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Introductory Note

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Thoughts and Considerations

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Introductory Note

INTERNATIONAL CRIMINAL JUSTICE: A DIALOG BETWEEN TWO CULTURES

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The framework of International Criminal Justice

The implementation of the idea that individuals, wherever they are and regardless of their official status, may be accountable for crimes against humanity breaks away from the Westphalian paradigm that each State is responsible for trying (or not) its citizens. After the Cold War, several international criminal courts were created, namely the *ad hoc* courts for the former Yugoslavia and for Rwanda and a permanent criminal court, the International Criminal Court (ICC). Power no longer serves as a means for impunity. Those leaders involved in conflicts have learned to fear international criminal justice as a "sword of Damocles". On the other hand, the creation of international criminal jurisdictions has become a means to consolidate peace in post-conflict situations so as to restore justice.

The foundation of the ICC in 2002 - and the preference for permanent jurisdiction rather than *ad hoc* courts - represents the pinnacle of international criminal justice. The Court is even referred to as a prime institution in terms of the universalistic perspective of International Law, which aims at a reinforced international public order and is part of the wider liberal framework currently predominant in both International Law and in

International Relations. As Bogdandy and Dellavalle state, "in the global context, the development of a truly international public order and of true International Law is now largely dependent on the development of International Criminal Law" (2008: 2). The creation of the ICC should be viewed not simply as an innovation but, above all, as a civilizational conquest for the defense of human dignity and the promotion of peace.

However, its universalism is criticized, namely in terms of global imposition on institutions and of liberal legal standards. Thus, hard criticism has been made against the ICC regarding its bases which reflects a concern concerning the imposition of "Western" liberal ethical and legal solutions. These mainly focus its Statutes and facts. A set of core criticism has been made, including that it is dependent on the Security Council for the United Nations, which suggests political intrusion in a criminal body, and that up to now only situations related to Africa have been submitted, which leads to suspicion on its selection criteria. This criticism raises questions as to the bases of the ICC.

The ICC is still in a state of grace. However, the risk of marginalization is increasing (Kowalski, 2011). The Kampala Review Conference in 2010 was a warning: the sun had not yet set on Lake Victoria on the last day of the conference and already there were differences regarding how to apply what had been approved. Up to the present, 14 States have committed themselves to the amendments[1], including those referring to the typification of the crime of aggression.[2] In 2012, 10 years after the ICC Statute came into force, the Court has delivered its first conviction: Thomas Lubanga Dyilo was sentenced to 14 years in prison for the crimes of recruiting and enlisting children under 15 and have them participate in the hostilities in the Ituri region, Congo Democratic Republic. The ICC's first conviction was greeted with the comment "finally"; yet, it also fueled the debate around the delay in trials and ultimately on the efficacy of slow criminal justice.

At the same time criminal justice is becoming universal, alternative forms of justice are being promoted in situations in which serious international crimes have been committed. In Rwanda, justice was a core element for reconciliation. The evidence is that considering the limited role the International Criminal Court played in the case of Rwanda and the limitations of the Rwandan legal system, traditional collective structures were used to enforce justice after the genocide (Gacaca courts). In the case of Rwanda is, therefore, a good example of how traditional collective structure may be mobilize for justice, namely in terms of their restorative though pragmatically imperfect features (Kowalski, 2009). This must also fuel the debate on international criminal justice and its complementary jurisdictional role.

Reflecting on the ideals at the basis of international criminal justice should be permanent so as to lead to ethical legitimacy and an effective ability to resist and change. Yet, for there to be legitimacy, criticism, deconstruction and revelation must take place. This is also why the hope in international criminal justice -and in particular in the International Criminal Court - may be linked to the hope for critical thought and in the will of all international participants.

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1 Mauritius, Norway, San Marino, Trinidad and Tobago, Estonia, Liechtenstein, Luxembourg, Samoa, Germany, Botswana, Andorra, Cyprus, Slovenia and Uruguay.

2 Trinidad and Tobago, Estonia, Liechtenstein, Luxembourg, Samoa, Germany, Botswana, Andorra, Cyprus, Slovenia and Uruguay.

International Criminal Justice between two cultures

Peace and Law are ancient theoretical and social construction concepts. Becoming scientifically independent, developing in terms of concept and their academic acceptance and practice have never been and will never be simultaneous. Yet, their aims are similar: human beings' material and emotional well-being. In the last hundred years, the debates between realism and idealism/liberalism have influenced both International Relations (Richmond, 2008) and International Law (Koskenniemi, 1992), including in the field of theoretical concept of peace. In terms of "peace", this is a structured and extraordinarily multilayered material concept. In terms of International Law, its wide material and personal scope, as well as the imperative nature of some of its rules pave the way to a "Law of Humanity" (Pureza, 2002). Peace is a concept that has evolved from the idea of negative peace to the present idea of positive and structured peace (Galtung, 1975; Richmond, 2008). This peace is composed of several elements from different fields which evidences a desire for a holistic well-being in a non-violent environment. International Law may play a role in standardizing the elements of peace and ensuring their effective and fair implementation.

"Academic isolation" of International Relations and International Law (Beck, 1996) leads to what Yound (1992: 174) described as the "syndrome of two cultures". These scientific fields are not in synchrony as a result of the different discourse by their authors as well as due to political and diplomatic practice which tends to have a (moderate) Cartesian perspective of diplomatic legal and political discourses. International Relations authors tend to view International Law as marginal or as a dangerous myth (Kewenig, 1973), especially in relation to peace theory. State supremacy and the lack of legal Statutes in view of the impossibility to enforce sanctions would make legal regulation irrelevant. Other question the true contribution of Law for peace (Boasson, 1968), namely in what concerns the activity of international criminal courts (Meernik, 2005) or the conventions on human rights (Hafner-Burton & Tsutsui, 2007).

There are those who believe the opposite: that international order will only truly be order and international society will be a community when international social relations are regulated by Law (Tomuschat, 1993; Fassbender, 1998). Abbott (2005) even describes legal nationalists as "architects of global government". International Law scholar often view International Relations as theoretical rather than a active and changing political discourse, limited to analysis of relations between States *ad nauseum* as well as of power relations States have to be part of. Moreover, it is sometimes referred that, considering that the history of Law can be dated to Roman Law and that of International Law in particular to the "legal theologians" and to Grotius in the 16th and 17th centuries, International Relations are still a young and immature scientific field of the 1950s. From a more subjective perspective, this discourse adds to the corporate pressure of International Law scholars over International Relations. This then fuels the reactions of International Relations' scholars who declare the irrelevance of International Law. In any case, and as Pureza points out, this "syndrome of two cultures" " is grounded on the different perspective each field has: International Relations has an explaining and analytical point of view, International Law a prescriptive and regulating one" (1998: 79-80).

"International criminal justice" has been widely analyzed. This is, in fact, an issue that requires a wide and encompassing approach which includes themes belonging to different fields, as the typification of serious crimes against the international community; the functioning of the courts; the contribution to the development of International Law; the promotion and protection of human rights; the relevance of the individual in international scenario; impact in conflict prevention / resolution; or States' external policy towards the ICC. This is usually an analysis carried out separately by different scientific fields, and "international criminal justice" has drawn more attention from International Law than from International Relations.

There is, however, space and relevance for a discourse on a multilayered approach to the theme. Firstly, several of the current issues in International Law and International Relations consider "international criminal justice" a case study. Afterwards, "international criminal justice" may become a discourse element that combines these two fields, which have stubbornly kept separate, suffering from the "syndrome of two cultures". Yet, "international criminal justice" may benefit from an integrated approach by International Law and International Relations, thus enriching them and providing them with new perspectives.

The project "International Criminal Justice"

The project "International Criminal Justice", developed within the scope of Observatório das Relações Exteriores at Universidade Autónoma de Lisboa, aims to be a space of research that brings together researchers, experiences and methodologies in one of these scientific fields. Whenever deemed relevant, researchers from International Law may be asked to step out of their comfort area and that, though keeping their scientific background, deal with issues usually analyzed within the scope of International Relations (and vice-versa). The research center will invite authors, national and foreign, with different scientific backgrounds and who have either an academic point of view or practical experience within the scope of international criminal justice.

This research project has four objectives. The first is to design a discourse on "international criminal justice" that combines International Law and International Relations texts on common themes, contributing to more creative and well-founded responses. The second is to identify approach convergence /divergence (and their consequences) on common themes by the referred scientific fields. The third objective is to find new proposals for some of the current issues in international criminal justice. Finally, this project aims to provide research results that evidence a wide perspective of international criminal justice that may benefit researchers, diplomatic agents, international justice agents or students.

Considering these objectives, the project is divided into themes so as to allow coherent multidisciplinary approach, thus generating complementary ideas. Therefore, limitation of each theme is designed in accordance to the following criteria: (i) each theme includes common concerns of International Law and International Relations in terms of international criminal justice; (ii) each theme can benefit from contributions of researchers from different scientific fields; (iii) each theme has potential to show convergence / divergence in the the approach by International Law and International Relations to international criminal justice. Thus, four major themes were selected:

"Conceptual Issues"; "International Criminal Courts"; "International Criminal Justice, Human Rights and Conflict Resolution"; and "Justice, Power and External Politics".

Contributions to the project (scientific papers) will be published in Portuguese (or in any other language) and in English at JANUS.NET *e-Journal of International Relations*. Once the project is concluded, we aim to publish a monograph that gathers these papers.

"Conceptual Issues"

The first two contributions being published now are a good example of the "dialog between two cultures" that the project "International Criminal Justice" aims to promote. The first, entitled "International criminal justice and the erosion of sovereignty" was written by Miguel Serpa Soares, a lawyer and former Director of the Department of Legal Affairs of the Ministry of Foreign Affairs, having represented Portugal at the Kampala Conference and at the States Parties Assembly of the ICC and recently appointed Secretary-General for Legal Affairs and Legal Counselor at the United Nations. The second, entitled "Serious violence (crimes) relevant for international community" was written by Maria Francisca Saraiva, an expert on International Relations and university lecturer who has worked not only in the area of human rights but also on conflict resolution, strategy, geo-strategy and public policies on security. Both contributions analyze the impact the creation of the ICC, from a conceptual point of view, has on international legal and political order in relation to State sovereignty and the geo-politics of great powers.

In his paper, Miguel de Serpa Soares emphasizes the fact that the ICC is still "in its teens" in world legal order but that, as it affects institutional balance and the powers in force since 1945, it evidences the tensions between supranationalism and the erosion of State sovereignty, which the author views differently depending of being big or small/medium-sized States in terms of "judicial sovereignty". The text analyzes in detail the process that led to the inclusion of the definition of crime of aggression, the most serious international crime, as well as the conditions to exercise jurisdiction in the Rome Statute (the jurisdiction on crime already included in 1998) at the Kampala Conference in 2010, concluding that the compromise obtained evidences the differences in position between, on the one hand, the five permanent members of the Security Council, whose objective was maintaining the prerogatives the United Nations Charter assigned to them in determining situations of aggression and, on the other hand, a set of different alliances between groups of countries whose common element was the defense of ICC independence before the Security Council, as well as autonomy of legal determination that a crime of aggression was committed. The author considers that the compromised attained at Kampala represents a defeat for the five permanent members of the Security Council and, just like the Rome Statute, it has created gaps in the punishing monopoly of States and the Security Council. The paper concludes that the existence of an international criminal justice is in opposition with the idea of state sovereignty. Yet, the relation between the two should not be viewed as antagonistic but rather complementary and changing the concept of sovereignty itself. However, so that the ICC may assert itself, especially before more powerful States, Miguel de Serpa Soares contends that it must consolidate impeccable jurisprudence, as did the

European Union Court of Justice or the International Court of Justice and, as such, time must be given to this new institution.

In her paper, Francisca Saraiva argues that the ICC has allowed to provide the international community with a permanent legal mechanism to dissuade and repress barbarous and extremely cruel acts. Yet, the result attained by the Rome Statute in 1998 and by the definition of the crime of aggression at the Kampala Conference in 2010, was nevertheless influenced, in the author's point of view, by the negotiation strategies of the great powers, organized considering their long term interests, which led to selective multilateralism, i.e., with a possible political control. In particular, the author contends that the ICC's hostility towards the United States of America is not due to American power vitality but is a political survival strategy so as to delay the rise of new hegemonic powers which will take the USA's place in the international system. The negotiation of the crime of aggression showed that what was in question in the ICC was great powers' right to maintain their freedom in strategic (and warfare) action and to protect their humanitarian agenda.

Analyzing both paper papers from a *neopolitik* perspective, they coincide in their assessment of the fact that, from the point of view of the great powers, the definition of the crime of aggression was not up to expectations in terms of the Security Council role in this matter because its five permanent members advocated the need for prior authorization by the Security Council for a process to be submitted by a Party State or by the Prosecutor *proprio motu*.

The solution was one of compromise in which the international community was able to defend the integrity of the Court, yet the Security Council maintained the power to suspend criminal procedure, including in the case of aggression. If, on the one hand, as Francisca Saraiva declares, it will be difficult for the ICC to try crimes of aggression involving the great powers, the encompassing definition of the crime allows for adequate trying of cases that reach the Court.

We must now wait to see how the ICC continues to function as the list of crimes under its jurisdiction is complete and a full judicial cycle is over. Only then is it possible to take stock of its role in world legal and political order. Other analyses fostered within the scope of the research project by OBSERVARE, "International Criminal Justice", will undoubtedly contribute to that end.

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INTERNATIONAL CRIMINAL JUSTICE AND THE EROSION OF SOVEREIGNTY

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Abstract

The author states that any form of international justice always represents a means of limiting national sovereignty. In the case of International Criminal Law, this limiting is even more evident by compromising elements essential to the classical paradigm of International Law, as for example the punishing monopoly of States or the concept of a quasi-absolute State sovereignty. International criminal tools, crimes, sentences, jurisdictions, are all able to be, at least partially, a legal alternative to the issues of peace-keeping and national security, exclusively political and diplomatic. This alternative inevitable leads to tensions with a power structure that has not been altered since 1945. However, for this legal criminal alternative to be put in place, a long period of maturation will be required based on irrefutable technical and legal credibility.

Keywords:

Sovereignty; International Crimes; International Criminal Court; Security/Aggression Council

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International criminal justice and the erosion of sovereignty
Miguel de Serpa Soares

INTERNATIONAL CRIMINAL JUSTICE AND THE EROSION OF SOVEREIGNTY

Miguel de Serpa Soares

Introduction

International Criminal Law and the International Criminal Court are institutions still in their early years in terms of world legal order. Ten years after its implementation, the International Criminal Court is an institution that still has to prove its credibility in international criminal narrative in the prevention of international crimes that "*affect the international community as a whole*" and that "*are a threat to peace, to security and to the well-being of Humanity*", in the words of the Rome Statute. All international legal bodies are restraints to the legal and even constitutional sovereignty of States. However, the relations between these institutions of legal supra-nationalism and States do not necessarily have to be antagonistic or competitors. Affirmation of any legal, supranational, regional or universal, legal order will always go through periods of conflict and rivalry that represent the time needed for national sovereignties to adapt to new scenarios. In the case of the International Criminal Court, this tension is heightened because, inevitably, institutional balances and an arrangement of powers in place since 1945 are affected.

The times to come will be a period for observing rather than for explaining. We will observe the way in which the Court will create a judicial language against impunity and how complementary relations with national jurisdictions will be defined.

1. State sovereignty: a flexible concept

Before analyzing some specific instances that will allow us to reflect on the emergence of International Criminal Law and the erosion of sovereignty, it is important to state some basic facts.

The first is that there are two separate but overlapping realities in international legal order and these correspond to two different paradigms of thought. The "*Grocian*" (or "*Hobbsian*") paradigm, based on a state perspective of international relations and the "*Kantian*" paradigm, cosmopolitan and universal[1].In the first case, sovereign States develop cooperation relations with the single purpose of better pursuing interests they considered national interests. In the second case, States develop cooperation relations

[1] Antonio Cassese (2005). *International Law*, Oxford: University Press, p.20 and in particular texts by M. Wight e H. Bull mentioned in footnote 11.

also bearing in mind the interests of an international community separate from the States themselves.

In 2013, the State is still the primary subject of International Law and international society is basically the result of the interaction among territorially-based political communities, independent, protected by formal legal equality and having certain essential features. Simultaneously, the recent dynamics in international relations and the huge development of International Law, in particular after 1945, lead us to acknowledge the existence of real conditions, perhaps restraints, to the sovereign powers of States. In the latter case, the explosion of multilateralism, the appearance of international subjects such as international organizations, some including supranational elements, the restraints to jus ad bellum, the relativization of the principle of State immunity[2], the consolidating of a Humanitarian International Law and a Human Rights International Law, as well as the concept of international crimes and the creation of a permanent International Criminal Court, all contribute to the idea of a relative, flexible Sovereignty, in any case a sovereignty that needs to adapt to external factors affecting its powers, whether these are legal rules or competing centers of political and judicial power.

It is not important to understand the concept of sovereignty as mere emanation of realistic thought in which power politics is at the core but rather identify in international legal narrative, *in casu*, in International Criminal Law, the real implications of these possible restraints.

Noteworthy is to establish the basic idea that sovereignty is made manifest in power and independence. Identified as a feature of territorial State, sovereignty is essentially the possibility to enforce all powers of authority on a specific territory and on all the individuals living therein. These powers are put into practice through the adopting and enforcing rules (administratively or judicially) and in the ability to restore the Law, either though coercive enforcement of sentences or through *jus punendi*. As a consequence, the sovereign State has the right to exclude enforcing the powers of authority by any other State within its territory and the other State has the duty of non-interference. Choosing this basic concept, which corresponds to an absolute and realistic sovereign paradigm, is for analytical purposes only, so as to deconstruct the concept.

In 1928, the referee Max Huber stated that:

> *"La souveraineité dans les relations entre États signifie l'independance"*[3].

Independence affirmed against other subjects of international Law and a fundamental consequence of international legal personality exclusively acknowledged by International Law, in accordance with the formula of legal immediacy referred by Allain Pellet (Pellet, 2002: 424). In 1758, Vatel wrote that:

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[2] Under Portuguese jurisdiction on the jurisdictional immunity of States, see Margarida Salema D'Oliveira Martins (2011). "Comentário ao Acórdão do Tribunal da Relação de Lisboa relativo ao Processo 135/06.2TVLB.L1-7" in *Anuário Português de Direito Internacional 2011*, M.N.E. p.119.

[3] Decision on 4 April 1928 «L'Île des Palmes», Recueil des Sentences Arbitrales II-838.

> *"Un nain est aussi bien un homme qu'un géant: une petite republique n'est pas moins un État souverain que le plus puissant royaume"* (Vatel, 1863: 100)

In the formal and legal translation of this principle, nothing fundamental has changed since the 18th century: article 2, nº 1 of the United Nations Charter lays down this principle of formal equality among States and, thus, adopts several principles which ensure that equality and independence.

Based on these elements, *potestas* or internal authority and independence, sovereignty should be seen as the ability States enjoy of enforcing their prerogatives, both internally and externally, as well as the ability to influence the development of international law.

The current analysis of the conditions under which States exercise their sovereignty cannot ignore the historical process by which modern States were formed, which is intertwined with the process of how the *Jus Gentium* have developed.

Claim by States that they are *superiores non recognescentes* beings stems essentially from the rebellion by the princes against the double authority of the Emperor or the Pope and their refusal to acknowledge the secular universal authority of both (*potestas directa*). The fact that each community aspires to exercise sovereign powers within its territory and to relate with other political communities without the interference of other secular authorities embodies this first "aggressive" concept of sovereignty, which must be affirmed against other existing powers. Interestingly, the Portuguese are also at the base of extreme reactions against secular authority by the pope and in speeding the creation of the Modern State. The Treaty of Tordesillas in 1494, based on the assigning of new territories and seas exclusively to Portugal and Spain by papal edict added to the anger of other European nations against the power of the Pope and the old order *civitas christianna*. Sovereignty was argued as a claim for a space of freedom, freedom to gain territory, freedom to navigate and do commerce against a secular authority with a transcendent foundation[4].

The destruction of medieval order, symbolized by the Peace of Westphalia in 1648, marks the foundation of the modern State and of International Law. However, in the beginning, State sovereignty is still included in the sovereignty of the prince; only with the onset of liberal constitutionalism at the end of the 18th century, subjects are considered citizens and "the sovereignty of the prince" becomes the sovereignty of the State. The affirmation of sovereignty-power, seen as exclusive jurisdiction and supremacy of public powers over citizens and territory, and of sovereignty-independence, the capacity for direct and autonomous relation with other powers reached a climax during 19th century legal positivism which only ended in 1945.

In this international legal order, basically consisting of a European public legal order, in the concert of "civilized nations", the principle of quasi-absolute State sovereignty has

[4] On the historic development of the concept, see H. Steinberger (2000). "Sovereignty " in *Encyclopedia of Public International Law*- IV, R. Bernhardt ed. North Holland:Max Planck Institute.

become the basis for all international relations and Law[5]. The slow historical process leading to the collapse of this concept of absolute sovereignty starts after the 1950s.

The first interventions by International Law on defining the restraints to State sovereignty are in the Right to War. The freedom to initiate war as an essential feature of the sovereign State is limited firstly through the first attempts to regulate *jus ad bellum*, a process which started with the foundation of the International Red Cross and the Hague rule of law. *Jus ad bellum* remains unchanged until the Briand-Kellog Pact in 1928.

From 1945 onwards, the international legal *acquis* and the multilateral institutional framework starts to be formed and develop in which sovereignty will be exercised. The United Nations Charter and the principle to forbid the threat to use force as means of conflict resolution, Humanitarian International Law including, namely the Geneva Conventions, the legal protection of the individual, even if in its early stages, through the adoption of different universal and regional treaties on human rights, the sophisticated formulas of joint exercise of sovereignty, as in the case of the European Union, and finally, the emergence of International Criminal Law, all create a mulch-layered reality in which the idea of absolute sovereignty cannot be reconciled with the idea of absolute sovereignty[6]. All these changes imply specific restrictions in exercising state sovereignty, largely based on legal rules that discipline the freedom of States.

So as to reflect on the current nature of sovereignty we must also establish the concept of sovereignty that is at stake. Is it a military, monetary, economic or judicial sovereignty? A sovereignty as exclusive powers of authority over citizens and territory? A legal sovereignty as an imperviousness of international legal order to International Law or as an ability to influence the production of international laws? Sovereignty as an exclusive set of rights and prerogatives or sovereignty that also includes the duties of States?

For the author of this text, a Portuguese citizen, in March 2013, the following statement must be made: Portugal is a member of the European Union, to which the country transferred several of its sovereign powers, namely monetary sovereignty, and is currently under the intervention of a troika of foreign institutions under a financial assistance program. This intervention implies a restraint to its sovereign powers so as to make fundamental political choices. Portugal signed, among many other treaties, the European Union Treaty which includes several provisions on European citizenship. Portugal accepts the compulsory jurisdiction of the International Court of Justice, it is under the jurisdiction of the Luxembourg and the Strasbourg Courts and has signed the Rome Statute. Portugal does not have its own currency, has no relevant military power

[5] And, according to Martti Koskenniemi (2008), especially a justification for International Law resulting from European history and culture as a means to justify the colonial expansion in Africa by means of a distinction between civilized and uncivilized peoples, the latter having no Sovereignty which was an exclusive feature of civilized nations in The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870-1960. Cambridge: University Press. p. 127.

[6] For the sole purposes of this analysis, we use artificially simplified versions of concepts. The concept of absolute sovereignty cannot in itself be acknowledged in theoretical terms except as a denial of International Law, a concept accepted since long by the international legal Doctrine.
As G. Scelle states in 1932, “La notion de souveraneité est donc incompatible avec celle de droit objectif comme avec celles de sujet de droit. C’est une tâche vaine de vouloir construire le Droit, et en particulier le Droit international, sur la notion de la souveraineté de l’Etat. Là encore, le concept ne peut aboutir pratiquement qu’à soustraire la volonté des gouvernements à l’emprise du Droit, à détruire la notion de compétence et, avec elle, celle de légalité» (Scelle, 1932: 14).

and has its Constitution which is mainly in agreement with International Law[7] and which even automatically accepts laws from general International Law. Portugal is not a permanent member of the Security Council, does not have significant natural resources beside a wide EEZ, its diplomacy has limited material resources and its population is rather small in world terms.

The understanding of what may be the erosion of national sovereignty cannot be separated from the national perspective of each observer nor from the strategies of adaption by each small or medium-sized State.

A permanent member of the Security Council will likely assess the erosion potential of its sovereignty differently from the author. Exercising sovereignty in Portugal is largely based on a link with the multilateral system, in the joint exercising of sovereign powers, namely within the framework of the European Union and in an openness to those outside its legal order. An American or a Chinese citizen will probably view the same phenomenon under the perspective of real restraints that full participation in a multilateral system may bring to its powers. This is especially true in Law and in International Criminal Law in particular. Through observing the relation between the permanent members of the Security Council and the International Criminal Court we aim to evidence this idea.

2. The End of the punishing monopoly of States: crime and punishment in International Law

In 1919, article 227, n.º 1 of the Treaty of Versailles laid down that:

> *"Art. 227 - Les puissances alliées et associées mettent en accusation publique Guillaume II de Hohenzollern, ex-empereur d'Allemagne, pour offense suprême contre la morale internationale et l'autorité sacrée des traités. Un tribunal spécial sera constitué pour juger l'accusé en lui assurant les garanties essentielles du droit de défense. Il sera composé de cinq juges, nommés par chacune des cinq puissances suivantes, à savoir: les États-Unis d'Amérique, la Grande Bretagne, la France, L'Italie et le Japon.*
>
> *Le tribunal jugera sur motifs inspirés des principes les plus élevés de la politique entre les nations avec le souci d'assurer le respect des obligations solennelles et des engagements internationaux ainsi que la morale internationale.*
>
> *Les puissances alliées et associées adresseront au Gouvernement des Pays-Bas une requête le priant de livrer l'ancien empereur entre leurs mains pour qu'il soit jugé»*[8].

[7] See Miranda, Jorge (2010). "O Artigo 8º da Constituição e o Direito Internacional" in Augusto de Athayde/ João Caupers/ Maria da Glória F.P.D. Garcia (eds.) Estudos em homenagem ao Professor Doutor Freitas do Amaral. Coimbra: Almedina. 415.

[8] «Pages d'Histoire -1914-1919» (1919). Paris: Librairie Militaire Berger-Levrault. 108.

The ending of this story is well-known: Kaiser William II took refuge in the Netherlands, whose Government refused his extradition invoking the nonexistence of a competent international court as well as a preliminary incriminating rule. Nevertheless, it is interesting to analyze the language used at Versailles ("international morals", "high political principles among nations"), as well as a true novelty which was the a Sovereign was described as a defendant, accused of "offense suprême" (supreme offense, yet not qualified as crime), to " international morals"[9]. Equally noteworthy is the subtle and continuous change in international legal language which emerges after the appearance of International Criminal Law and progresses with the successive attempts at rules and limiting the "warring" sovereignty of States.

In 1814, the Declaration of Vienna against Slave-trading refers to civilized nations", essentially European nations, slowly shifting the moral speech, in particular that of European powers, in a speech on International Law, gradually translated in legal rules. The Hague Peace Conferences in 1899 and in 1907 mark the first coding process of the laws of war and the so-called "Martens Clause"[10], included in the preambles of the Conventions II of 1899 and 1907 stated that:

> *"until a more complete code of the laws of war is adopted, the parties consider adequate to declare that, in the cases not included in the provisions adopted, the populations and the warring parties are under the protection and observation of the Rights of People, considering they derive from customs among civilized nations, the laws of humanity and the demands of public conscience"*[11].

Noteworthy is also that some of this language survived the new world order after 1945: article 38, nº 2c) of the Statute of the International Court of Justice still refers to the general principles of Law recognized by the "civilized nations" as a source of International Law.

The peace of Versailles originated the first instances of institutionalization of multilateralism, such as the failed Society of Nations as well as the transference of a criminal narrative to international scenario. The Legal Advisory Committee, appointed by the Society of Nations recommended in 1920 that an International Supreme Court should be founded with competence to try crimes committed against international public order and the universal law of nations. This court would also be assigned competence to define the list of crimes and applicable punishments, the means to enforce them as well as its rules of procedure. In 1920, Elihu Root asked the following question on this project:

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[9] In 1932, Hans Kelsen in his course in the Hague Academy, used the examples of the Versailles rules on the responsibility of the Kaiser to evidence the idea that only States could be subjected to International Law would be a false one in Robert Kolb (2003). *Les Cours Généraux de Droit International Public de l'Academie de la Haye*. Brussels: Bruylant. 82.

[10] In 1883, the same Fyodor Martens, Professor at the university of St Petersburg, defined International Law as follows: "Les États indépendants jouissant de la civilisation européenne constituent le domaine régi par le droit international et jouent un rôle actif das la communauté internationale (…) C'est de cette action des États civilisés que provient le droit international » (Martens, 1883: 307).

[11] See Mateus Kowalski/Miguel de Serpa Soares (2011) "Cláusula Martens" in Manuel de Almeida Ribeiro/Francisco Pereira Coutinho/ Isabel Cabrita (eds) *Enciclopédia de Direito Internacional*. Coimbra: Almedina, p. 91.

> *"Are the Governments of the world prepared to give up their individual sovereign rights to the necessary extent?"* (Ferencz 2000: 40)[12].

The question, obviously rhetoric in 1920, was not answered in a positive way before the adoption of the Rome Statute in 1998 and even then it was only partially positive.

The Nuremberg and Tokyo Trials led to the collapse of the Sovereign's punishing monopoly and are a turning point in the erosion process, the adaptation *rectius* of state sovereignty. Several perspectives are possible on these historic trials: from considering it was all mere winner justice to a judicial catharsis of guilt and redemption; historians, political scientists and lawyers will hardly understand these events in the same way[13].

In the aftermath of the victory by the allies in 1945, two possibilities opened to the winners: mere execution or imprisonment of the losers and their punishment following a trial. Benjamim Ferencz, the youngest member of the American prosecution team in 1945, says, in a rather humorous and acid tone about the British that

> *"In fact, the Foreign Office still did not favor war crimes trials. To avoid long legal proceedings, that might become a propaganda forum for Nazi leaders, the United Kingdom preferred a «political disposition». Always noted for their «fair play», the British argued that «execution without trial is the preferable course». Exactly who was to shoot whom and when to stop shooting was not made clear"* (Ferencz 2000: 42).

The London Agreement on 8 August 1945, which led to the creation of the Nuremberg court, resulted mainly from the American perspective which, with the Soviet support, managed to be imposed on the remaining allies. In a vaguely grand speech about the trial, Judge Robert Jackson, Chief Prosecutor of the American team at Nuremberg, said:

> *"That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power as ever paid to Reason"* (Ferencz 2000: 37).

The Charter of the International Military Court established as crimes under its competence for which individuals may be held accountable the crimes against peace, crimes of war and crimes against humanity, thus creating, for the first time a criminal list of international crime - the origins of the International Criminal Code. Article 6

[12] Elihu Root was the American Secretary of War (1899-1904) and Secretary of State (1905-1909) with President Theodore Roosevelt. Nobel Peace Prize in 1912, Root presided to the Carnegie Endowment for International Peace. Elihu Root's political thought was made public in his book (1927) *Politique Exterieure des États-Unis et Droit International: Discours et Extraits*. Paris: A. Pedone.

