schmitt, *La science allemande du droit dans sa lutte contre l'esprit juif (1936)*, in *Cités*, No. 14, 2003, pp. 173-180.

⁶³ Reinhard Höhn, *Staat und Rechtsgemeinschaft*, in *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 95, No. 4., 1935, p. 676. In National Socialist constitutional discourse, such a communitarian perspective would not imply "the value of personality": "On the contrary, in politics, art and economic life, he complains about strong and free personalities"; it would be highlighted, e.g., by Ulrich Scheuner, *Peuple, État, Droit et Doctrine Nationale-Socialiste*, cit., p. 50.

⁶⁴ E. Forsthoff, *Der totale Staat*, Hanseatische Verlagsanstalt, Hambourg, 1933, p. 42 (*apud* Olivier Jouanjan, *Justifier L'injustifiable*, cit., p. 137).



*but represents an independent community that goes beyond such limits.*⁶⁵

Consequently, the following ideas were adopted: union of all Germans in the same political entity – the establishment in 1938, with the end of Austria as an independent State, of a Great German Reich would be the largest part of it; constitution of a future Germanic Reich (Hitler *dixit*) that should integrate populations understood as objectively belonging to the *Volk* (e.g., Holland and Norway), all under the leadership of its original and mostly conscious core based in Germany; expansion of Germans to a new imperial "vital space".⁶⁶

Also originated from the idea of Reich, a thought on international order and international law particularly emerged (and also on a German Europe): Carl Schmitt's theory of the Great Spaces (*Grossraumlehre*), which was inspired by the Monroe Doctrine and pointed to an international order founded on the constitution of empires, leading large spaces and maintaining relationships with each other based on a principle of non-interference in one another's sphere; and a theory of vital space (*Lebensraum*), which was inspired by Haushofer and supported the right of the nation to conquer the territory necessary to meet the needs of its population (a theory with greater impact on the grand National Socialist expansion strategy to the east and related to National Socialist racialism).⁶⁷

The political community and Christianity

The regime initially adopted Christianity as a national State formation ethos and sought to co-opt Christian confessions into the establishment of a top-to-bottom national consensus. On 23rd March 1933, Chancellor Hitler declared to the Reichstag:

*[T]he national government considers the two Christian confessions essential factors for the maintenance of our ethnic personality... But at the same time the Government expects its national and moral reconstruction task proposed to be properly appreciated... The only objective of the Government is to ensure a sincere collaboration between Church and State. The struggle undertaken by the Government against materialism and the effort to create a real national community serve both the interests of the German nation and the Christian religion.*⁶⁸

⁶⁵ Ernst Rudolf Huber, *Verfassungsrecht des grossdeutschen Reiches*, op. cit., p. 158.

⁶⁶ See: *Hitler's Table Talk, 1941-1944: His Private Conversations*, cit., pp. 401 ff.; Reinhard Höhn, *Reich, Sphere of influence, Great power*, in Arthur J. Jacobson, Bernhard Schlink (eds.), *Weimar A Jurisprudence of Crisis*, cit., pp. 332-333.

⁶⁷ On these subjects, see, e.g., the following articles in Christian Joerges/Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe*, cit.: Ingo J Hueck, 'Spheres of Influence' and 'Völkisch' Legal Thought: Reinhard Höhn's Notion of Europe, pp. 71-85; John P McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, pp. 133-141; Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, pp. 167-191.

⁶⁸ Cesare Santoro, *Hitler Germany, as seen by a foreigner*, cit., p. 36.



In such a framework, pointing to a national State civil peace and remembering the Bismarckian *Kulturkampf*, a concordat with the Catholic Church would be celebrated on 29th July 1933.⁶⁹ For a certain period, an attempt to establish a Protestant Church of the Reich was sponsored.⁷⁰

There were also a movement to square the Christian universe symbolic with the National Socialist worldview, according to an idea that the order should give substance to the concept of "positive Christianity". Although, the National Socialist Party programme had already consecrated such a concept:

*[T]he party, as such, defends the point of view of a positive Christianity, without confessional connection to a particular belief. The party combats materialistic Jewish spirit within us and outside us.*⁷¹

Part of the National Socialist universe had a "racist syncretism that was making Christ and God Aryan and Germanic" (E. Gentile).⁷²

A sector of the governing class favoured, even explicitly, the replacement of Christianity with a new German *mythos* (Alfred Rosenberg, Heinrich Himmler).⁷³ Hitler explicitly distanced himself from such a project, publicly denying (in 1938, e.g.) an interpretation of National Socialism as a mystical worship movement, presenting it only as a movement with a racist *völkisch* political philosophy.⁷⁴

The Führer still remained strictly – liberally – linked to the "clarity" of the division between the State domain and the spiritual domain of the churches. In 1942, Hitler theorised about the very space of the churches' representatives in the life of the German community:

[A]s long as they are concerned with their religious problems, the State does not care about them. But, if they try by any means –

⁶⁹ The concordat text can be seen in *The Persecution of the Catholic Church in the Third Reich, facts and documents translated from German*, Burns Oates, 1940, pp. 516-522.