[13] For a contemporary critical perspective on Nuremberg and Tokyo, see Guénaël Mettraux (ed.) (2008). *Perspectives of the Nuremberg Trial*. Oxford: University Press and Yuma Totami (2009). *The Tokyo War Crimes Trial*: The Pursuit of Justice in the Wake of World War II. Harvard: University Press.

typifies ("the following acts or some of them") as *"crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility"*: crimes against peace (the precedessor of the "crime of aggression" adopted in the Kampala Conference in 2010); crimes of war ("namely the violations of the laws or customs of war"); crimes against humanity ("namely murder, extermination, enslavement, deportation and other inhumane acts"). A national criminalist today cannot but wonder in face of the open typification of these crimes.

There is ample literature on the Nuremberg and Tokyo trials as well as hard criticism, in particular American criticism, on the exceptional nature of an *ex post facto justice*.

The discomfort of some judges at the time, namely in terms of the crimes against peace, stemmed from the knowledge that the Nuremberg and Tokyo International Military Courts operated outside the framework of Criminal Law principles, namely the principles of *nullen crimen sine lege* and *nulla poena sine lege*. Judge William Douglas expressed his criticism on criminalizing "crimes against peace" as follows:

> *"(I) thought and still think that the Nuremberg trials were unprincipled. Law was created ex post facto to suit the passion and clamor of the time"* (Glennon 2010: 75).

In 1946, Federal Judge Charles E. Wyzansky stated the following on criminalizing war of aggression:

> *"The body of growing custom to which reference is made is custom directed at sovereign states and not individuals. There is no Convention or Treaty which places obligations explicitly upon an individual not to aid in wagging an aggressive war"* (Glennon 2010: 76)

and to the question whether the bases for Nuremberg may lie in the general principles of Criminal Law common to all "civilized nations", he said that*:*

> *"(…) it would be a basis that would not satisfy most lawyers. It would resemble the universally condemned law of June 28, 1935 which provided: 'Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound popular feeling, shall be punished'. It would fly straight in the face of the most fundamental rules of the criminal justice – that criminal laws shall not be ex post facto and there shall be nullum crimen et nulla poena sine lege – no crime and no penalty whiteout an antecedent law"* (Glennon 2010: 76).

This debate was equally present at the Tokyo trial, two judges having voted against the final decision to sentence. The dissenting opinion of the Indian judge Radhabinod Pal, absolving all defendants at Tokyo is an extremely relevant text in the recent history of International Law, representing, under the appearance of a confrontation between naturalism and positivism, the first serious challenge to international legal order by western empires and is worth being reread today[14].

However, Nuremberg and Tokyo are a turning point in International Law. Despite their flaws, these trials mark the beginning of a criminal narrative in International Law. Offenses to morality or to the laws and customs of the "civilized nations" are clearly defined as criminal conduct, though ex post facto, and considered of individual criminal liability. The hanging of some Nazi convicted at Nuremberg and the conviction of Hideki Tojo, Japanese Prime Minister at the time of the attack to Pearl Harbor are highly symbolical moments of this turning point. State sovereignty is no longer the last and ultimate protection of its citizens, of its policy-makers and military high ranks *maxime*. International legal order, even considering that the order in 1945 included mainly the winners of WWII, is more important than state sovereignty and holds the individual directly accountable in criminal terms. Drawing a parallel with Anglo-Saxon doctrine on the disregard of legal personality, in Nuremberg and Tokyo, there was a lifting of the sovereignty veil, disregarding state personality as subject with international liability and focus on the political or military leader as subject of criminal liability, traditionally protected by state sovereignty. The hanging of those convicted in Nuremberg and Tokyo ends the State punishing monopoly: crime and its punishment are no longer exclusively defined and enforced by the Sovereign. Even with the physical disappearance of the individual.

Something changed since the exile of Kaiser William II: the lawyer took hold of the area belonging to the historian and the diplomat at the time when the narrative on War is no longer the sole responsibility of history and the peace-treaty makers. Through the hands of the judges, the narrative of War becomes a legal and judicial narrative, as is made evident in the thousands of pages with minutes from the Nuremberg and Tokyo trials. The best evidence of how the Law has taken possession of areas reserved to sovereign States is the new criminal speech in international law and the definition of crimes and their sentencing. Despite its flaws (criticized since that time), the fact that criminal speech is now present at international level and the gaps in States punishing monopoly are irreversible.

In the period after 1945, the concept of individual criminal liability before International Law, withdrawn from States exclusive power to punish its nationals, began its slow consolidation process. First through adopting the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly in 1948[15]. Noteworthy is that the term "genocide" did not exist before 1946[16], the extermination

[14] Documentation on the Tokyo processes is available at http://avalon.law.yale.edu/imt/imtconst.asp On the Pal doctrine see Kirsten Sellars (2011) "Imperfect Justice at Nuremberg and Tokyo". *European Journal of International Law*. 21: 1095. http://avalon.law.yale.edu/imt/imtconst.asp

[15] Convention on the Prevention and Punishment of the Crime of Genocide (approved through Resolution by Assembleia da República nº 37/98, of 14 July in DR, 1ª Série-A, nº 160.

[16] Term created in 1946 by the Polish lawyer Raphael Lemkin, author of the preliminary draft of the 1948 Convention. See Mateus Kowalski/Miguel de Serpa Soares (2011) "Cláusula Martens" in Manuel de Almeida Ribeiro/Francisco Pereira Coutinho/ Isabel Cabrita (eds) *Enciclopédia de Direito Internacional*. Coimbra: Almedina, p. 143 and Larry May (2010) Genocide: a Normative Account, Cambridge: University Press. p. 2010.

of the Jews was tried and punished at Nuremberg as a crime of war or a crime against humanity. The narrative of the Law itself has undergone a change in the new order established in 1945: genocide, universal jurisdiction and universal punishment are terms that did not exist or were almost nonexistent in the period of almighty sovereignties[17].

On 11 December 1946[18], the first session of the United Nations General Assembly adopted a set of Resolutions with significant impact for the later development of International Criminal Law. In particular Resolution 95 restated the principles of International Law recognized in the Nuremberg Charter and appointed a Commission to prepare an International Criminal Code.

The founding of international criminal courts ad hoc for Yugoslavia and Rwanda are a relevant step in this process. The collapse of the Soviet Empire, symbolized by the fall of the Berlin War, provided a new political scenario and a cycle of significant economic growth. According to Henry Kissinger, in 1990: "The world was entering a post-sovereign era" characterized "by the rule of law aspects of international law over traditional State sovereignty". It is in this "mood of triumphalism" (Kissinger, 2011: 454, when speaking on the main political spirit in Washington) or in the "naive and rather obtuse spirit" (Cutileiro, 2003: 12), in the words of Ambassador José Cutileiro, Coordinator for the European Community Peace Conference in Yugoslavia in 1992, presided by Lord Carrington, that the Nuremberg principles are recovered. The concept of global justice, embodied in the idea of Nuremberg as having competence on international crimes, appeared in this period of "global optimism" (Koh, 2003: 1503) which was in full force from 1989 and 2001. This generalized optimism of a global justice was made manifest not only in the creation of ad hoc Courts in Yugoslavia and Rwanda but also in the creation of mixed courts for Sierra Leone and Cambodia, the Lockerbie trial, the indictments in Spain and Chile against Pinochet. It reached its peak with the signing by President Clinton of the Rome Statute in 2001, before the USA began its period of open hostility against the International Criminal Court.

William Schabas[19] declares that the idea of an international criminal justice was vaguely approached by George Bush and Margaret Thatcher in the 1990s when discussing the invasion of Kuwait by Iraq, according to preliminary studies by the American army. The idea would have been viewed positively by some European leaders but resulted in nothing.

After mid-1992, the USA were the biggest promoters for adopting Security Council Resolution 827 (1993) of 25 May 1993. This Resolution, adopted by consensus, is special because it was based on article VII of the Charter, in particular in articles 39 and 41, a new interpretation of the United Nations Charter. As Paula Escarameia points out, the Charter

[17] Except for the crime of sea piracy.
[18] Resolutions AG 94(I), 95(I) and 96(I) on (i) the appointment of a Committee for the Study of Coding International Law, (ii) affirming the principles of international Law laid down in the London Charter and the mandate awarded to a new Committee to write an International Criminal Code and (iii) condemning genocide and assigning a mandate to organize a convention on the subject.
[19] W. Schabas (2004) "United States Hostility to the International Criminal Court: It's All about the Security Council", *European Journal of International*. 15: 707.

> *"was probably not thought based on the principle that impunity of international criminals was a threat to or a breach of world peace and security and that the Council may, therefore, create courts with competence to try them. Thus, though that interpretation may be possible, it was only viable at a moment when world polarization had disappeared (..)"* (Escarameia 2003: 34).

This rather unprecedented consensus among the five permanent members allowing for the approval of Resolution 827 was somehow a consensus on the role of international law in the restraints to States sovereign prerogatives. However, it evidenced selective justice as it was a consensus of "some" to be applied to "others".

A specific and rather obvious example of the tension between international criminal justice and sovereignty occurred when the Security Council was discussing Resolution 955 (1994) of 8 November 1994 on the creation of the International Criminal Court for Rwanda; Rwanda itself, a non-permanent member of the Council, voted against it.

Analyzing the role of the two ad hoc Criminal Courts above mentioned is not in the scope of this paper. However, two elements should be emphasized: (i) from a purely legal perspective, these courts contributed to the development of an international criminal *corpus juris* and (ii) they prepared the way for a non-selective and permanent (and independent) criminal justice by adopting the Rome Statute[20].

3. The Rome Statute: a permanent and independent jurisdiction

After 1946 several attempts were made to codify International Criminal Law[21]. In July 1994, the Committee submits its draft statute of the Court and in 1996 it presented a draft for the Criminal Code. The approach of 1994 project by the Committee for International Law was extremely conservative and basically defined a model of criminal justice fully integrated in the United Nations system and, in particular, dependent on the Security Council. This project proposed a mode inspired in the ad hoc versions for Yugoslavia and Rwanda in a rather paradoxical way - an ad hoc type of court but permanent.

Among its most striking features was its full subordination to the Security Council, the only body with trigger mechanism and the fact that there was no Prosecutor with power to independently investigate and submit cases to court *proprio moto*.

The history of the negotiation on the Court Statute during the Intergovernmental Conference in the summer of 1998 in Rome is in itself a very significant element for our analysis.

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[20] So as to analyze the contributions of these courts see Fausto Pocar (2010). *The International Criminal Tribunal for the Former Yugoslavia in Roberto Bellelli* (ed) International Criminal Justice. UK: Ashgate, p. 67 and E. Mose (2005) Main Achievements of the ICTR. Journal of International Criminal Justice. 3: 920.

[21] The General Assembly Special Committee for the Criminal Jurisdiction present a draft statute for an International Criminal Court in 1951. In 1953 the General Assembly tried to create two new Committees to create an International Criminal Court and a Special Committee to establish a definition of aggression through Resolution AG 697 (VII) of 5 December 1952. Following the adoption of resolution AG 3314, on 14 December 1974, on the definition of aggression, the Committee for International Law started writing an international criminal code and its jurisdiction.

It is important to understand the dynamics of negotiation processes in a enlarged multilateral environment. In June 2010, the author participated in the Portuguese delegation to the Intergovernmental Conference in Kampala, Uganda, convened to adopt, in particular, the amendments to the Rome Statute on the crime of aggression. This type of negotiations is a formidable diplomatic mechanism involving hundreds of people assigned with the negotiation of legal texts to be adopted by the largest number of States possible. During the two long weeks of negotiation in Kampala, final compromise on the texts of the amendments was reached on the 25th hour on the last day of the Conference, after its official date of conclusion. These negotiations are a series of lower or higher dramatic intensity, where alliances are formed and broken at an impressive speed, with a series of informal bilateral meetings, by geographical groups, spontaneous groupings of States with ephemeral or permanent common interests, with alternative texts, proposals and counter-proposals.

This element should not be neglected: the process of negotiating this type of texts is also exercising differentiated sovereignty. The ability to manage negotiations, aggregate interests and form alliances and influence the final content of the law is evidence of the power and of specific interests of States in specific solutions. In Kampala, as in Rome, this dynamic was made obvious: you can imagine the difference between the US delegation, which included dozens of delegates and promoted many bilateral meetings, a uniting element in the Informal Group of the five permanent members, author of written proposals adopted in the Final minute of the conference and the Portuguese delegations which included two representatives during the two weeks. And we must not forget that the USA are not even a State Party of the Statute.

Nevertheless, not even a State like the USA have enough capacity to influence the final meaning of a law produced in a multilateral environment. The history of the negotiations in Rome is a particularly significant example of this.

Philip Kirsch[22] recalls that in the beginning of the negotiations, on 15 June 1998, the draft written by PrepCom was presented with about 1400 items about which there was disagreement, which were incomplete and hundreds of alternative proposals. Although the Statute was not approved in a consensus, its adoption was almost a miracle even if we consider that

> *"The Statute is nor a perfect instrument; no internationally negotiated instrument can be. It includes uneasy technical solutions, awkward formulations and fully satisfied no one"* (Kirsch 1999: 2).

Negotiation agenda of the five permanent member at Rome was extremely heavy. Based on the direct testimony by David Scheffer[23], the USA's main goals were those of a court similar to the ad hoc courts and with an important role in the Security Council, having no independent power to investigate or submit cases, complementary and whose criminal list would be very limited. To sum up, a Statute that would take into consideration the fact that

[22] Legal consultant from the Canadian Foreign Ministry, presided to the "Joint Committee" during the Rome Conference.
[23] The Head of the American Delegation in Rome and Ambassador- at- Large for the Crimes of War.

> *"United States has special responsibilities and special exposure to controversy over our actions. This factor cannot be taken lightly when issues of international peace and security are at stake. We are called upon to act, sometimes at great risk, far more than any other nation. This is a reality in the international system"* (Scheffer 1999: 12).

Still according to Sheffer

> *"Throughout the Rome Conference our negotiators struggled to preserve appropriate sovereign decision making in connection with obligations to cooperate with the court"* (Scheffer 1999: 15).

The end result did not live to American expectations, the delegation complained of process's lack of transparency[24] and asked for formal voting of the final project and voted against it, thus breaking the desired consensus.

France, the only State that submitted its own Statute to the ICC (in August 1995), had a very restrictive perspective of a permanent Court without any type of independence and under the exclusive responsibility of the Security Council.

Alain Juppé's government proposed a system which required three levels of authorization for a case to be submitted to the Court (that of the State where the crime had occurred and those of the national States of both the victim and the aggressor) after a very difficult internal process of agreement among the different French Ministries. The compensation for France voting for the Resolution was the introduction of article 124, the possibility of opting-out for a seven-year period in terms of crimes of war committed by French nationals (France and Colombia were the only States that used the possibility allowed by article 124)[25].

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[24] According to Scheffer "The process launched in the final forty-eight hours of the Rome Conference minimized the chances that these proposals and amendments to the text that the U.S. delegation has submitted in good faith could be seriously considered by delegations. The treaty text was subject to a mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 A.M. on the final day of the Conference, July 17. Even portions of the statute that had been adopted by the Committee of the Whole were rewritten. This 'take it or leave it' text for a permanent institution of law was not subject to the rigorous review of the Drafting Committee or the Committee of the Whole and was rushed to adoption hours later on the evening of July 17 without debate" (Scheffer 1999:20). On another occasion, before a room of American army lawyers, Scheffer, when referring to the final outcome at Rome, declared the following on the limitations to American diplomatic power: "A negotiating room is not a conventional battlefield, but it is a theater of diplomatic conflict and cooperation.
Within the negotiating arena, as in the courtroom, overwhelming force is defined by logic (…) Our superpower status and the magnitude of our military forces mean very little in these settings. That is the hard reality today. We need to adjust and turn that reality to our own advantage with winning strategies and not self-righteous tactics that impress no one but ourselves" (Scheffer 2001: 9).

[25] "La position de la France a évolué au rythme d'un double arbitrage, difficile, entre le ministère de la Défense, le Quai d'Orsay et le ministère de la Justice d'une part (c'est à dire in fine de la décision du Premier ministre, ce que M. Lionel Jospin a fait pour les plus importants d'entre eux en avril 1998), et entre Matignon et l'Elysée d'autre part (son histoire et en grande partie secrète et reste à écrire, sauf à rappeler que les changements de premier ministre n'ont pas empêché que l'Elysée et le ministère de la

The United Kingdom changed its position and, after the election of Tony Blair, abandoned the P5 alliance and joined the like-minded countries group, which provided the main support to the ICC project.

Four areas laid down in the Rome Statute include the key elements in the tension between sovereignty and judicial supra-nationalism, thus exemplifying the main ideas in the 1998 discussion of this issue[26].

Firstly, the preliminary conditions to exercising the Court jurisdiction, laid down in article 12 of the Statute. Based of the criteria established for this precept, the court may exercise jurisdiction in cases the States (that are parties in the Statute or have declared they accepts its jurisdiction, pursuant to article 12, n.º 3) (i) where the crime takes place (pursuant to article 5) or (ii) of nationality of the defendant. This precept makes it possible for the Court to exercise its jurisdiction on individuals who are nationals from States not party to the Rome Statute. Considering that one of the criteria for assigning jurisdiction is the place the crime was committed, resorting to article 12, n.º 1a) of the statute allows, in fact, that the court exercises its jurisdiction on nationals from States outside the Statute. From a conservative approach, this precept is an unacceptable shift in relation to the basic principle that international obligations derive from the consent of States pursuant to the general principles of the Law on Treaties (questions have been raised that the precept is compatible with article 36 of the Vienna Convention on the 1969 Law on Treaties); its element of "universal jurisdiction" is also unacceptable as it allows that nationals from States that have not accepted to adopt the Treaty can be punished. From a progressive approach, the precept was not up to expectations because it requires consent (by the State where the crime was committed or of the aggressor's nationality), because of its nature as a treaty among states and the idea of complementarity (see below).

The second element concerns the powers of the Judge in article 15. Under n.º 1 of this precept, the Prosecutor "may, on his own initiative, open an inquiry based on information on crimes committed that are under the jurisdiction of the Court". Within the scope of his powers to investigate and in case he believes there is evidence supporting starting an inquiry, the Judge will ask permission to do so to the Investigating Judge. The Security Council can only intervene pursuant to article 16.

Articles 15 and 16 are the main innovations: for the first time at international level there a truly independent legal power (even if we consider all its restraints), independent from political interference and, in particular, from the interference of the Security Council. The control over the Prosecutor's power of investigation and inquiry is carried out by a judicial body, the investigating judge, a change in comparison with the previous model.

The third element is related with the power of the Prosecutor and concerns the role of the Security Council and its relation with the Court. Though the Security Council holds a privileged procedural position (under article 13, the submission by the Security Council to the Prosecutor of a situation does not require the consent of the implicated States), it is in huge contrast with the solution found for previous ad hoc courts and with the

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Défense soient globalement sur la même ligne). L'article 124 a été l'une des exigences du Ministère de la Défense et de l'Elysée» (Bourdon, 2000: 297).

[26] The content of the Statute would represent a compromise in relation to Westphalia legacy, according to José Manuel Pureza (2001). "Da Cultura da Impunidade à Judicialização Global: o Tribunal Penal Internacional". *Revista Crítica de Ciências sociais*. 60: 129.

1994 project of the Committee for International Law. In the 1994 project, the Prosecutor could only start a case after the Security Council had authorized; in the current article 16, the Security Council has only the power to suspend an already ongoing investigation. In the draft by the international law committee, as in previous ad hoc courts, exercising international criminal jurisdiction was completely conditioned to the powers of the Council and, as a result, to being vetoed by any of the five permanent members. This shift in balance is crucial: a permanent Member State that wishes to suspend an inquiry, either that it begins or that it develops, has to simultaneously ensure 9 of the 15 votes in the Council as well as the positive vote of the remaining permanent members.

Lastly, the fourth element concerns the commitment to complementarity/cooperation in the international criminal system as a whole. The idea of complementarity, laid down in the preamble and in article 1 of the Statute, is the formula that allows to reconcile judicial sovereignty and supranational or national justice. In the European Union there was heated debate on the affirmation of the principle of primacy and the affirmation of a judicial federal system, a debate where there was sometimes a conflict with constitutional courts from some Member-States. Similarly, in the international criminal system proposed by the Rome Statute, national criminal jurisdictions have primacy over the International Criminal Court jurisdiction. The latter cannot intervene unless as an alternative, in cases described in the Statute, which contradicts the idea of universal jurisdiction. Articles 17 to 19 include very detailed rules on this dynamic between national jurisdictions and the international jurisdiction. Articles 86 and following establish different specific cooperation obligations, thus tempering this primacy of national criminal jurisdiction. According to Marten Zwanenburg:

> *"The principle of complementarity constitutes a deference to national sovereignty, which is contrary to a development in international law away from broader notions of sovereignty"* (Zwanenburg 1999: 130).

The discussing taking place today in terms of applying the principle of complementarity in the cases of Kenya and Libya are of extreme importance from the point of view of applying complementarity.

Considering the initial compromise adopted in Rome, William Schabas states that:

> "*The adoption of the Rome statute on the international Criminal Court represents a singular defeat for American diplomacy. The world's only superpower found itself outmanoeuvred by a constellation of small and medium powers, including some of its closest friends and allies (…) Faced with an accelerated pace of ratification and entry into force, the United States took several aggressive measures directed against the Court"* (Schabas 2004: 720).

The degree of hostility, if not of active aggression, evidenced during the Bush administration against the court can only be understood if you consider the USA point

of view that an international criminal justice that is permanent and independent is a threat to strategic interests, a serious attack to national sovereignty. President Clinton signed the treaty on the last day possible, in a possible strategy to change the text as Member party, and this signature was immediately withdrawn by the new administration, in the famous episode of unsigning[27].

This escalating of hostility reaches its peak in 2002 with the adoption of the American Service-members' Protection Act (ASPA). Regardless of the gap between republicans and democrats, American legal and legal-political literature is divided on this matter[28].

In Portugal, as in several other States, the debate on the accession to the Rome Statute focused on the constitutionalization of the transference of sovereignty. The starting point for a constitutionalist is the sovereignist perspective: the national Constitution preserves the commanding capacity of a political community over its territory and a greater or lesser openness to the outside by the constitutional order is in itself a constitutional issue. Accession to the Rome Statute (as to other Treaties of European integration) is viewed as a surrender of sovereignty[29], which must first be included in the international Constitution, with its amendment if necessary. Vital Moreira[30] refers to the issue of accession to the Statute as an issue of judicial sovereignty: the capacity to investigate and try crimes committed in its territory is an essential feature of State sovereignty (in the Portuguese case, constitutional laws describe the courts as bodies of sovereignty). Therefore, specific laws in the Rome Statute represent derogation of the "Criminal or judicial Constitution". For a State like Portugal, judicial sovereignty, as any other type of sovereignty, has an adaptation strategy which includes flexibility in relation to its constitutional order. Article 7 of the Portuguese Constitution, amended in 1997, solves the conflict with a solution of openness, of a sovereignty able to accept limited schemes of supra-nationalism or of real legal federalism.

4. From Illegal War to the Crime of Aggression

On 12 June 2010, in Kampala, Uganda, the first amendments to the Rome Statute were adopted concerning criminalization of certain type of arms and the crime of aggression, in particular in terms of the conditions the International Criminal Court can exercise its jurisdiction.

This progress opens very interesting discussion for the theme studies here and will contribute to future discussions on International Criminal Law.

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[27] See the interesting paper by Edward Swaine (2003). *Unsigning*. Stanford Law Review. Vol 55: 2061, in which the author discusses the meaning of this practice in the Law on Treaties, its legality in view of the 1969 Vienna Convention and possible effects in negotiation and signing of international treaties.

[28] See for example Ruth Wedgwood (1999). "The International Criminal Court: an American View". *European Journal of International Law*. 10: 93, Casey, (2002) The Case against the International Criminal Court. Fordham International Law Journal. 25: 840, Monroe, Leigh (2001). *The United States and the Statute of Rome*. American Journal of International Law. 95: 124.

[29] The affirmation process of the principle of primacy by the Luxembourg Court was a latent conflict which lasted decades and included the constitutional courts and governments of Member-States. See Karen Alter (2001). *Establishing the Supremacy of European Law – The making of an International Rule of Law in Europe*. Oxford: University Press.

[30] Moreira, Vital (2004). "O Tribunal Penal Internacional e a Constituição" in Vital Moreira/ Leonor Assunção/ Pedro Caeiro/ Ana Luisa Riquito, *O Tribunal Penal Internacional e a Ordem Jurídica Portuguesa*. Coimbra: Coimbra Editora, p. 20.

Article 6 of the London Charter on the International Criminal Court, which preceded the Nuremberg Trials, established, among the crimes submitted to the Court jurisdiction,

> *"Crimes against peace: namely, planning, preparation, initiation or wagging of a war of aggression, or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".*

The International Court Charter for the Far East, of 19 January 1946, included a very similar provision.

Indictment and conviction for the crime of aggression "the supreme international crime" was one of the most revolutionary and controversial issues in the Nuremberg and Tokyo processes, there being a huge opposition between normativists and jus naturalists which remain until today.

The collective security system laid down in the United Nations Charter solemnly proclaimed the prohibition of the threat to use force, pursuant to article 39 of the Charter, assigned competence to the Security Council to determine, among others, the existence of an act of aggression, as well as the appropriate measures to restore collective peace and security.

During the period before the Rome Statute, there had been attempts at codifying International Criminal Law and they included the issue of the crime of aggression.

The fact that the General Assembly adopted Resolution 3314 on 14 December 1974 is one of the most important milestone in this process, in particular the inclusion in article 5 of the declaration that "a war of aggression is a crime against international peace". The International Court of Justice analyzed issues related to the illegality of aggression in Nicaragua[31] and referred some of the provisions in Resolution 3314. There was growing affirmation of the illegality of aggression, based on the system of the United Nations Charter, but still acts of aggression had not been clearly typified as an international crime. Though the prosecutions in Nuremberg and Tokyo were based on the assumption of an international crime of aggression having been committed (or a crime against peace as it was called at the time), the issue was not resolved until 1998.

The reasons leading to the crime of aggression not being definitely included in the Rome Statute are well-known and aimed only at making the compromise possible, a compromise that was difficult to achieve. Therefore, this discussion was postponed to a later date. Article 5, n.º 1 included the crime of aggression as submitted to the court jurisdiction but, under n.º 2 of the same precept, that jurisdiction could only be exercised with the adoption of amendments with the definition of the crime and the conditions for the exercise of jurisdiction by the Court.

Between 2002 and 2009, a Special Working Group for the Crime of Aggression, created by the first Assembly of States Party to the International Criminal Court and assigned to write a project of amendments, held several formal and informal meetings

[31] Decision of 27 June 1986 Nicaragua vs. the United States, in particular paragraphs 187 to 201.

to attain the objective mentioned in article 5, n.º 2[32]. The work carried out by this Group was the basis for the 2010 Diplomatic Conference.

The text adopted in Kampala suffers from the flaws commonly found in legal texts prepared, discussed and broken down in a multilateral scenario, as was mentioned when discussing the Rome Statute.

As a consequence of the clash of absolutely different interests and legal cultures, the texts resulting from the compromise are technically opaque and somewhat ambiguous, frequently allowing for different interpretations on what was agreed on.

The Kampala texts include amendments to article 8 (criminalizing the use of three new types of arms), a new article was added, article 8bis, which defines crime of aggression, and new articles 15 bis and 15 were added on exercising jurisdiction.

The 2010 amendments are based on a still rather complex system that separates (i) entering in full force of (ii) exercise of jurisdiction by the Court and the still (iii) possible differentiated activation of the jurisdiction when cases are resubmitted by the Security Council or submitted by States and following an investigation initiated by the Prosecutor.[33] There is limited possibility for opting out in some jurisdiction situations, subjected to final decision at the Assembly of States party after 1 January 2017.

The amendments will enter into force under article 121, n.º 5 of the Statute, i.e., they will enter in force individually for each State that ratifies them one year after being ratified. However, the fact that the amendments enter into force will have no effect on the Court's jurisdiction; two general and special additional steps must be taken. For the Court's jurisdiction to be activated, a minimum number of 30 ratifications must take place (preferably until the end of 2015) and a final decision must be taken by the Assembly of States Party (after 1 January 2017) allowing the Court to start exercising its jurisdiction (voted positively by 7/8 of the Assembly members). Besides these conditions, another set of special conditions have to be met, depending on the procedure involved. In case of resubmissions by the Security Council, the court may exercise its jurisdiction without conditions in case of any of the four crimes in the Rome list and no consent by the States involved is required. In case of submissions by States or investigations proprio motu by the Prosecutor, the following conditions must be met: all situations of aggression involving States not party are excluded from the court's jurisdiction. For situations in which the aggression involves States parties to the Rome Statute at least in one of the States (either the aggressor or the victim) the

[32] These results were influenced by the informality of several meetings held in academic environment and the process is known as the Princeton Process. Documentation on these meetings may be found in Stefan Barriga/Wolfgang Danspeckgruber/ Christian Wenaweser (eds.) (2009) The Princeton Process on the Crime of Aggression. Princeton: The Liechtenstein Institute on Self-Determination at Princeton University. On the technical negotiations in the Special Group, see Stefan Barriga (2010) Against the odds: The results of the Special Working Group on the Crime of Aggression" in Roberto Bellelli (ed.) International Criminal Justice. UK:Ashgate, p. 621 and Roger Clark (2009) Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise on Jurisdiction over it. European Journal of International Law.20:1103.

[33] A clear explanation of what was agreed on in Kampala and the different issues in terms of interpretation regarding entering in full force and the conditions for jurisdiction exercise may be found in Stefan Barriga (2012) Exercise of Jurisdiction and Entry into Force of the Amendments on the Crime of Aggression" in Gérard Dive/ Benjamin Goes/ Damien Vandermeersch (eds.) From Rome to Kampala: the first 2 Amendments to the Rome Statute. Brussels: Bruylant, p. 31 and also in Roger Clark (2010) Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference of the Court, Kampala, 31-May-11 June 2010. Goettingen Journal of International Law. 2: 689.

amendments must be in force and cannot have been opted out in terms of accepting jurisdiction on these cases (in the moments prior to the aggression). Besides these, there are specific obligations in the relationship between the Prosecutor and the Security Council and the powers of the latter as a jurisdiction filter as well as its being able to stop ongoing investigations under article 16 of the Statute.

Considering the description above is rather simplified and does not account for specific issues in interpretation regarding the application of regime 121, n.º 5 of the Statute and of the opting out system for some situations, this provides us with a very clear idea of the maze of interpretations this type of texts arouses. The road towards the full functioning of the Court as far as the crime of aggression is concerned will not be straightforward. In March 2013 only five State have ratified the Kampala amendments, which makes it seem difficult that the Court jurisdiction will be ensured after 2017 on the crime of aggression.

Besides the referred procedural aspects, some significant amendments introduced in 2010 are of major importance for the theme we are discussing.

The most important aspect of the Kampala compromise concerns the relations between the Security Council and the Court in terms of the latter's exercise of jurisdiction. In fact, this was a key issue in the negotiation process and in the gap between two opposing positions. This gap is easy to understand: on the one hand, the five permanent members of the Council advocating the prerogatives the United Nations Charter grants them in situations of aggression and, on the other hand, a set of different alliances among countries that only share the fact that they advocate independence of the Court before the Security Council, as well as a certain judicial autonomy in establishing the existence of a crime of aggression.

According to what is laid down in numbers 6 to 8 of the new article 15 bis[34]:

> *"6 - If concluded there are sufficient grounds to open an inquiry regarding a crime of aggression, the prosecutor should ensure first that the Security Council has verified the existence of the act of aggression by that State.*
>
> *The prosecutor should notify the United Nations Secretary-General of the case to be presented in court, as well as any other relevant information or documentation.*
>
> *7 - Upon verification by the Security Council of the existence of an act of aggression, the prosecutor may open an inquiry in relation to the crime of aggression.*
>
> *8 - Whenever the act of aggression is not confirmed within six months from the notification date, the prosecutor may open an inquiry in relation to an act of aggression as long as the inquiry office has authorized the opening of an inquiry in relation to an act of aggression pursuant to procedure laid down in article 15, and except if the Security Council decides otherwise, pursuant to article 16".*

[34] Translation from English originals into Portuguese by the Department of Legal Affairs from the Ministry in 2011.