⁷⁰ Rudolf Hess Hermann Göring pointed out on 18th April 1940 that "the Führer not only gave up the plan of creating an Imperial Church that had already been proceeded, but now he rejects the entire plan". Vide Hans Mommsen, *National Socialism as a political religion*, in Hans Maier and Michael Schäfer (ed.), *Totalitarianism and Political Religions: Concepts for the comparison of dictatorships, Volume II*, Routledge, London/New York, 2007, pp. 158 and 162, note 18.

⁷¹ On the National Socialist "positive Christianity", Richard Steigmann-Gall, *The Nazis 'Positive Christianity': a Variety of 'Clerical Fascism'?*, in *Totalitarian Movements and Political Religions*, Vol. 8, No. 2, 2007, pp. 315-327; cf., by the same author, *The Holy Reich, Nazi conceptions of Christianity, 1919-1945*, Cambridge University Press, Cambridge New York, 2003.

⁷² Emilio Gentile, *New idols: Catholicism in the face of Fascist totalitarianism*, in *Journal of Modern Italian Studies*, Vol. 11, No. 2, 2006, p. 148. Karla Poewe, *New Religions and the Nazis*, New York/London, Routledge, 2006; Karla Poewe and Irving Hexham, *The Völkisch Modernist Beginnings of National Socialism: Its Intrusion into the Church and Its Antisemitic Consequence*, in *Religion Compass*, Vol. 3, No. 4, 2009, pp. 676-696; Doris L. Bergen, *Twisted Cross: The German Christian Movement in the Third Reich*, University of North Carolina Press, Press, Chapel Hill, 1996.

⁷³ Roger Eatwell, *Reflections on Fascism and Religion*, in *Totalitarian Movements and Political Religions*, Vol. 4, No. 3, 2003, p. 157. On the topic of occultist-pagan genealogy of National Socialism, see Nicholas Goodrick-Clarke, *Raízes Ocultistas do Nazismo, cultos secretos arianos e sua influência na ideologia nazi*, 1st Portuguese ed., Terramar, 2002.

⁷⁴ Emilio Gentile, *New idols: Catholicism in the face of Fascist totalitarianism*, cit., p. 148.



letters, encyclicals, for example – to attribute to themselves rights that belong only to the State, we will force them to return to their specific spiritual, pastoral activities. They have no title to criticise the morality of a State. The German State leaders will be responsible for the morality of the German State and the German People".⁷⁵

In addition, like the liberals of the nineteenth century, the Führer expected, not without a deist residue, Christianity to gradually disappear with the progress of science and its social effectiveness.⁷⁶

Anyway, and decisively, due to the intensity of value in the *quid* that determined it as the Supreme Good and the reach of its idea, it was inherent to the National Socialist order the possibility or virtuality of a community ethos to replace Christianity as an existential paradigm, grammar of the collective existence. An outside observer of the National Socialist "system" noted:

[T]he Nazi movement is not anti-religious. The danger is to have a religion that is not of the Christian orthodox. This religion does not have the dogmatic character of the communist creed; it is a fluid and incoherent thing expressed in different ways. There is the neo-paganism of the extreme pan-Germanic element, the Aryan and nationalised Christianity of the German Christians and the racial and nationalist idealism that is a characteristic of the whole movement and this, if it is not religious in the strict sense, tends to develop its own mythology and ethics that can easily take the place of Christian theology and ethics.⁷⁷

One example of the latter essential reality: "Once we attributed an eternal existence to it, the *Volk* is the embodiment of value. Religions only have value if they serve to preserve the living substance of humanity", Hitler stated (in 1937, at the Congress of the National Socialist Party).⁷⁸ According to Hans Frank:

For us, National Socialists, the people are a primary ordering, given by God. The churches' Jus Divinum, as original divine right, is an erroneous application of the concept of law. The formulation of the complex of natural laws are clearer, while they can touch the common life of a people, that law which nature teaches.⁷⁹

⁷⁵ *Apud* Emilio Gentile, *New idols: Catholicism in the face of Fascist totalitarianism*, cit., p. 147.

⁷⁶ On these dimensions of the Führer's thoughts, see Eric Voegelin in *Hitler and The Germans, the collected works of Eric Voegelin volume 31*, cit., pp. 121-129 and Roger Eatwell, *Reflections on Fascism and Religion*, cit.

⁷⁷ We referred to the historian Christopher Dawson – *vide* Christopher Dawson, *Religion and the Totalitarian State*, in *The Criterion*, Vol. 14, No. 54, 1934, p. 8.