The text above was only possible after huge negotiation effort and mostly represents the defeat of the position of the five permanent members. The latter defended that the Court should be activated based on a green light proposal: in those cases submitted by the States or by the prosecutor, the latter could only pursue the investigation after a request by the Security Council to do so[35]. The proposal that was approved is, thus, closer to a red light proposal: in case of inaction by the Security Council, the Prosecutor may pursue the investigation (authorized by the investigating judge) except if the Security Council decides otherwise (pursuant to article 16).

The implications are rather significant: in the so-called green light proposal the Court jurisdiction is completely subordinated to a prior decision by the Council. In the second proposal, closer to the final Kampala text, despite the important conditions imposed on the exercise of jurisdiction in terms of the crime of aggression, this is a concurring jurisdiction (even if partially so) with the Council prerogatives to determine the existence of a situation of aggression (independently of its classification as criminal conduct). Though the Prosecutor being able to pursue investigation is restricted (requires authorization by the investigating judge), this restriction in judicial and independent, and can also be stopped due to political reasons, considering the Security Council may suspend it for a 12 month period (renewable), nevertheless the impact in the Council's prerogatives is obvious.

Firstly, the inaction by the Security Council in determining the existence of aggression does not necessarily lead to an impasse. This inaction has a time limit, six months, after which the Prosecutor may use his independent powers, though under judicial control. If the Security Council wants to stop an investigation (this halt has also a time limit), it will have to have 9 votes in the Council and ensure that none of the permanent members opposes its veto.

The dynamics of the action or inaction of the Security Council in determining the existence of a situation of aggression will be necessarily affected by there being a judicial alternative in criminal terms which can be put in motion in case of inaction.

Though an assessment of aggression for political reasons exclusively is the Security Council's responsibility only, the Council's inaction leads to no consequences. The Council adopts no resolution and nothing can be done from then onwards. Today, the Council does not have the monopoly in determining aggression as the Prosecutor and the Court may determine the existence of a crime of aggression. The specific balances of vote and veto within the Security Council are now crucial to halt jurisdiction rather than to allow Court jurisdiction, which is assigned to it by the international treaty, the Rome Statute.

Another especially interesting situation is the one that will occur when the Security Council, required by the Prosecutor to determine by means of a resolution the nonexistence of a situation of aggression. The Prosecutor, when pursuing the investigation, or later the Court reach the opposite conclusion and declare that a crime of aggression was committed. Or the opposite situation occurs: under its prerogatives the Security Council determines the existence of a situation of aggression and the

[35] On the history and documentation of the negotiation and the different proposals submitted, see Stafan Barriga/Claus Kreβ (eds.) (2012). *Crime of Aggression Library: the Travaux Préparatoires of the Crime of Aggression*. Cambridge: University Press.

Prosecutor or the Court conclude the opposite, that no crime of aggression was committed. Perhaps these are more theoretical than practical possibilities but the two are consequences of the amendments introduced in the Statute. And in these cases it is not worth it to state that the Security Council has an essentially political exercise while the Court has a judicial exercise. Even though from a different perspective - political or judicial - the possibility that the same facts may be classified as aggression or not (situation or crime of aggression) is nonetheless disturbing[36].

The history of determining the existence of aggression by the Security Council may easily be summarized considering the small number of cases about which there was such a decision. In truth, the Security Council assessed only one situation of aggression in five cases: South Rhodesia, South Africa, Benin, Tunisia, Malvinas/Falkland Islands and Iraq/Kuwait. In the cases of South Rhodesia and South Africa, the Council adopted different resolutions throughout the years, considering the "acts of aggression" against neighbor States as situations of threat against international peace and stability. In the case of Benin, the mercenary attacks in 1977 were equally classifies as acts of armed aggression. In the case of Tunisia, the Council classified the Israeli attacks as acts of aggression and condemned them. In the case of the Malvinas/Falkland Islands, the Council expressed its concern with the Argentinian military attack in the archipelago though they did not classify it as an act of aggression. Lastly, the case of Kuwait being invaded by Iraq, undoubtedly the most evident situation of aggression in the past years, the different resolutions adopted never classified the military invasion of Kuwait or its annexing of territory as an act of aggression.

It is not bold to state that the Security Council's natural tendency is towards inaction: the Council naturally tends to not declare the existence of a situation of aggression.

This derives not so much from the balances related to votes and vetoes but mostly from the silent nature of the Council. Within the framework of the exercising of powers by the Council under article 39, silence may in itself be a decision: to not determine that in a specific situation there were acts of aggression may be a conscious option with very different motivations. The Council may even, through silence, aim to not resort to any of the possible measures under Chapter VII of the Charter, insisting on political and diplomatic solutions for events that indeed include acts typified as conducts of aggression. Regardless of the Council's motivations, at the moment the Kampala amendments are able to be executed, there will be an alternative to that inaction.

The theme in itself includes a "constitutional" issue for public international order which are linked to the exclusive or not exclusive powers of the Security Council pursuant to chapter VII of the Charter, as well as the exact scope of article 103.

Before dealing with this issue, it is important to review some comments on the Kampala amendments. Zhou Lulu[37] should be quoted here, firstly because international legal Chinese thought is not well known and secondly because Zhou Lulu participated in the Chinese delegation to the Kampala Conference.

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[36] Sean Murphy (2012). *The Crime of Aggression and the ICC*. George Washington University Law School, Legal Studies Research Paper 50: 39, has created fear that the existence and expansion of jurisdiction by the International Criminal Court may limit the Security Council's ability to manage situations of armed conflict.

[37] Zhou, Lulu[37] (2012). "Brief Analysis of a Few Controversial Issues in Contemporary International Criminal Law" in Morten Bergsmo/ Ling Yang (eds.) *State Sovereignty and International Criminal Law*. Beijing: Torkel Opshal Academic EPublisher, p. 21.

Zhou Lulu globally assesses the Kampala compromise on the conditions for exercise of jurisdiction as a disturbing factor for international peace and security by introducing negative impact to the current international legal and political system.

The ability awarded to the Court to assess situations of aggression in case there is inaction by the Council is not compatible with powers that article 39 the Charter awards the Council and the system of concurring competences between the two bodies affects the whole collective security system in force after 1945. The author also expresses great concern with the possibility of the two bodies (one of which, the Court, is independent from the United Nations system) being able to reach completely opposite conclusions as far as the existence of aggression in a real situation. In this situation, what type of obligations would arise for the States in article 103? The author refers implicitly that the precept would impose on States the disrespect for a Court sentence if that sentence would go against a prior decision by the Security Council. And the final result of different decisions by the Council and the Court would be that

> *"(…) not only will the international community be faced with the disorder brought on by the lack of clear right-or-wrong standards, the fragmentation of international law will be exacerbated which may stimulate states to go more on their own ways. In the long term, this will be harmful to preventing acts of aggression and maintaining international legal order"* (Zhou 2012: 35).

Guo Yang describes the possible conflict in terms of decisions, saying:

> *"(…) to authorize the Prosecutor to proceed with the case in disregard of the decisions of the Council will put the reputation and credibility of both institutions at risk if their decisions conflict each other. It will also put the States into a dilemma when faced with conflicting decisions because they are required to give priority to the obligations from the Council under Article 103 of the Charter, which could hinder their co-operation with the Court (…) The intervention of the Court under these circumstances might not be a contribution to peace and security"* (Guo 2012: 2012: 97).

Much of this debate presupposes that the powers of the Security Council under chapter VII of the Security Council (rather the mixed interpretations of articles 24, 25 and 39 of the Charter) are exclusive powers in the scope of international peace and security and, as a results, excludes all concurrent powers. The idea that the powers of the Council are exclusive is based on the perspective that determining aggression is, in its essence, a political decision and, therefore, one that only the Council as a political body is able to take. This is a narrative of excluding any attempt to judicially assess aggression, of excluding any technical-legal assessment of conducts. This is an aggressive narrative against the existence of judicial powers independent from the Council aimed at eliminating any alternatives to the Security Council in matters of international security.

There would be several ways to counter this concept of exclusive powers by the Council. Yet, you just have to consider that the uncompromising defense of this monopoly would in fact create a difference between Giant States and other States that Vattel referred to, a situation in itself incompatible in legal terms with the sovereign equality laid down in article 2 of the Charter. Ultimately, if the Court (or any ad hoc court) jurisdiction is made dependent of the veto dynamics would lead to absolute jurisdiction immunity in favor of five States for any international crime.

No reconciling is possible between judicial independence and political assessment, largely discretionary and cannot be contested, and an objective judicial assessment on the existence of certain conditions typified as criminal conduct in an already existing law. These assessments have different objectives: the Security Council assesses the existence of "situations" of aggression so as to determine threats to international peace and security while the Court assesses the practice of "crimes of aggression" so as to assign individual criminal liability and apply a possible sentence.

However, up to 1998[38], both were kept under Council control: the creation of ad hoc courts allowed for the Council claiming also the administration of international criminal justice, of crime and punishment, at least at an early stage. Two recent events, in 1998 and in 2010, have opened gaps in a punishing monopoly, which the 1945 order progressively took sovereignty from States to assign it to Super-Sovereigns at the Security Council. Article 15-bis, paragraph nº 4, makes it hard to support this exclusivity, as David Scheffer points out "However, in order for the pre-trial Division to authorize the investigation of a crime of aggression, it will need to determine (…) that a crime of aggression arises from an act of aggression.

The expansion of the Court jurisdiction to areas exclusive to the Security Council, as is the assessment of (criminal) legality of War, may, if conducted according to model judicial patterns from a technical point of view will slightly alter existing balances.

As Kreβ and von Holtzendorff state, if the Court

> *"(…) succeeds, it is not unreasonable to assume that world opinion will begin to slowly exert its soft power towards the expansion of the ICC's jurisdictional reach"* (Kreβ/ Holtzendorff 2010: 1179).

5. Conclusions

The existence of an international criminal justice that is permanent and independent is against the idea of state sovereignty in terms of judicial and punishing sovereignty.

However, it is not accurate to state that the relations between sovereignty and international criminal justice are simply of opposition, there is no need for choice between sovereignty and international criminal justice[39]. National sovereignties, usually subject to factors of erosion, have their own adapting and changing strategies, which

[38] That requirement challenges the view that the Security Council has the exclusive authority to determine an act of aggression" (Scheffer 2010: 16).

[39] See Robert Cryer's comment: "An excess of sovereignty and state power can lead to international crimes, as in the Holocaust, but so can a lack of sovereign powers, as in Somalia or Sierra Leone. Ironically, we act through state sovereignty in order to restrict actions justified in the name of sovereignty" (Cryer 2005: 1000).

can even be viewed as consented and not permanent cessions of items of power and independence. Noteworthy is to remember that the Security Council has already submitted real situations of aggression for the Court to assess.

In terms of criminal justice, it will not be the small and medium-sized countries that will have difficulties to adapt to the growing erosion of sovereignty through internal political consensus, more or less peaceful, but the big States, in particular the Super Sovereigns with a permanent position in the Security Council. Secondly, these difficulties will also arise from other Big Sovereigns, which do not have such a militarized sovereignty or the prerogatives granted to the differentiated legal status derived from being a permanent member.

After 1945, the consensus among the Super Sovereigns allowed for the inclusion of criminal judicial mechanisms in international legal order as the Nuremberg and Tokyo trials. This model of selective international criminal justice has essentially a punishing function rather than a preventative function regarding international crimes and thus contribute to international peace and security.

The survival of the Nuremberg model in the experiences in former Yugoslavia and in Rwanda is still an interesting proposal for the Super Sovereigns, which decide when, to whom and how punishment is used. Only in 1998 and now in 2010 does this model of selective justice is no longer under the control of its creators, really opening new possibilities, even if limited, and alternatives to an established power scheme embodied in the composition of the Security Council. The malaise and even hostility shown by the five permanent members of the International Criminal Court evidence that international criminal justice is a possible judicial counter-power and is viewed as an undesired conditioning to sovereignty. This malaise may be seen as the result of a subtle shift from a model of international justice that is still, in its core, a sub-product of the interstate Westphalian-style model to one, perhaps more sophisticated, cosmopolitan and universalist one. This malaise is also a consequence of the difficulties in communication between diplomats and lawyers: at its core, the diplomatic method is based on secrecy, cession, composition of interests even if achieved *contra legem* or *praeter legem*, while a lawyer cannot work outside the framework of pre-established and publicized rules. And yet, international peace and security clearly require parallel intervention from Diplomacy and the Law and their tools. The international lawyer cannot be restricted to mere writer of formulas agreed on by the diplomats, similarly, International Law is not only the Law on Treaties.

The judicial alternative has only formally been created: the International Criminal Court can only be affirmed through its technical credibility and through consolidating jurisprudence by means of its model application. The fact that international criminal law is still rudimentary should be progressively changed so as to be closer to interpretation and application of criminal rules used by the criminalist in internal legal orders, defining a set of patterns in the administration of criminal justice, based on clear precepts of universal "consciousness and morals".

The judges deserve a vote of confidence. We must remember that without the judges in Luxemburg, often accused of judicial activism, European integration would not exist; similarly, without the judges in Strasbourg a European legal order of human rights would not exist. And can anyone realistically imagine a world legal order without the International Court of Justice? All these courts have contributed to creating a legal

framework in an environment of open conflict with those States concerned with preserving the most of judicial and even constitutional sovereignty. You just have to remember the tension between the European constitutional courts and the Luxemburg court or the difficult relation between the big States, namely France and the United States, and the compulsory jurisdiction of the International Court of Justice.

The events in the next few years will be critical to assess the credibility of this judicial alternative for world peace and security and for the fight against impunity: the implementation of the Kampala amendments, the dynamics in the discussions on complementarity and maturity process of a set of rules in International Criminal Law will be crucial tests to that very same credibility. Despite everything, we must bear in mind that in March 2013 the Rome Statute includes 122 States party and, therefore, the objective of universality is not naive or lyrical but a perfectly realistic goal.

The International Criminal Court must be given time. That is why this is the time to observe but not yet the time to explain.

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MAJOR VIOLENCE (CRIMES) AGAINST THE INTERNATIONALCOMMUNITY

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Abstract

The foundation of ICC in 1998 and the fact that its Statute entered into force in 2002 allowed the international community to provide a permanent legal mechanism to dissuade and repress extreme violent and cruel acts. However, the change in international scenario after the USSR fell apart, which led to the increase in political violence - preventative war/pre-emptive war - and the affirmation of exceptional policies, has had a considerable impact in the negotiation of the Statute and later in the definition of the crime of aggression, approved in the Kampala Conference. The great powers structured their negotiation strategies in terms of their long term interests, which are made evident in the approved texts, namely in the possibility of human rights securitization and the preference for selective multilateralism that the Statute and the Kampala declaration were not able to prevent, thus raising questions as to the basis for the Court and its future. The text advocates that this arrogance should not be understood as a manifestation of US vitality, which can question the legitimacy of the ICC. In fact, this hostility is a strategy for political survival aimed at maintaining the freedom of strategic action in a strategic scenario increasingly dynamic and demanding.

Keywords:

International Criminal Court; International Law; Theory of Hegemonic Stability; Revolution in Military Affairs

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MAJOR VIOLENCE (CRIMES) AGAINST THE INTERNATIONALCOMMUNITY

Francisca Saraiva

Introduction

International life presents increasingly complex phenomena, such as the atrocities against innocent civilians and the systematic violations of war laws and customs by regular armed forces and resistance forces.

For many, international criminal justice is the main tool in the fight against impunity and iniquity of these behaviors, considering that it is in court that the victims are compensated for the acts of violence and arbitrariness by means of fair and unbiased trial of events and through dissuading future illegal actions.

This is the justice that after the 1990s has been building a complex national, regional and global regime that has led before international courts individuals who are suspect of committing serious crimes against society as a whole and are therefore considered crimes under International Law.

The entry into force of the Rome Statute in 2002 has provided the international community with a permanent criminal justice able to prevent and repress war and to punish those responsible for it. However, the particularly negative circumstances surrounding the negotiation and entry in force of the Statute have led to the court's low level of autonomy which, according to many, has resulted in growing inadequacy of the Court's objectives to the concepts for its creation.

In particular, the balance established in the Court's Statute and the amendment approved in the Kampala Conference provide no guarantees considering there is the need to protect the Court from the interventionist policies of the great powers. On the one hand, the increasing empirical evidences of the growing number of internal conflicts, visible since 2005 and which has not yet reached its turning point, and, on the other hand, the policy for selective involvement in multilateral mechanisms, which is part of American involvement in these conflicts, have raised turmoil in the international systems whose scope is yet to be fully understood.

The practical solutions found for these problems have not been satisfactory and it does not seem they will be so in the short run. These solutions, defended primarily by the small powers, evidence mobilization deficits because of the inability to attract great powers and even medium-sized powers, which tend to be autonomous in the issues they present to the Court and focus on the like-minded agenda.

In fact, the United States opposition to the Court's jurisdiction (which has caused some embarrassing diplomatic situations) shows, in our opinion, that the chosen policy is

counterproductive because it endangers the long term interests of the United States and of other technologically developed powers. In this sense, the analysis of events indicates that this is mostly a survival strategy by Washington before an international system in rapid change which it does not fully control anymore. It is true that many other States have also resisted the International Criminal Court. These are mostly great powers, such as China, India, Pakistan, Indonesia, Malaysia, Turkey (which did not sign it; noteworthy is that the first three are nuclear powers) and the Russian Federation (which signed but did not ratify it), just to mention the most obvious. Some small and medium-sized powers - especially but not only from Africa - have also opposed to it with more or less vigor, motivation and success: from Libya to Saudi Arabia, from Cuba to El Salvador, from Mauritania to Sudan[1]. It is, however, our contention that the USA are the country which has resisted more successfully (considering American power), more consistently (because better explained by authors such as Henry Kissinger and virtually all Secretaries of State for Defense, both Democratic and Republican) and more clearly, in the sense that they themselves have publicized it widely. It is important, therefore, that we focus some of our attention to the American administration, though we reserve the right to further conduct more fully, less "*ad hominem*" and reductionist analyses.

1. The social contract and political violence

Violence exists since the beginning of times but it has changed as humankind has built new societies. In this sense, violence is a political and social construction in all organized societies.

Generally, governments claim the responsibility to protect the citizens living in their jurisdiction. The State as a conflict mediator is, in fact, the main guarantee for social stability and internal peace. In times of war, the State claims the monopoly for the legitimate use of physical violence to maintain the political space of the community and ensure that the most essential asset, human life, is not placed at risk by external and internal threats to the community[2].

The mechanisms of international criminal law are a result of the fact that the social contract between those governing and those governed has failed and fundamental human rights need to be defended before violence and impunity.

Hannah Arendt clearly explained the relationship between power and violence, which some consider umbilical. Arendt's innovative conclusion was that the wielding of political power corresponds to the acknowledgment of State authority and not the affirmation of power through violence. After years of study, Arendt demonstrated that the wielding of power is neither linked with violence nor does it need violence to be enforced (Arendt, 1969a). This position contradicts the well-known thesis by Carl Schmidt on conflict as an element of power (of which war is an extreme manifestation) (Schmidt, 1932). Arendt nevertheless recognizes, like Schmidt, that power is the

[1] http://www.iccnow.org/, retrieved on March 3, 2013.

[2] Jean Bodin (1530-1596) contributed to the concept of State as sovereign power with internal and external sovereignty. Later, Thomas Hobbes (1588-1679) and John Locke (1712-1778), theorized the social contract and its relation with sovereignty, namely the usefulness of the social contract for preventing social chaos in politically organized societies.

essence of government. If we consider power from this perspective, authority should keep order by using violence as a power establishing strategy as little as possible.

This does not mean that power does not require violence from time to time as a tool of political action. Yet, according to Arendt, when power is fully wielded, violence is not necessary. For Arendt, the use of power symbolizes, above all, the failure of power rather than its essence (Arendt, 1969b).

For a significant number of governments, the conflicting character of politics prevails over the idea that power must become authority to legitimize politics. This is why the United Nations' founding fathers realized that the world needed a new social contract based on the principle of the illegality of violence as a mechanism for conflict resolution, except in the case of self defense or under the global collective safety mechanism. In this sense, the rules in the United Nations Charter intentionally dissociate the concept of power from the idea of violence, reiterating the perspective that violence is a tool that, though available, is not the essence of power.

Theoretically, the institutionalization of collective security fulfills the urban dream of replacing the alliances and the balance of power by indivisible peace attained through national power being submitted to collective interest.

Collective security works mainly as a tool to reduce abuse of power and prevent future eruptions of organized international violence at the service of a permanent objective - to ensure stability and the predictability of the international system (Saraiva, 2001).

Thus, the enlarged mandate of the United Nations Charter - reflected in the triptych security/human rights/development - is, in fact, a formula that emphasizes security, which is in focus in the founding document, practically separated from the other two components.

States have always been the main subjects of International Law. Little by little, though, the notion that rulers who plan and order barbaric and brutal acts that harm the common good of humanity should answer before the international community as a whole.

The idea that rulers have responsibilities they should answer for arose after WWI, due to the atrocities committed by the armies during the conflict. This new era of Criminal Law establishes, besides common crime, more atrocious and heinous crime, characterized by violence, cruelty and barbarity. Hence, the concept of international crime as

> *"an act universally seen as criminal, a serious issue that raises international concern and that, for some reason, cannot be considered of the exclusive jurisdiction of a State which, under normal circumstances, would have control over it"* (Military Tribunal V 1947-1948, *Hostage* case).

At the core of international governances is now a type of crimes against international order committed by specific individuals, and these individuals may be assigned criminal accountability for their actions.

From the point of view of international security, the contributions of the Nuremberg International Military Tribunal and of the Tokyo International Military Tribunal are indisputable for establishing the limits to rulers' freedom. These trials are a first draft of an urban justice that represses the most serious international crimes of individual criminal accountability committed by political and military leaders, in this case German and Japanese leaders. They were, however, *ad hoc* courts which disappeared once the specific cases they had been created had been tried.

Yet, in the period after WWII and in the next decades of the Cold War, the significant increase in international crimes led the international community to set as an objective the creation of an international court permanently provided with sufficient power to enforce International Law on individuals accused of committing serious violations to Humanitarian International Law.

At the end of the 20th century the conditions existed for this project to be put in practice.

In the 1990s, the USSR started to break up and globalization was spreading fast, leading to new forms of violence and terror and conflict "civilnization". The core feature of armed conflicts at the end of the 20th century is the narrowing of the gap between fighters and non fighters. The result is increased pressure on those who are not linked to the conflict, the civilians - direct victims of the hostilities or killed by hunger or disease as a consequence of armed conflicts[3]. Technology has also made a great impact in the new conflict morphology and in the global effects it has in the international system. Finally, a third element, the narrative on the insecurity of the international system - the "war on terrorism", presented as a response to the new terrorist threat, is perhaps the most significant narrative created by the American foreign policy in the post bipolar era - is now so pervasive in the political debate that it has considerably influenced the creation of a permanent international criminal court able to effectively repress those responsible for more serious international crimes.

These signs of change in the international system, which are part of a long term trend, suggest that the sovereignist paradigm is used up and that a model is gradually becoming more used in which sovereignty limited by accountability where human fundamental rights are violated.

One of the achievements of the Statute of the International Criminal Court (ICC), completed in 1998, was exactly the fact that the crime of aggression (*jus ad bellum*) - as well as genocide, crimes against humanity, crimes of war (*jus in bello*) - was included in its jurisdiction, unlike what occurred in the International Criminal Court for the former Yugoslavia and in the International Criminal Court for Rwanda. In this sense, the Court is an international institution whose mission is to dissuade and repress extreme atrocity and cruelty and discourage the use of war as a mechanism for social change and political control over populations and resources.

The truth is that the new Court has a mandate to prevent and repress war and punished those responsible for war but it cannot forget that there are other institutions able to limit the external sovereignty of States. This is, thus, an institution that is not alone. There is practical need to coordinate the ICC and the UNSC, as the latter is

[3] On the development of this problem, see (2009) H*uman Security Report 2009/2010*. Oxford: Oxford University Press.

responsible for monitoring the full respect for the law preventing the strategic use of armed coercion outside the (restricted) framework of self-defense.

2. Collective security and individual criminal responsibility for international crimes

In this section, we aim to analyze the decision made by the great powers at the end of WWII of providing the international system with a collective security mechanism.

As stated previously, the development of a collective global security model adopted by the United Nations in 1945 aims to ensure order, stability and continuity in a post-war world. The institutionalized model is largely driven by the powers assigned to the UNSC, which has the material resources and the political will to maintain a global system that can work in favor of all States in the international system.

In theory

> *"the sine qua non condition for collective security is collective self-regulation: a group of States tries to reduce the threats to security by agreeing to collectively punish any State that goes against the rules of the system"* (Downs and Ida, 1994).

In this sense, it is different from collective defense in three aspects.

Firstly, the problems related with internal security of political space are more important than the external challenges to this group of countries. Secondly, the coalition of States within the space collectively has more power than their possible opponents. Finally, the system participants are united by a common objective: to react against any use of armed forces considered illegal under International Law (Downs and Ida, idem).

The institutionalized mechanism is essentially reactive, based on surveillance of States that are not UNSC members, solely when these disrupt the system and go against the most fundamental collective interests, namely, the safeguarding of international *status quo*.

However, the originally crucial principle of non-intervention in the internal affairs of States has, today, new parameters of analysis the UNSC must necessarily account for.

We do not aim to preview new UNSC trends, nor would it be advisable to do so; the most important is to emphasize that these parameters have decisive implications for the future of this institution.

One of the most important issues in the discussion regarding the limits to the use of armed forces is the possibility of armed humanitarian intervention in case of humanitarian disaster (under the doctrine of responsibility to protect, or R2P). Other possibilities are not completely legal, such as the forced (re)implementation of democratic regimes or the preventative use of force if possession or development of massive destruction weapons is suspected (Saraiva, 2009: 97).

In 1945, it seemed viable to build a system of global collective security based on legal convergence and spreading of consensus at international level. This was possible

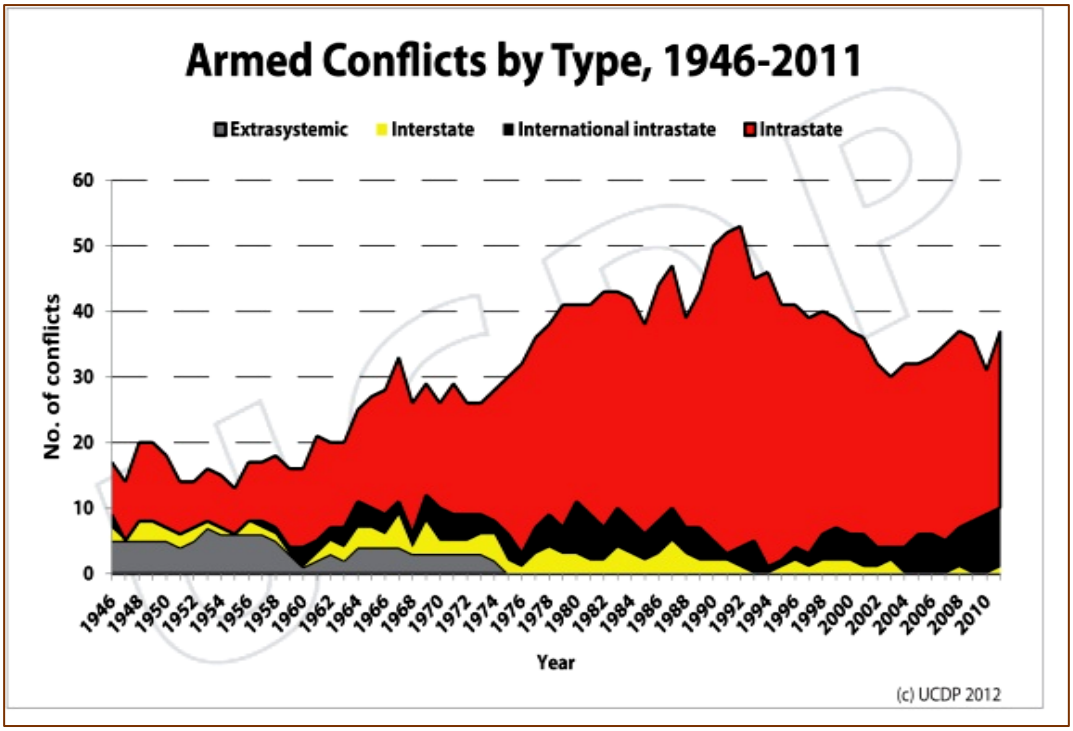
because there was a coalition of States strong enough to impose their will on other system members. During the Cold War, the balance of power United States/USSR prevented any public understanding from occurring which would allow the UNSC to act against perpetrator States. Yet, in this case, there was little interest in acting and no lack of capacity for acting.

The crucial issue in post-bipolar geopolitics is completely different: the historic tension between law and power has increased after the falling apart of the USSR because the United States, the country that maintains order in international system since it won WWII, aims to keep its dominant position by resorting to military power to continue deciding the rules of the game and eventually stop the rise of a new hegemonic power.

One of the main guarantees of this strategy is the United States' huge military and technological power which leads to a "revolution in military affairs", a process linked to new technologies in terms of long range shooting precision and permanent information on present forces and possible targets. "Clean war" allows for a strategy of protection against potential threats based on the perception that hegemony (American or otherwise) is a transient situation in the international system. Hence, it is not only important to face those that challenge American power but a need to delay in time the loss of hegemonic status, which is deemed inevitable (Saraiva, 2009: 113).

In fact, the end of the Cold War was important in the change in the international agenda. The change was twofold: in terms of the themes included in the agenda and mostly the importance awarded to international issues.

Chart 1 - Armed Conflicts by Type (1946-2011)



Source: Uppsala Data Program,
http://www.pcr.uu.se/digitalAssets/122/122554_conflict_type_2011jpg.jpg

The dynamic triggered by the implosion of the USSR immediately influenced the occurrence of non international armed conflicts, which started to steadily decrease after 1989. No consequence was visible in conflicts among States, they are almost non-existent statistically, as visible in the chart below on armed conflicts from 1946 to 2011.

In terms of the relevance given to problems in the decade after the fragmenting of the USSR and which coincided with the negotiation of the Rome Statute, a deep change occurred in the international perspective of assassinations, genocides, looting and crimes of war in former Yugoslavia, in Rwanda, in the Democratic Republic of Congo and many other forgotten places in the world.

Nevertheless, we cannot state that current strategic balance is the result of a new speech on the importance of human rights. What the strategic scenario has evidenced is that the international agenda has become more complex as a result of an important strategic revaluing of political violence and that rules forbidding the use of armed forces have become more fluid. As we suggested earlier and is visible in the chart, from 2005 onwards, we can see an increase in armed conflictwhich, as a global trend, has not shown real signs of decrease.

Simultaneously, a trend is obvious for a more systematic violation of laws and war rules - both in the institutionalized powers and in non State actors - thus keeping in pace with the rules of *jus ad bellum*.

In terms of the other superpower, the omnipresence of the United States in the main armed conflicts is to be taken into account, considering that, as we have mentioned, the laws against war as *jus in bello* are looser (in terms of weapons and war strategies). This is partly a consequence of a deliberate strategy by more advanced military powers to take advantage of a plethora of innovative weapons and military equipment produced by western powers' military industries. We reiterate it is partly a consequence though it may (and should) be seen from a wider perspective; this paper focuses on the case of the US but a more thorough and complete explanation may be found through complementary analyses of other superpowers, as well as of groups of small and medium-sized superpowers, such as the African powers and their alternative types of "resistance". Thus, with this paper we aim to take a step (just one step) in that direction.