⁷⁸ *Apud* Ernst Fraenkel, *The Dual State*, cit., p. 120.

⁷⁹ The idea that "the people was in itself a primary plan given by God" was later interpreted according to a racist interpretation of natural people. See Hans Frank, *Fondamento Giuridico dello Stato Nazionalsocialista*, cit., pp. 24-25 (*maxime* note 9).



Besides the "pragmatic" dimensions, there were conflicts against this background that were felt by the Catholic Church; the network of Catholic organisations was almost completely dismantled, with the progressive suppression of Catholic schools, institutions and press, which added to the systematic defamation of the Church's principles and institutions.⁸⁰ In 1937, the encyclical *Mit brennender Sorge* of Pius XI, although condemning core aspects of the conception of order associated with the National Socialist regime and not directly a regime, seemed to, ultimately, respond to the crystallisation of a new comprehensive secular absolute:

*If the race or the people, the State or any of its emanations, the representatives of State power or other fundamental elements of human society have, in the natural order, a respectable place, who, however, unties them from this scale of earthly values, elevating them to the category of supreme law of everything, even of religious values, deifying them with cult worship, perverts and falsifies the order created and imposed by God and is far from the true faith in God and the conception of life according to it.*⁸¹

In times of National Socialism in total war, Hitler clarified in the famous "table talk":

*When National Socialism has ruled long enough, it will no longer be possible to conceive a way of life different from ours. In the long term, National Socialism and religion will not be able to coexist.*⁸²

In such a context, likewise, the untying and disengagement of the National Socialist regime in relation to the sources and more structural ethos of the concrete order of society in which it emerged will be understood.

⁸⁰ A notorious symbolic dispute between the crucifix and the portrait of Hitler in schools in Bavaria from 1937 to 1941 was part of such a conflict scenario (by "bottom-up" imposition, and in wartime, the ban on displaying the crucifix in public schools would be raised in 1941). On the relations between the Third Reich and the Catholic Church, see Guenter Lewy, *The Catholic Church and Nazi Germany*, 2nd ed., Da Capo Press, Boulder, Colo, 2001.

⁸¹ Vide: http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_14031937_mit-brennender-sorge_it.html). Heinz-Albert Raem, *Pius XI und der Nationalsozialismus. Die Enzyklika "Mit brennender Sorge" vom 14 März 1937*, Schöningh, Paderborn, 1979.

⁸² The considerations that followed such a statement were also significant: "It is a simple matter of honesty and everything comes down to it. In England, the statute of the individual in relation to the Church is governed by State considerations. In the United States, it is all purely a matter of conformism. The special quality of the German people is patience; and they are the only people capable of making a revolution in this field. They could do it, because only the German people made the moral law the principle which governs their action. The heaviest blow that ever struck humanity was the coming of Christianity. . . ". Cf. *Hitler's Table Talk, 1941-1944: His Private Conversations*, cit., pp. 6-7 (15th July 1941).



Conclusion

It seems evident that the National Socialist regime characterised itself as having identified the political community – a racially determined political community raised to the Absolute – with an empirical and historical personality regarded as eminently communitarian. Martin Heidegger's following statements, contained in an appeal to German students on 3rd November 1933, may reflect the last substance of the National Socialist order:

German students! The National Socialist Revolution brings a complete turnaround to our German life. Do not let dogmas and "ideas" rule your being. The Führer himself, and only him, is the present and future reality of the German people and its law.⁸³

Regarding the National Socialist Third Reich, perhaps one should speak of a constitutional formation, ultimately, with no parallel in modern politics.⁸⁴

As well as in the interwar regimes, usually classified as non-democratic right-wing regimes, in the German case the political community was raised to the first and last reference of order construction (also taking into account the traditional-religious as part of the national). As in some of these regimes, especially in Italian fascism, the political community could also be interpreted as a comprehensive *Absolutum*. The National Socialist constitutional formula could not, however, be essentially assimilated to such "generic" and "sub-generic" frameworks: it stands out, mainly and in an eminently singular and *sui generis* way, for its construction of constitutional order through reference to a political community concretely absolutised in terms of its personification in a human figure, in a "community-individual."⁸⁵ Throughout twenty years of fascism, an essentially "mono-archival" State crystallised, but a proper constitutional doctrine similar to the

⁸³ Martin Heidegger, *Political Texts* (1933-1934), in Richard Wolin (ed.), *The Heidegger Controversy: A Critical Reader*, The MIT Press, Cambridge, Massachusetts, and London, England, 1993, pp. 46-47.