Another important aspect of the strategic scenario, sometimes overlooked, is the access to new technologies by some armed groups in the opposition, which has transformed them in global and informational movements, whose behavior is similar to that of technologically advanced States. The matter is extremely important because what is at stake here is a real strategic balance in terms of relation between groups in the opposition and the existing authorities, though there is a huge imbalance in terms of capacity (Saraiva, 2009: 156).

All these changes in strategic scenario have had consequences in the negotiation of the ICC Statute. The different opinions of great and small powers on these and other matters has led to long debates and negotiations which have almost always resulted in political concessions to the interests of the great powers.

There was only one case in which there was shared interest in making the ICC jurisdiction more flexible - that of the case of crimes of war. The military powers wanted to preserve the Network Centric Warfare, based on information control, on air-space superiority, the use of unmanned air vehicles (UAVs) and on cyberspace operations, but they were aware that the new paradigm of conflict completely chanced the traditional concepts of war and combat. Non democratic regimes, on the other hand, concerned with the need to neutralize armed opposing movement, also considered it advantageous to support the establishing of a transitional period for the crimes of war (Escamareia, 2003: 18).

The discussion around the Court's jurisdiction on the crime of genocide and crimes against humanity was more heated but the political divisions evidenced, though important, did not reach a critical point. The crime of aggression was rather unanimously considered as the most controversial political issue. In fact, in Rome it was almost excluded from the Court's jurisdiction.

3. Violence, cruelty and power

Violence and cruelty are universal and timeless and are at the core of the challenges politics faces today.

International crimes and their typification correspond to systematic violations of human rights in armed conflicts and practices in arbitrary regimes by means of atrocities and acts of violence and cruelty over victims. This trivialization of violence is frequently linked to a need by perpetrators to assert their power projects, either political or economical.

There is no clear definition of atrocity. There are also no clear definitions of cruelty, violence and power, though there are proposals as to their differences.

In terms of the concept of cruelty, several authors propose that cruelty is at a different level than violence and power because it involves the complete denial of the other's existence (Rundell, 2012).

In Rundell's opinion, here viewed essentially in a physical sense, it is an instrument of power. More precisely, it corresponds to a relation established between individuals, as power acknowledges the other's existence, though cruelty is often a main feature of the opposition between the one that coerces and the one that is coerced inside and outside the battlefield.

We may, thus, conclude that torture, violation and extermination of another we deny the existence of is more difficult when there is a power relation, which limits useless cruelty though the relation is still under a zero-sum logic (Rundell, idem).

The more serious crimes against society as a whole are an attempt to limit the manifestations of cruelty and violence in politically organized societies where law and power are basically antithetical realities.

The crimes against the civilian population, genocide and crimes against humanity, are the visible side of a barbarian and cruel State that persecutes and kills common citizens as a political strategy to maintain power, in the context of armed conflicts or within their policies of repression. They are also expressions of violence used by irregular

armed groups over defenseless populations. Generalized violence against civilians is now part of many people's daily life, which allows for perverse coordination between this violence and external and transnational conflict, thus creating a complex mix of tension that destroys societies.

The crimes of war are another aspect of violence and cruelty. As violations of law and war rules include acts committed during military conflicts that are condemned and forbidden both by international rules and by the Hague legislation, by the Geneva legislation and, ore recently, by the New York legislation. These crimes are framed by rules on the use of armed force in terms of allowed weapons and methods of combat once the decision has been made to use armed force by States or resistance groups.

Finally, noteworthy is import progress being carried out in institutionalizing the crime of aggression in regards to accountability of individuals involved in the decision to use force to attain political objectives in the outside.

The agreement on this matter achieved in Nuremberg, then denominated "crime against peace", has not only made it clear that peace, security and justice are deeply interdependent but that their concepts are not consensual. Though fifty years have passed, the political and strategic tensions connected with crime have not been resolved despite the efforts of the delegations in Rome and Kampala, as will be made evident in this paper.

The crime of genocide

This is a nameless crime and an international crime under international custom.

This is the crime, along with the crime of aggression, which has more political depth of all those listed in the ICC Statute

Genocide has happened in all eras and is closely linked with intolerance towards human diversity (Nersessian, 2007: 243). Genocide is the premeditated plan to exterminate or weaken national, religious, racial or ethnic groups. The plan aims to destroy political and social institutions such as culture, language, national feelings, religion and national groups' own economic survival.

Thus,

> *"Genocide is a systematic criminal state and it develops in two stages: the first consists in destroying the national model of the oppressed group, and the second in imposing the oppressor's national model on the remaining oppressed population."* (Nersessian, idem: 246).

The origin of the word can be found in a treaty on National Socialism and its policy of occupation written in 1944 by a Jew, Raphael Lemkin, who was a Polish Law professor. In the Nuremberg trials, no defendant was convicted of the crime of genocide *per se* because, at that time, genocide was included in the crimes against humanity (Nersessian, idem: 243).

In fact, at the end of WWII, the legal lexicon did not include a category expressing the act of mass extermination of the Jewish people. Some years later, a convention in 1948[4] defined and made autonomous a new type of international crime, "genocide", which meant crimes against humanity, against the dignity of humanity.

This crime's barbarity and cruelty is so against the principle of humanity that it is politically impossible for Western democratic governments to ignore it, there being no possibility of not moving forward once the crime has admittedly been committed.

In this sense, the typification of this crime in ICC Statute, which merely transcribes its definition from the one adopted in the **Convention** for the **Prevention** and Repression of the **Crime** of **Genocide** (mentioned above) reassured most States involved in the creation of the ICC because the crime was still limited the intentional (physical and biological) destruction of a national, religious, racial or ethnic group (Cardoso, 2012: 48). The adopted concept excludes, for instance, persecution or intentional destruction of political groups, allowing governments to not be held accountable for these crimes which, though considered serious, are not viewed as endangering common well-being.

Our comments aim to underline that legal concepts become merely instrumental in manipulating reality when used in political speech. This reference seeks to remember that reality is interpreted according to political interests, at each given moment being able to opt for a course of action in the name of the common good.

In the case of the crime of genocide, its denial almost always indicates political lack of interest in punishing this type of crime. On the other hand, international accusation of genocide does not necessarily mean there is political will to repress and punish these actions.

This is made evident through one example, of the many available: the United States eagerly condemned the events in Darfur as genocide, at a time when the report of the International Commission of Inquiry on the situation in Darfur[i5], created at the request of UNSC and presided by Antonio Cassese, had been unable to obtain conclusive evidence of the intent to eradicate groups completely or partly, therefore concluding there was no genocide policy in Darfur but military actions to counteract rebel action by a political group (Hamilton, 2011). Having the means at their disposal, it would have been easy for the United States to support the Commission's recommendation, which referred the need to reference the case to the ICC, thus allowing for the trial of those responsible for the atrocities committed in Darfur. Instead of supporting the proposal, the United States suggested the creation of a hybrid African court.

The crisis in Darfur evidences the existence of a moral duality in American political thought (as in the case of similar interventions by great powers), simultaneously specific and universal, and that this duality raises political difficulties when decisions need to be made.

In the beginning of September 2004, after the investigation promoted by the American administration on the crimes committed in Darfur, the State secretary Colin Powell described the crimes in Darfur as genocide and President George W. Bush used the

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[4] *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations General Assembly, 10 December 1984.*

[5] International Commission for Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, UN Doc, S/2005/60, Jan, 25, 2005.

same term in a speech in the United Nations some weeks later (Hamilton, 2011). In the crisis in Darfur, American foreign policy broke with tradition and spoke about this type of atrocity. Yet, direct reference to the ongoing dehumanizing process in Sudan did not lead to decisive action towards the serious events.

Thus, American discourse practice does not confirm that the country assumes responsibility in international repression of the crime of genocide. Rather the opposite. UNSC resolution which reported the situation to the ICC was approved only because it was known that a majority of 9 countries (the like-minded group) would vote for the text and place the United States in a spot: only American veto would stop the resolution from being approved.

The American administration opted for abstention and thus allowed resolution 1593 to be approved which reported the case to the ICC (Mackeod, 2010). This decision, which apparently evidenced a commitment with international criminal justice, does not in fact impose human rights international protection on the country because the American administration demanded in exchange for allowing the resolution to pass, namely jurisdiction immunity before the ICC for American citizens involved in military operations in that region.

As this episode involves the United States, a great power with a very specific discourse, it evidences the contradictory and ambivalent discourse which attempts to reconcile the promotion of human rights (focusing on the principle of human dignity at the core) and the reaffirmation of its status as exceptional nation which, in this case, makes it possible to be exempt from abiding to the rules provided by the international regime of protection of human rights.

We conclude, in this case, that, from the point of view of the United States' strategy, international legal tools are closely linked with a national strategy to promote democratic regimes, within the framework of a wider and more integrated security which includes, among others, defining spheres of interest, maintaining hegemony and the country's energy security. We believe the interventions of other great powers have a very similar dual pattern.

Crimes against humanity

We have been witnessing government-sponsored violence since the end of WWII.

Governments that intentionally kill civilians use lethal policies such as genocide and politicide.

As you have seen, genocide includes a policy of organized killing in which the victims are chosen because they belong to a specific group.

Policides, on the other hand, have a completely different pattern, victims are essentially defined in terms of their hierarchical position or their opposition to the regime or to the ruling group. Politically, this concept reflects the need to gather in one single type a set of practices in authoritarian regimes to which there is no corresponding legal category in International Criminal Law (Krain, 2005: 364).

In both crimes the aggressor's intention is to destroy the target group, either partially or completely (Krain, idem). Thus, what truly distinguishes the two crimes is not intent but target groups.

Mass murder is typically a crime committed by States but it can be applied to other perpetrators who control the region where the massacre takes place and operate as if they were a State and they are the authority in the region (Krain, idem).

For International Criminal Law, persecuting political groups is a crime against humanity in the framework of a generalized or systematic attack against any civilian population, and this attack[6]is known in the framework of armed conflicts or outside that framework.

However, as Cassese mentions, there is still no agreement on what practices to include in this type of crime. The Nuremberg Trials, when faced with this difficulty, decided to consider part of this category the "inhuman actions" carried out by the Germans. Despite the differences on the scope of the concept, the International Criminal Court for former Yugoslavia, the International Criminal Court for Rwanda and the ICC generically agreed on this concept which defines the crime based on the inhumanity of the actions under analysis.

In Cassese's opinion, this is a set of hateful offenses that constitute a serious attack on human dignity or a serious humiliation or the degradation of dignity (Mackeod, 2010: 283). ICC Statute considers part of this group the crimes of sexual violence and the crime of apartheid, for example.

The inclusion and definition of the crimes of sexual violence in the ICC Statute was one of the most significant victories of Portuguese diplomacy and in particular a result of Paula Escarameia's[7]commitment, who largely contributed to in-depth studying of these issues during the negotiations of the Statute and of the Crime Elements.

The impact of the crimes of sexual violence in armed conflicts has continuously increased. Governments' security forces, military forces, military companies hired by western governments and armed groups in the opposition, all resort to psychological war so as to humiliate the enemy and destroy their and the population's morale, as was made manifest in Afghanistan and Iraq (Zawati, 2007). Considering that sexual offenses always have devastating consequences for the communities and that those responsible for these actions hope the social stigma stops the victims from openly speaking about the crime, thus drastically reducing their chances of being punished.

Systematic sexual violence is, therefore, a means to weaken society because their consequences do not only affect the individuals involved.

Sexual violence has affected men, women and children. The rape of men in times of war is essentially a manifestation of power and aggression rather than a means to satisfy the perpetrators' sexual desires. The winner violates these men as a way to guarantee they will never fight or lead others again. Men submitted to these abuse become outcasts.

6 ICC Statute, article 7.
7 As Legal Advisor at the Mission of Portugal to the United Nations.

In contemporary societies, the social contract has been unable to oppose this and other acts of violence over civilians. The practical responses for this difficulty have not been satisfactory.

One of the most discussed solutions is the use of armed force in a scenario of humanitarian emergency where the physical integrity and survival of the civilian population are at risk because of human action. However, implementing a more flexible model of sovereignty does not seem to be viable, at least for now because a large part of the international community opposes to this change.

Other solutions are, thus, needed. Yet, as seen previously, the technical and legal difficulties and the political reservations regarding the typification of some behaviors as crimes against humanity make it more difficult the implementation of international criminal justice based solely on a permanent universal jurisdictional institution. It is, therefore, obvious that the inter-relation between Law and international politics requires more thought.

Crimes against humanity deal with criminalizing human atrocities that endanger the security of those communities affected by that indignity and outrage. Thus, international responsibility not only includes the possibility to try these crimes as it is in politics that the defense of human dignity has its last resort.

Crimes of war

Crimes of war were defined by the ICC Stature based on the serious violations to Humanitarian International Law within The Hague Legislation and the Geneva Conventions and their additional Protocols from 1977.

Crimes of war include two elements: the crimes are committed within the context of armed conflict and the crime is connected with that conflict. The different between crimes of war and crimes against humanity is the need for an armed conflict, international or not[8].

Though the ICC gives primacy to the Nation-state, allowing it to try their citizens in case of serious violations to human rights and this way preventing these cases from being tried by the ICC (principle of complementariness), it was France, a western country, that demanded (and succeeded in it being approved in Rome) that a State that has become part of the Statute has a 7-year period after it entered in force to accept the ICC jurisdiction over these crimes whenever committed by their nationals or in their territory (Escarameia, 2003: 18).

Currently, France is no longer in the transient period but the truth is that this clause may be used by other States in a Court created to act in a wide territory and supposedly has general jurisdiction.

On the other hand, the dynamic triggered by France was used by the United States that initiated a policy to protect its armed forces stationed abroad, either in peace missions or more muscular armed intervention (Escarameia, idem).

[8] ICC Statute, articles 7 and 8.

All these developments evidence a securitization of human rights and a growing availability by the great powers to carry out humanitarian interventions as a justification for their unilateral military actions.

Let us return, then, to our example: the United States. This logic justifies that the US attempted to limit the ICC jurisdiction to crimes occurring in the territory of a State party "and" were committed by a national of a State party. What happened was that the delegates reached a radically different consensus, convinced that the disjunctive "or" (Lindberg, 2010: 17) would reinforce the idea the the individual was at the core of International Law and the paradigm of justice serving the unity of human community.

Before this achievement of international public order, the United States doubled their efforts to find alternatives to the Statute because in theory the American military abroad may be subject to ICC jurisdiction if they commit crimes in the territory of States party and they do not want or cannot try them[9].

The defense of sovereignty is not incompatible with international commitments signed by the States themselves, in a clear extension of the social contract, but cannot be be question when a citizen from a State that is not part of the Statute is reported to the ICC to be tried. Aware of this fact, the United States have skirted around the Court's jurisdiction using several means.

At UNSC, Washington has been committed in ensuring jurisdiction immunity to the military in peace missions abroad, despite most countries considers these clauses are contrary to the letter and the spirit of the Rome Statute. Tensions have reached a critical point when the United States informed they aimed to renovate the guarantees for immunity of all American forces in UN missions or missions authorized by the UN, as the coalition of forces in Iraq after July 30, 2004 (Birdsall, 2010: 460, Johansen, 2006: 308-310).

The Council was not receptive to the US proposal because they were again forcing the approval of a status of exception for American military at a particularly delicate time when the legality of the intervention in Iraq was being discussed. At that time, only the Russians, the Angolans and the Philippines supported the US proposal, so they were left isolated and had to withdraw their proposal (Johansen, idem, 310).

Washington reacted to this failure by withdrawing 9 American soldiers from the peacekeeping missions in Ethiopia and Kosovo, States that had not signed bilateral agreements with the United States (Johansen, idem) and were not part of the ICC either.

The policy of the United States towards multilateral mechanisms is not a new factor in international relations: what concerns the United States is that the ICC has the capacity to enforce international rules at a global level, thus conditioning the design of great powers' national policies, in this case, their policies (May et al, 2006: 354).

Another example of the policy followed is the network of bilateral agreements signed between the United States and a large number of countries which determine that the countries in the Statute should not hand in American nationals or nationals from other countris that are not in the Statute to the ICC; these include people linked to the Department of Defense and the CIA, even civilians.

[9] Considering that in the ICC Statute there are no exceptions..

Another important aspect of this period is the *American Servicemember's Protection Act* (ASPA), legislation which prohibits military assistance to countries that ratified the Statute unless they have bilateral agreements with the United States (Johansen, 2006: 313-314).

There is already evidence of the counter productivity of these policies in Latin America. The Latin American countries refused to sign bilateral agreements with the United States and signed military assistance agreements with China. Confronted with the loss of these close contacts, Congress aproved a legislative amendment in September 2006 which lays down the exclusion of military training programs from the list of sanctions applicable to countries that refuse to sign these agreements (Birdsall, 2010: 462), thus making it possible to sign military cooperation agreements.

An additional problem to the increasingly interventionist agenda of the great powers is the power assigned to the Prosecutor of the ICC, who can begin a process.

Noteworthy, however, is to acknowledge that the Prosecutor has shown prudence in exercising his functions. In the case of the intervention in Iraq, the Prosecutor received several messages requesting that Blair, Bush and Rumsfeld were tried (Lindberg, 2010, 24-25). In a letter made public, the Prosecutor recognized that American soldiers (belonging to a State that is not a State party, just like Iraq) acted in collusion with British soldiers (belonging to a State party) in the way they treated their prisoners in Iraq. Nevertheless, the Prosecutor decided that the UK was internally investigating the facts and, from his point of view, it made no sense to involve the ICC[10].

Besides everything that was mentioned so far, the United States created a new conflict with international justice regarding the prohibition to use torture, a principle laid down in International customary Law and in the international treaties as *jus cogens*. This is banned practice by all peoples and criminalized in the ICC Statute as crime of war, crime against humanity and genocide[11].

Amnesty International, among other organizations, accused the former President Bush, former vice-president Dick Cheney and the former secretary of State for the Defense Donald Rumsfeld, as well as the former CIA director George Tenet of having ordered practices legally considered torture against prisoners in the context of "war against terrorism"[12] in secret detention facilities ran by the CIA[13]. Former president George W. Bush's statements on television acknowledging that he had authorized torture and official documents confirmed these practices (Guantanamo, Abu Grahib) (Ross, 2007).

Torture is always carried out in the name of national security. The main feature of torture is its specialization as a routine tool in interrogation about activities by the opposition to military regimes and other non-democratic types of government.

Torture in democracy is not acknowledged as official policy and it is simply a method of illegally obtaining information. This is why it is particularly difficult to understand why George W. Bush acknowledged he had authorized **torture** to prisoners in the custody

[10] OTO, Policy Paper, *On the Interests of Justice*, September of 2007.
[11] Article 8. paragraph ii, article 7f), and article 6b) of the ICC Statute.
[12] Amnesty International (2012). *USA Human Rights Betrayed, 20 Years After the Ratification of ICCPR, Human Rights Principles Sidelined by "Global War" Theory*. UK, p.3
[13] Many sectors are still not convinced there was an armed conflict with Al Qaeda. Anyway, as seen previously, the Rome Statute allows to try acts of torture within the framework of crimes against humanity.

of the United States. The Bush administration openly compromised the universal prohibition of torture, laid down in article 2 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, threatening the bases of political liberalism and the idea that people are the objective. To relativize the immorality and illegality of torture and its institutionalization in the democratic state represents a flaw in the information system, in particular of HUMINT, unacceptable because this is a country with huge international responsibilities and global interests.

Obama tried to remedy the situation and approved a new National Security Strategy that condemns the use of torture as a means of fighting terrorism, suggesting that the United States are willing to abolish this practice once and for all[14]. Yet, the truth is that the doctrinal discussion on the legitimacy of torture in exceptional cases cannot be dissociated from the doctrine on preventative war, which the 2010 National Security Strategy maintained in full. This has made it difficult to consolidate the principles of international law and justice.

To sum up, unilateralism and exceptional policies deepen the difficulties for international public order and fpr International Law regarding the protection and promotion of human rights and thus foster the conceptual contradictions of the text approved in Rome. In fact, the differences in perspectives have allowed countries parties (and non-parties) to the Statute to exploit the mentioned flaws and has made it possible for them to project their interests rather than the values of a global society the Statute aims to defend.

Crime of aggression

Crime of aggression is a crime against the main international peace promotion institution, the sovereign State.

The crime of aggression is crucial in the legal construction of the ICC as it is up to the Court to end "abuse of power", discourage violent competition and promote peace through preventing and trying crimes of aggression in the international legal structure.

It is relatively consensual that the Briand-Kellog Pact (1928) was the first legal document to introduce the idea that war is not the solution for all international problems, a revolutionary idea at the time. Before this dates the focus was completely different, the use of force and armed aggression were simple political concepts used to describe the conduct of strong and powerful States (Meddi, 2008: 658).

The atrocities committed in WWII drew the attention of the international to the need to judge the war of aggression. The Nuremberg Trials are the first attempt in codifying International Criminal Law and an important political compromise with the new international regime based on the general rule to prohibit the use of force in international relations.

[14] According to the 2010 National Security Strategy, the American administration "prohibit torture without exception or equivocation: brutal methods of interrogation are inconsistent with our values, undermine the rule of law, and are not effective means of obtaining information. They alienate the United States from the world. They serve as a recruitment and propaganda tool for terrorists. They increase the will of our enemies to fight against us, and endanger our troops when they are captured. The United States will not use or support these methods". In USA (2010). *National Security Strategy*. Washington: the White House, p. 36.

Yet, despite its importance, the contradictions in international politics at the end of WWII were evident in the Nuremberg Trials. Bass (2002: 173-174), for example, states the the preparatory negotiations to the trial show that the American and British national interests were more important than the responsibilities of the international community in punishing the crimes committed by the Nazi political and military elite. The preparatory work to the Nuremberg Trials allow us to understand the importance of the effects of war on American society and the need to stop the suffering inflicted on the American people. This national circumstance would sideline the memory of national-socialism and the suffering of the Jewish people in the holocaust (Bass, 2002: 173-174)[15].

This specific feature of American home politics helps to understand the extreme importance of the "crimes against peace" in the post-war period:

> *"At the International Conference on Military Tribunals, held in London between 26 June and 8 August 1945, the most controversial issue was still aggressive war criminality. The USA insisted on defending the idea that aggressive war was an international crime that implies that those responsible should be criminally made accountable. The crime of aggression was presented at the Conference on the same day that the San Francisco Conference made it illegal to use force in the United Nations Charter"* (Saraiva, 2009: 221).

Fifty years after these events, the United States radically changed their position regarding criminalization of aggression within the ICC Statute negotiations, having influenced considerably to exclude the crime of the Court's jurisdiction.

Yet, despite the pressure by the USA and by other UNSC permanent members, the crime of aggression was included in the Statute as a result of the feeling shred by the delegates to the Rome Conference that aggression is a major threat to collective peace and security. Nevertheless, due to lack of time and political consensus - let us not forget that the great powers accepted the reference to the crime near the end of the conference - its definition was postponed to future amendment conferences.

The first amendment conference occurred in Kampala, in 2010. As expected, the discussion on the definition of crime of aggression met numerous political obstacles, which did not allow for fine tuning several elements in the adopted version, which reflects the strategic priorities of the great powers.

The crime of aggression is, in fact, the crime under the ICC jurisdiction that best reflects the current balance of powers in the international system - an asymmetric distribution of power among States.

The succession of obstacles placed by the dominant power throughout this whole process evidences its deep suspicion of international laws in force that rule the use of armed force as these are like a defensive barrier to territorial integrity of the most fragile political units in the international system (Saraiva, idem). The Non-Aligned

[15] Perhaps this positions helps to explain the need for other trials, in Israel and in Western Germany, to try the holocaust.

Movement (NAM) has questioned the position of the P5 and has already stated it is not willing to effect the interventionist agenda of western powers as a specific solution for humanitarian emergency erupting in their territories and which the local authorities cannot control or are the primary responsible for. In this sense, NAM always have favored the EU proposals in the like-minded group, advocating the inclusion of the crime of aggression and a wider scope of action for the Court against the open opinion of great powers.

Despite the initial inflexibility in their position, as negotiations continued, small and medium powers would have to give in and admit the role of the UNSC in this matter, making this the only crime in the Statute that establishes a pre-condition for an individual to be held accountable fro a crime of aggression that that person has planned, prepared, started or carried out an act of aggression that makes the State responsible (scope of action of UNCS)

In any case, the resolution adopted in Kampala on the crime of aggression is an amendment to the ICC Statute that finally defines the crime the conditions to the exercise of the jurisdiction.

However, as I have said, the final text evidences a very fragile consensus and the ambivalence of great powers towards multilateralism. The final architecture of the crime of aggression took into account the strategic doctrines in force in the United States, in NATO and in other western countries deeply based on the Revolution of Military Affairs, the Transformation and in related concepts aiming to reconcile military forces and the information era we live in.

Information and Communication Technologies (ICT) have a multiplying effect that 'allows the Armed Forces that have already incorporated the technological requirements of RMA to start considering a more pro-active strategic attitude, of military prevention of "new threats" (Saraiva, 2009: 338).

This strategic option of the United States, put in practice by the Bush administration and continued by Obama, is base on the preventative war doctrine because it is a long-term strategy, "by definition, a strategy that is developed in a framework of strategic superiority because only when in military advantage is it possible to stop the emergence of potential rivals (Saraiva, idem: 2029). In this sense, the idea that technological superiority would be decisive in future conflicts, which would make them shorter, less intense and with less casualties (Espírito Santo, 2007) has won over other permanent UNSC members and allowed for the adoption of a common position by the P5 in regards to the crime of aggression.

The history of the negotiation around the crime of aggression shows that what is in dispute at the ICC is the right by great powers to keep their freedom in terms of strategic action and pursue their humanitarian agenda.

During the negotiation of the crime, many strategies were followed to attain the objective. For example, in 1999, in the aftermath of NATO intervention in Kosovo, the German delegation advocated that the restricted concept of the crime sets aside categories of the crime beyond the idea of "armed attack whose objective or effect is the military occupation or annexation of a territory by another State"[16] This means, air bombing and sea blockade would not be acts of aggression (Saraiva, 2009: 295). AS

[16] German proposal (PCNICC72000/DPPP-139 (1999), *Discussion Paper* PCNICC/2000/WGCA/DP.4 (2000)

you know, the argument was not accepted by the Preparatory Commission (PrepCom) because it dis not seem reasonable to thus exonerate NATO of responsibility in the air campaign in Kosovo[ii].

The controversial issur of legality/legitimacy of "humanitarian interventions" in Kosovo, Aghanistan, Iraq and Georgia was back on the table in Kampala. Yet, a final position related to legality/illegality of armed unilateral *bona fide* humanitarian intervention (Trahan, 2011: 75-76) was ultimately not included in the final text because this was not a stable matter and is still under discussion by the legal community (and among scholars in international relations), essentially under R2P. Despite this being the decision, the final wording still leaves open some indirect approaches on this issue.

In terms of the concept of exceptional illegality of armed humanitarian interventions, as was the proposal by Franck, Chesterman and Byers (2003), there is the idea, especially among the NAM, that illegality has led to over 130 unilateral or collective interventions of countries formally opposing to its being laid down (Leckerc-Gagné and Byers, 2009: 380).

However, in Kampala the diplomatic initiatives of the United States managed to win over the resistance of African and Asian countries. According to the wording of the final approved text, the crimes committed in States not party are excluded from the Court's jurisdiction. This implies that the crime of aggression committed by American nationals in a State party can no longer be tried by the Court, thus making it easier for military coalitions to be formed for interventions. These coalitions include the United States (State not party) and a State party to the Statute (UK or France, for example) in the territory of a State not party, because, in this case, the ICC cannot try the crime of aggression (Trahan, 2011: 91-93).

Let us not forget that one of the aims underlying the creation of the ICC was to avoid trials on specific situations and geographical areas. The issue in terms of States party is that article 15 bis (4) previews a statement of exclusion that allows these States to declare that they do not accept the Court's jurisdiction in relation to the crime of aggression by means of submitting a simple declaration to the Secretariat (Arribas, 2011).

The situation is worsened by the fact that the solution found does not allow that s crime can be tried before 2012, at best[17].

We may conclude that the Court and the countries supporting it were unable to handle the sovereignist position of States in the issue of crime of aggression, which reinforces the idea that the Court will only be able to try individuals suspected of the crime of aggression in limit cases.

As far as the definition of the crime is concerned, we consider the result rather more satisfactory though not particularly innovative.

Crime of aggression was defined as planning, preparing starting or executing an act of aggression by an individual in a position to control or lead political or military action of a State. The seriousness and scale of this act of aggression is such that it violates the United Nations Charter (Arribas, idem).

[17] See amendment to the Rome Statute, Kampala, 11 June 2010, available at http://www.iccnow.org/?mod=aggression.

From the point of view of the great powers, the text was not up to expectations in terms of the role of the UNSC on this matter, as at a time the P5 believed it would be possible to introduce in the text the need for Council authorization to begin the procedure by a State party or the Prosecutor him or herself. The delegates to the Kampala conference opted to defend the integrity and independence of the Court by kept the UNSC prerogative to be able to suspend the inquest or the criminal procedure for one year (extendable).

The compromise formula rather reverts the initial strategy of the great powers which was focused on a restricted definition of the crime of aggression. This strategy was eventually put aside and replaced by another, focused not on the definition but on the conditions to exercise the Court jurisdiction. In practical terms, the Court will be very selective and will have greater difficulty in trying crimes of aggression involving the great powers, which emphasizes the multilateralism *à la carte* of the Statute. On the other hand, the establishing of a broader definition of the crime of aggression allows appropriate trying of reported cases, considering that the crime, as it was typified, allows to place in the Court jurisdiction most aggressive phenomena that are typical of current conflicts and, thus, contribute to the reinforcement of international legal order.

Conclusion

The creation of the ICC is a milestone in the history of International Criminal Law because, though its jurisdiction is not universal, as many had wanted, the Statute allows a citizen of a State that is not a State party to be handed in to the Court to be tried.

This limitation of sovereignty through a culture of responsibility is a legal revolution and, above all, it is a threat to the right of great powers to maintain their freedom in terms of strategic action and to pursue their ambitious humanitarian agenda.

In this sense, there is a delay between this structural feature of the Rome Statute and the post-bipolar geopolitics, characterized by a significant increase in armed conflict situations and a permanent involvement of the United States in these armed conflicts.

However, as we have shown throughout the text, the strategy for ICC institutional weakness, which involves great powers but is clearly led by the US in our opinion, does not only change the high innovative character of the Court but also provides an explanation on the nature of the international system and the role of the United States in that system.

In conclusion, we may say that the international system is in rapid change and the great powers cannot (and in most cases, do not want) satisfactorily control the process.

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MULTIDIMENSIONALITY OF CENTRIPETAL AND CENTRIFUGAL NATIONALISMS

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Abstract

Traditionally, authors focus on the speech of political actors and how these define themselves in order to identify the presence of nationalist political trends. This paper aims to present a wider analytical grid so as to include how nationalism is manifested. In line with this multidimensional proposal, we aim to identify differences as to how nationalisms are made manifest according to their relation with power.

Keywords:

Centripetal nationalism; centrifugal nationalism; regional State; national identity

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Introduction

The term nationalism has a double empirical connotation in current political life: the violent connotation, whose strongest image is that of the conflicts in Yugoslavia in the 1990s and, to a lesser extent, that of the violent pro-independence groups, such as the Palestinian Liberation Front or the Irish Republican Army (whose importance has gradually decreased); and the open and democratic one, a sort of light nationalism whose claims are perfectly accepted and subdued in the political system they are integrated in. In the latter case, the most visible example are the autonomous regimes as those of Catalonia in Spain or of Scotland in the UK. This classification, rather light and more based on common sense than on a thorough analysis of facts, is accepted in some scientific approaches (Kaldor, 2004). At media level, nationalism appears in the news only when its noisy presence is made visible, either because of a holiday or a sports event that arouses nationalistic pride or because of a major demonstration in defense or against the right to self-determination.

However, some nationalistic actions, though more discreet, may take on a more transcendent nature. Active policies of defense or maintenance of a State's integrity and sovereignty led by central government, which was democratically elected, by a group of representatives who were directly or indirectly elected may be an example of this, regardless of its more discreet nature when compared to demanding or violent nationalism

In line with this issue, this paper proposes a perspective on nationalism based on its three manifestations: action, speech and self-definition. The scope of this analysis, and considering the influence that the fact that being an independent State or not has on how nationalism is present, we will use two other concepts - that of centrifugal nationalism and that of centripetal nationalism - so as to explain its multidimensional character.

Finally, in theoretical terms, we believe that structural principles are crucial for the development of ideas of "banal nationalism" and "everyday nationhood". These are the starting point for our paper and the base concepts we aim to discuss.

1. Theoretical and conceptual elements

By approaching nationalism based on the way it is made manifest we aim to demonstrate the importance of action, how it is as valid an element as speech or self-definition. The development of concepts such as "banal nationalism" (Billig, 1995) and "everyday nationhood" (Fox and Cynthia, 2008), are noteworthy in this context. At the core of these proposals is the daily and discreet reproduction of consolidate Nation-States, which leads to an almost subconscious dimension present in common citizens' daily actions.

We believe we can go further than banal or everyday nationalism. As we will later see, there are actions by a State's political actor that are conscious and premeditated to preserve and consolidate a specific nation that are more than discreet, they as much as deny and reject nationalism itself, as paradoxical as that may be. National bonds will be strengthened by factors other than nationalism, factiors which are often rejected by public opinion because of their negative connotation.

John E. Fox and Cynthia Miller-Idriss state the importance that certain daily gestures and actions have in producing and reproducing a nation. This is not a simple consequence of structural guidelines by State elites, it includes daily actions by common people (2008 537). The core of this approach is the performative nature of each action: it does not merely evidence belonging to a person or nation, it creates the nation.

Michael Billig, emphasizing the importance of common citizens' actions, introduces the expression "banal nationalism" in the debate so as to demystify nationalism and refute the idea that it is only present in the behaviour of politicians ant right-wing groups or in the fights for national independence led by those who want the independence of a State (1995: 5). Considering the commonly accepted idea that the Nation-State is, since the end of the 19thc, the main political unit of home and international systems, Billig believes it strange that nationalism is usually seen as a phenomenon that does not concern consolidated nations or States (1995: 5). In fact, nations that have their political desires framed in independent States continue to exist and are made manifest every day, though they do that in a banal and discreet way.

Therefore, there is a set of behavior and interaction that are not usually viewed as related to nationalism and are linked to extraordinary practices or have a negative connotation. The author of "Banal Nationalism" considers that nationalism in consolidated nation-States is so ingrained that citizens repeat certain actions and do not link them with manifestations of national identity. Billig exemplifies this through the showing of the United States flag in public spaces (1995: 39). This is present in the daily life of millions of citizens and is so natural that it not qualified, unlike violent radical phenomena. According to Billig, besides being ignored by citizens and politicians, the study of this element of nationalism has also been neglected by scholars studying this theme (1995: 43). However, Billig assumes his modernist perspective when he emphasizes the guiding role nationalism has had in the development of the current State (1995: 19). The Nation-State established patters that citizens take for granted today and do not realize that their link to national identity is something relatively new.

2. Centripetal and centrifugal nationalisms

In the context of western democracies, democratic nationalism ends up being a monopoly of those Anwen Elias (2009) describes as minority nationalist parties (for example the Catalonia Democratic Convergence), a concept that is similar to that of "little nationalism" used by Mary Kaldor (2004). Definitely, great parties and State governments do not use this type of language, which is in line with the concepts of "banal nationalism" by Michael Billig (1995) and "everyday nationhood" by John E. Fox and Cynthia Miller-Idriss (2008) when they advocate the enhancing of other manifestations besides rhetoric. Billig himself emphasizes that essentially nationalisms are associated with fascist ideology or separatist movements.

We must now make clear, separate and justify our interpretation of two core concepts to our approach: centripetal nationalism and centrifugal nationalism. We believe centripetal nationalism to be the nationalism that aims to maintain together or gather one or several national identities within the same political entity (typically the State) in as much an integrated way as possible. We refer integration and not homogeneity (more used in traditional approaches) because political dynamics in the last decades has evidenced there are several types of nations, some more embracing and tolerant towards internal diversity. Integration seems to be gaining over homogeneity.

Opting for the term 'centripetal' is linked with the evolution of democratic political systems. In the context of autonomic States, the term 'centralizing' tends to lose strength. In these cases, political decentralisation is perfectly compatible with the existence of a national identity which seeks to maintain supremacy over other identities within the territory. On the other hand, centrifugal nationalism attempts to separate from the driving force it is integrated in. Its end objective may be the independence of a political unit or have greater autonomy within a regional or federal State.

As in any political regime in a multinational State within the scope of a democracy, the shock between centrifugal and centripetal nationalism necessarily leads to an asymmetric conflict relation. The structure of an organized central State contributes to centripetal nationalism, as this State allows the political actor in power leeway to direct their project. When centrifugal nationalisms opt to respect the constitutional order established in the State they are in as it occurred in Scotland until recently. The highest institutional level they may initially aspire to was regional or local governmental structures. Obviously, the change of a reversal in constitutional order cannot be ruled out. This is often the objective of centrifugal democratic nationalisms because of the constitutional protection to State sovereignty. Considering that traditionally the ultimate goal of nationalism is the implementation of an independent Nation-state, it is natural that it aims to subvert the order stopping from reaching that level. However, there are types of State which lead to more pragmatic behavior and favor establishing objectives prior to a hypothetical independence.

Among the types of State with a territorial organization more adequate to combining different national identities within the same sovereign political unit, there is the federal State and what Jorge Miranda defines as "regional unitary State" (1994: 259). The latter, also known as autonomic State or autonomy State, contributed to end exclusivity in terms of the image of a centralizing nation that aims to subdue, through the State, its peripheral counterparts without recognizing any specific rights. The dichotomy we have been describing may perfectly fit this political model: central State

institutions include mostly those from or advocates of centripetal nation and regional autonomies include mostly advocates of centrifugal nations. It seems obvious that, in the same regional State, there may be regions in which centrifugal national identity is predominant and regions that only have centripetal national identity, once their regional specificities have been safeguarded This adequacy between a certain political system and a plural national scenario does not harm other contexts in which the regional State is implemented in ethnically homogeneous countries or that have no predominant national identity.

Contemporary State does not correspond to the standard image of the Jacobinical centralizing models whose national sovereignty bodies are the only to be able to exercise political power. Currently, several state territorial organization models coexist, a regional unitary State may aim to accommodate peripheral political desires through resorting to the creation of new power poles which are not the capital and to where competences traditionally exercised by central government are transferred. Through applying these legal constitutional rules, escape mechanisms are created to alleviate, at least partially, the identity tensions through institutional means. This is in line with the ideas of liberal nationalism scholars who relativize national independence in favour of cultural self-determining processes and of regional or federal enhancement (Tamir, 1995: 69, Miller, 2000: 124).

Federal State which, at a superficial analysis, may be viewed as the more logical option for democratic countries that have internal national tensions, ends up not being a very interesting option. There may be some fear in exaggerating formal decentralization, which does not prevent a regional unitary State from being as decentralizing as a federation in terms of competences at infrastate levels- In issuesconcerning sovereignty, the symbolic still pulls a heavy weight. As an example of this, we may realize that three of the most relevant federal states, the North American, the Brazilian and the German, have no politically relevant centrifugal nationalism. The Canadian federal system, which includes the province of Quebec (which has a strong centrifugal nationalist movement) is a rare exception among western democracies. On the other hand, there are several similar States that opt of formally unitary though decentralized models, as is the case of the United Kingdom, Spain and Italy.

Considering that nationalism and power are two directly related concepts, centrifugal nationalisms are the obvious beneficiaries of the creations of institutional peripheral power centers. This framework contributes to demistify the idea of the close link between nationalism and violence through political democratization of non-violent national conflicts or which gradually tend to be non-violent. Face to face, resorting only to democratic channels, are a centripetal nationalism, which may be defined by its speech subtlety, and one or several centrifugal well-defined and affirmative nationalisms.

In this context, the famous expression "Independence or death" by emperor Pedro the first when Brazil became independent, which appeared to adapt to decades of secessionist or expansionist conflicts. no longer makes any sense. The final objective of independence may now be postponed to a more convenient moment by centrifugal nationalism and becomes a more undefined and complex grid of intermediate objectives which, once met, may lead or not to secession. This may lead to a change of strategy by centripetal nationalism, which may forgo the muscled speech and focus on the less visible conflict for intermediate objectives. In fact, this is the main debate as, depending on what happens, there will be room or not to evolve to the final debate: that of national independence day.

3. Dimensions of nationalism: action, speech and self-definition

Citizens are fundamental in electing political agents. It is inevitable that, in the context of current democratic system, highly publicized, there is constant assessment of the convergence and divergence between speech and action, as well as the conformity between these manifestations and their agents' self-definition. In the case of identity, the issue is more relevant as the essence of a main structural element of the main political unit of the international system is in question - the nation-State. Thus, for example, we may assume, when discussion government action, that nationalism is a phenomenon that is made manifest in a multidimensional way and we may isolate and analyse its three specific materializations: action, speech and self-definition.

By valuing action and disregarding speech as the manifestation of nationalism, this concept becomes more encompassing and the focus becomes its intensity. Defending an identity with political objectives in the context of State internal and external activity is more common than we usually believe it to be but they rather c«vary in intensity. A nationalism that is only that will be less intense that another that, besides acting also speaks in its defense and advocates its identity; this will be less intense than the nationalism that acts, speaks and assumes that option.

The fact that we understand nationalism as a multidimensional phenomenon and that we consider action must be the focus of attention in analytical terms does not imply that we devalue speech, probably the most visible and indispensable element in what we define as affirmative nationalism. Often, it is through speech that nationalism mobilizes and keeps cohesion of its bases, in peaceful and democratic contexts and in violent conflicting contexts. There is a wide variety of nationalist speeches as several cases indicate. For example, at the time when fascist dictatorships were in their peak (between the 1920s and the 1940s), nationalist regimes par excellence, the type of speech these governments used was clearly affirmative, violent, praised their identity values and excluded what was different. In parallel, the speech of liberal democratic regimes claimed another type of values though they still assumed and praised their identity (probably because they consider that democratic and liberal values were inherent). Base on this terminology, we may state that fascist regimes were the perfect example of nationalism in an affirmative and assumed State, one which is against the non-existence of this type of nationalism in contemporary independent democratic State governments.

A speech with similar features to those of fascist regimes has been reused by the different parties in the war in the Balkans, in the 1990s. In this case, after almost fifty years of Cold War (when the focus was ideological speech) and subsequent speech decompression a liberal democratic practice, the world witnessed a come back of aggressive reasoning and nationalist enhancement. In the past years, as the liberal democratic system expanded and the political map became stable, the nationalist element of political speech in Europe tended to less dialetic enhancement and a more discreet profile. Nevertheless, less visibility does not necessarily mean lack of it; a more discreet attitude may lead to more effective results than a more affirmative approach.

Going back to the example of a government that acts so as to keep the nation-State it is a governing body of, we frequently realize that parallel to the policies developed

towards this goal there may be a speech praising identity that emphasizes its importance and its function. In this case, we may say that there is a link between action and speech, which materializes an action we would describe as affirmative nationalism. On the other hand, we may also find examples of governments that develop and implement similar policies but which do not have the same type of speech. They fulfill their function as a guarantee of political rights of a specific identity but are not open in terms of putting those objectives into practice. We may, in this case, speak of subtle nationalism.

Conventionally, we consider that right-wing parties and ideologies are more in line with nationalist positions (McCrone, 1998: 3). We believe that the fact that left-wing parties usually have a more urban speech with less identity references has also contributed to this idea. However, in practical terms, an analysis that sees nationalism as a multidimensional phenomenon requires readjustments, which leads us to identify that right-wing parties, governments and ideologies are more prone to fit a model of affirmative nationalism and their left-wing counterparts to a model of subtle nationalism. Both will act in favour of an identity and its political objectives and implementations, the differences residing in the speech rather than in the action.

In relation to the third dimension we propose - self-affirmation - it is materialized in someone's (or some structure's) explicit assumption that they are nationalist or advocate nationalist politics or of open defense of a specific nation's identity. This is a rather infrequent phenomenon these days, especially when we observe government action or that of great powers of developed countries. As we have referred, the link between nationalism and violent and exclusive logic has considerable media exposure, which leads to fear of negative connotation among political agents.

Nevertheless, there are several parties, of different ideologies and political contexts, who assume they are nationalist or place political rights to an identity at the core of their program. Since extreme right-wing parties, which take on the defense of the nation in the most exclusive and totalitarian assumption, as in the case of the *Nationaldemokratische Partei Deutschlands* (NPD), to fully democratic parties that advocate the enhancement of self-governing levels of their region, within the framework of the regional rule of law they are part of, as is the case of the *Catalonia Democratic Convergence* (CDC). Obviously, we cannot infer any link between these two examples which are only mentioned to illustrate the wide scope of assumed nationalism.

4. Discourse dimension and the centripetal and centrifugal nature of nationalism

In the case of the link between speech and the centripetal or centrifugal nature of nationalism and in current political framework, the latter tends to be more affirmative than the former as we realized when referring to the CDC from Catalonia. There seems to be a correlation between the degree of affirmation in nationalist speech and its position in relation to power (its peak position being that o a Nation-state).

In this sense, Xosé M. Núñez Seixas states that

> *the nationalist component (...) has a protagonist role in the agenda of social and political parties or movements who nation of reference whose institutional and, above all, sovereign recognition is not deemed sufficient* (2010: 13-14).

Lets us consider the case of Scotland, a region with historic independent desire which is part of the United Kingdom: Scottish nationalism is clearly affirmative and assumed, materialized in the name of the local nationalist party, the Scottish National Party (SNP) and in its student organization, the Federation of Student Nationalists (FSN). The British government, main executive body in the United Kingdom, probably as a result of the comfort a power position that until recently was taken for granted and rather uncontested, does not use the same terminology and maintains a formally open position towards a potential political evolution in the status of the region by resorting to a model that is between the affirmative and the subtle.

Another noteworthy aspect is the absence of an effective English regional nationalist movement (English, 2011: 5). Unlike Scotland, Wales and Northern Ireland, England is the only region in the United Kingdom that does not have a regional parliament. The political power the England holds on the State of the United Kingdom is such that it is probably the English themselves who do not want a regional parliament, as that would take away some of the symbolic power of Great Britain's parliament (the state parliament of the United Kingdom), which is in London, the English (and British) capital. On the other hand, British nationalism openly accepted and affirmative, which advocates the maintenance of the United Kingdom of Great Britain and Northern Ireland as an independent and unified State, is limited to clearly conservative or right-wing personalities and movements.

It therefore appears to be a space of speech silence that is dominant in centripetal nationalism. Its proneness to what we call subtle or affirmative (but not assumed) nationalism may not be justified merely by the fear of connotation with the more negative elements of identity speech. There may be a deliberate attempt by a certain centripetal nationalist agent to draw the attention of citizenship towards other issues (for example social and economic policies) as means to achieve new objectives and keep already attained achievements in terms of political power. Under certain circumstances, subtle nationalism or not assumed affirmative nationalism may be the most adequate recipe to materialize the political objectives of an identity, especially when this is already materialized in a State.

In parallel, advocates of a breaking away from centrality and building of new political units based on a national idea that understands these are not in accordance with such as encompassing entity, tend to openly assume their nationalist positions. One of the probable causes for this difference may lie in the referred association between nationalism, expansionism and violence, a rather rash and wrong association (Everea, 1994: 5). It is understandable that, before this framework, centripetal nationalisms opt for a less declarative means as those a more easily associated with expansion strategies and the derived potential conflict situations Moreover, centrifugal nationalism is more acceptable from an intellectual point of view, as may be made visible when Mary Kaldor describes what she classifies "Littlke nationalism" a being non-violent, open and inclusive. 173).

Conclusion

We propose to analyze nationalism based on two specific elements: the defense of multi dimension in its actions, in particular, the role of action (often ignored to the detriment of superficial analyses mostly focused on speech and self-definition; and in the difference among the different nationalisms in terms of their closeness or not to sovereign power (centrifugal and centripetal nationalism).

It is also possible to identify a trend to correlate the two identified variables. In the time in which we live, probably as a result of less positive examples in recent history, sovereign States political agents avoid identifying themselves as nationalists though in their daily life they do act aiming towards the corollary of nationalist desires: maintaining national identity as the basis for the State, a sovereign political unit par excellence, and of the international system. On the other hand, nationalists that advocate national identities not materialized in sovereign and independent States seem to be prone to fully assume nationalism, inclusively in the speech and self-definition dimensions.

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STATE AND MULTILATERALISM, A THEORETICAL APPROACH. TRANSFORMATIONS IN A GLOBALIZED INTERNATIONAL SOCIETY

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Abstract

The State, classical international actor, has had to readaption to the new dynamics in the International Society and has given prominence to other actors. In this logic, it´s relevant to analyze the role in the international system after the Cold War to evaluare whether it is still an actor capable of responding to the functional needs of the society. For this, reaffirms its commitment to multilateralism as a response to the main issue on the international agenda. Namely, is reactivated as an ideal tool to manage structural changes, despite the different interpretations of United States, the European Union or the BRICS. The object of this analysis contribute to the academic debate and focuses on studying the transformations of the State in the globalized international society where multilateralism has become a concept discussed and a common practice in the international discourse, despite its complexity and the different visions and interpretations by different actors. Multilateralism granted the State a path of cooperation and understanding as a guiding principle and foreign policy legitimizing discourse.

Keywords:

State; Multilateralism; United States; European Union; BRICS; TIMBI

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STATE AND MULTILATERALISM, A THEORETICAL APPROACH. TRANSFORMATIONS IN A GLOBALIZED INTERNATIONAL SOCIETY

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I. Introduction

The changes occurred in the current International Society evidence mutations, significantly affecting the State, which remains the classic actor of the international system, even though other international actors have been gaining prominence and power. Following this logic, it is still pertinent to persist in the analysis of the role the State plays in International Relations, especially when at present, in a globalized society, it shares its traditional supremacy with other actors.

Therefore, there are several reasons that contribute to keeping these analytical dynamics on the role of the State in the international scene. In the first place, the State is the institution that has achieved the most advanced level of development as a form of socio-political organization. In the second place, because as the classic actor of international relations, it has had to adapt to the changes of the globalized International Society. In the third place, because it is the main subject of sovereignty. In the fourth place, because it designs public policies based on the political-economic space of the different International Societies. In the fifth place, because it holds the legitimate monopoly of violence; and, in the sixth and last place, because the evolution of the International Society itself has modified the role of the State, going from a Westphalian system of powers to a multipolar one, after a period of bipolarity. At present, there has been an emergence of some new international actors that have increasingly more power and prominence (Barbé, 2010) and that contribute to modify the policies in force.

Even though the State is one of the most studied actors from a multi-disciplinarian point of view and the word State is one of the most used words by the different Social Sciences, the analyses on this actor are focused on two main levels: national and international. However, the perspective of an insoluble reality is diluted: the interaction between the two levels, due to the dynamics of interdependence generated in the current International Society. In this sense, Ulrich Beck, adopts such approach when stating that this International Society, transformed by globalization, is in need of a cosmopolitan analysis that should overcome the classic “national look” approach. Therefore, it is necessary to broaden the Westphalian logics to apprehend the current dynamics which increasingly condition politics, economy and safety.

In the last decades, and due to the globalization processes, the ability of the State to continue complying with basic functions has been questioned: "the notion of the State as a self-governing unit seems to be more like a normative demand, than a description of reality" (Held, 2002). In this sense, relations of interdependence overpower the States' abilities and jurisdiction, through the application of other frameworks of regulations, as well as the transnationalization of finance and the economic process (production, distribution and consumption). Furthermore, the emergence of new transnational actors, the appearance of challenges at different levels and global safety risks in a broad sense, the weakening of national identities and sovereignty erosion are decisive factors that question the role of State as an agent capable of providing answers to the functional needs of society.

Likewise, we find reactivating elements of the currency of the State as a determining actor of the international scene, among these we should mention international cooperation, the reinforcement of international organizations and the recent prominence of regionalism as answers of the State and new alternatives to the multi-level governance. Therefore, the State reasserts its bet on multilateralism as an answer to current challenges. That is, as of the end of the XX century, it is reactivated as a suitable tool to manage the structural changes of the international system, in spite of the different interpretations made of it by the international actors.

In this sense, the actors in the international system face these mutations with differentiated answers: "The United States continues to push an hegemonic multilateralism, the EU promotes a normative multilateralism, developing countries practice a defensive multilateralism and the emerging ones promote a revisionist multilateralism based on differentiated practices and goals, discursive legitimations and narratives" (Sanahuja, 2013:27).

While the U.S.A. had been participating during the last Republican administrations in a higher unilateral performance or, in other words, an "institutionalization of unipolarity," the Democrat administrations of presidents Clinton and Obama practice a more inclusive performance, resorting to multilateral forums looking for a stronger consolidation of specific actions of their foreign performance. For the EU, due to its own integration experience, multilateralism is positioned as an imperative by virtue of its own identity and acknowledgement as international actor in a context of sovereign States (Natorski, 2012). In relation to developing countries, multilateralism has become a decisive tool, for its normative and institutional framework, channeled through the United Nations' system or in private regional organizations. Due to the processes of power shifting, emerging countries are in a better position to demand normative and institutional reforms and a higher balance in the international order, with the purpose of achieving symmetric alternatives of cooperation.

This analysis is focused on assessing the State's transformations in the globalized international society, where multilateralism has become a debated concept and a common discursive practice in the international scene. In spite of its complexity and the different viewpoints and interpretations of the different actors, multilateralism provides the State with a channel of understanding and cooperation as a foreign policy governing principle and legitimating discourse.

Starting from a brief historical narration regarding the evolution of the State in the international system, this article intends to contribute to the academic debate and identify the answers depending on the positioning of the different state actors in the international system (United States, EU and emerging countries -BRICS/TIMBIs[1]-). That is, the different answers each one has depending on their idea of multilateralism, putting together a multidisciplinary approach broadly based on International Relations. Following this logic, the intention is to study the correlation between the international structure and the variations regarding power epicenters in the current international system. Therefore, the analysis is based on the premise that the State has had to adapt itself to the changes in the international system in order not to lose power and competitiveness, thus increasing its abilities. Multilateralism is precisely the most suitable tool as re-adaptation strategy, niche of opportunity, to adjust its position in the international system.

II. Continuity of the State as central actor in the international system

The history of Europe, a consequence of different complex transformations, is, to a great extent, the history of the modern State as political community (Truyol and Serra, 1974: 30-41). The modern state is the way in which societies have built their political organization. It is the State that draws the community together, since that community, as such, does not exist before. In the Westphalian order we can observe the exclusive and central role of the State as actor in the system and center of power within a still anarchic structure, which could only be mitigated by the principle of balance of power, which means that each State has to protect its own interests and safety, or, in other words, each State is left to fend for itself. (Del Arenal, 2002).

Westphalian States are mainly structured "around reality and distribution of power, purely interpreted in relational terms and mainly understood in political-military terms, and based on the role performed by the great powers that used to act as a directory in relation to itself" (Del Arenal, 2002: 23). Therefore, the Westphalian order implies two main characteristics: the establishment of permanent and increasingly sophisticated diplomatic relations, in practice as well as in coding; and the external and internal dimension of the States which has had a broad influence on the normative, political and theoretical development of international relations.

Along these lines, and by way of summary, we can restate that the concept of the modern State-nation implies, as stated by Held, a series of innovations to the State itself and, hence, to the International Society. Among others, we should mention territoriality, the monopoly of violence, the notion of impersonal power structure and legitimacy. That is, Westphalia establishes the development of sovereignty as organizational principle of the States (Barbé, 2007: 165).

[1] Turkey, India, Mexico, Brazil and Indonesia. Since the term BRICS was created to refer to emerging economies, there has always been debate in relation to whether these members should be kept, if new international actors should be included or if the group should be rebuilt. Professor Jack Goldstone of the George Mason University, researcher for the Brookings Institution, in its article entitled Rise of the TIMBIs (2011), published in Foreign Policy, holds the theory that BRICS should give way to TIMBIs and proposes the absence of China and Russia in the following decades in this new bloc since their abilities are changing, especially their demographic patterns and exports level, together with a political system which is still too rigid, obstacles that could stall their progress.

Since the appearance of the Westphalian interstate system, the structure has suffered important changes, highlighting the numeric variation of States with an ability to have influence on the international order. After the Congress of Vienna, the concert of great powers incorporates eight nations (Austria, France, Great Britain, Russia, Portugal, Spain and Sweden) that end up being reduced when the last three lose potentiality in the balance of power. At the end of the XIX century and the beginning of the XX, some countries enhance their abilities, which signifies improvements in their position in the international structure of power. The United States, Germany, Italy and Japan are incorporated to the directory of great powers until then European.

After the World War II, there is another decisive event regarding the numeric variation of the States that are part of the directory of great powers, not because of the disappearance or formation of new States, but because the United States and the Soviet Union enhance their abilities, becoming superpowers. As a consequence, the structure of the international system is oriented towards a bipolar configuration of power, where the technological factor, that is, the nuclear potential, deeply alters the competition and socialization schemes developed by the system units. With the disappearance of the Soviet Union, the power of the international system tends to decentralize in a higher number of actors. However, it does not lose its oligopolic nature, in accordance with Raymond Aron's terminology. In fact, in spite of all these changes, there is a permanent directory of great powers that concentrate higher quotas of power in relation to an extensive number of States.

The State is reasserted as a main actor at several levels; for sure, it has had to face the new challenges and risks brought by globalization such as destatization, deterritorialization and power relocation. In this sense, new international dynamics have been generated in which interstate cooperation has blurred the line that separates national from international. States are forced to search for formal mechanisms of voluntary and permanent cooperation, creating independent entities destined to achieve collective goals (Sobrino Heredia, 2006: 43).

Going deeper along these lines, we can affirm that in an increasingly interdependent world, multilaterality has become an appropriate answer to face the demands of the XXI century. An answer that "cannot be understood without referring to the States-nation and to a Westphalian order based on the principle of national sovereignty" (Sanahuja, 2013:p. 31). The progressive increment of state activity in international institutions is evident. This is motivated by a cause and it leads to a consequence. In relation to the first one, States are incapable of satisfying new collective needs *per se*; regarding the second one, States are drawn to cooperate in the light of these development and transnationalization processes. Therefore, multilaterality becomes a valid tool that settles the contemporary international order, with the permanent purpose of laying the foundation of peaceful relations between States.

III. State-globalization dialectics

The globalization phenomenon has generated broad debates in different scientific disciplines, in which the issue of the State is inserted in these dynamics of reflection due to the core transformations this process entails. Several authors support the hypothesis that the globalization process has produced a significant loss of presence of the State in the social dynamic, in a double aspect: at a national level and in the

international scene. However, it is appropriate to introduce a balancing point since the changes that the sovereign State has been experiencing imply the necessary re-adaptation to this new international reality, in which multilateralism is an explanatory variable that allows for an ontological review of power.

As of the 80's of the past century, the analytical production regarding globalization has been abundant. In this sense, many of the transformations experienced by state societies and by the International Society itself are explained, to consider different characteristic features of the current international order. However, globalization could not be understood without other prior phenomena, since coinciding with authors like Castells or García Segura, there are four processes which are continuous in time and of different nature and effects that affect the International Society: worldization, increasing interdependence, humanization and globalization (Castells, 1997 and García Segura, 1999). Therefore, the new post-World War II International Society is very different from the one that characterized international relations as of the Peace of Westphalia. The consequence has been the birth of a new post-Westphalian global International Society, characterized by the weakening of some actors, such as the State, which defined the previous period, and the empowering of other non-state actors, such as the transnational companies, International Organizations, government-owned and not, and above all, the individual.

In spite of this weakening, the International Society continues to be state-centric, where this international actor is confirmed as the only form of political organization. "In this sense, statization constitutes the maximum expression of worldization of the logic and the Westphalian model of International Society, by dividing the world society into sovereign political units, equal in rights, with clearly marked borders, but evidently unequal in terms of power and development" (Del Arenal, 2008: 21).

In the new international society, there has been a change in the nature and distribution of power. If in the Westphalian society power was identified with State, in the information society, power is a mutating, multidimensional phenomenon expressed in economic terms, but also, in cultural, technological and information terms, and, less and less, in military terms. Moreover, there is a change in the traditional base of power: the territory, which is no longer considered an essential element, and it is replaced by other elements which are not always tangible, such as communicational, financial or commercial networks…, (Del Arenal, 2008: 31). Authors like Thomas Risse question concepts like multipolarity "to describe a partially globalized world in which States are only one of the different centers of power" (Risse, 2008).

A direct consequence of the shift in the distribution of power is the increased number of new actors, which previously did not hold the economic or the political power, and in this new International Society emerge trying to establish a new inclusive international order, while demanding normative and institutional changes, together with a more balanced system. We are referring to the emerging powers, which are mostly referred to using the acronym BRICS (China, India, Russia, Brazil and South Africa), created by Goldman Sachs (Sachs: 2003). These States concentrate an important percentage of the global population, 40%, and are consolidating their economic position, questioning the traditional western supremacy of the previous society, from a more spirited positioning of multilateralism.

The main challenge faced by these States is turning their demographic relevance, their territorial extension and their economic potential into political power capable of having influence on the international system, even though they are already identified as relevant actors in the regional scene. Unlike in the past, these emerging powers have looked into strengthening the multilateral forums that currently enable a more equitable representation. A clear example is the answer to the financial crisis provided by the G-20, a forum which is more representative than the G-8 or any other reduced and select group that does not turn out to be legitimate or efficient for the resolution of global issues.

While bilaterality is defined by the principles of exclusion and negotiation, multilateralism participates in the logic of complementarity. In this sense, it implies a suitable model to analyze multiple and varied relations, even though it is not a generalized reality yet, and it could even be classified as embryonic, in spite of some already consecrated processes –the UN General Assembly, the World Trade Organization (WTO), the UN Conference on environment and development in Rio or the Convention on Climate Change in Kyoto…-

IV. Multilaterality as a theoretical approach

The study of International Relations entails the analysis of transforming structures. From this point of view, it is appropriate to assert that the classic formal logic of the post-World War II International Society is oriented towards a bipolar configuration of power, where the United States and the Soviet Union become superpowers as a consequence of an enhancement in their abilities, mainly the military ones. The evolutions of the international system, before and after the dissolution of the Soviet Union, sharpen the academic focus on multilateralism as an instrument of relation, while extending the participation of the States in multilateral forums, in pursuit of common interests and goals after the loosening of the restriction produced by the bipolarity of the Cold War. The article developed in John Gerard Ruggie's book contributes to the academic debate. This is a classic but controversial example, which focuses on the normative dimension of this concept.