⁸⁴ The idea that the personification of the political community in a community-individual is a nuclear dimension, if not the central dimension, of the National Socialist regime, can be found in the writings of some authors, although frequently the National Socialist case is pointed out, among others, as a case in which a phenomenon of "community embodiment" occurs superlatively or par excellence. See, e.g.: Klaus Vondung, *National Socialism as a Political Religion: Potentials and Limits of an Analytical Concept*, cit., pp. 587-595; Marcel Gauchet, *À l'épreuve des totalitarismes, L'avènement de la Démocratie III*, Bibliothèque des sciences humaines, Gallimard, Paris, 2010, pp. 464 ff. Cf. Also see Claude Lefort's pioneering writings (mainly focus on Stalinism, but also referring to National Socialism and fascism) on the figure of the "Egocratic" as a characteristic figure of totalitarianism: Claude Lefort, *la logique totalitaire e l'image du corps et le totalitarisme*, in Claude Lefort, *L'invention démocratique: les limites de la domination totalitaire*, Fayard, Paris, 1981, pp. 85-106 and pp. 159-176, respectively.

⁸⁵ On the constitutional realities referred to in the text, see: Pedro Velez, *Das Constituições dos Regimes Nacionalistas do Entre-guerras*, ICS, Lisboa, 2016 and Pedro Velez, *Sobre a ordem constitucional no/do fascismo italiano*, cit., pp. 69-96. These are the various fundamental constitutional decisions (or material constitutions) concretely recognised: (i) elevation of the political community to Absolute (Italian fascism); (ii) designation of the political community as a prominent good, but not clearly as an exclusive order principle (several order projects "constitutionalistically" articulated, especially through the emanation of new written constitutions – as in Poland, Estonia, Lithuania and etc.); (iii) desire for a monist national State order with a Catholic identity (Spain under Primo de Rivera; first Francoism); (iv) definition of a public orthodoxy of Christian radication, in which Christianity is inscribed no more than as a civil national element (Hungary restored by Horthy, the "French State"); (v) conception of an ethnocentric political community as exclusive and unconditional *nec plus ultra* (absorbing in itself the local traditional religious) (the "Croatian Independent State" to the Romanian "Legionary National State", e.g.); (vi) elevation of the political community to the Supreme Good, but submitting itself to a concretely Catholic "moral invariant" (crystallised Francoism, in the first line; in the "Austrian State" and Portuguese New State).



German doctrine of the *Führerstaat* did not. Contrary to what happened in Hitler's Germany, the constitutional was not identified with the original authority of a communitarian person.⁸⁶

The distance in relation to the liberal-constitutionalist tradition was a maxim – at least on the surface (given a last certain permanence of the category of the individual, with his "transference" to the communitarian plane – to a political community postulated as macro-individual, and to the community-individual). Something similar could be said, without qualification, in relation to a certain Christian politico-constitutional tradition of linking political power to a previous and superior law. There was a clear manifestation of "political religion", evoking an Absolute Good that channels all axiological normative authority to the political order and/or power.

The National Socialist constitutional experience somehow re-edited the paradigm of the Divine Rulers, a constitutional paradigm of pre-Christian or pre-Jewish-Christian origin, revived in the late Middle Ages, the early Modern Ages, with theories of the divine right of kings (a politico-theological standard in which a "sovereign" centre instantiates (and diffuses) divine power and will).⁸⁷ The fact that the articulation of the German Nation-State began in a post-Christian and post-idealist era was not strange to that "re-edition".⁸⁸ The millenarian, messianic and apocalyptic ballast of German society, perhaps reactivated in the hyper-disruptive conjuncture of Weimar, could also have been its condition of possibility.⁸⁹

⁸⁶ See, again, Pedro Velez, *Sobre a ordem constitucional no/do fascismo italiano*, cit.

⁸⁷ On the paradigm of the Deity-Kings, see: Eric Voegelin, *The Collected Works of Eric Voegelin Vol. 14: Order and History Volume I, Israel And Revelation*, University of Missouri Press, Columbia/London, 2001, first part («*The Cosmological Order of the Ancient Near East*»). On this paradigm and its "repetition" in the early Modern Ages, see Francis Oakley, *Kingship: The Politics of Enchantment*, Blackwell, Malden, MA/Oxford, 2006, pp. 108 ff., and Catherine Pickstock, *After writing: on the liturgical consummation of philosophy*, Blackwell, Oxford, 1998.

⁸⁸ Vide Eric Voegelin, *Race and State (1935)*, in Eric Voegelin, *Published Essays 1934–1939, The Collected Works of Eric Voegelin Vol. 9*, University of Missouri Press, Columbia/London, 2001, pp. 40-53; Eric Voegelin, *The Growth of the Race Idea*, cit.

⁸⁹ Vide Norman Cohn, *The Pursuit of the Millennium: Revolutionary Millenarians and Mystical Anarchists of the Middle Ages, revised and expanded*, Oxford University Press, Oxford/London/New York 1970; Klaus Vondung, *The Apocalypse in Germany*, English vers., University of Missouri Press, Columbia, MO, 2000.