Multilateralism is a tool, in regards to the decision-making process, where consensus and negotiation between the parties are essential. For Ruggie, multilateralism is "an institutional form that coordinates relations between three or more States based on generalized principles of conduct, that is, principles that specify the adequate conduct for each type of action, disregarding the particular interests of the parties or the strategic demands that may appear in each case in particular" (Ruggie, 1992:14). Therefore, for this author the focus is not on the ability to coordinate national policies between countries, but on that this is done based on certain principles of relation. His idea differs from "the quantitative and functional definition of multilateralism, which is broadly used, among others by Robert Keohane, for whom multilateralism is the practice of coordinating national policies in groups of three or more States. Through *ad hoc* mechanisms or through institutions" (Barbé, 2010).

Caporaso states a difference, in an attempt to make a contribution to the intellectual debate, between multilateralism of multilateral. The distinction made by this author introduces an interesting conceptual debate, for two reasons; in the first place, because since the decade of the eighties and throughout the nineties they were present in the

political discourse of the main actors in the international system; in the second place, because many authors, mainly from the North American academic scene, try to limit these terms and create a definition applicable to political science and international relations.

In this sense, it is pertinent to define both terms, what they consist of and if they are useful to face the new challenges posed in the XXI century. "The terms multilateral and multilateralism suggest some linguistic consideration. The noun comes in the form of an *ism* suggesting a belief or ideology rather than a straightforward state of affaire" (Caporaso, 1992: 601). "The term "multilateral" can refer to an organizing principle, an organization, or simply an activity. Any of the above can be considered multilateral when involves cooperative activity among many countries. "Multilateralism" as opposed to "multilateral", is a belief that activities ought to be organized in a universal (or at least a many-sided) basis for a relevant Group, such as the Group of democracies" (Caporaso, 1992: 603).

Even though both terms imply cooperation between States, multilateralism refers to a set of beliefs and values on which the international policy should rest, this being a proposal in which to coordinate international relations. On the other hand, multilateral is an organizational principle, that is, the functioning of an organization or just an activity. Likewise, this idea is defended by a significant number of politologists and internationalists, and it is reflected on the works of Ruggie, Martin, Keohane or Cox, who states that "multilateralism appears in one aspect as the subordinate concept. Multilateralism can only be understood within the context in which it exist, and that context is the historical structure of World order. But multilateralism is not just a passive, dependent activity. It can appear in another aspect as an active force shaping World order" (Cox, 1992: 161); that is, multilateralism is a dynamic phenomenon of rules and organizations that do not remain unchanged and it introduces a clear intention of shaping the global order in a framework of understanding and cooperation between States.

The evolution of multilateralism "should be seen in relation to the transformation of the entire international society: of the structure of power, of the nature of the State, of the relations between State and society, of the prevailing ideas. Multilateralism (or each type of multilateralism), from this point of view, is nothing but the product of a certain type of international society" (Costa, 2013: 11-12). The evolution of the historical structure, in Cox's terminology, of the international society produces three types, "multilateralism of the coexistence, of cooperation and of the solidarism. Each one of these types of multilateralism is an expression of a concrete type of international society, but so far all of them have proved autonomous and resilient enough to survive (more or less) to the conditions that made them possible, so that each one of the phases has gone through an accumulation of a sedimentary layer of rules. These phases are analytical constructs, ideal types, but they pretend (tentatively) to have a correspondence with the historical reality" (Costa, 2013: 12).

In relation to the first one, the multilateralism of the coexistence, which represents the starting point, possesses a marked Eurocentric character in terms of power, since the United States or Japan focus on regional or domestic questions. Its goal is to "restrict and coordinate the action of the States to allow each of them the highest freedom to pursue their national interests with minimum interference or imposition from the rest" (Burley, 1993: 127). This multilateralism of coexistence prioritizes the avoidance of

confrontation over the resolution of common conflicts, showing its weaknesses before the challenges of a society in evolution. In relation to the second one, the multilateralism of cooperation is founded on the new relations that arose between the States after World War II, based on one proposition: interstate cooperation as a solution to international problems, as stated by the preamble to the Charter of the United Nations. In this sense, Burley considers that the United Nations system marks an inflection point between the rules of coexistence and the cooperative efforts, as embryonic as they might be in this period. The third type of multilateralism (solidarism), which starts as of the end of the Cold War, that is, the end of the eighties, is characterized by an increased number of international organizations together with an "increasingly more assertive promotion of universalized liberal regulations by international institutions and a budding global civil society" (Rüland, 2012: 257).

Finally, multilateralism brings about two variables, a political dimension and an economic one. In this sense, multilateralism in the political dimension, more general and macro, refers to the institutional architecture that is originated in the cooperation between States to face common challenges (climate change, terrorism, global poverty, drug trafficking…). In its economic dimension, limited to the sectoral level of the economic-commercial policies, it addresses the coordination of the actors that participate in the multilateral relation. In this sense, Cox expresses himself in the following terms: "economic multilateralism meant the structure of World economy most conductive to capital expansion on a World scale; and political multilateralism meant the institutionalized arrangements made at that time and in those conditions for interstate cooperation of common problems" (Cox, 1992: 162). This approach can be completed with Ruggie's contributions, who states that multilateralism possesses a quantitative dimension, regarding the number of States, and a qualitative dimension, depending on to the values such States should hold, "in short, the nominal definition of multilateralism misses the qualitative dimension of the phenomenon that makes it distinct" (Ruggie, 1992: 566).

There is no doubt in that the international system which arose after World War II implies a milestone in the establishment of new forms of interstate cooperation, on top of the propagation of multilateral regimes and institutions which have promoted the concurrence of "global values," never before experienced (democracy, governance, human rights, poverty reduction…). However, in practice, the multilateral system does not respond to such values and there is a resistance by the States to act in a multilateral manner, prioritizing the defense of their welfare and security interests. In international relations, this dichotomy (unilateral-multilateral) is put forward as a debate between relative vs. absolute profits (Mersheimer, 1995). Against this logic, the altruist purpose of multilateralism consists of establishing rules of behavior for the satisfaction of the countries; as well as developing institutions that favor international cooperation.

V. Assymetric behaviors in the face of multilateralism: United States-European Union

International actors have different points of view in relation to multilateralism, based on the historical context and the actors' own interests. The United States, as military and economic superpower has been a part in the construction and design of the

institutions we know as multilateral forums, originated after World War II. With the fall of the Soviet Union, comes the opening, in the theoretical level, of a favorable framework for the reshaping of the international order after the rupture of the bipolar system. Without going back to past ages, and focusing on the last decades, we can observe an evolution in the United State's foreign policy. With the termination of the bipolar world and the military victory in Iraq (1991), intervention backed by the United Nations, it gets into what Robert Kagan calls the *unipolar moment* that "predisposed the United States even more for the use of force abroad and to behave as an *international sheriff*, on the basis of some unrivalled military abilities" (Sanahuja, 2008: 302), reasserting the neoconservative position of the international order.

Following this logic, Robert Jervis "has qualified the United States as *revisionist hegemon* by trying to modify some multilateral institutions and rules that, paradoxically, have, to a large extent, been created by the United States, and for that reason, grant it a higher quota of power. In other words, the *hegemon* would not be finding itself comfortable in its own post-war <hegemonic multilateralism>, and for that reason would be pretending to establish new rules and institutions to provide legal coverage and legitimacy to an essentially unilateral performance -which would illustrate the formation of <*coalitions of the willing*> instead of acting through the United Nations, the NATO or other international organizations- and pose less restrictions to its freedom of action" (Sanahuja, 2008: 304).

For the United States, multilateralism is not a belief, it is an instrument applicable to specific issues in the global agenda, regardless of whether Democrat or Republican administrations have used this practice to a greater or lesser extent, causing a weakening of the multilateral system, as analyzed by Fred Holliday: "George W. Bush's victory in 2000, marked the end of a decade and a half of George Bush Sr.'s and Bill Clinton's model of foreign policy. A model which was compatible with multilateralism and with international rules, even those referred to the use of force, which supported the first Golf War, or the interventions in Kurdistan, Somalia or Haiti. That policy had already been rejected by George W. Bush before the S-11 attacks in New York and Washington. After those attacks, the United States foreign policy has fluctuated between a stark unilateralism, and the attempts to adapt international organizations to its own interests. Iraq's War, in particular, has shown that Washington's interest in the rules of the United Nations was limited to obtaining their support and legitimacy, but if this could not obtained, it would not avoid the attack. For the Bush administration, it was enough to show a symbolic interest in the allies' will and to enhance without deceit the United States' national interest and the patriotic sentiment" (Mesa, 2006: 3).

The neo-imperial viewpoint held by the US power has its own limits, political and economic limits, particularly in the financial and military ground, and it is also expensive to maintain. This is reflected in periods like the current one, marked by a context of international economic crisis. To rectify what Paul Kenney calls the "*imperial disproportion"* of the United States, the evolution towards a multilateral order induces to abandon the lack of appetite for multilateralism. It will be with president Obama when we can observe a swift concerning his predecessor's policy, where multilateralism is a natural space for the maintenance of leadership, observing, at a discursive level, a higher approach to these principles, especially, during the first period of his administration. However, with the recent stance of intervening in Syria it has been

shown that this is not only a certainty, but a need, since it is not the time for unilateral performances.

In this sense, the United States multilateralism is assertive. On the one hand, it advocates for international organizations, contributing with financial support (it contributes with 22% to the UN budget) and, on the other hand, its interpretation is tightly associated to its national interest, which implies a strategy, that is, the mean to achieve a goal. In short, even though the Obama administration has been reasserting its commitment to multilateralism, this does not mean that it is positioned as a key instrument of its foreign policy, unlike Canada or the European Union.

To sum up, the multilateralism for the United States may be a suitable answer to counteract the cost implied by unilateral performances in different scenes (climate change, safety, terrorism...), but also to face the new challenges of the current global agenda that would otherwise be hardly solved in a unilateral way. For that, it has reinforced its cooperative relation in forums such as the G-20, which even when it symbolizes the difficulties of a multipolar order, it is represented as an alternative to a classic institutional system, being a relevant example the United Nations that turns out to be inefficient to prevent breaches of basic game rules; or the obsolete of its structure, mainly the Council of Safety's, since, it answers to a post-World War model which was very different to the current one; or the lack of efficient means to satisfy the needs of the global agenda, marked by transversal challenges.

The European Union has a relevant role in regards to multilateralism. As of the post-Cold War period, and even before, "the commitment of the European Union to democracy, human rights, development and the struggle against poverty, peace processes and multilateralism has contributed to create a powerful positive image of the Union as a *progressive and civil* actor (…) We observed a strengthening in its will to become a global actor capable of actively participating in the formation of the principles, rules and institutions that constitute the international system through its singular identity as *civil power and normative actor* based on values. These values, on top of constituting its international identity, would also become a source of its soft power, by exercising influence through non-coercive means" (Sanahuja, 2013: 40).

The European Union, multilateral by nature, states its commitment to efficient multilateralism, a term suggested at the Strategy on European Safety (2003), which implies a useful tool to achieve global governance through International Law, shared rules and principles agreed upon among equals. Along these lines, the European Union Treaty (section 21.2.h) regulates that the foreign policy has to be committed to an "international system based on stronger international cooperation and good global governance."

Even though Brussels has turned efficient multilateralism into a vertex of foreign performance, we can not hide the divergences there have been surrounding this term even between functional multilateralists, for whom it is a tool, like others, and normative multilateralists, for whom it is a principle of interaction. Likewise, there are dissimilarities regarding its application, while community powers use *unilateralism* and *minilateralism* as instruments of foreign policy, smaller member States find in multilateralism a way to defend their own interests with a higher possibility of success.

Efficient multilateralism is a main goal and a relational framework with preferred partners. The approach applied in the nineties sits on strategic associations with

regional base. However, currently, bilateral relations are reinforced with a pool of prominent actors, as a process prior to the efficient multilateralism with which it is intended to give collective answers to the challenges of the global agenda, under the wing of binding international regulations and multilateral entities.

The promotion of an efficient multilateralism on behalf of the European Union is, up to a point, paradoxical when the progress experienced in its composition as an only actor (addition of 28) would imply a relative weight loss in multilateral organizations in which it has a representation and power that is no longer proportional to the one that it effectively has in the international system. In fact, it is worth wondering to what extent the efficient multilateralism it promotes benefits or negatively affects its interests, "and to what extent it does not constitutes, facing the future, one of its strategic options to promote the modification of the multilateral system towards its progressive transformation into a more appropriate system of global governance, on the base of relinquishing institutional power in it in favor of other actors" (Montobio, 2013).

Conclusions

The current International Society shows changes in the international actors, being the State the one that has gone through more changes. This actor, decisive in the international system, has seen its prior exclusiveness, prominence and autonomy modified as a consequence of dynamics of interdependence and of a series of new international realities that separate the International Society of the past from a human, transnational and global one, like the current one. The State has suffered an important weakening and it has even been questioned but, nonetheless, it still maintains a prominent role, although it shares prominence with other booming international actors.

From Westphalia up to this date, interstate relations and the oligopolic distribution of the international system remain a constant. The association between the economic and political-military power maintains a directory of great powers, that is, a small group of state international actors that possess higher abilities in terms of power and always in relation to other units of the system and that, based on this position, exercise a decisive role in the international scene. Proof of that are the new emerging States, BRICS, or even in an immediate future, the TIMBIs, that explain a new configuration of power and the development of a different polarity, with the purpose of locating themselves better in the international system. Following this logic, multilateralism positions itself as governing principle of international relations, used in a different way based on the States own interests. Some meaningful examples are the different relations of the United States, the EU or BRICS with multilateralism.

Multilateralism has become an important resource in the international political discourse, which does not mean it has the same importance in the global agenda. Likewise, it entails a complex practice since it is not conceived and interpreted in the same way by the different actors that form the International Society. Multilateralism is a belief, a form in the rules that should rule the relations between States, in the face of the multilateral, an adjective that modifies a certain type of internal organization. In this sense, it is worth mentioning that as of the World War II, there has been an explosion of multilateralism and of multilateral organizations, as niches of opportunity, in which the States make a bet in pursuit of its defense as tool of their foreign action and to face global challenges. It would be worth wondering if the current multilateral

system has the proficiencies and instruments needed to face the challenges posed by the international agenda.

Based on the different narratives, goals, practices and discursive legitimations, we can observe different visions of multilateralism. The United States as unipolar power, considers its values universal, which distorts the essence of multilateralism. In regards to the stance of the European Union, it is worth mentioning that it promotes a normative multilateralism that mainly reflects European values, which contradicts the essence of the concept, since the current international society is increasingly more cosmopolitan and demands agreements based on diversity. Developing countries practice a defensive multilateralism and the emerging ones a revisionist multilateralism.

The weakness of the international system in responding to the challenges of the global agenda; the emerging role of the new state and non-governmental actors with a clear calling to influence and reshape the structure of the global foreign policy; the consolidation of new blocs and the strengthening of other regional blocs, reflect the deficits of the international system. In this sense, the limited answers of institutions like the United Nations, redirect the situation towards new mechanisms *ad hoc* like the G-8 and the G-20, where the decision-making process results more effective, although the international democratic legitimacy is reduced since they are exclusive.

The global strategic scene has changed decisively. The US unipolarity is questioned by emerging powers, especially China, the European Union to a lesser extent, but also the other members of the BRICS and the TIMBIs, which have appeared with strength and impose their style, demanding higher quotas of power. Even non-state actors, such as the non-governmental organizations have been slowly acquiring more influence and demand a prominence in accordance with their specific weight. Therefore, in an international system like the current one which significantly digresses in organizational, geopolitical and economic issues, from the previous ones, the new challenges faced by the system, in the last decades, have to be faced multilaterally.

Within the current international economic crisis, distortions are even more evident. In this crisis occurring in the “center”, the countries in the “periphery” play an important role contributing to the maintenance of the financial system, which shows their economic ability and solvency together with the interdependence and acknowledgment that the negative effects of the crisis have global repercussions. Joined to this feature, the economic crisis implies a reconsidering of costs by the classic actors (mainly the United States, the European Union, Japan…), reflecting the worsening of divergences which go further into the predominance of the collective over the national. Even when emerging powers have global interests that are clearly manifested, they may not be fitted to face responsibilities of leadership and financing at an international level, especially on the subject of international safety.

The XXI century multilateralism is too interdependent and complex. It demands a new framework of cooperation which, on top of the balances of power, should take into account the diversity of the current challenges and the need to reassert a normative model. To sum up, the strengthening of the multilateralism is generating a greater legitimacy in the decision-making processes, either through *ad hoc* instruments or through those institutions with a global calling to protect collective interests.

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THE POINT OF VIEW OF THE TRADITION IN THE INSTITUTIONAL IDENTITY. THE CASE OF THE MINISTRY OF FOREIGN RELATIONS OF BRAZIL

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Abstract

The purpose of this article is to describe certain elements that we consider constituent of the Ministry of Foreign Relations of Brazil - Itamaraty - as "empty signifier." The tradition of continuity in foreign policy is the result of the combination of these elements, which, in the end, creates a distinctive institutional identity. Among them, we will describe the different values, principles and constants, the importance of strategic thinking and administrative evolution.

Keywords:

Itamaraty; Foreign Policy; Tradition; Institutional Identity

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THE POINT OF VIEW OF THE TRADITION IN THE INSTITUTIONAL IDENTITY. THE CASE OF THE MINISTRY OF FOREIGN RELATIONS OF BRAZIL

Gisela Pereyra Doval

Introduction

Some elements, conceptual as well as institutional/organizational, generate acknowledgment inside a group and obligatoriness for the individual members. Thus, these 'implied standards' help define social meanings, establishing collective expectations. These standards are repeated through internalization of the group members and result in a solution of continuity through *tradition*. In this way, the aforementioned social meanings are established. The hypothesis of this article is that this tradition of continuity is composed of several elements that are part of the Ministry as "empty signifier". For this reason, the purpose of this paper is to describe each one of these elements. Thus, the first section – The Diplomatic Tradition – focuses on tradition with everything that implies, the different values, principles and constants that are held through time allowing the continuity of the foreign policy. The second section – The Strategic Thinking – briefly shows the importance of the ideas that were maintained throughout the years. Finally, the third section – The Ministry's Organic Evolution – briefly describes Itamaraty's administrative evolution through three periods -the imperial diplomacy, the charismatic period and the bureaucratic-rational or modern phase- to show that, in spite of administrative adaptations, the diplomatic elite started to shape up together with the nation and that the axiological base of the country's foreign action was conformed since the Baron of Rio Branco took office which, at the same time, coincided with the declaration of the Republic.

In this way, we will start from the analytic dimension proposed by Aboy Carlés (2001) –the *point of view of the tradition*- to analyze the institutional identity of the leading diplomatic elite[1] of the Brazilian foreign policy. In the first place, we consider paramount to share the concept of political identity,

[1] We are referring to a "selected" group of people that is distinguished in a particular activity. In this case, it is the group of diplomats that are a part of the political helm of the Ministry of Foreign Relations and that, as such, has the power of taking decisions regarding the foreign policy. They are one level below the political leader (in this case the president) in the decision-making process in matters of foreign policy. This group we call diplomatic elite (or just elite) is the one that most closely surround the political leader. They are "(…) all those members of one body that altogether select a course of action, in consultation with each other" (Hermann, 2001: 57).

> *"(…) the set of engraved practices, shapers of meaning, which establish, through one same process of external differentiation and internal homogenization, stable solidarities capable of defining, through units of nomination, gregarious orientations of the action in relation to the definition of public affairs"* (2001: 54.)

Another dimension presented by Aboy Carlés is the *representative dimension.* In this regards, he states:

> *"(…) the element defining the representative dimension shall be the never finished inner closing of a self-defining surface (...) We have here as central elements either the processes of constitution of a leadership, either the formation of what has generally been called a 'political ideology,' either the relation with certain symbols, such as cohesive elements of an identity (…)"* (2001: 66-67).

That is to say, the representative dimension is the unfinished effort to close, to internally homogenize an identity, an institutional one in this case, the way in which it is internally built. In this way, this bureaucracy creates frameworks of 'meanings' within which they think and act themselves; as a consequence, their actions reinforce the leading speeches created by themselves.

Basically, what allows for a definition of Itamaraty's institutional identity is a Weberian[2] bureaucratization and rationalization as *empty signifier*, that is to say, as the generalization of the different characteristics that make up the diplomatic elite. In this sense, we can relate the decision-making process with the second model presented by Allison (1988), according to which the bureaucratic units function in accordance with a specific pattern, whose behavior is determined by routines and oriented by goals and objectives which condition its action, which leads to maximize certain values which are inherent to it.

With regular career patterns, control over recruiting, and a professional assessment and training system, Itamaraty made the maintenance of a high degree of corporate cohesion possible enabling the emergence of an institutional identity of its own, independent and *articulating* of the several identities of their particular components. As stated by Laclau y Mouffe,

> *"(…) it all depends on how this 'organization we are capable of giving ourselves' is conceived, which redirects the fragments to a new form of unit: that organization is contingent and, therefore, external to the fragments (...) this form of 'organization' may be considered as articulation (...)"* (1987: 106-107).

[2] We could call this ideal type Bureaucratic-Rational.

> *"(…) we will call articulation to any practice which establishes such a relation between elements that their identity ends up modified as a result of that practice"* (1987: 119).

In the third section, we will see how the ministry was created under a monarchic regime and if there were considerable modifications with the creation of the Republic.

Besides its autonomy, cohesion and bureaucratic 'isolation,' the long "corporate coherence" in force in the institution is also remarked as a Weberian characteristic of Itamaraty. This is expressed in the continuity and the soundness of its members' adhesion to the 'doctrine' of foreign policy developed by the corporation. It is worth mentioning some reasons that enable this 'isolation' of the Ministry. Political parties have been generally distant from the foreign policy, the official agenda of the main parties ignored, or simply respected the Itamaraty's points of view. The same applies to unions, business persons, armed forces and society in general. But, moreover, according to Barros, it has also been an elitist matter, which made Itamaraty bureaucrats "feel" superior to the rest of the bureaucracies:

> *"Partly because of that (and partly because of the high geographic mobility of diplomats), they have cultivated a strong sense of isolation from the rest of the bureaucracy, for which they have sometimes been mocked as the jeunesse dorée"* (1984: 32).

According to Geddes (1990), the competence of the bureaucratic staff depends on two factors: the capability to train people in a society from which to recruit and the recruiting process which chooses between potential employees based on merit. At the same time, if the recruiting process is successful, career bureaucrats will be isolated from political favors and, therefore, their incentives will be more corporate. Their work will be oriented towards the agency, its goals and their colleague's values rather than towards personal interests and benefits. Thus, the isolation of an agency is a way of preventing the organization tasks from being overturned. At the same time, bureaucratic agencies have a natural tendency to try to control the resources they depend on, including the faculty to hire candidates, develop an ideology of belonging and a sense of mission to guide their decisions, and also to develop divisions between themselves and their surrounding environment.

In this way, the institutionalization of the diplomatic service contributed to 'depoliticize'[3] the foreign policy; however, the bureaucratic factor is not enough, by itself, to account for that result. Another thing that seems to have favored that relative separation of the foreign policy from the dynamic domestic policy was the nature of the issues that, generally, made up the foreign agenda, a consequence to which certain institutional characteristics of the policy formation process contributed, guaranteeing the Ministry of Exterior Relations a decisive influence on the definition of that agenda (Lima, 2000: 288-289.) The idea of coherence and continuity – which may be

[3] Depoliticization is narrowly related to *realism,* and it has to do with the adaptation to circumstances in order to make a profit.

considered a traditional political ideology for Itamaraty – is explained based on this strong institutional element in the formation of foreign policy and the presence of an autonomous, bureaucratic power defined in the existence of a specialized agenda. These elements may be identified in the decision-making process. In accordance with Pimenta de Faria (2008: 81) there are six factors that enable the centralization of Itamaraty's decision-making process regarding foreign policy: the country's constitutional system grants autonomy to the Executive Branch, demoting the Congress to a marginal position; at the same time, the Legislative Branch granted the Executive total responsibility over foreign policy decisions; the "imperial" character of the presidential system; the fact that the industrialization model by substitution of imports generated an introversion in financial and political processes which resulted in the country's international isolation; the country's diplomatic performance which has been non-confronting; and the early professionalization of the diplomatic body, added to a recognition at a national and international level. These factors explain that the foreign policy, more than a government policy is a State policy.

To sum up, the aforementioned elements, the bureaucratization process, the selection and the preparation of the diplomatic body by Itamaraty are some of the most important elements that justify why the Brazilian Chancery operates as an 'empty signifier'. In this way, the work developed by Itamaraty accounts for how the particularities are organized –candidates' individualities- contributing to build one institutional identity through the formation process.

The Diplomatic Tradition

The last dimension Aboy Carlés refers to is the *point of view of the tradition* and, in this regards, the author states that:

> *"Any political identity is constituted in reference to a temporal system in which the interpretation of the past and the construction of the desired future are combined to provide meaning to the current action"* (2001: 68).

Diplomacy and history in Brazil are linked in many ways and for several reasons. In this relationship, we can see reflected visions and perceptions of national interests anchored in the State formation, in its distinctive characteristics and in the tension each country, when exercising its individuality and sovereignty, carries with in its relationship with the other.

In all its fields of influence, the profession of diplomacy is revealed as essentially political[4], constantly conditioned by the critical consideration and the adequate knowledge of background. For professional diplomacy, therefore, history and tradition represent an essential work tool. The Brazilian diplomatic process has worshipped its ideas and actions which have a tendency to remain in time, a commitment to tradition, a commitment to keep the present in touch with the past and the future. Diplomacy, for formal and substantial reasons, is indeed one of those things. The Brazilian foreign

[4] Leaving out of the goals of this paper the discussion on what is *political*.

policy is associated with long-term national and permanent interests. That's where its coherence and continuity through time come from.

The diplomatic tradition in Brazil, since its independence, has strategically and pragmatically shaped its foreign policy, avoiding rough detours from the doctrine. In this way, as stated by Aboy Carlés:

> *"If the relation between the collective action and the achievement of goals defined as desirable seems evident to those who pretend to approach the action in terms of its rationality, the understanding of the current action to future companies acquires specific importance by contributing to give sense to the collective action through a traditional validation"* (2001: 68).

Thus, Itamaraty's elite maintained the domestic interests, making small changes to the foreign policy implemented depending on the international juncture where it was applied, but continuing to keep a realistic vision[5], in line with the country's general goals. As stated by Lins da Silva:

> *"The Brazilian foreign affair policy has been preserving, historically, strong features of continuity. The exchange of people and government parties, even when coming from thrauma movements, such as revolutions or putsches, has not changed, in a significative way or long lasting way some of its foundation principles, which were persistent through the whole 20th century (…)"* (2002: 295).

In this sense, we are not unaware that this statement may be challenged with some examples as well as that the presidential diplomacy – carried out, mainly, as of the decade of the nineties with the FHC administration and reinforced by Lula's administration - would question such a categorical statement. However, it is important to highlight two issues. The first one is that the prominence of the presidential figure in the foreign policy environment is not part of the Brazilian tradition (Giaccaglia, 2010), but a recent model of foreign policy; and second, that the pluralization or democratization of the decision-making process in foreign policy should be understood in relative rather than absolute terms – "Pluralization departs from a unique baseline: the quasi-monopolistic reputation of Itamaraty" (Cason y Power, 2006, 7). Thus, even though Amaury de Souza's renowned study focuses on the expectation of the diversification of parties interested in having any influence on the decision-making process, the author also argues that there is a

> *"'democratic deficit' coming from the lack of transparency in the decision processes and from the inexistence of adequate channels regarding the*

[5] Regarding the pragmatism and the importance of the National Interest.

> *representation of the interests of organized groups or of the major tendencies of the national point of view"* (2009, 85).

As stated by Pimenta de Faria

> *"(...) if today, there are significant evidences of a wider porosity of the PEB production process, maybe it is a bit premature to categorically state that there was a change in the roots of that same policy, of a clearly top down to a more bottom up format"* (2008, 84).

Finally, according to Amado Cervo[6], there are three constant conceptual premises of the foreign policy, which emerge as secondary elements of the Brazilian identity and consolidate through time to currently become primary elements as foreign policy principles and have more impact on its continuity. These are universalism, disarmament and integration. Cervo explains that it was possible to carry out a universalist foreign policy, as one of the vector principles of the foreign policy, because Brazil is a heterogeneous country and has a heterogeneous social composition[7]. In this way, universalism derives from a plural cultural and diversified ethnic composition with a strong indigenous and European stratum, but also with Oriental and African elements (Arabic, Chinese, and Japanese).

> *"Three lines define the ethnic composition of the Brazilian population: a) an original root of mixed race formed with the mixture of whites, Indians and blacks; b) a crescent whitening as a consequence of the European emigration and of the interethnic mixtures and c) the elevated degree of integration of ethnical and cultural matrixes"* (Cervo, 1995: 134).

Thus, Brazil has a historical formation of the national identity of coexistence of the differences associated to the heterogeneous character of the country and its inhabitants. In this way, the construction of an identity with plural bases, lead to principles, values and patterns of behavior which were incorporated to the country's foreign policy, composing its historical heritage. As of the impulse to modernize society in the decade of the thirtieth, Brazilian diplomacy has reflected the ideology of the cultural and ethnic plurality in its discourse. This background was useful for the defense of principles of conduct and values inherent to the foreign policy which gave it a continuity character. In the words of Cervo,

> *"The way that the speech has taken over the concepts of the plural national identity ideology will be exposed through the reference to the lusitanism terms, African roots, ecumenism and universalism to*

[6] Interview conducted to Professor Amado Cervo in October of 2010.
[7] This explanation is also backed up by Minister João Mendes Pereira, Financial General Coordinator for South America (IIRSA/COSIPLAN) in an interview conducted on November 9th, 2011.

> *conclude something about the connection between multiculturalism and foreign politics in Brazil"* (1995: 140);

currently, we have to add South Americanism to these concepts. From this author's point of view, universalism as strategy of the Brazilian foreign policy was possible through the incorporation in the discourse of cultural and ethnic issues, which served to establish bonds with the communities in which those features were shared.

Furthermore, we highlight that the universalist strategy is accompanied with pragmatic political actions. This is observed in the Brazilian discourse whenever it is asserted that cultural attachés are reasserted as long as they are useful in consolidating foreign orientations. Thus, it is observed that each discourse helped Brazil establish relations depending on who was the valid speaker for the context. It could be inferred from that that as Brazil has one of the most heterogeneous populations in the world, it has the ability to perform the role of bridge between the different continents.

Notwithstanding, we have to take into account that there other positions regarding the racial issue. Classic authors oscillate from the most favorable to the most reluctant to the mixture of races. Oliveira Vianna outlined the inequality of races – for the African to have a positive influence in a civilization's generation, they had to "mix" with the Arian race -; Gilberto Freyre (forefather of the Brazilian "racial democracy"), on the contrary, weighed the contribution of Africans to the formation of the Brazilian culture. De Almeida Vasconcelos (2007), in his study on the racial issue, concludes that: the racial issue is delicate; spatial differences have to be taken into account; in a very "mixed" society, it is difficult to "separate" blacks from mestizos and Indians; the discussion over the racial issue places the country's social inequalities in a secondary position, regardless of color.

The second key concept is disarmament. In the decade of the fifties, the ambassador Fácio proposed in the OAS the need to assign the resources that were used to maintain the military apparatus to finance economic development at a regional level – at that moment, projecting the issue at a global level was considered a lack of realism. Fácio (1958) stated that the safety of the countries of the region would not be threatened since the Inter-American Treaty of Reciprocal Assistance [*Spanish: Tratado Interamericano de Asistencia Recíproca (TIAR)]* would work as a dissuasion in the presence of a potential extra-continental aggression and, therefore, it was unnecessary to maintain military forces over those demanded by domestic security. Cervo (1995) argued that this Fácio idea is a theoretical subsidy to the Brazilian diplomatic thinking. In this way, we observe a need not only to demilitarize the region, but also to assign those resources to other areas more fruitful for the social development. Those terms were also stated, in the XVIII Ordinary Session of the 1963 United Nations General Assembly, in the famous speech by Minister Araújo Castro on the 3 Ds[8], which would leave a deep mark in the Brazilian diplomatic tradition.

> *"The fight regarding the disarming is the fight for Peace and juridical equality of States which aim to save themselves of fear and intimidation"* (de Seixas Corrêa, 2007: 173.)

[8] Disarmament, Development and Decolonization.

As of that moment, in discourse and practice, the Brazilian diplomacy would use this resource to show its non-confrontational policy.

However, it is worth clarifying that this situation was jeopardize with the arrival of the most active stage of the nuclear process which came hand in hand with the Doctrine of National Security and the military governments and the historical situation of rivalry with Argentina. This rivalry was manifested mainly through two key events. On the one hand, in the Rio de la Plata basin which had the shared waters of the Paraná River as stage, where some misunderstanding occurred in the context of the construction projects of the Itaipú (Brazil) and Corpus (Argentina) dams in the seventies. The first effort to revert this situation was made with the signature of the Tripartite Agreement in 1979. On the other hand, this competition was evidenced through the nuclear and arms race which only started to go through a path of cooperation with the signature of the bilateral Cooperation Agreement for the Development and Application of the Peaceful Uses of Nuclear Energy in 1980. As of the decade of the eighties, this rivalry disappears, among other factors, due to the re-democratization process in both countries which is complemented with the several regional integration mechanisms, especially, the MERCOSUR. Even when the moments of higher tension between both countries were generated strictly in the nuclear environment, it was also the space in which the first Measures of Trust which would lead, after the arrival of the democracy, to the consolidation of what we consider a process of Cooperative Security were established. After the arrival of the democracy in both states also came the adhesion to the treaties of non-proliferation of nuclear weapons. As an example, we state: the adhesion to the Treaty of Tlatelolco, to the Non-Proliferation Treaty, the signature together with Argentina of the Missile Technology Control Regime (MTCR), the signature of the Declaration of the Mercosur as a peace and free of massive destruction and nuclear weapons zone and the Declaration of the South Atlantic Peace and Cooperation Zone, among others. In this way, even when it is true that there was a critical period in regards to the nuclear development, it is also true that it was a short period of time and under de facto regimes.

As far as the third Cervo's heading is concerned –integration- we can highlight that this constitutes an ever-present issue in the discourse since several actions have been carried out to achieve regional integration throughout time. This policy stayed, regardless of the sways the Latin American integration processes were subjected to.

In the decade of the fifties, Kubitschek's administration program gave priority to the effort of industrialization, considered paramount for the country's economic development. The understanding between Kubitschek and the rest of the region's leaders - especially Frondizi - was not only in the economic arena, but also in the political. When the Brazilian president fostered the so-called Operation Pan-America, he received full support from the Argentinian leader; at the Pan-American Conferences, they both defended the idea that the major threat to our countries was not to be found in the extra-continental powerful nations but in the underdevelopment. That cooperation environment enabled the emergence of the Latin American Free Trade Association (LAFTA), first integration step in the region. In this context, the definitions of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) were framed, and particularly, those of the Development Theory formulated by Raúl Prebisch whose recommendations were adopted by the countries of the region. In

this way, the main goal of the regional integration processes was to support the industrialization model by Substitution of Imports, which had to be driven by the State. This us how in the sixties, the regional financial integration was seen as an instrument useful for the search of a development conceived as a stage post-underdevelopment. Under this conception, the regional economic integration was a strategy to achieve the expansion of the domestic market and foster industrialization in Latin American countries. This integration was characterized as introvert and closed[9] (Van Klaveren, 1992, 64.)

LAFTA's goals were limited but during the first years we were able observe an increase in the exchange between the member countries as a result of tariffs reductions on goods that did not originate resistance. Negotiations were stalled at the time of reducing fees in an effort to achieve the essential in the exchange. Moreover, there was also no progress on the reduction of quantitative restrictions or on industrial complementation agreements. As a consequence, the supremacy of protectionism, the authoritarian regimes that succeeded in the following decade in all of Latin America, the inefficient bureaucratic interventions, the obtaining of asymmetric earnings among the members and the financial and political instability contributed to the failure of the model.

In spite of its poor breakthroughs, the ECLAC experience was the foundation stone on which the LAIA stood. Such institution became, as of 1980, the point of approximation of the countries which currently form the Andean Community[10], the members of the MERCOSUR, Chile and México. The transformation of ECLAC and LAIA was the result of a need to provide a new framework to the Latin American integration. Under this new model, new generation agreements which overcame the commercial dimension to incorporate the political dimension were implemented. In this way, a new phase started, characterized by the assimilation, in a pragmatic model, of the region's heterogeneity and the institutional channeling of the region's integrationist commitment within a flexible framework. Without pre-established quantitative commitments, it contained elements needed for the model to evolve towards superior economic integration stages and achieve, eventually, the goal of the Latin American common market. Compared with the ECLAC, the LAIA emerged as a more open institution since it foresaw the participation of member countries in partial actions with non-member countries, as well as the participation of the Association in the movements of horizontal cooperation between developing countries.

By the middle of the decade of the eighties, the foundations for a more ambitious regional integration project in Latin America were laid, the Southern Common Market *[Spanish: Mercado Común del Sur, MERCOSUR.]* In the first place, factors of systemic order were influential in a governmental perspective of approximation between the countries of Latin America: the crisis of the debt, the Central American crisis and the worsening of the East-West conflict. Taking into account the aforementioned factors, the Brazilian administration intended to favor Latin American integration. Thus, the Declaration of Iguazú, signed in 1985 by Alfonsín and Sarney, appeared like the first

[9] An introvert financial integration is deemed as one that looks inside and is devoted to solve the domestic demand problems the underdeveloped countries have. It was closed since it was instrumented based on the processes of substitution of imports which intended to energize the national industry.

[10] The Andean Community (1996) derives from the Andean Pact (1969) and it is formed by Bolivia, Colombia, Ecuador, Peru and Venezuela.

step towards the re-launching of a bilateral relation. On July 29th, 1986, the leaders signed the Act for Brazilian-Argentine Integration in Buenos Aires, and on December 10th the Act for Argentine-Brazilian Friendship in Brasilia. Finally, this stage would be completed with the Integration, Cooperation and Development Treaty of 1988, ratified by both congresses in 1989.

The decade of the nineties starts with the broad structural reforms recommended by the Washington Consensus and from there emerges the so-called new regionalism which would be adopted in Latin American integration processes, as is the case of MERCOSUR. The beginning of the Open Regionalism led to multiple changes regarding the conception of the integration processes and the practices that would be adopted to make them operational.

The Treaty of Asunción was signed on March 26th of 1991 between the four Member States – Argentina, Brazil, Paraguay and Uruguay. The purpose of this agreement was the creation of a common market. On that account, they outlined a strategy of gradual integration which led, first, to the establishment of a Free Trade Area between 1991 - 1994 and to the creation of the Customs Union as of 1995. It is worth mentioning that the four partners have experienced several problems which hindered complete fulfillment of the two aforementioned stages.

Regardless of the analyses which may be performed on the efficiency of the MERCOSUR, it is worth mentioning that in geo-economics terms, the regional integration has enabled and expanded the cooperation between our countries making them stronger at a global level. Thus, during the FTAA project negotiations, the MERCOSUR countries negotiated en masse – upon Brazil's request and due to its *Building Blocks* proposal in opposition to the North American suggestion of *Step by Step* negotiations -, which conferred them a higher impact on the negotiations than if each country had acted individually. Moreover, integration has helped democratic countries strongly seal the peace achieved in the borders with a tradition of conflict (creating the Peace and Cooperation Zone), and protect the democracies through the democratic clause (Protocol of Ushuaia of 1996.) These FHC administration achievements were obtained under the assumption that the formation of integration blocks constituted the only solution for developing countries against the risks of globalization. In this way, just as it happened in almost all Latin American states, Argentina with President Carlos Menem and Brazil with Collor de Melo, Itamar Franco and FHC abandoned the developmentalist State model adopting a neoliberal model. Accordingly, the governmental policies and perceptions that used to rule in the past were reformulated, the strategies of substitution of imports were abandoned, the role of the State and the international commercial and economic relations were reformulated in both countries, and the interpretation adopted was the one according to which all issues were of pure economic nature. In this way, the regional integration was used as an efficient political instrument to intensify the trade liberalization and continue reducing the protection levels average demanded by neoliberal policies. From the wide structural reforms emerges the so-called new regionalism or Open Regionalism which was to be adopted in Latin American regional integration processes. Within this framework, we have to comprehend not only the signing of the Treaty of Asunción of 1991, which set the commencement of the MERCOSUR, but also, and more importantly, the Protocol of Ouro Preto of 1995, which finally implemented its institutions and the creation of the common external tariff. Unlike the neighboring countries, Brazil did not suffer

counterweights and we even observed positive reactions of the economy to the economic opening. The fact that it is the biggest economy in South America generated asymmetries among its other partners that are still getting deeper into the planning of the integration.

As of Lula Da Silva's administration, the Southern Cone's peripheral condition started to be analyzed with an optimistic opinion, as long as the countries of the region started trying to associate to, jointly, handle the situations generated by themselves between them and with third parties, as well as those caused by third parties and which impacted on national economies and societies. In 2004, Brazil furthered what is now called Union of South American Nations [*Spanish: Unión de Naciones Suramericanas, UNASUR*] expanding the importance previously given to the MERCOSUR to the whole of South America. Having said that, it is worth mentioning the importance of diplomacy in the genesis of integration processes. As stated by Cervo (2008), even though political leaders are the apparent creators of integration processes, these can be carried out if, and only if, social forces are directly involved, and diplomacy is the one in charge of raising awareness around it. Integration as a permanent item in Brazil's foreign policy agenda can be observed in its participation in the several instances and processes, as those already mentioned.

In all these cases, diplomacy had a superlative importance. The Empire left diplomacy as a legacy that is 'genetically' transmitted in the construction of the State. In this way, Itamaraty adopted a position of strength in foreign affairs, informing and forming foreign policy opinions adequately. In the words of Melo:

> *"The strengthening of Itamaraty, as a professional body, has its origins in the history and in the formation of the National state. It can be observed that the institution acquired a crescent autonomy concerning the social system and the government apparatus itself (…)"* (2000: 58).

Thus, the combination of autonomy and centralization enabled the decisive process to reach a high degree of union. The sound consensus on foreign policy, Itamaraty's approval by key segments such as the armed forces and entrepreneurial groups and the functional articulation with other federal agencies significantly contributed to shape the core role of Itamaraty in the formulation of the Brazilian foreign policy (Russell, 1990.) Historical approval comes from the fact that the foreign policy agenda has been focused on the country's development priorities.

The strategic thinking

The ambassador Meira Penna states that Brazil is the product of diplomacy. Even though we consider this assertion to be a bit extreme, we agree that the direction of the Brazilian policy by itself has been influenced by important strategists and, among them, we find a great number of diplomats. For this reason, we believe that the study of the political identity that underlies in the corpus of thought of Itamaraty diplomats, and with the one of its great dignitaries, is paramount to understand the Brazilian foreign action and its relation with Brazilian domestic political goals.

The history of political ideas in Brazil is full of images and deep concepts. In this section, we will not talk about political ideas in action, as materialized by statisticians who consider themselves the people's representatives, but about those political ideas which may have influenced those statisticians to finally act, that is to say, what was essential in the base consensus of the national political-strategic thinking. Basically, as stated by Severino Cabral (2004), it has to do with the study of contemporary political-strategic ideas that analyze a set of concepts on Brazil, created by intellectuals that are settled in the country's high political command, and applied to the creation of a national response to the challenges, both domestic and international.

Studying the way thinking developed by these intellectuals

> *"(…) It can seem an anacronical exercise of erudition not that relevant (…) However, it seems even closer to nowadays in the political agenda developed, at that time, by some of the characters which took care of the scenery with ideas and problems related to the national Human Being and its fate"* (Cabral, 2004: 15).

The way of thinking of these politicians and intellectuals has an amazing importance in relation to the country's domestic development as well as in relation to its performance in the international scenario.

Calvario dos Santos defines strategic thinking as that

> *"Intellectual activity turn to the preparation and application of National Power to reach or to maintain our goals overcoming every kind of obstacles"* (2003: 41.)

According to Severino Cabral[11], in order to define 'strategic thinking,' in the first place, we have to ponder on the existence of a system of thought, that is, of a set of systematized ideas in a theoretical body which express a determined field of knowledge about facts and data. The system of thought differs from a simple conception of the world or ideology since it admits an epistemic formalization capable of generating speculations and previsions susceptible to be proved or demonstrated – a system of thought example would be the Marxist socialist or liberal economic doctrines on the nature of the society and the State. Secondly, when the system of thought is supported by costs and benefits calculations to figure out projections of possible scenarios for a determined society, which imply the possibility of competition, conflict, approximation and/or cooperation with other societies, we then stand in a strategic situation, and the thought depends on the strategy, thus creating a field of thought that serves as background for the emergence of a strategic theory. The duration in time consolidates that doctrine and makes it a role model for other thoughts.

[11] Interview granted by Dr. Severino Cabral in October of 2010 in the Superior School of War of Rio de Janeiro.

In this way, regardless of who the thinker is, the important thing is that those concepts have to be taken into account to be expressed in actions. Thus, the Baron of Rio Branco, Gilberto Freyre, Sérgio Buarque de Holanda, José Honorio Rodrigues, Hélio Jaguaribe, Golbery do Couto e Silva, Fernando Henrique Cardoso, João Augusto de Araújo Castro, San Tiago Dantas, Gerson Moura, Ramiro Saraiva Guerreiro, Celso Lafer, Samuel Pinheiro Guimarâes, are some of the examples of an idea of *Brazil country*, which was later, somehow, turned to actions. The articulation between these politicians-intellectuals who had very different thoughts from each other was that they thought of the Brazil of their times, however, their ideas prevail in time.

In the third place, we stated that certain historical characters as well as goals established at the beginning of Brazil's independent experience, have considerably contributed to provide meaning to Itamaraty's current action, taking permanent interests, perceptions and premises and adapting them to the current times, which, in Aboy Carlés's opinion, constitutes part of the whole political identity.

Nascimento (2005) explains that intellectuals have been present at times which expressed deep modifications in Brazilian history. In the decade of the thirties –which, as far as we understand, marks the beginning of Brazil's modern State-, intellectuals decided to direct their actions towards the State, conceived, as of that decade, as the superior representation of the idea of nation and the brain capable of coordinating and enabling the harmonious functioning of the whole social organism. In this way, the intellectual of that time had a social role which demanded that it was necessary to join thought and action. It was a period in which the nationalist thought was intensified. The consequence in the foreign policy was an important change in the representation of Brazil's national interests. Pragmatism and deideologization had as a counterpart –at a national interest level- a main goal: obtaining supplies for the national development. Another historical turning point was in the decade of the seventies with the military governments, which highlighted the idea that the Brazilian foreign policy had to be updated to give Brazil a prominent role in the world -the idea of Brazil as a power.- The last period we want to highlight, on which we will expand, is the Lula da Silva's administration, whose minister of foreign relations, Celso Amorim, has gone in depth on three strong core ideas. The first one is the feeling of belonging to South America, South Americanity. From this first core idea, we can deduce the second one: national leadership. Finally, this regional leadership tries to portray itself beyond South American borders to play at a global level. In the words of Amorim:

> *"At the same time, we understand the Latin Americans and, more specifically, the South Americans, we recognize the Brazilin singularity in the world context. There is no incompatibility in that. The Brazil`s position as a global actor is consistent with the emphasis which we give to the regional integration and vice-versa. In reality, the capacity to coexist pacifically with our neighbors contributes to the development of the region and it is a relevant factor of our international projection"* (2007: 7-8).

Brazil has become an emerging power, under the direction of Lula Da Silva's prominence and charisma. To that purpose also contribute a self-oriented diplomacy,

the company of a minister of Foreign Relations with experience and with a strong understanding with the president. This international identity has enabled the country to become a speaker for the Southern states within the most important international organizations, as well as a 'creator' of regional institutions.

The increasing prominence the country has acquired its regional and global role and, as a consequence, its insertion in the world, derive from an idea of manifest destiny (Almeida Neves, 1995.) This is, in part, the result of the construction of its national identity. As stated by Busso & Pignatta (2008), those countries whose national identity acted as a structuring element of its foreign policy, have achieved better results in their international insertion than those states in which the identity is weaker.

Led by Amorim, at a regional level, Brazil 'used' its territorial condition to strengthen its position regarding its movements in the continent and in the world. The mentions to *the regional*, which are part of the country's identity, are reinforce in the XXI century, when South America starts to represent the regional platform that references Brazil's international insertion strategy[12] (Freitas Couto, 2009). As stated by Samuel Pinheiro Guimarâes –another ideologist of the Da Silva administration-:

> *"South America is the inevitable circumstance, historically and geographically of the State and of the Brazilian society"* (2002: 146).

As stated before, the absorption of a South Americanity in Brazil's national identity meant the creation of initiatives to strengthen that dimension, which were reinforces by Amorim's administration.

In a structural dimension, the contributions of the different periods may be seen –paraphrasing Weber- in a harmonious balance of certainty and responsibility. In other words, the maximum external responsibility is tied to the game of national interest to consolidate a national project of strong domestic development and autonomous international presence. There, certainties act like subsidiary contributions -as parts of a whole- which assist to one, in broad outline, unique identity that becomes the support of the political continuity.

The Ministry's Organic Evolution[13]

The organic evolution which, later, led to the creation of the Ministry of Foreign Relations as such was complex and bumpy. Even before the Brazilian independence, the handling of foreign issues by the empire went through several modalities. As of the year 1822, Borges Cheibub (1984) performs a follow-up of the evolution of the diplomatic organ par excellence, dividing the history of the diplomatic process in Brazil in three moments: the proprietary period (imperial diplomacy) - from 1822 to 1902 - the charismatic period (the Baron of Rio Branco) -1902 to 1920-; and the rational

[12] At the Presidential meeting of the Rio Group in 1993, president Itamar Franco proposed the creation of the South American Free Trade Area [*Spanish: Área de Libre Comercio Sudamericana, ALCSA.*] Thus, the Group served as the real first South American essay of the Brazilian foreign policy. At that time, Amorim stated that the ALCSA initiative marked the beginning of South America's political construction.

[13] According to Oliveira Castro (2009), the process we will describe may be similar to the development of a living organism.

bureaucratic period - 1920 to date. We will take these three categories and we will briefly describe the Ministry's process of bureaucratization since in its evolution, we find the explanation of the organicity.

In the first period, Brazil had a diplomatic structure inherited from Portugal. At this point, the recruiting policy aimed at the diplomatic task being exercised by members of families of noble ancestry, close to the State and linked to it by trade links. This characteristic did not allow for clear boundaries between collective and individual interests. This –together with the Empire's financial insufficiency- did not enable a high degree of professionalization of the diplomatic scenario of the period. However, these characteristics, which *per se* are not considered good, produced good results: the elite, previously socialized in the Portuguese tradition, was not heterogeneous.

> *"Were the stability, cohesion and homogeneity of the imperial elite which made Brazil a country different from all the other in Latin America – which guaranteed the country the diplomatic supremacy in relation to the neighbor countries (...)"* (Borges Cheibub, 1984: 118).

The most interesting thing stated by Cheibub is that, during the whole period, there was an intra-elite consensus which was what enabled the continuity of the foreign policy. During this period, the goal of generating a bureaucratic structure *of its own* to recruit diplomats –although in the first stage prebendary characteristics were adopted- created the most important background for the diplomatic service, which would steady itself in the subsequent periods.

The transition from the Empire to the Republic did not imply great alterations in the Brazilian foreign policy, as stated by several authors (Borges Cheibub, 1984; Lafer, 2002; Pinheiro, 2004). However, Borges Cheibub (1984) makes a distinction between the imperial period and the charismatic moment due to the figure of the Baron of Rio Branco and the symbolic force this character would acquire through the years for Itamaraty. The so-called legacy of the Baron has a broader significance for the fact that he was responsible for the assertion of principles and values that would later be recognized as the axiological base of the country's foreign action (Sénéchal de Goffredo, 2005).

The Baron of Rio Branco impressed a distinctive seal in the manner of exercising diplomacy from their managements, especially through the symbol of *esprit de corps* which he instilled in Itamaraty. His management may be considered as the paramount symbolic framework in the modern conception of the Ministry of Foreign Relations. As stated by Celso Lafer:

> *"(...) the direction that oriented Rio Branco's vision of the future was the development as a means to reduce the differential of power, responsible for South America's vulnerability"* (2002: 102).

On the other hand, as stated by Barros (1984), the originality of the Baron's situation lied in that, with the exception of the Armed Forces, no other bureaucratic agency of

the Brazilian government generated such a powerful historical symbol as to help it act coherently and sort out the uncertainties of the current bureaucratic competence. Rio Branco was the politician who started the definite turn. As of his intervention, diplomatic history starts to be told in a different way as the Ministry acquired a leading role in the republican bureaucracy.

After the death of Rio Branco, the so-called *Belle Epoque* of the diplomacy would end and the bureaucratic-rational or *modern phase* of the history of the Ministry of Foreign Relations' organization would start, with the consequent administrative modifications and regulations that would lead to the current organization. Thus, this last period focuses on the bureaucratic reform which turned Itamaraty into the institution we know today. It is worth mentioning that, as stated by Borges Cheibub, the bureaucratic-rational transformation process of Itamaraty was typical of the general modernization of the State in the XX century - particularly as of 1930 -, when the tendencies to centralization and bureaucratization of the whole public administration are sped up.

In this way, Itamaraty has been getting stronger throughout the history of the formation of the Brazilian national State, among other things, due to the characteristics of the State formation process itself and to some factors related to the diplomacy itself and to the diplomatic institutions. Thus, diplomats tend to acquire independence with respect to the system, which confers them an increasing initiative in regards to the formulation and implementation of the foreign policy, while securing them a certain ability to secure its continuity (Borges Cheibub, 1984).

Summing up

In this paper, we have tried to analyze the Ministry of Foreign Relations as "empty signifier", which enables Itamaraty's tradition of continuity. On that account, we described certain foreign policy constants, detailed some points of view of the diplomatic thought, and we made a brief description of its organic evolution. Furthermore, we believe that Itamaraty's officers – the diplomatic elite - have generated the tendency to act in one same direction, to protect and go deeper into its shared identity – institutional identity - through the application of these guidelines.

In Itamaraty, there is a structural component over the political component, which, regardless of contextual changes, maintains certain guidelines, principles, values and goals. The foreign policy is developed in such a way that organic goals are more important that the governmental ones. Regardless of the bad critics that may be made to some State agencies, it is worth mentioning that Itamaraty acts as *bolsô de eficiência* in which the *esprit de corp* allows it to be an agency that keeps a coherence through time, maybe because of the feeling of belonging of the agents composing it - which makes it possible for the shared identity to overcome individual identities. - We agree with Arbilla in that the presence of a diplomatic corporation with a strong self-institutional orientation and a high degree of control over most access channels to the process of formulation of the foreign policy, inhibited conceptual ruptures in spite of contextual changes. These have been translated into an *update* of the traditionally sustained principles, as stated by Azeredo da Silveira, "the best Itamaraty tradition is *knowing* how to renew itself*".*

Summing up, Itamaraty's political identity is defined through the Weberian bureaucratization as empty signifier. It is this bureaucratization the one that allows for the establishment of one unique identity in the continuity, with a high degree of corporate cohesion. Considering the practice of articulation stated by Laclau y Mouffe, we state that it is precisely this Weberian bureaucratization which allows the establishment of that modification in the different individual elements that re-drives the fragments to one unit represented in one unique institutional identity, which is evidenced in the maintenance of a high degree of corporate cohesion.

It is worth mentioning that, for the last couple of years, it has been stated that the premise of positive consensus of the several political-ideological tendencies on the Brazilian foreign policy is no longer valid. In general, critics consider that the current foreign policy is a late emission of the underdevelopment of the decade of the sixties, characterized by a childish anti-imperialism, as well as in the limitations in Brazil's leadership ability (de Almeida, 2006). Even though these opposite opinions make the consensus hypothesis more complex, it is undeniable that they reinforce the hypothesis of coherence and permanence throughout history of the continuous treatment of certain issues and perceptions. Taking the latter into account, we dare to asseverate the existence of a unique political-institutional identity in the core of Itamaraty.

The organizational and administrative modifications suffered by the Ministry of Foreign Relations as institution show what Olivera Castro (2009) calls organic evolution; that is, that the Ministry has evolved and continues doing it as the needs stated by the international policy and the Brazilian domestic policy move forward.

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CONSIDERATIONS ON THE ROLE OF FEDERALISM IN MANAGING ETHNIC PLURALITY IN MULTINATIONAL STATES IN CONFLICT PREVENTION

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Abstract

The existence of several ethnic, religious and/or linguistic groups whose rights are not acknowledged or are continuously violated leads to tension with unpredictable consequences. If, in some cases, those groups use peaceful means to ensure that their specificities are acknowledged but, in other cases, there is frequent use of force to attain the same goals. This type of conflict occurred in the western Balkans in the 1990s or still take place in regions such as the Caucasus, the Democratic Republic of Congo, Nigeria or Myanmar in which the ethnic element, together with the religious issue, are the main causes.

Though it is true that several solutions have been presented to respond to the tensions inherent to ethnic diversity of multinational States, it is also true that the several theoretical practical models have not always met the objectives and, above all, resolved situations of peace, which are often of negative peace. From minority rights to federalism, we may identify principles whose importance and adequacy to contexts may be defined as formal peace. Nevertheless, it remains important to include and frame those elements within specific cases, considering that each case is different and adapting these principles to a specific situation does not prevent them from being inadequate to a situation apparently similar.

It is therefore crucial that considerations are raised on the role a political and administrative organization model such as federalism may play, partly as a complement to the law of minorities as a tool to manage ethnic diversity in States that may be defined as multinational, as well as to prevent ethnic conflicts.

Keywords:

Minority rights; federalism; conflict prevention; ethnic nationalism

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CONSIDERATIONS ON THE ROLE OF FEDERALISM IN MANAGING ETHNIC PLURALITY IN MULTINATIONAL STATES IN CONFLICT PREVENTION

Daniel Rodrigues

Introduction

As the title indicates, this paper aims to make a general comment on the role of federalism in managing ethnic diversity in multinational States and, thus, in preventing conflicts whose cause is partly or entirely due to ethnic issues associated with nationalism and one or more actors involved. The issue is as complex as its implications in terms of a State's political and administrative organization.

Therefore, an approach to this issue implies not only a presentation of the federal model as a viable solution to prevent ethnic national conflicts but also as an understanding of the difficulties faced by multinational States in managing their ethnic diversity. Therefore, this paper aims firstly to analyze this issue from the point of view of minority rights and their acceptance and application by this type of States and then analyze the federal model, considering the lack of respect for minority rights increases the risk of ethnic conflict in contexts where ethnic tension is smoldering.

This paper does not aim to define the concept of federalism nor to put forth the federal model as the only possible outcome in contexts of ethnic tension. What we aim is to present elements that allow assessing the potential of this model considering its advantages in fostering greater equality among ethnic groups within the same State.

Multinational States and acknowledging internal idiosyncrasies

Considering that the creation of multinational States is a consequence of several elements (historical, economic, cultural, and religious) and their maintenance is a complex task, regardless of the type of State structure (city-State, monarchy, republic, empire or other).

According to Jennifer Jackson Preece,

> *minorities are no more than ethnic nations that were unable to attain the final objective of ethnic nationalism - independence in relation to its State-nation - whose existence is, therefore, within the political borders of another nation's State; its own existence in an uncomfortable*

> *reminder of the 'belief in national self-determination' in international society [...]. In short, the issue of minorities only arises in the context of State-nations and is the direct result of its anomalies and inconsistencies* (1998: 29).

These anomalies that several States have attempted to resolve, mostly after several internal movements have appeared claiming the belonging to these "ethnic nations" or "Stateless nations". In the last decades of the 20th century, some devolving solutions have appeared as responses by States to internal centrifugal tendencies, namely in Europe. The United Kingdom, Spain, Italy, Belgium and even France are examples of western democracies that moved in that direction by opting for a political and administrative restructuring to resolve ethnic national and ethnic regional claims. These claims are different in terms of their ability to destabilize that harmony and unity within the national space, as well as in terms of perspective. And because each State has its own issues, the solution must also vary according to each case and local specificities. There is ample literature on ethnic conflict and institutional schemes as regulators of tension between the State and its groups in terms of non-violence and includes several solutions on conflict prevention, management and resolution. Some authors merely make generic reference to existing possibilities, other create endless lists. In short, we may state that conflict resolution and prevention through institutional schemes includes creating mechanisms such as territorial and non-territorial self-government, division of power at local and central levels, cross-border institutions, paradiplomacy or measures promoting human and minorities' rights (Cordell & Wolf, 2010: 87). On furthering these options, William Safran (1994) presents several State policies he defines as being positivist/plural; federalism according to ethnic criteria, quasi-federalism and pseudo-federalism; local and/or regional autonomy; association; functional decentralization; public servant rotation; local autonomy and/or mixed functional decentralization; communal representation; legislative representation guaranteed to major ethnic racial groups; multiple legal and court systems, with different functions; acknowledgment of official or co-official status to several languages and institutionalized multilingualism; affirmative action; distinction between citizenship and nationality; allocation of sponsorships; promotion and subsidization of cultural creations by ethnic minorities. Another solution is adopting policies that promote non-territorial autonomy, also known as personal (or cultural) autonomy, the latter based on the ideas by Otto Bauer and Karl Renner (Bottomore & Goode, 1978), two Austrian Marxist thinkers. However, whatever the State responses are, they all use territorial decentralization (and frequently federalization and pseudo-federalization) as a synthesis of the interests of central and local (regional) powers, thus preventing that the response may become a legal basis for new claims.

Minority rights as a response to the claims of "ethnic nations"

If we limit our analysis to Europe, we may realize that the protection of national minorities is now within the scope of several international organizations (for example: the Council of Europe, the EU, the OSCE, the Council of Baltic Sea States, and the European Central Initiative). The role played by these organizations has been studied by several authors who focus on the issue of the minority rights from different angles

(Pentassuglia, 2004; Hogan-Brun & Wolff, 2003; Thornberry, 2001; Trifunovska, 2001a)[1].

The protection of national minorities is not a recent phenomenon. It has indeed become an internationally acknowledged principle at the end of WWI, when the United States president Woodrow Wilson defined the Fourteen Points and their partial adoption by the winning powers. However, and despite several conventions, such as the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages or the Tool of the European Central Initiative for the Protection of the Rights of Minorities, where recommendations may be found on the protection of those minorities, these are not fully abode to by the signing States. According to Trifunovska (2001), the Council of Europe defends the idea that individuals belonging to a minority have several rights because of that. Minorities have thus the right to be acknowledged as part of the State they live in, the right to keep and develop their culture; the right to keep their educational, religious and cultural institutions; and the right to participate and be fully fledged subjects of law in decision-making in terms of subjects directly related to them (2001: 146).

Among the several European convention on this issue, the best-known is the Framework Convention for the Protection of National Minorities, issued by the Council of Europe in 1995 (COE, 1995). Of the forty-seven Member-States of the Council of Europe, only four have not signed this convention, France being one of these exceptions[2] as this country does not recognize the existence of minorities in its territory. Noteworthy is also the fact that of all the States that have signed the Framework Convention, only thirty-nine have ratified it[3]. Another very important document on the protection of minorities, particularly in linguistic terms, is the European Charter for Regional or Minority Languages (COE, 1992). In this case, only twenty-five countries have ratified the convention and eight other countries have signed it but not ratified it[4]. Not signing and not ratifying the Charter is due to several issues, from the non-existence of national minorities and, consequently, no regional or minority languages, to internal linguistic policies. It is rather clear that the existence of such a document is not enough to ensure legal rights to minorities, at least in States that did not sign it nor that those (legal) rights are complied with in those States that did sign it. References to the violation of the minority rights or these rights not being acknowledged is frequent, not only in literature but also in the local and national media of several States, as well as in reports by international organizations that focus on the protection of minorities, as is the case of OSCE and its High Commissioner for National Minorities, several research centers[5] or non-governmental organizations such as *Freedom House*, *Minority Rights Group International* and the *Human Rights Watch*. The Baltic countries (in particular Estonia and Latvia) are frequently faces with the claims of their Russian minorities. The Macedonian minority in Bulgaria was not legally acknowledged by the local authorities. The Polish are still discriminated against by the

[1] See also Rechel (2009); Packer (2005); Philips (2005); Alcock (2000).
[2] The other exceptions are Andorra, Monaco and Turkey.
[3] The countries which did not ratify the Framework Convention for the Protection of National Minorities are Belgium, Greece, Iceland and Luxembourg.
[4] The European Charter for Regional or Minority Languages was not ratified by Azerbaijan, France, Iceland, Italy, Moldova, the Russian Federation and Macedonia. Besides these countries, there are fourteen other that did not sign it. That's the case of the Baltic countries (Estonia, Latvia and Lithuania), Albania, Andorra, Belgium, Bulgaria, Georgia, Greece, Ireland, Monaco, Portugal, San Marino and Turkey.
[5] Noteworthy is the ECMI, or *European Centre for Minority Issues, based in the German city of Flensburg.*

Lithuanians despite a common history and peaceful relations between the two communities. Yet, it is not our intention to state that minority rights are constantly violated by these States, nor that these are situations in which ethnic or religious persecution takes place comparable to the progroms in the 1980s. The results of the recent referendum on Russian becoming an official language in Latvia[6] (more than a quarter of the country's population speaks Russian and a third of the population is of Russian ethnicity) showed that most voters were against the proposal (75%). It appears obvious that submitting minority rights to popular vote frequently leads to their being denied. In the case of Latvia, the result was expected, not only because of the country's recent history and the existence of a Russian minority that is viewed as a consequence of the denationalization policy in Latvia by Soviet authorities, as well as due to suspicions of referendum orchestration by Moscow.

The non-compliance to some of those rights is a reality in some countries but it not necessarily is a recurring and persistent practice. In situations in which minority rights are complied with, even if there are no legal documents on this issue, the non-signatories may argue that respect for local and regional specificities, as well as for national identities, does not require any legal binding. This way, that legal binding would be unnecessary when respect for national minorities is a tradition. Refusal to sign and ratify international conventions (at regional and global levels) is not only due to a set of more or less rooted best practices or the simple non-existence of national minorities in a specific State. Besides international conventions, there are several bilateral agreements so as to correct historical "errors". These are, to a certain extent, part of a reconciliation process, more important even when it is frequently due to international negotiations towards the accession to supra-national institutions or bodies. They are different because they were mostly signed in the 1990s, after the Cold War, and they refer to the issue of national minorities in central and Eastern Europe (Hornburg, 2006; Gál, 1999).

Federalism as a tool for conflict prevention

Though it is true that federalism is not at the basis of minority rights, it is also true that the minority rights may lead to federal regimes. In such cases, federalism arises as a definitive solution, i.e., when peaceful management of local and regional differences resulting from there being ethnic national minorities but via other legal and/or cultural mechanisms.

> *In former decades, violence and political dissent in the Basque Country, in Corsica and in Northern Ireland, for example, were considered as evidence of failure in State integration. Presently, a certain national*

[6] The Russian Ministry of Foreign Affairs Aleksander Lukashevich expressed Russian authorities' outrage at the result of the referendum. According to him, the rights of Russian speakers were being disrespected by the Latvian State, and the latter would be disrespecting international obligations (http://en.rian.ru/russia/20120219/171400820.html, último acesso a 14-VII-2013). Latvia is one of the countris which did not sign the European Charter for Regional or Minority Languages. The country signed the Framework Convention for the Protection of National Minorities in 1995, though, and ratified it ten years later, The last resolution of the first monitoring cycle, presented by the Council of Europe Committee of Ministers on 30 March 2011 mentions the difficulties citizens belonging to national minorities felt in their relations with the State due to their languages not being acknowledged.

> *acknowledgment and infra-State autonomy has led to a decrease in violence as a tactical actions.* (Williams, 2009: 199).

Based on the theory on the origin of federal States, what reasons may justify the adoption of a federal regime instead of the existence of separate States or secession by parts of a given State? What is at the basis of centripetal or centrifugal federalisms?

Firstly, it is possible to realize that, according to several authors, federations (and in particular multinational federations) are seen as a viable tool in promoting peace and being used as a conflict prevention tool. Many are, therefore, created to respond to fears resulting from the possibility of a conflict. By forming a federation, formerly independent States aim for a sense of power, real or imagined, or, depending on the perspective, a greater power than that held by each individual State. This feeling may be real or imagined but is able to dissuade possible aggressors and/or avoid conflicts among federation members, as was the case of the Iroquois Confederation. Neta C. Crawford argues that,

> *as a security regime, the Iroquois Federation functioned well in terms of decreasing conflict among its members. Later it was partially successful by allowing the Iroquois nations to adapt to exogenous shocks as a consequence of the arrival of the Europeans - mass epidemic depopulation, disruption of local economy and wars among the Europeans - because it laid the basis for diplomacy and collective security.* (1994: 346).

This idea appears in the work of several European thinkers who advocated federalism applied to the Old Continent. Altiero Spinelli and Ernest Rossi's (1941) Ventotene Manifesto, published in 1941 is an example of this; the text was a response to the violence caused by World War II and European authoritarian regimes. John Stuart Mill argues, though, that for a federal regime to become a valid conflict prevention tool, it cannot become more aggressive than each member-State of the federation.

Secondly, the argument according to which there is higher economic efficiency in federations appears as one its positive elements, federations are considered more able to promote economic prosperity. This is highly debatable but a rather attractive argument. Ideas are pout forth such as creating a bigger internal market without boundaries[7] or the that federations can become important global actors, able to influence rules in international trade (which may be the case of some federations but not of all) It is also common that reference be made to binomial trade/prosperity as positive factors of peace, which may be easily found in several peace projects in the modern era. Thirdly, the creation of a federal regime may enhance the development of a regime that protects minorities through creating mechanisms to accommodate them. These may include a limitation of the sovereignty of the federate members through attributing a power of intervention to the federal power in their internal affairs when

[7] It is not by chance that the unification of Germany was preceded by the elimination of customs rates in the German territories through the creation of Zollverein in 1818 and their development and expansion to most German States.

minority rights have been violated. The validity of this argument depends on the nature of the federal State. If the latter also disrespects minority rights, then the power of intervention it has been assigned is corrupted. Fourthly, federations may make it easier to attain certain objectives of previously independent sovereign States. Transferring some powers and competences to a common body, the federal State, will allow it to coordinate external activities such as foreign policy. This coordination at federal level may become out of control because it requires more coordination in other sectors and, therefore, lead to power centralization. Fifthly, federal entities have more political influence within the federation. In the case of previously independent territories, these obtain advantages through political alliance, such as the previously mentioned coordination. Small State (or former regions and provinces) may acquire greater recognition and power to decide when belonging to a federal State.

On the other hand, we must also understand the reasons for choosing a federal type of regime instead of a unitary State. The reasons presented are also diverse, some similar to those mentioned above. When opposing himself to the unitary and centralizing federal model, Proudhon states that

> *the federal system tackles the people's effervescence at its roots, along with its ambitions and demagogic enthusiasm: it kills the public square regime, the triumph of speakers and the dissolving of capitals. [...] The federation thus becomes the people's salvation: it saves it from the tyranny of its leaders and from its own insanity by dividing it.* (1863: 100-101).

Federalism as a complement to minority rights

As mentioned earlier, unitary States are criticized because of their policies towards minorities in their territory. As these States are a consequence of power centralization and periphery assimilation, one national group dominates the others, the latter being integrated in the national community, which should be encompassing and including all territories under State authority. This double policy led to minorities being denied their rights. Federalism may be a protection against central power by providing them with powers and duties laid down in the constitution. Secondly, and as a result of the previous argument, federal systems may accommodate the so-called "stateless nations", regardless of their claims. Federalism may be a response to a desire for secession or self-determination by those nations, as well as a solution for preserving local identity - culture, language or religion. In the 19080s Stanislaw Ehrlich said that

> *federal systems opt for territorial decentralization for who holds the power, which sovereignty. Federal institutions are ideologically neutral, their objective being to decentralize power or to protect ethnic identity in their midst. Marxists favor unitary governments, accepting federalism as a means to avoid the dissolution of the State. [...] Secession is usually fought against through force [...] Federalism has a future!* (1984: 359).

Thirdly, the federal model allows for greater participation by citizens in public decision-making, either through deliberation or through holding positions in federal entities or within the structure of the federal State. Finally, the federal structure, and in particular the asymmetric federations, may include several ethnic groups in a specific area of a territory and not subject them to the same legal regime as the whole of the territory, thus, protecting them from the "tyranny of the majority" when this is against their interests. This type of unitary regime minimizes repression to a certain extent and is sensitive to the needs of a larger number of citizens.

Though not restricted to multinational States, federalist theories easily develop their proposals in these States so as to prevent conflicts, manage violent ethnic tensions and, ultimately, maintain their territorial integrity. From a political point of view, adopting federalizing measures in contexts of (real or predictable) violence aims to adequately respond to territorial secession, which is viewed by authorities as the violation of a sacred principle: State unity and indivisibility. In some cases, maintaining territorial integrity of a State includes the need to redefine the internal structures of regional and local administration, and establishing highly autonomous regional governments (for example: Scotland in the United Kingdom; Catalonia in Spain). We cannot, however, forget that "different types of society require different types of institutions. Federalism, for example, may be irrelevant for small homogeneous countries but a necessity for bigger and heterogeneous ones" (Reilly, 1998: 137). Redefining administrative structures and sharing power imply dialog and compromise by the parties involved. We may find federalist theories within different ethnic nationalist movements, among which movements usually associated with extreme separatism[8] Under such circumstances, we may conclude that secession occurs only when, despite everything, these alternatives are deemed insufficient to meet the claims of all parties involved (State, region, political actors, society) and resolve a conflict, regardless of its level of violence. The end of negotiations or their non-conclusion frequently leads to maintaining a state of violence whose consequence may be a unilateral secessionist process. Though the idea of territorial integrity is demystified in these cases, the table of negotiations remain the place where the rules are established whether the new State becomes one of the few independent States.

Reference to the federal model as an effective means to promote and defend differences within a territory is not a novelty. Its apologia has yet increased when political structures in force have not adequately responded to claims that may jeopardize the existence of a State and its territorial integrity. Early introduction of mechanisms on sharing of power may prevent ethnic or identity conflicts from becoming deadly conflicts (Sisk, 1998: 139). Alain-G. Gagnon advocates that

[8] It is rather usual that different positions and claims exist within some nationalist groups. If independence is frequently presented as the only possible and desirable solution in situations perceived as being of political, economic and cultural injustice towards an ethnic group; those advocating implementation of federalist solutions are an alternative to independence. The cases of Galicia and Brittany are examples of this. Ramón Maiz (1984) divides Galician regionalism between 1886 and 1907 into three ideological trends: liberal, traditional catholic and federal. On Galician nationalism / regionalism, see also Duran (1984). Similarly, the role of federalist thought in Brittany should not be underestimated due to the strong historical role it played in the local nationalist movement (Nicolas, 2001; Barbin, 1937). Interestingly, Basque nationalism also included a federalist current through the *Mouvement Démocrate Basque* that emerged in France in the 1960s (Gurrutxaga, 2005: 78; Izquierdo, 2001: 149-150).

> *federalism, both in its institutional manifestations and sociological features, is a promising solution for managing coexisting political communities and in affirming the collective activities in States that include one or more nations* (2010: 1).

At first sight, the federal model appears to be an almost perfect conflict prevention and management tool. At least as perfect as other political institutional and structural tools created our adapted for that objective. However, it is Utopian to believe in perfection when conflict prevention and management and, ultimately, the individual are the focus. Neither federalism nor other mechanisms are perfect. When analyzing the role played by federalism in India and Pakistan after the independence in terms of managing their ethnic plurality, Katherine Adeney concludes that

> *though it does not necessarily promote security and ethnic peace, it cannot be accused of increasing conflict, especially when in combination with other mechanisms* (2007: 181).

The federal model's ability as a conflict prevention and management tool has, however, made it rather popular, particularly in multinational contexts in which keeping territorial unity has been threatened by secessionist or irredentist claims. The issue of Transnistria has been open since the implosion of the Soviet Union and the independence of Moldova; it is a challenge for which a solution is yet to be found. Several proposals have been put forth to federalize the country so as to resolve the conflict but they have been unsuccessful. (VVAA, 2009; Lowenhardt, 2004). According to Andrey Safonov,

> *it seems that, in our case, resolution is only possible through federalizing the former Socialist Soviet Republic of Moldavia using confederate elements. Moldova should let behind its unitary approach and Transnistria should give up its claims for full independence as member-State of the United Nations.* (2009: 188).

Another example of a conceptual proposal promoting federalism as means of conflict management may be found in the analysis by Bruno Coppitiers on the conflict between Abkhazia and South Ossetia, two regions in Georgia, and the Moldovan authorities. Coppitiers proposed that Georgia became a federal republic and those regions would enjoy local autonomy (2003). The conflict between Georgia and the Russian Federation in the summer of 2008 destroyed any chances of internal administrative redefinition, at least in the short run. The proclamation of independence by those two regions, politically, economically and militarily acknowledged and supported by Moscow only aggravated the situation and did not resolve the conflict for good.

However, several examples of failed federations or, in the words of Emilian Kavalski and Magdalena Zolkos (2008: 163), "dead federalisms", evidence the limitations this model has in building a State, and simultaneously shows that federalism is no panacea

for contexts as those previously mentioned. Does this mean that this political model should be abandoned or at least refused as one of the most adequate solution for managing ethnic diversity in States where the situation is potentially explosive? Or does this mean that what is meant by federalism should be restructured depending on specific situations and accept that this may be inadequate though it was a valid response in other circumstances? As conflict management tool, in particular in ethnic conflicts, the federal model has the same objective as other institutional mechanisms, which is conflict resolution.

> *The objective of conflict resolution is to establish an institutional framework in which the opposing interests of the main parties in conflict [...] may be accommodated in such a way that cooperation and non-violent actions through compromise pose greater benefits that those which may be attained through violent confrontation.* (Cordell & Wolff, 2010: 17-18)[9].

Federalism cannot be in any way viewed as a panacea for all world problems. (Watts, 2003: 17). However, this is a solution which should not be ignored. According to Watts, hybrid systems are being developed which combine federal and unitary elements, as is the case in South Africa and in the European Union (idem, 18). Is that the solution? The variety of existing federalims and their ability to adapt to different cases may indicate that the federal regime should be accounted for as a model of State organization. If, according to J. Denis and Ian Derbyshire (2000, 19-22), federalism may be historical, cultural, geographic, linguistic, ethnic, artificial or imitative, this characterization is always cumulative. Thus, Belgium is defined as a cultural and linguistic federation by these authors, and Switzerland is a historical a cultural one. Bosnia-Herzgovina, on the other hand, is not only a historical and cultural but also an ethnic federation. However, this definition may easily questioned. Switzerland would be a clear example of an ethnic federation though, unlike other cases, the Swiss federation is not based on an ethnic on linguistic differentiation. The implementation of a federal regime is a paradox. If, as mentioned before, federalism is a response to the traditional, unitary and centralized State-nation, its implementation should also be different. Yet, some issues require clarification. According to Carré Malberg "the federal State seems rather a unitary State in certain things" (1962: 96). This is rather contradictory and the reason lies in the principle of overlapping. Subordination of federal entities to federal power leads to their competences being limited and to legal conflicts between the two levels. It is not uncommon for the federal State to be accused of wanting to take on a role that is beyond its competences and become the omnipresent State. The American case is a rather obvious example of this. Considering it is half way between confederalism and Unitarianism (centralism), federalism is often criticized by advocates of both regimes. Its implementation and maintenance result from the permanent tension between those in favor of a strong federal State and those for as great an autonomy as possible for federal entities. Historically, the need for greater political integration and a strong executive power was responsible for confederate regimes opting for stronger centralization and, thus, for federal regimes.

[9] Italics in the original.

Going back to the Swiss federal model, we must remember that it derives from a seven-hundred old development which has undergone three distinct stages. When in 1291 the cantons of Uri, Schwyz and Unterwalden joined in the so-called Uri alliance, renewed in 1315 through the Boden alliance, they could not imagine this would be the beginning of the Swiss Confederation. According to Andreas Wimmer (2002: 233) the Swiss model is characterized by the so-called "linguistic peace" that makes it different from traditional minority protection regimes in that they refuse to make official the minority status of the languages spoken in the country. This means that, despite German being the most spoken language in the Swiss Confederation, French, Italian and Romance do not have a different legal status or is there any linguistic policy to protect and/or promote these languages. Ultimately, these are national Swiss languages as is German. "Politically speaking, Switzerland dos not acknowledge minorities" (*idem, ibidem*).

However, and despite the exception of Switzerland, acknowledging policies (or identity policies) are very important. Their importance should be emphasized through analyzing how viable the federal model is in conflict management, prevention or resolution. Considering that federalism is an option for accommodating national minority groups, maintaining them within national limits, it should aim to positively respond to minority claims. Federation can achieve that through two different means, whether should equal sharing of power or through assigning more competences to minorities, namely in terms of their influence in decision-making. Yet, politicization of identity may also lead to new challenges, especially in federal regimes in which there is risk of instability linked to the existence of strong ethnic national feelings by minorities. Maintaining double political loyalty[10], or two political loyalties[11], is needed, as is self-governing status, and these may lead to increased instability if subverted by growing local interests despite the common good the federation represents. The federal model may involuntarily be adding to secession rather than fighting it. Acknowledging and institutionalizing different would be undermining a common identification.

Conclusion

Interestingly, federations are often viewed as deviant regimes. As the unitary and centralized post-Westphalian type is considered the ideal State system, federalism may seem *sui generis*. The fact that there are different types of federations is proof of that. Considering there is not one type of federalism, a typical federalism, it appears to suffer from legal schizophrenia for which there is no cure but rather new variations. Each federation is federal in its own way. Noteworthy is also the fact that regimes with federal features, and therefore differentiating themselves from the unitary State, are not a modern innovation. As analyzed here, they are in existence since Antiquity and in several geographic contexts.

This paper aimed at analyzing the main advantages of this model. Yet, it must not be forgotten that federalism is not infallible and must be viewed as one of the many

[10] Double political loyalty means that, though it is one it includes two different loyalties (for ex.: regional and national, national and supranational). These are felt in the same way by the individual and neither is more important than the other.

[11] In the case of two political loyalties, two different loyalties are also at stake. However, though they can be simultaneous, they are not necessarily felt in the same way by the individual. Therefore, one loyalty may be considered more important than the other.

solutions possible. We aimed not at presenting an intensive and extensive study of federalism but rather a brief overview of this model as a viable tool in managing ethnic plurality in multinational States as well as in conflict prevention in contexts where ethnic plurality exists.

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Thoughts and Considerations

AFRICA IN THE 21TH CENTURY: PROSPECTS AND CAUSES; EFFECTS ON AFRICAN STATES

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Preamble

The Organization of African Unity (OAU) was founded on May 25, 1963, and aimed at unifying all African nations, recently independent as a result of their fight for independence; in July 2002 and upon a not-so-innocent proposal by Muammar Kadhafi, the OAU becomes the African Union in the Durban Convention. The new AU aimed and aims at political and economic integration of the African Member-states.

We are currently commemorating the 50th anniversary of the African Union.

Since the beginning of times, Africa has been a continent of migration, in cultural- especially due to gatherer and sheep-farming movements - commercial and military terms.

These migration movements allowed the Egyptians their golden age, their contacts with the Nubian kingdom or the contacts between the Nubian and the people from the Monomotapa - a region between Mozambique and Zimbabwe where, according to some legends, the mythical kingdom of Sheba was situated -, the migrations of the Carthaginians beyond the Pillars of Hercules and as far as the "gulf of the Western Horn" and "the mountain of the Gods' Chariot"[1]. From this place did Hanan, in his journey, bring furry skins that, according to his companions, were of female gorillas but

[1] The gulf of the Western Horn would be between Boujdour and the mouth of the river Geba (Guinea-Bissau) and the mountain of the gods' chariot would be in the area where the Cameroons are today (according to legend, this would be a word of Phoenician origin *camer + ayoun = gods' chariot*); the pillars of Hercules correspond to the strait of Gibraltar.

which, for authors such as Ki-Zerbo, were of pygmies (rather difficult, in my opinion, because pygmies are not furry) or of chimps.

However, the first big migrations, which almost caused the disappearing of a people, the Khioi-san[2] (also called bushmen or hottentot, depending on the area) people with yellowish skin and almond shaped eyes, took place after the invasions of the Negroes, negroid people from southeast Asia who crossed the Sinai and the Red Sea over 20 thousand years ago Among these, two sub-groups were most noteworthy: those from western Sudan and the Ba'Ntu (Banto).

Initially, the Banto went as far as the Equator, where they stayed for thousands of years. With the Arab migrations, in particular, the group moved down towards the Cape, where they arrived almost at the same time as the Dutch Calvinists, the ancestors of the Afrikaner. In both cases, the worst off were the khoi-san, who were limited to a small region between the Angolan desert of Namibe and the north of Botswana (though there are a few in the north of South Africa), i.e., almost all the Namibe/Kalahari desert.

Currently, the Banto are considered the real African natives. Either due to political or sociological issues, all other genealogical members are forgotten, in particular the Bushmen, probably the first continental people, descendants of the "*Kenyapithecus africanus*", of the "*Homo habilis*" and of the "*Boskop* man". On the other hand, and though recent events in the northern region evidence otherwise, partly due to the Arab Spring, Caucasian peoples from the north, the Arabs, or from the south, the Afrikaner, tend to be forgotten.

Introduction

Between the creation of AUO and it becoming the African Union, Africa went through many important political, economic and social difficulties, namely, the fact that former European colonies became potential magnets of economic, political and military development.

In the late 1980s, in particular after the implosion of the USSR, the end of the Marxist myth and the reinforcement of conservative neo-liberalism, in the style of Fukuyama or Friedman, has been viewed and defined as accountable for the references to the democratization of Africa and the consequent eruption of political movements in that continent, in particular in the Sub-Saharan Africa.

The north of Africa is also struggling with a crucial problem: the coexistence of religious rulings which are, in temporal terms, still medieval or which is thus represented, unchangeable and the basis for national political systems, and democratic ideals, defined as western and secular, in which the law of the state is above religious law. The "Arab Spring" is a true example of this.

The election processes in Angola, Democratic Congo, Ghana, Mali and Nigeria, among others, are or were or will be (just like the continuously awaited but never announced elections in Guinea-Bissau and Madagascar) the result of illegal coups d'état,

[2] They are divided into bushmen (san-khoi, hunters) and hottentot (the khoi-khoi, shepherds).

condemned by international institutions, namely the African Union, and whose regional decision offices are not able to control.

Noteworthy is that this type of democracy, also known as demo-liberalism, currently in fashion in eastern European countries and in Western Europe, is not as widespread in African States. In Eastern Europe, these systems were not able to control the spread of violent neo-national movements as was the case in the Caucasus and in the Balkans.

However, if, at a political level, Africa has moved forwards and backwards, at a cultural level, progress has been inevitable. In fact, the challenge arises from the fact that Africa is a huge mix of cultures. The first part of this paper analyzes one of the cultural issues in Africa - the migrating movements, either internal or external, and their influence on culture and, at a later stage, on the social and political organization of a continent in constant mutation.

What perspective and what prospectivity?

1. The Formation of two Africas

In view of current political movements throughout almost the whole of Africa - some challenging, others revolutionizing - it is legitimate to question whether this is a symptom that the party system we are imposed on is in involution and, therefore, being replaced by cultural pluralism or is becoming proto-Mexican, as made visible in some States.

To analyze this issue, let us resort to a thesis by Fernando Chambino[3](Almeida, 2004).

According to him, and considering the thalassocratic implementation model of the European colonizer (only Portugal used a pure thalassocratic model, the English and the French adopted the epiruscratic* model), there are two Africas. One Africa is that of contact and cultural change, usually identified as coastal urbanism, where pedagogy and social massification overcome the conditions of change; the other is the one in which the contact with other cultures was uncommon or even lacking, where custom, privilege and conservativeness is represented by traditional chiefs, whose power is supported by the complex issue of legitimacy of birth and who are opposed to change.

Both these two Africas claim the right to keep and use power and from an egocentric perspective.

Lavroff also refers to three major obstacles to the establishing of the multi-party system in Africa. The fact that new leaders try to define themselves as leaders of all peoples and, as a consequence, allow for no other political parties to exist, though they advocate their existence, so as to gather in a clearly predominant party, described as enlightening, all those qualified for *good governance*. Mr. Mugabe is one of the major advocates of this thesis, but there are more...

[3] Fernando Chambino, now deceased, analyzed this issue with me when I was a student at Universidade Lusíada, and suggested I would further this study. I never did because I knew this was an issue he would study in his own PhD thesis.

* Both the word 'Epirus' and the word 'Thalassa' come from the Greek; 'thalassocracy' means 'control of the seas', epiruscracy represents 'control of the land' (continents – continental power or power over the Heartland).

Finally, the creation of true nationalism, still in progress. We must not forget that most African countries are a group of different ethnic groups and that ethnocentricity was promoted during the colonial period. The concept of nation has only recently been implemented in a few countries such as Cape Verde, Angola, Lesotho; Senegal or Swaziland. The others are mere national projects with greater or lesser impact in society; South Africa is one of these cases.

These three obstacles, together with the concept of there being two Africas, are not, *per se*, sustainable bases for allowing political Mexicanization that (almost totalitarian) regimes still maintain.

Based on a thesis by Erik Wright (1981: 69) - though in a different context - the implementation of a truly democratic western-type of regime will only be occur when there is "effective economic sabotage by capitalist bourgeoisie" so that an insurrection is successful when facing a repressive system. And this insurrection will only be successful when "... that system divides or crumbles...".

This is what took place in the Soviet Union, in the former Eastern European states, in the Yugoslavian countries, and what is taking place, though in a smaller scale, in African states such as Madagascar, Benim, Burkina-Faso or in Kenya.

2. What Democracy, what Pluralism

Personally, I think ideological diversity will succeed, though there will still be leaders like Mugabe (Zimbabwe), Obiang (Equatorial Guinea), Biya (Cameroons), Museveni (Uganda) or Camporé (Burkina Faso), who advocate and defended the maintenance of power according to their pragmatic vision and their personal "charisma", considering that some of them attained power by means of violent coups d'état.

However, we should consider each case, Country and its specificity. We can never put in practice the same values for an Arab and a European- These values cannot, partly or totally, depending on the case, be put in practice in all African cultures, whose cultural root is epiruscratic, animist, conservative and based on custom, i.e., the "soba", the political chief, the administrative chief and, sometimes, the healer, the manager of a united group, is more important than the individual interests of any given individual not integrated in society.

Thalassocratic Africa, urban Africa, on the contrary, is more receptive to this. The big African metropolis are very individualistic and have no distinctive characteristics. In fact, the African city dweller is by nature acculturated and, as a result, more open to new ideas.

The best solution for Africa may be the coexistence of a western political system, the so-called democratic liberalism - not that currently in practice in Europe mas a mixture between Anthony Giddens' social third way (the theory of structures) with Locke and Adam Smith's conservative liberalism - with the African social custom system.

The best would be to create a political organization where there are two Chambers of Representatives. One of these chambers would be typically western, the National Parliament, having all the features of a democratic system. The other, probably even more important, would be a Consultation and Monitoring Chamber, like the Senate, which would include the so-called "Good Men" from traditional social structure: the

"sobas", the chiefs or the "national monarchs and prices", i.e., the traditional chiefs. This would be a Consultation Chamber with monitoring powers and which could eventually have legislative powers.

3. What borders will there be in 21st century Africa?

The AUO Charter, approved in Addis Ababa in 1963 and ratified by its successor, the African Union, laid down the maintenance and intangibility of colonial borders after the Berlin Conference.

Cases such as those of Biafra, Katanga, Chad or the Tuareg region (Mali-Algeria) confirm that the Charter is being enforced, regardless of the consequences for those infringing the rules, as was the case in Cabinda or Kaprivi. Only the region of Eritrea separated from Ethiopia in 1993 but for political and historical reasons and with Ethiopia's previous agreement.

However, more recently, a fact went against the AU Charter, rather more due to external impositions than to the will of Africans: the secession of South Sudan. This may be a signal of what may occur in other regions where external interests are more important than those of the Africans or of the natives. And there are cases where that may occur...

We may recall that the emerging of a nationalism, closer to the tribal than to the national concept, the affirmation of ancient ethnic and cultural values, the appetite for power of some leasers, who show no mercy to achieve their ends, the case of Sudan being divided into two States, indicates that the unchangeability of colonial borders is not as clear as was stated in the Charter.

The adoption by Uganda of the old regal name Buganda may lead (and, in a way, it does) to questioning of current colonial borders which correspond to the old kingdom. It is not in vain that, every now and again, the issue of the Great Lakes - though with different actors - appears in international news services. This occurred in the recent visit of UN Secretary-general, Ban Ki-moon, to the area and to the fact that northern Congo (which is part of the lake region) is in constant political and military instability and its solution is unpredictable.

At a political, cultural and especially at an economic level, the western concept of nationalism is no longer an unquestionable value and it now includes (though it seems a paradox considering its content) values closer to those of a Global Village.

Despite everything, and quoting the Financial Times, Africa is a continent to invest in. The recent report by the consulting company Ernst & Young "Africa Attractiveness Survey", indicates that until 2040 Angola, Nigeria, South Africa, Ghana, Egypt, Kenya and Ethiopia, will the countries where the majority of external investments will take place and these countries will be among the major drivers for global growth.

It is up to our leaders to state and confirm that investment; we must not forget that, since 2007, the accumulated gain of African growth was 21%, about three times higher than in the so-called developed markets.

Thus, the stability of national borders is a model to consider and to defend by African states or the social development of our countries may be even more compromised.

There can and should no longer be border issues as those between Angola and the Democratic Congo, in the mouth of the river Zaire; the one between Guinea-Bissau and Senegal (in the Casamance region); or that between Malawi and Tanzania/Mozambique, in Lake Niassa, just to mention three cases which are close to us. All these issues are due to one thing: hydrocarbons!

African states may better defend their political and geographic borders through multiple cooperation, whether internal, through different political and economic institutions such as SADC, ECOWAS or CEEAV, or through furthering external political, economic and military cooperation, such as, for example, the Commission of the Gulf of Guinea and/or the South Atlantic Peace and Cooperation Zone (ZOPACAS) (Almeida & Bernardino, 2013) as means of safeguarding water territory.

We realize that the fact that our African states, namely the regional proto-powers of the Gulf area (South Africa, Angola and Nigeria) have or had little interest for navy power has allowed for external powers (the USA, the UK, France, Spain, Portugal and Brazil, among others) to maintain their water routes between the Cape and the western hemisphere.

Noteworthy is that both South Africa (which has ordered 3 submarines) and Angola are now promoting their navy and, thus, trying to stop the Gulf from being a non-African area.

These thoughts, as well as this question, remain: "what will be the borders of our Continent at the end of this century like?".

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